No. 18-2368

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CHRISTOPHER BLAKE and JAMES ORKIS, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

JPMORGAN CHASE BANK, N.A., CHASE BANK USA, N.A., JPMORGAN CHASE & CO., and CROSS COUNTRY INSURANCE COMPANY,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 5:13-cv-06433 (Hon. Lawrence F. Stengel)

BRIEF OF AMERICAN BANKERS ASSOCIATION, BANK POLICY INSTITUTE, THE HOUSING POLICY COUNCIL, THE MORTGAGE BANKERS ASSOCIATION, AND U.S. MORTGAGE INSURERS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF THE *AMICI CURIAE*[1]

The **American Bankers Association** (ABA) is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its over 1 million employees. ABA members provide banking services in each of the fifty States and the District of Columbia. ABA membership includes all sizes and types of financial institutions, including very large and very small banking operations.

The **Bank Policy Institute** (BPI) is a nonpartisan public policy, research, and advocacy group, and the successor to the Clearing House Association and the Financial Services Roundtable after their merger in 2018. Members of the BPI include universal banks, regional banks, and major foreign banks doing business in the United States. BPI members employ nearly two million Americans and make 72% of all loans and nearly half of the nation's small business loans.

The **Housing Policy Council** (HPC) is a trade association comprised of 30 of the leading national mortgage lenders, servicers, mortgage insurers, and title and data companies. HPC advocates for the mortgage and housing marketplace interests of its members in legislative, regulatory, and judicial forums. HPC's

[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

interest is in the safety and soundness of the housing finance system, the equitable and consistent regulatory treatment of all market participants, and the promotion of lending practices that create sustainable home ownership opportunities leading to long-term wealth-building and community-building for families.

The **Mortgage Bankers Association** (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. The association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees. Its membership of over 2,300 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, and others in the mortgage lending field.

U.S. Mortgage Insurers (USMI) is a trade association comprised of the leading private mortgage insurance (MI) companies in the United States. Together, the private mortgage insurance industry has helped nearly 30 million homeowners over the past 60 years, including more than 1 million in the past year alone. USMI is dedicated to a housing finance system backed by private capital that enables access to housing finance for borrowers while protecting taxpayers. Mortgage insurance offers an effective way to make mortgage credit available to more people.

Amici have a strong interest in the outcome of this litigation, and in particular in the rejection of Plaintiffs' attempt to dramatically expand the limitations period available for private actions under the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2607(a), based on the continuing violations doctrine. If Plaintiffs' theory were adopted, it would conflict with the clear intent of RESPA and years of legal precedent. And it would fundamentally alter RESPA's private enforcement scheme by allowing challenges to settlement-service arrangements well after the one-year limitations period merely because consumers pay for certain services over time. Compromising repose in this manner by extending the risk of liability indefinitely would inject uncertainty into the markets for settlement services, to the detriment of borrowers as well as lenders.

INTRODUCTION

The district court correctly dismissed Plaintiffs' RESPA claims as untimely based on its application of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1973). *See* A17-A21. But the court nonetheless erred in concluding Plaintiffs could otherwise evade RESPA's statute of limitations by invoking the "continuing violations" doctrine. A11-A16. If the continuing violations doctrine were extended to RESPA claims like Plaintiffs' here, it would undermine RESPA's statute of limitations and eliminate repose for lenders and mortgage insurers—injecting uncertainty into the secondary market for mortgages and ultimately leading to higher borrowing costs for consumers. *Amici* thus urge the Court to reject Plaintiffs' continuing violations theory if the Court reaches the issue.

Congress enacted RESPA "to effect certain changes in the settlement process for residential real estate," including, as relevant here, to eliminate referral fees and other kickbacks that "tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b)(2). But members of Congress also recognized that RESPA's prescriptions had to be carefully tailored so as "not to impose large new costs on lenders, costs which would lead them to … restrict credit" and leave consumers worse off. *See* 119 Cong. Rec. 25,287 (1973) (statement of Sen. Brock) ("[C]onsumers will little appreciate it if we worsen the situation by throwing out the mortgage baby with the settlement bath."). One important way that Congress achieved this balance was to place a strict one-year limitations period on private actions based on RESPA's anti-kickback provision (section 8 in RESPA, now codified at 12 U.S.C. § 2607) starting from "the date of the occurrence of the violation." 12 U.S.C. § 2614.

As RESPA section 2607 applies only to exchanges directly connected to "a real estate settlement service," *id.* § 2607(a), courts have long understood that "'[t]he date of occurrence of the violation' refers to the closing." *Snow v. First*

Am. Title Ins. Co., 332 F.3d 356, 359 (5th Cir. 2003); *accord Cunningham v. M & T Bank Corp.*, 814 F.3d 156, 160 (3d Cir. 2016). Thus, borrowers have one year from the date their loans close to bring a claim under section 2607. After that point, lenders and other providers of settlement services are entitled to repose.

In the face of this clear law, the plaintiffs' bar has repeatedly tried to extend RESPA's statute of limitations to challenge settlement practices as to loans that closed years earlier. In particular, counsel have targeted so-called "captive"-reinsurance arrangements (*i.e.*, where the reinsurer is an affiliate of the lender), which were a common business arrangement in the late-1990s to mid-2000s. This Court has squarely rejected earlier attempts to circumvent RESPA's statute of limitations, holding that plaintiffs cannot invoke equitable tolling when they did not exercise due diligence to discover their claims during the limitations period. *Cunningham*, 814 F.3d at 162-63; *see also Riddle v. Bank of Am. Corp.*, 588 F. App'x 127, 129-30 (3d Cir. 2014).

Undeterred, Plaintiffs here advanced a new theory premised on the continuing violations doctrine. According to Plaintiffs, they have a right to sue under RESPA years after closing on the theory that each time a portion of an insurance premium is ceded to the captive reinsurer, it gives rise to a brand new RESPA violation and restarts the statute of limitations. As Appellees explain, this new theory runs directly contrary to both the outcome and reasoning in

Cunningham; if Plaintiffs' continuing violations argument were right, then *Cunningham* would come out differently on the exact same facts, rendering the decision a dead letter. Appellees' Br. 38-40.

Moreover, the continuing violations theory as applied to RESPA section 2607 claims "has been repeatedly rejected by other courts." *Illinois ex rel. Hammer v. Twin Rivers Ins. Co.*, No. 16-cv-7371, 2017 WL 2880899, at *9 (N.D. Ill. July 5, 2017) (collecting decisions). And for good reason: the theory is inconsistent with section 2607's text, structure, and purpose. Section 2607(a) focuses on services provided in relation to settlement, ***at or before*** closing. Plaintiffs' claims here accrued when their mortgage insurance policies became effective at closing; the mere payment of an insurance premium pursuant to existing agreements—agreements that were established and effectuated at closing—does not qualify as a ***new*** RESPA violation that triggers a ***new*** one-year limitations period. The district court's contrary holding is a clear outlier,[2] which

[2] The district court judge in this case appears to have authored the only judicial decisions endorsing the theory in the RESPA context. In addition to the opinions from this litigation, the district court judge reached the same conclusion in an earlier case. *See White v. PNC Fin. Servs. Grp., Inc.*, No. 11-cv-7928, 2017 WL 85378, at *8 (E.D. Pa. Jan. 10, 2017). In an administrative enforcement proceeding under its former Director, the Bureau of Consumer Financial Protection also accepted a theory that a mortgage lender committed a separate violation of RESPA every time it accepted a payment pursuant to an allegedly unlawful captive-reinsurance arrangement agreement—though the Bureau expressly rejected a "continuing violations" theory. *See In the Matter of PHH Corp.*, No. 2014-CFPB-0002, at 26-27 (CFPB Jun. 4, 2015). As Appellees note (at 46 & n.14), the

(if accepted) would deprive mortgage issuers and mortgage insurers of the repose Congress plainly intended to provide. Indeed, plaintiffs could delay suit for years (and lawyers could serially recruit new plaintiffs) without needing even to establish a basis for equitable tolling.

In short, this Court should reject Plaintiffs' invitation to create an end-run around RESPA's statute of limitations and hold that a continuing violations theory is inapplicable for a section 2607 claim.

ARGUMENT

RESPA sets a one-year statute of limitations for claims brought by private plaintiffs alleging violations of the statute's anti-kickback provision. 12 U.S.C. § 2614. It has long been accepted, consistent with the decisions of this Circuit, that the limitations period for section 2607 claims "runs from the date of the occurrence of the violation, which begins ***at the closing of the loan***." *Cunningham*, 814 F.3d at 160 (emphasis added, quotation marks omitted); *see also* Appellees' Br. 36-37 & n.9 (collecting decisions). Despite that strict limitations period, Plaintiffs try to resurrect a RESPA claim regarding mortgage loans that closed years before they filed their complaint. Those claims are untimely regardless of how the Court resolves the question of *American Pipe* tolling that is the subject of Plaintiffs' appeal.

D.C. Circuit vacated that decision, and it is based on a misinterpretation of RESPA.

I. <u>An Alleged Violation of RESPA Section 2607 Accrues at Settlement.</u>

Plaintiffs' contention that Defendants violated RESPA each time a reinsurance premium was paid would extend section 2607's limitations period for years after settlement. This theory conflicts with the text, structure, and purpose of section 2607, which is designed to regulate the settlement process itself, not downstream transactions that occur under long-term agreements.

A. RESPA Section 2607 Is Directed to Regulating Discrete Services Provided at or Before the Settlement Process.

Section 2607 of RESPA "regulates the market for real estate 'settlement services,'" which the statute defines to include certain services "provided *in connection with a real estate settlement*." *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 626-27 (2012) (emphasis added). "Real estate settlement" is synonymous with real estate "closing," and it means "the process of executing legally binding documents regarding a lien on property that is subject to a federally related mortgage loan." 12 C.F.R. § 1024.2 (Regulation X). As articulated in RESPA's findings and purpose section, Congress enacted RESPA to provide, *inter alia*, "more effective advance disclosure to home buyers and sellers of settlement costs" and to eliminate "kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b)(1), (2). These purposes plainly focus on regulating the period *before* or *contemporaneous with* the settlement process, demonstrating that "Congress directed RESPA toward the closing." *Snow*, 332 F.3d at 359.

The principal provision at issue here, section 2607(a) ("Section 8(a)" in the original Act), bars any person from giving or accepting any unearned "fee, kickback, or thing of value pursuant to any agreement or understanding" that business "shall be referred to any person" that is "incident to or a part of a real estate settlement service involving a federally related mortgage loan." 12 U.S.C. § 2607(a).[3] Critically, this provision makes clear that its proscription on paying fees or other "thing[s] of value" as a *quid pro quo* for business only applies to business that is directly connected to a "real estate settlement service"—a term defined by RESPA to include services that are connected to real estate settlements such as title searches, title examinations, title insurance, credit reports, property inspections, and loan originations. *Id.* § 2602(3); *see also Bloom v. Martin*, 77 F.3d 318, 321 (9th Cir. 1996) (noting that the enumerated services are all services "necessary for the closing"). This follows from the fact that Congress designed section 2607 "to remedy … the potential for 'unnecessarily high settlement charges'" caused by kickbacks and other similar practices that may "suppress price competition for settlement services." *Snow*, 332 F.3d at 359.

[3] Section 2607(b) similarly prohibits the splitting of fees made or received for a real-estate settlement service in connection with a federally related mortgage loan "other than for services actually performed." 12 U.S.C. § 2607(b); *see generally Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635-36 (2012).

Other sections of RESPA confirm that Congress generally intended to regulate the settlement process leading up to (and culminating at) closing. For example, section 2603 prescribes a uniform disclosure for mortgage loan transactions that the person conducting the settlement must make available to the borrower "at or before settlement." 12 U.S.C. § 2603(b). Similarly, section 2604 requires the lender to distribute booklets (now prepared by the Consumer Financial Protection Bureau) describing the nature and costs of real estate settlement services, and also to include a "good faith estimate of the amount or range of charges for specific settlement services" that the borrower is likely to incur. *Id.* § 2604(a), (c), (d); *see also id.* § 2607(c) (requiring disclosures when referrals are made to affiliates to qualify for a safe harbor for affiliated business arrangements).

Collectively, these provisions ensure that consumers have the information needed to fairly evaluate the terms and costs of the deals they are entering and to make an informed choice. And they work in conjunction with section 2607, which is intended to eliminate referral arrangements for settlement services that could reduce consumer choice and inflate closing costs. *See PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 42 (D.C. Cir. 2016), *reinstated in relevant part by* 881 F.3d 75, 83 (D.C. Cir. 2018) (en banc).

B. Services That Occur *After* Settlement Are Not "Settlement Services" Within the Meaning of RESPA.

Plaintiffs' "continuing violations" theory seeks to apply section 2607 to ongoing services provided *after* a loan closes. But it is well-settled that such ongoing services are not "settlement services" subject to RESPA. *See Bloom*, 77 F.3d at 321 ("RESPA's non-exhaustive list of settlement services also suggests a limitation to costs payable at or before settlement."). As a result, fees paid for those services cannot give rise to potential RESPA claims, notwithstanding creative efforts to characterize those fees as "kickbacks" or "fee splits."

Courts have repeatedly rejected attempts to expand the definition of "settlement services" to cover services completed after settlement. For example, in *Cohen v. J.P. Morgan Chase & Co.*, 608 F. Supp. 2d 330 (E.D.N.Y. 2009), the district court held that post-closing services such as the revision of closing documents and the retrieval of missing documents do not qualify as settlement services. *Id.* at 345-46. In reaching that conclusion, the court stated that it was "clear" that "the closing of settlement is complete at the time when the property is transferred," and the court further noted that "[c]ourts have found that suits challenging fees for services that were provided post-settlement fail to state a claim under RESPA." *Id.* at 346 & n.10 (collecting decisions); *see also McAnaney v. Astoria Fin. Corp.*, 357 F. Supp. 2d 578, 589 (E.D.N.Y. 2005) (recognizing a "bright-line rule … limiting the scope of RESPA to practices at or before settlement").

Similarly, courts have held that insurance provided after a loan closes is not a settlement service. This issue has arisen in the context of "lender-placed insurance"—*i.e.*, insurance purchased by a mortgage servicer if a borrower defaults on her contractual obligation to maintain certain insurance on her property, such as hazard or flood insurance. *See generally Rothstein v. Balboa Ins. Co.*, 794 F.3d 256, 260 (2d Cir. 2015). Even though the "[p]rovision of services involving hazard, flood or other casualty insurance" is defined as a "settlement service" in RESPA's regulations, 12 C.F.R. § 1024.2, courts have universally refused to apply section 2607 of RESPA to claims alleging that lenders received kickbacks in connection with the insurance's placement post-closing. Those courts have reasoned that "[b]ecause settlement is, in essence, the closing of the loan … no RESPA claim is viable based on an allegation that the defendant force placed insurance" (and received a kickback) "*after* the closing of the loan." *Cannon v. Wells Fargo Bank N.A.*, 917 F. Supp. 2d 1025, 1048 (N.D. Cal. 2013); *accord Swain v. Wells Fargo Bank, N.A.*, 54 F. Supp. 3d 850, 859 (N.D. Ohio 2014); *Arnett v. Bank of Am., N.A.*, 874 F. Supp. 2d 1021, 1040 (D. Ore. 2012); *McNeary-Calloway v. JP Morgan Chase Bank, N.A.*, 863 F. Supp. 2d 928, 953 (N.D. Cal. 2012).

These cases should inform the decision here because they directly undercut the district court's reasoning. In endorsing the Plaintiffs' continuing violations theory, the district court "agree[d] that ordinarily RESPA's statute of limitations begins running on the date that a homeowner closes on his or her home loan," but the court nonetheless concluded that "subsequent kickbacks, fees, and referrals" *after* closing could qualify as new "violations of RESPA that can trigger new limitations periods." A11. The court suggested this rule was necessary to prevent lenders from "accepting kickback after kickback for years on end." A13. But the district court's reasoning ignores the "bright-line" RESPA draws between pre- and post-settlement services. *McAnaney*, 357 F. Supp. 2d at 589. Contrary to the district court's reasoning, "subsequent" fees and referrals after closing (A11), do not quality as independent RESPA violations merely because they are "incident to or part of" a "settlement service," 12 U.S.C. § 2607(a). Further, as demonstrated below, the ongoing premiums were not subsequent kickbacks at all. *See* pp. 16-18, *infra*. As a result, such payments do not restart the statute of limitations.

II. RESPA's One-Year Statute of Limitations Does Not Restart Each Time a Borrower Makes a Premium Payment Under an Insurance Agreement Whose Terms Were Set at Closing.

Plaintiffs challenge a contractual arrangement to extend reinsurance, which they allege provided Defendants (through a JPMorgan affiliate) with a valuable right to receive a percentage of mortgage insurance premiums in exchange for referring business to the insurer. Under the clear text of RESPA, Plaintiffs' claims accrued when the insurance policies and the obligation to reinsure them became effective. The statute of limitations did not restart every time premiums were paid. The district court's contrary approach would undermine RESPA's one-year limitations period for settlement services involving insurance, and could threaten repose any time payments for settlement services are escrowed or financed over time rather than paid in a lump sum at closing.

A. The Entry of the Reinsurance Agreement Is the "Thing of Value" Under Plaintiffs' Theory, Which Starts the Statute of Limitations.

As noted, p. 9, *supra*, a violation of section 2607(a) occurs only when a "thing of value" is exchanged "pursuant to any agreement" to refer business "incident to or a part of a real estate settlement service." 12 U.S.C. § 2607(a). Section 2602(2) defines "thing of value" as "includ[ing] any payment, advance, funds, loan, service, or other consideration." 12 U.S.C. § 2602(2). Here, the "thing of value" alleged in Plaintiffs' claims is the reinsurance arrangement that went into effect at the closing of Plaintiffs' loans.[4] Under Plaintiffs' own theory, the alleged RESPA violation occurred when the mortgage insurance policy,

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[4] According to Plaintiffs, the mortgage insurers agreed to these "captive insurance arrangements"—under which they would cede a percentage of monthly mortgage insurance premiums—in exchange for a "referral of business." Pls.' Br. 6-7; *see also* A763 (monies "paid by the Private Mortgage Insurers and accepted by JPMorgan through their captive reinsurance arrangements" constitute "things of value") (First Amended Class Action Complaint ¶ 255).

reinsured by Cross Country Insurance Company, became effective, because it was at that time that Defendants received a "thing of value" (*i.e.*, the right to reinsure the loan and receive ceded premiums as a consequence). 12 U.S.C. § 2607(a).

Indeed, the statute's definition of "thing of value" extends beyond immediate payments to include "other consideration," *id.* § 2602(2), and RESPA's regulations define "thing of value" to include numerous arrangements that involve payments over time, including "the opportunity to participate in a money-making program," 12 C.F.R. § 1024.14(d); *cf. United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979) (recognizing "thing of value" is a commonly used phrase across the U.S. Code that is "generally construed to cover intangibles," including promises of future actions).

This understanding of "thing of value" also aligns with RESPA's purposes. As discussed, p. 9, *supra*, Congress adopted section 2607 because it believed that certain referral arrangements and fee splitting tend to increase settlement costs. *Amici* vigorously dispute that "captive" reinsurance arrangements had any such negative impact. To the contrary, such reinsurance structures have important benefits for the mortgage market. *See* pp. 24-25, *infra*. And as the D.C. Circuit has held, RESPA's plain text "permits captive reinsurance arrangements where mortgage insurers pay no more than reasonable market value for the reinsurance." *PHH Corp.*, 839 F.3d at 41. In addition, these reinsurance arrangements generally cannot affect settlement costs because the premium rates paid by borrowers for mortgage insurance are filed rates in most states, so are the only rates that can be charged, and the borrower pays the exact same mortgage insurance premium whether or not a reinsurance arrangement exists. Indeed, Plaintiffs here have not alleged (and could not plausibly allege) that their settlement costs have been retroactively impacted by the fact that the mortgage insurers simply adhered to their (alleged) reinsurance agreements with Defendants. *See* A57 (complaint stating that "[i]n this action, Plaintiffs are not … challenging the insurance rates they paid for their individual private mortgage insurance policies").

B. The Continuing Violations Doctrine Does Not Apply to Insurance Premium Payments Made Under an Established Contract.

The continuing violations theory provides no basis to revive otherwise stale RESPA claims merely on the ground that premium payments were made after settlement, precisely as the relevant insurance agreements contemplated. As this Court has recognized, the reach of the "continuing-violation doctrine" is "understandably narrow." *Tearpock-Martin v. Borough of Shickshinny*, 756 F.3d 232, 236 (3d Cir. 2014). The doctrine is invoked most commonly "in employment discrimination cases," *id.*, particularly in the context of causes of action that arise on the basis of "the cumulative effect of individual acts" that might not have been independently actionable, *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002) (addressing hostile-work environment claims). Neither the Plaintiffs nor the district court rely on such a theory here. *See* A14. Indeed, the district court recognized that Plaintiffs' RESPA claims first accrued at closing and thus that Plaintiffs could have filed suit at that time. A11.

Instead, Plaintiffs' theory, which the district court embraced, is that Defendants committed ***new*** RESPA violations every time they received reinsurance premiums. But their theory conflates "mere continuity" in conduct with the "critical question [of] whether any present violation" of the statute "exists." *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977).

Reinsurance premiums paid ***after*** closing are not offered in connection with a settlement service. Once the reinsurance agreement has been entered into, ***if*** the mortgage insurance is still in place,[5] the reinsurer is entitled to a ceded reinsurance premium as a matter of contract without regard to any future referrals. Because the subsequent reinsurance premiums are not given in exchange for a new referral of settlement-service business, they cannot underpin a new RESPA violation. *See* pp. 14-15, *supra*; *see also Weiss v. Bank of Am. Corp.*, No. 15-cv-0062, 2016 WL 6879566, at *5 (W.D. Pa. Nov. 22, 2016) (rejecting a continuing violations theory under the RICO statute in a case challenging a captive-reinsurance arrangement on

[5] Except for the first payment, there is no guarantee that any subsequent premiums will be paid because there are numerous ways that a mortgage-insurance policy can be cancelled. For example, payments may be ended as a result of the cancellation of the policies due to loan-to-value and amortization rules, the sale of the property or other payoffs, or the servicer switching carriers.

the ground that each alleged violation "related to a payment amount that was part of the initial closing process, rather than discrete, later-arising facts").[6]

In short, as other courts have recognized, "[t]he closing of the mortgage and continuous premium payments are more properly conceived of as a single violation followed by continuing consequences, where the closing of the mortgage is the single actionable violation and the recurring payments" are merely "the continuing ill effects." *Menichino v. Citibank, N.A.*, No. 12-0058, 2013 WL 3802451, at *12 (W.D. Pa. July 19, 2013); *accord People ex rel. Dowling v. AAMB Reinsurance, Inc.*, 260 F. Supp. 3d 972, 978 (N.D. Ill. 2017); *Twin Rivers Ins.*, 2017 WL 2880899, at *8-9. This result is consistent with the rule courts have applied outside the context of RESPA that "individual payments" made under a "previous agreement" are not "new and independent act[s] … required to restart the statute of limitations" under a continuing violations theory. *Grand Rapids Plastics, Inc. v. Lakian*, 188 F.3d 401, 406 (6th Cir. 1999); *see also Varner v. Peterson Farms*, 371 F.3d 1011, 1020 (8th Cir. 2004) ("Performance of the alleged anticompetitive contracts during the limitations period is not sufficient to restart the period.");

[6] The reasoning in the now-vacated decision by the Bureau of Consumer Financial Protection is flawed for this reason. The Bureau correctly recognized that the continuing violations doctrine does not apply to RESPA claims, but it wrongly concluded that a mortgage issuer "commit[s] a separate (and separately actionable) violation of RESPA every time it accept[s] a payment pursuant to" a reinsurance agreement. *In the Matter of PHH Corp.*, No. 2014-CFPB-0002, at 22-27. That assertion is wrong for the reasons explained above in Part II.A, *supra*.

Tomaselli v. Beaulieu, No. 08-cv-10666, 2013 WL 4780085, at *11 (D. Mass. Aug. 30, 2013) (although payments under an agreement were made "over time," the alleged wrongful conduct of imposing an assessment "was a one-time event").

The two decisions applying the continuing violations doctrine that the district court relied on as supposedly "analogous," *Blake v. JPMorgan Chase Bank, N.A.*, No. 5:13-cv-06433-EGS, Dkt. No. 47, at 16-17 (E.D. Pa. Apr. 26, 2017), are in fact clearly inapposite. In *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192 (1997), the Supreme Court held that each time an employer failed to make a mandatory payment to a trust fund, it constituted a new violation of ERISA that triggered a new limitations period. But *Bay Area Laundry* turned on the thoroughly individual nature of each ERISA violation—as the Court noted, a pension plan "must … generally wait until the employer misses a particular payment before suing to collect ***that payment***" because the employer has not violated its obligation until that point. *Id.* at 208. By contrast here, Plaintiffs could have brought a challenge at closing to the entire stream of insurance premiums contemplated by the reinsurance agreements. *See* p. 17, *supra*.

Similarly, in *In re Niaspan Antitrust Litigation*, 42 F. Supp. 3d 735 (E.D. Pa. 2014), the court held that the continuing violations doctrine applied to restart the limitations period for antitrust claims based on the sale of drugs at supracompetitive prices. *Id.* at 745-47. As in *Bay Area Laundry*, claims based on each overcharge did not become actionable until the particular sale was made because consumer plaintiffs would not have suffered any antitrust injury before that point. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339 (1971). Again, not so here: even the district court recognized that Plaintiffs' RESPA suit was ripe at closing, because Defendants (according to Plaintiffs' theory and allegations) received a "thing of value" when the reinsurance agreements became effective. *See Blake*, No. 13-cv-06433-EGS, Dkt. No. 47, at 11.

C. Allowing the Continuing Violations Doctrine To Extend RESPA's Statute of Limitations Would Create Arbitrary Distinctions Between Plaintiffs.

The poor fit between the continuing violations theory and RESPA section 2607 claims is further confirmed by the odd and unjustifiable disparities that applying the doctrine would create. Under the theory, "like plaintiffs would face unalike limitations periods," *Snow*, 332 F.3d at 360-61, based on the happenstance of how they decided to structure their mortgage insurance payments.

Insurance premiums can be either paid up-front or on a monthly basis (usually reimbursed from monthly escrow payments by the borrower). There is no conceivable reason that a borrower who pays her insurance premium up front should have less time to file her RESPA claim than a borrower pursuing an identical RESPA claim who chose to pay over time. *See Mullinax v. Radian Guar. Inc.*, 199 F. Supp. 2d 311, 325 (M.D.N.C. 2002) ("The Court can find no statutory support or legislative history that suggests that Congress intended to provide such an uneven benefit."). Indeed, such a penalty for early payment would be perverse, since borrowers may benefit from prepaying their premiums. *See Cohen*, 608 F. Supp. 2d at 348 (discussing "prepaid insurance premiums, which are clearly beneficial to borrowers who pay for them"). Likewise, if borrowers pay down their loans more quickly, it may result in cancellation of their mortgage insurance. *See* p. 17 n.5, *supra*. There is no plausible reason why Congress would have intended to provide such borrowers with a shorter window of time in which to bring a RESPA claim.

D. Endorsing Plaintiffs' Continuing Violations Theory for Section 2607(a) Claims Would Undermine RESPA's Deliberately Short One-Year Limitations Period.

Plaintiffs' continuing violations theory also would compromise the importance of RESPA's strict limitations period for private actions. Congress attended carefully to the statute of limitations under section 2607 when it crafted RESPA, creating a three-year statute of limitations for governmental enforcement of section 2607 but a one-year statute of limitations for private enforcement actions. 12 U.S.C. § 2614. Through this structure, in particular by adopting such a short limitations period for private actions in the context of loans that may last for decades, Congress expressed its desire that section 2607 violations be litigated expeditiously or that all parties could know, by a date certain, that no litigation would follow. Moreover, because the statute of limitations runs from the "occurrence of the violation," 12 U.S.C. § 2614—rather than the discovery of the violation—Congress further incentivized plaintiffs to pursue claims at the earliest opportunity. *See Cunningham*, 814 F.3d at 162 (rejecting discovery rule for claim accrual in RESPA context).

The version of the continuing violations doctrine accepted by the district court here is especially problematic, because the court completely discarded any equitable safeguards on its application. *See* A16 ("Unlike certain equitable remedies that have a diligence requirement, the continuing violations doctrine … resets the statute of limitations … regardless of knowledge."); *see also* Appellees' Br. 48-49 (describing Plaintiffs' lack of diligence in pursuing their claims). If that approach were adopted, borrowers subject to contracts with ongoing payments could sit on their rights and wait for years after closing to bring a RESPA section 2607 claim despite knowing, or having sufficient information to know, the full basis of their claim. The result would essentially reward the conduct by plaintiffs that *Cunningham* held did not qualify for tolling.

Plaintiffs' approach would deprive lenders of repose and could place a cloud on mortgage loans for years after closing, potentially reducing liquidity in the secondary market. According to their theory, borrowers would retain the right to bring RESPA section 2607 suits so long as they continue to make mortgage payments that include an escrow payment for mortgage insurance. Thus, lenders and insurers could face the risk of lawsuits (complete with exposure to treble damages, *see* 12 U.S.C. § 2607(d)(2)), until a year after an insurance agreement is cancelled. The practical effect would be substantial, given the long-term nature of many mortgage insurance policies.

Such a rule would invite gamesmanship. Indeed, counsel for Plaintiffs in this case have already tried to extend the statute of limitations for section 2607 claims several times before, trying a new legal theory every time their former legal theory fails. But courts have rejected attempts to rely on other theories like equitable tolling to escape the statute of limitations. *See, e.g.*, *Cunningham*, 814 F.3d at 162 (rejecting equitable tolling for captive-reinsurance section 2607 claim where borrowers were informed of practice at closing); *Menichino v. Citibank, N.A.*, No. 12-0058, 2017 WL 2455166, at *8-9 (W.D. Pa. June 6, 2017) (rejecting attempt to add RICO claims five years into litigation); *Weiss*, 2016 WL 6879566, at *5 (rejecting continuing violations theory in RICO context where the alleged violations "arose from obligations and facts already known and acknowledged at the time of the parties' mortgage agreements"). This Court should not allow the use of the continuing violations theory to evade the one-year limitations period Congress placed on section 2607 claims.

E. Plaintiffs' Continuing Violations Theory Would Allow Belated Challenges to Good-Faith Business Practices.

Faithful enforcement of the statute of limitations also is necessary to provide repose to lenders and to prevent belated challenges to business practices that were conducted in good faith. This case is illustrative. Contrary to Plaintiffs' caricature, "captive" reinsurance arrangements have clear economic benefits that belie any claim that they are nothing more than kickback arrangements. Specifically, captive insurance arrangements ensure that lenders retain "skin in the game" even after loans are securitized and sold in the secondary market, thus incentivizing lenders to improve the quality of their loan origination and helping to ensure that borrowers only take loans they can manage. *Cf.* James DiSalvo *et al.*, *Banking Trends: Skin in the Game in the CMBS Market*, FED. RESERVE BANK OF PHILA.: ECON. INSIGHTS, at 15 (Quarter 1, 2018), https://www.philadelphiafed.org/-/media/research-and-data/publications/economic-insights/2018/q1/eiq118.pdf (finding that "residential mortgage-backed securities deals performed better when the issuers held a larger share of the junior claim."). This improves the portfolios of investors and reduces defaults.

The U.S. Department of Housing and Urban Development ("HUD"), which administered RESPA for years before enactment of the Dodd-Frank Wall Street

Reform and Consumer Protection Act in 2010, also recognized the benefits of captive reinsurance. In a 1997 advisory letter, HUD wrote, "the Department notes the trend in the mortgage market toward increased diversification of risk. The Department welcomes such trends to the extent that such arrangements increase the availability of mortgage credit." Letter from Nicolas P. Retsinas, Assistant Secretary for Hous., Dep't of Hous. & Urban Dev., to Countrywide Funding Corp. 7-8. Far from simply expressing an agreement in principle, the HUD letter provided detailed, specific guidance on how to ensure that captive-reinsurance arrangements complied with section 2607. *See id.* at 2-7. HUD concluded that as long as reinsurers actually provided reinsurance services and premiums were commensurate with the value of the reinsurance, it would not violate section 2607. *Id.* at 5.

Now, over a decade after their mortgages closed, Plaintiffs seek to retroactively litigate the legality of a practice that was disclosed to them at their loans' closings and that (per their own admission) did not affect the insurance rates they paid for their individual private mortgage insurance policies. Applying the continuing violations approach, and permitting Plaintiffs to revive long-dead claims, would run counter to the principle of repose underlying RESPA's statute of limitations. This Court should not permit Plaintiffs to sidestep years of jurisprudence and re-litigate lending and insurance practices from a decade ago.

CONCLUSION

The Court should affirm the judgment of the decision court and hold that Plaintiffs' claims are untimely because a RESPA section 2607 claim accrues at settlement and the continuing violations theory is inapplicable.

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Respectfully submitted,

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This brief complies with the type volume limitations of Federal Rules of Appellate Procedure 32(a)(7)(B) because it contains **5,992** words, excluding the parts exempted by Rule 32(f)

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Rule of Appellate Procedure 46.1(e), the undersigned hereby certifies that he is a member of the bar of the United States Court of Appeals for the Third Circuit.

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