For Opinion See 319 Fed.Appx. 615

United States Court of Appeals,
Ninth Circuit.
Sarah PEREZ, Michelle Lackney, Rachel Stewart, and Rachel Hardyck, Plaintiffs-Appellants,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Allstate Indemnity Company, Geico General Insurance Company, Certified Automotive Parts Association, and Liberty Mutual Fire Insurance Company, Defendants-Appellees.
No. 06-16965.
March 21, 2007.

Appeal from an Order and Judgment Entered October 5, 2006 by the United States District Court for the Northern District of California Case No. C 06-01962 JW (San Jose Division)
Honorable James Ware

Joint Brief of Defendants-Appellees

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GLOSSARY

“Br.”, followed by a number, refers to plaintiffs' opening brief.

“EOR,” followed by a number, refers to plaintiffs' Excerpts of Record.

“Tr.,” followed by a number, refers to the transcript of the hearing on the motion to dismiss.

JURISDICTIONAL STATEMENT

Defendants agree that this Court has appellate jurisdiction, in that plaintiffs filed a timely appeal from a final judgment

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dismissing their complaint.

For the reasons set forth in Point II of this brief, defendants do not agree that the District Court had jurisdiction to adjudicate plaintiffs' state law claims challenging defendants' automobile insurance rates and seeking, as a remedy, a retroactive premium refund. The District Court did not have jurisdiction because, under California law, the California Insurance Commissioner has exclusive authority to approve or reject insurance rates and to adjudicate challenges to those duly-approved rates.

STATEMENT OF ISSUES

I. Whether plaintiffs, who do not allege that they had an automobile accident, made a claim under their policies, or had their vehicles repaired with non-OEM parts, have Article III standing to seek damages for alleged overcharges in insurance premiums, when the sole cause of the alleged overcharge is an alleged agreement to provide non-OEM parts after a car accident “whenever possible.”

II. Whether plaintiffs' claims are barred because they seek a refund of insurance premiums based on rates approved by the California Insurance Commissioner under his exclusive original jurisdiction.

STATEMENT OF FACTS

Plaintiffs' statement of facts consists of a diatribe against the quality of automobile crash parts manufactured by some entity other than the original equipment manufacturer (non-OEM parts).[FN1] The basis for the District Court's ruling had nothing to do with the quality of non-OEM parts. Rather, the basis for the dismissal was plaintiffs' lack of Article III standing to challenge defendants' insurance rates, regardless of the quality of non-OEM parts. Defendants will therefore provide a proper statement of the relevant facts.

> FN1. The parts at issue include sheet metal fenders, quarter and door panels, hoods, trim grilles and bumper covers. EOR 17 ¶ 74. These parts are largely cosmetic and, except for hoods, serve no crash protection or safety functions.

1. *The Parties*

According to the second amended complaint (the “complaint”), plaintiffs Sarah Perez, Michelle Lackney, Rachel Stewart, and Rachel Hardyck were insured for automobile liability, casualty and collision coverage by, respectively, State Farm Mutual Automobile Insurance Company (“State Farm”), Allstate Indemnity Company (“Allstate”), GEICO General Insurance Company (“GEICO”), and Liberty Mutual Fire Insurance Company (“Liberty”) (the “insurer defendants”) for the last four years. EOR 3-4 ¶¶ 11-14. Plaintiffs seek to represent a class of other California policyholders who also purchased such coverage from the insurer defendants “between March 14, 2002 and the present.” EOR 3 ¶ 9.

Plaintiffs also sued the Certified Automotive Parts Association (“CAPA”). EOR 4 ¶ 18. CAPA is not an insurance company. Rather, CAPA certifies non-OEM parts for quality, although the complaint alleges that it does not do so properly. EOR 12-13 ¶ 49; EOR 14 ¶ 56.

The complaint does **not** allege that any of the four plaintiffs made a claim under their respective policies. It does **not** allege that any of their automobiles has been repaired with non-OEM parts, or that any estimate of damage was based upon the use of such parts. At the hearing on defendants' motion to dismiss, plaintiffs' counsel acknowledged that “[w]e don't purport to have that” kind of claim. Tr. 30:9-10.

2. *The Alleged Conspiracy*

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The complaint alleges that the defendants and other unnamed (and unidentified) conspirators violated the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 (the "UCL"), by purportedly "charging Plaintiffs premiums for OEM and other high-quality parts, and instead deceptively certifying, advertising, and palming off inferior crash parts as parts of like kind and quality." EOR 18-19 ¶ 83.

The complaint also alleges that "named and unnamed insurance companies have conspired to avoid competition among themselves for the provision of high-quality repair coverages," in purported violation of the Cartwright Act, Cal. Bus. & Prof. Code § 16720, California's state antitrust law. EOR 20 ¶ 90.

Neither count alleges that defendants conspired to fix the price of the premiums charged for the insurance provided. Nor does either count allege that any of the insurance policies required defendants to use OEM parts in any necessary repairs.

3. *The Alleged Impact*

The complaint alleges that defendants have caused "premium overcharges." EOR 2 ¶ 4. The complaint is quite clear about the alleged source of those "overcharges": "the conspirators have been able to charge premiums substantially above those competitively warranted for the actual inferior quality of the coverages actually provided." *Id.*

Paragraphs 80 and 81, styled "common class premium injury," set forth the crux of plaintiffs' claim:

80. The conspirators' conduct has the effect of causing members of the four California Classes of policyholders to pay above-competitive premiums for the inferior insurance repair coverages they have actually received. The policyholders are told by the insurance conspirators that they are receiving repair coverages that ostensibly will restore their vehicles to a pre-loss condition akin to the quality provided by the original equipment manufacturer. They pay for such high quality repair.

81. Instead, they receive substantially inferior repair coverage which would command substantially lower premiums "but for" the conspiracy, and its unlawful deception and anticompetitive conduct.

EOR 18 ¶¶ 80-81.

The complaint does not allege that the defendants have done anything that directly affects the level of the premiums. Rather, the gravamen of the complaint depends on the occurrence of the following series of hypothetical contingencies, none of which is alleged to have occurred in this case:

A plaintiff has an accident;

She makes a claim under her policy with one of the defendants;

Her car is repaired with non-OEM parts;

These non-OEM parts are "inferior".

4. *Proceedings Below*

Because none of the plaintiffs allege that the contingencies set forth above actually occurred, defendants moved to dismiss the complaint. Defendants argued that plaintiffs lack Article III standing under these circumstances since it

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was impossible to determine whether plaintiffs got exactly what they had paid for until the insurable event occurred and the repairs were provided. Tr. 32.

Defendants filed a separate motion to dismiss on the ground, *inter alia,* that, under California law, only the California Insurance Commissioner has jurisdiction to determine the proper premium. Defendants demonstrated that California law requires insurers to charge the rate approved by the Commissioner and no other. Tr. 6.

After extensive briefing and oral argument, the District Court granted the motion to dismiss for lack of Article III standing. EOR 35. The District Court held that plaintiffs' contingent “diminution in value” theory of harm was insufficient to confer standing because “Plaintiffs' injuries are speculative.” *Id.* The District Court did not reach the issue of the Commissioner's exclusive jurisdiction. *Id.*[FN2] Plaintiffs timely appealed.

FN2. CAPA also filed a motion to dismiss for want of personal jurisdiction that the District Court did not reach.

SUMMARY OF ARGUMENT

The District Court correctly dismissed the complaint because the injury that plaintiffs allege is too speculative to confer Article III standing. The complaint does not allege that defendants conspired to raise the premiums charged to plaintiffs. It alleges only that defendants conspired to provide non-OEM parts “whenever possible.” As a result of this ill-defined conspiracy to provide non-OEM parts “whenever possible,” plaintiffs claim that their insurance policies were overpriced.

Article III standing requires a concrete, particularized injury, not one that is hypothetical or speculative. Plaintiffs' complaint does not satisfy that standard because the existence and amount of any injury depends entirely on what happens in the future.

Unlike other products and services, insurance is the promise of future, conditional performance. It is conditional because the event that triggers performance may or may not happen. If the insured is not in a car accident or does not make a claim, the insured does not become entitled to a payment or other policy benefit. Moreover, prior to those contingent events, it is impossible to determine whether the insurance company will keep its promise or how it will perform. Whether these plaintiffs will ever have an accident or make a claim is entirely hypothetical. Thus, whether any of the insurance defendants will perform their obligations if that hypothetical event occurs is, likewise, hypothetical. An “injury” that depends on the occurrence of two conditional hypothetical events is clearly speculative.

In the insurance context, therefore, most cases that have addressed plaintiffs' contingent diminished value theory of harm have held that the theory is too speculative to support Article III standing. Of the two district court opinions on which plaintiffs rely, one was reversed on appeal for lack of jurisdiction and the other has been rejected by every court to consider it. Both opinions announce a conclusion on Article III standing unsupported by either authority or analysis.

Although the court below found it unnecessary to reach the issue, defendants also moved to dismiss because plaintiffs are seeking a refund of premiums based on rates that were approved by the California Insurance Commissioner, relief that is not available under California law.[FN3]

FN3. A “rate is the price or premium that an insurer charges its insureds for insurance.” *20th Century Ins. Co. v. Garamendi,* 8 Cal. 4th 216, 240 (1994). Auto insurance premiums are determined by first calculating “a base rate for a particular type of coverage which is the same for each policyholder and reflects the total annual premium the company must charge all policyholders to cover its projected losses and expenses and obtain a reasonable rate of return.” *Spanish Speaking Citizens' Found., Inc. v. Low,* 85 Cal. App. 4th 1179, 1186 (2000). “The base rate is then modified by applying a series of ‘rating factors' for each policyholder which determine how much the policyholder is charged and how the total premium the company received is divided

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among the policyholders." *Id.*

The Commissioner has exclusive jurisdiction over the approval of the rates upon which automobile insurance premiums are based. Once the Commissioner has approved a rate, the carrier is required to charge the resulting premium and no other. Suits to recover paid premiums based on approved rates are expressly prohibited. *See* *Walker v. Allstate Indem. Co.,* 77 Cal. App. 4th 750, 756-57 (2000). If plaintiffs believe their premiums were excessive, their sole remedy is by petition to the Commissioner requesting discontinuance of that rate prospectively. *Id.*

STANDARD OF REVIEW

This Court reviews de novo a district court's decision to grant or deny a motion to dismiss. *Firemen's Fund Ins. Co. v. City of Lodi,* 302 F.3d 928, 939 (9th Cir. 2002). Although the Court takes all well-pleaded factual allegations as true, *id.,* it is "not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors,* 266 F.3d 979, 988 (9th Cir. 2001).

"If support exists in the record, the dismissal may be affirmed for any proper ground, even if the district court did not reach the issue or relied on different grounds or reasoning." *Steckman v. Heart Brewing, Inc.,* 143 F.3d 1293, 1295 (9th Cir. 1998). *See also* *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 322 F.3d 1064, 1077 (9th Cir. 2003) (affirming order granting motion to dismiss on grounds not considered by district court but "amply supported by the record on appeal").

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED THE ACTION BECAUSE THE INJURY PLAINTIFFS HAVE ALLEGED IS FAR TOO SPECULATIVE AND INSUBSTANTIAL TO CONFER ARTICLE III STANDING.

Plaintiffs' theory is that defendants had conspired to use non-OEM parts to repair their automobiles "whenever possible." They do not allege that any defendants conspired with respect to the premiums charged. At the hearing on the motion to dismiss, plaintiffs explicitly conceded that they were **not** alleging that any insureds had made a claim or even had their automobiles repaired with non-OEM parts. Tr. 30.

Thus, plaintiffs' "overcharge" claim is based on pure speculation: the imagined poor quality of non-OEM parts that might in the future be provided if they have an accident and if their cars are repaired with those non-OEM parts. That "injury" is far too speculative to provide plaintiffs with Article III standing.

A. The Only Injury That Plaintiffs Alleged Was Based On Allegedly Poor Quality Claims Adjustment And Plaintiffs Do Not Allege That Their Cars Received Poor Quality Repairs.

As the complaint makes clear, the only source of the alleged overcharge was the alleged conspiracy to supply non-OEM parts "whenever possible." For example, ¶ 2 of the complaint alleges defendants conspired to:

A. "deceive their California policyholders by passing off their insurance coverages as providing high quality repair capable of restoring a vehicle to its pre-loss condition"; and

B. "prevent competition among insurance companies in the provision of high quality crash parts."

EOR 2 ¶ 2.

The complaint also alleges that defendants employ "markedly inferior and less costly crash parts" to meet defendants' "insurance repair obligation." EOR 2 ¶ 3; 12 ¶ 48. The injury alleged is a premium overcharge. But it is an overcharge defined entirely by the allegedly low quality of the repair parts:

By conspiring to deceive, and not to compete as to the quality of their repair services, the conspirators have been able

to charge premiums substantially above those competitively warranted for the actual inferior quality of the coverages actually provided.

EOR 2 ¶ 4. *See also* EOR 20 ¶ 96 (plaintiffs' "businesses and property" injured by paying premiums "above [those] competitive premiums for the actual inferior repair the coverages provided").

The clearest statement of this theory is the alleged "common class premium injury":
The conspirators' conduct has the effect of causing members of the four California Classes of policyholders to pay above-competitive premiums for the inferior insurance repair coverages they have actually received. The policy-holders are told by the insurance conspirators that they are receiving repair coverages that ostensibly will restore their vehicles to a pre-loss condition akin to the quality provided by the original equipment manufacturer. They pay for such high quality repair.
Instead, they receive substantially inferior repair coverage which would command substantially lower premiums "but for" the conspiracy, and its unlawful deception and anticompetitive conduct.

EOR 18 ¶¶ 80-81.

Plaintiffs make no claim that any of their cars has been damaged and repaired with non-OEM parts.

If, for example, plaintiff Sarah Perez's car had actually been damaged and had actually been repaired with a non-OEM part determined to be inferior to an OEM part, that could arguably constitute the kind of actual, non-hypothetical event that Article III requires. But the complaint makes no such allegation about her or any of the other plaintiffs. Counsel admitted as much at the District Court's hearing. Tr. 30. In short, it is undisputed that plaintiffs did not receive inferior parts during the time period referenced in their complaint: "between March 14, 2000 and *the present.*" EOR 3 ¶ 9 (emphasis added).

B. Even If "The Present" Were Found To Mean "Sometime In The Future," The Possibility That Plaintiffs Might Receive Poor Quality Auto Parts Would Still Be Too Speculative To Support Article III Standing.

The "irreducible constitutional minimum of standing" under Article III includes a "concrete and particularized" injury that is "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (citations and internal punctuation omitted). The injury must be "actual or imminent to ensure that the court avoids deciding a purely hypothetical case in which the projected harm may ultimately fail to occur." *Richards v. Fleetboston Fin. Corp.,* 427 F. Supp. 2d 150, 174 (D. Conn. 2006).

In addition to concrete injury, Article III standing has two additional requirements. There "must be a causal connection between the injury and the conduct complained of," and it "must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan,* 504 U.S. at 560-61 (citations and internal punctuation omitted).

Even if "the present" (EOR 3 ¶ 9) meant "sometime in the future," plaintiffs would still not sustain actual, concrete injury unless no fewer than six separate hypotheses all came true:
Plaintiff has an accident.
At the time of the accident, plaintiff has a policy of insurance with one of the defendants.
Plaintiff makes a claim under that policy.
Non-OEM parts are available for the particular automobile.
The car is repaired with non-OEM parts.
• The particular non-OEM parts used in the repair are inferior to the parts replaced.

If any one of those hypotheses fails, plaintiffs have sustained no cognizable injury.

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Numerous cases have held that insureds lack standing to assert claims based on future contingencies that might, or might not, reduce the value of their insurance. The leading case in this Circuit is *Impress Communications v. Unumprovident Corp.*, 335 F. Supp. 2d 1053 (C.D. Cal. 2003). In that case, plaintiffs purchased disability benefit policies from defendants. Plaintiffs claimed that defendants had numerous policies in place to "arbitrarily deny and delay the processing and payment of benefits for such claims." 335 F. Supp. 2d at 1056.

Like plaintiffs in this case, the plaintiffs in *Impress Communications* did not allege that they had ever filed any claims under those policies, or that they had ever been denied benefits. The *Impress Communications* plaintiffs relied on the same contingent diminution in value theory of harm that the plaintiffs allege here. *Id.* at 1057-58 n.6.

Relying on two earlier cases, the Court dismissed the complaint. In the prior cases, plaintiffs,
could hot allege that they had been provided fewer benefits based on the defendants' internal policies than had been contracted for. Thus, any injury was necessarily predicated on the anticipated denial of future benefits. Such injury was purely speculative and insufficient to confer standing under Article III. Plaintiffs here cannot allege that they have been provided with less disability coverage than they contracted for. Indeed, Plaintiffs here have never sought *any* benefits under Defendants' plans. An allegation that Defendants' administration of the plan might result in denial of future benefits is purely speculative....

Id. at 1059 (emphasis in original).

Impress Communications relied on *Doe v. Blue Cross Blue Shield, of Maryland, Inc.*, 173 F. Supp. 2d 398 (D. Md. 2001). In that case, after substantial discovery, Doe "abandon[ed] all claims for denial of benefits" and instead asserted a "'market value' theory of recovery." 173 F. Supp. 2d at 400. As the Doe Court explained:
This theory argues that Blue Cross, by applying a set of clandestine, restrictive review criteria, has eroded the market value of the policies it has issued. As a remedy, Plaintiffs seek to require Blue Cross to disgorge, for a class of policyholders, the difference between the market value of the coverage Blue Cross should have been providing and what it has actually been providing.

Id.

Doe rejected the "market value" theory - the same theory plaintiffs are pursuing here - explaining that the proposed proof of injury was "speculative" and would yield "little concrete information from which the jury could decide the case." *Id.* at 406. The Court held that plaintiffs "have not alleged a concrete and actual or imminent 'injury in fact,'" and thus "their claim fails for lack of standing under Article III." *Id.* at 403.

Impress Communications also relied on *Horvath v. Keystone Health Plan East, Inc.*, 333 F.3d 450 (3d Cir. 2003), which involved a challenge to the Health Plan's efforts to control medical costs, although Horvath's care and coverage was "never affected by" those controls. 333 F.3d at 456. Instead, the alleged injury was that her employer had "overpaid for the healthcare she received." *Id.* Again, that is the identical theory that plaintiffs have alleged here.

The Third Circuit held that the overcharge theory was "problematic," resting on the "troublesome assumption" that the jury could "accurately determine the amount her firm allegedly overpaid Keystone." *Id.* at 457. It also refused to allow juries to second guess the decisions of insurance regulators:
This value inquiry, in turn, inappropriately transforms juries into quasi-regulatory commissions by requiring them to decipher complex rate structures in order to determine whether, and to what extent, HMO plan members overpaid for the insurance they received.

Id. The Court found this theory "far too speculative to serve as a basis for a claim of individual loss and thus conclude[d] that Horvath lacks standing to seek restitution or disgorgement." *Id.*

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Both *Doe* and *Horvath* relied on the analysis in *Maio v. Aetna, Inc.,* 221 F.3d 472 (3d Cir. 2000), which also dealt with cost-saving measures in health insurance policies. The court held that the plaintiffs' property interest at issue "is their contractual right to receive benefits in the form of covered medical services." 221 F.3d at 489. As a result, even if the overcharge theory had some conceptual validity, it "simply has no application here." *Id.* at 492. As the Third Circuit explained:

[I]t follows from the nature of their property interests in their HMO memberships that they would be injured only to the extent that they could show that they suffered medical injuries, a denial or delay of medically necessary care, or the receipt of inferior or inadequate care ... which in turn caused them consequential financial loss in the form of overpayment for the coverage they actually received.

Id.

These cases are directly on point. None of the plaintiffs here alleged that her car was repaired with inferior non-OEM parts. Unless and until that hypothetical repair happens, it is impossible to know whether the actual value of the policies is equal to the value plaintiffs paid for them. That is the very definition of a speculative or hypothetical injury.

Plaintiffs' attempts to distinguish the authorities the District Court relied upon in granting defendants' motion are not persuasive. For example, plaintiffs complain that *Doe, Impress Communications* and *Horvath* were all ERISA actions. Plaintiffs pretend that these cases rested on "the peculiarly limited nature of ERISA standing," choosing to ignore their actual holdings. Br. at 23.

To the contrary, all three cases explicitly rest squarely on Article III rather than on some esoteric ERISA principle. *Impress Commc'ns,* 335 F. Supp. 2d at 1059 ("injury was purely speculative and insufficient to confer standing under Article III"); *Doe,* 173 F. Supp. 2d at 403 ("claim fails for lack of standing under Article III"); *Horvath,* 333 F.3d at 455 ("primary inquiry here is whether Horvath has pled a violation of her ERISA-created rights sufficient to satisfy Article III's injury requirement") (citations and internal punctuation omitted).

Plaintiffs also claim that, in *Doe* and *Horvath,* the plaintiffs employer had purchased the policy and there was no guarantee that the employer would have passed the savings on to its employees. Br. at 22-23. As *Doe* specifically states, however, that issue relates only to the third *Lujan* requirement: redressability. 173 F. Supp. 2d at 403 n.8 ("it is unclear whether a cash award to Plaintiffs would redress the alleged injury"). In both cases, however, the courts also held that plaintiff had failed to satisfy the first *Luian* requirement of concrete injury. *Id.* at 403; *Horvath,* 333 F.3d at 457. When "a decision rests on two or more grounds, none can be relegated to the category of obiter dictum." *Best Life Assur. Co. of Cal. v. Comm'r of Internal Revenue,* 281 F.3d 828, 834 (9th Cir. 2002) (citations and internal quotations omitted).

Plaintiffs claim that *Impress Communications* is distinguishable because the plaintiffs there tied their claim to a breach of contract, whereas plaintiffs here are alleging antitrust claims. Br. at 24. This purported distinction fails because the Article III holding in *Impress Communications* had nothing to do with the legal theory of recovery. As *Impress Communications* concluded, the analysis is "no different under contract or tort: Plaintiffs have not suffered an injury until they have sought and been denied benefits." 335 F. Supp. 2d at 1061.

Plaintiffs criticize *Maio* on the ground that it drew a distinction between tangible products and services, a distinction plaintiffs claim does not exist in antitrust law. Br. at 24-25. Virtually all of the antitrust cases plaintiffs cite, however, deal with alleged conspiracies to raise prices. Where price-fixing is concerned, it indeed makes no difference whether the affected prices are for tangible or intangible products.

The conspiracy alleged here, however, is not one to raise prices. It is an alleged conspiracy to use non-OEM parts in automobile repairs "whenever possible." Unless and until there is an accident, a claim, and the use of a non-OEM part

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that is inferior, the insured gets precisely what she paid for.

Avery v. State Farm Mutual Automobile Insurance Co., 835 N.E.2d 801 (Ill. 2005), *cert. denied,* ___U.S. ___, 126 S. Ct. 1470 (2006) held as much. *Avery* was the first non-OEM parts class action to go to trial and plaintiffs obtained a $1.3 billion judgment for consumer fraud and breach of contract. The Illinois Supreme Court reversed it outright.

Plaintiffs argued that the mere specification of non-OEM parts in the repair estimate caused them damage. Although that theory initially allowed them to proceed as a class, they achieved that goal "at the expense of denoting real damages." 835 N.E.2d at 832. As the Supreme Court explained:

Common sense dictates that any injury resulting from non-OEM parts would be inflicted, not by the mere *specification* of such parts in an estimate, but by the *use* of the parts in the repair of the vehicle. No possible damage could come to a policyholder simply because a non-OEM part was listed on his repair estimate. *Only if the part were actually installed, and only if it were shown that this part failed to restore the vehicle to its preloss condition, could it possibly be said that the policyholder suffered damage.*

Id. (final emphasis added.)

Whether plaintiffs here will have an accident that requires a repair, and whether that repair will result in a vehicle that is inferior to the vehicle before the damage, is a matter of pure speculation. Thus, any injury is entirely hypothetical and plaintiffs have failed, as a matter of law, to establish the kind of actual, concrete injury *Lujan* requires.

Plaintiffs rely on two district court opinions, both of which have been thoroughly discredited. In *In re Managed Care Litigation,* 150 F. Supp. 2d 1330 (S.D. Fla. 2001), the court held that money is a form of property, so that plaintiffs were in fact injured if the policies they purchased were worth less than they cost. 150 F. Supp. 2d at 1338.

That rationale entirely begs the question. Whether the policies are worth less than they cost is pure speculation under the circumstances presented here. It depends on what happens if and when an insured sustains a loss. No court has followed *Managed Care* on this issue, and every court to consider it has rejected its holding. *See Impress Commc'ns,* 335 F. Supp. 2d at 1064; Doe, 173 F. Supp. 2d at 404; In re Bridgestone/Firestone Inc., *Tires Prods. Liab. Litig.,* 155 F. Supp. 2d 1069, 1091-92 n.25 (S.D. Ind. 2001).

Plaintiffs' only other authority is the now-reversed District Court opinion in *Gilchrist v. State Farm Mutual Insurance Co.,* No. 1:00cv66 MMP (N.D. Fla. 2000), *rev'd,* 390 F.3d 1327 (11th Cir. 2004). Like *Managed Care,* the District Court's opinion in *Gilchrist* announces a conclusion unburdened by either authority or analysis.

Moreover, the Eleventh Circuit reversed *Gilchrist* on the ground that the District Court lacked subject matter jurisdiction. When the District Court has no jurisdiction, any opinion it writes "lack[s] precedential value." *Clark v. McDonald's Corp.,* 213 F.R.D. 198, 218 n.14 (D.N.J. 2003). No court has followed Gilchrist's discredited *ipse dixit* about standing, and this Court should not become the first.

The injury that plaintiffs have alleged is simply too speculative and insubstantial to constitute the kind of concrete harm that Article III requires.

C. Plaintiffs' Other Arguments About Standing Have No Merit.

Plaintiffs' brief raises a number of other scattershot arguments about standing. The defining characteristic of these arguments, however, is that they do not recognize the **kind** of antitrust conspiracy plaintiffs have pleaded. Plaintiffs have not alleged a conspiracy to raise the price of insurance, only to specify certain non-OEM parts if available in the repair process.

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For example, plaintiffs claim that the District Court "misunderstood" their theory in finding that injury is dependent on what happens after a crash. According to plaintiffs, they alleged that the price was too high when they purchased the policies, so they sustained damage in the form of an overcharge. Br. at 16.

That is pure semantics. The only reason plaintiffs claim that the premiums are "too high" is that the quality of parts to be provided during some future claims adjustment process allegedly might be too low. They have failed to explain how they can meaningfully quantify the value of those future contingent events unless and until they have occurred.

Doe squarely rejected that "I might not get what I bargained for" theory. The *Doe* plaintiffs argued that the prospect that Blue Cross might read the contract restrictively "diminishes the present value of their policies":
Contract law, however, does not recognize a cause of action based on the theory that the market value of the contract itself has been diminished because one side may breach it in the future.

173 F. Supp. 2d at 406. And even if their claims were analyzed "under tort law ... [plaintiffs'] claims are not ripe" and "fail for lack of Article III standing." *Id.* at 407. *Accord* *Maio,* 221 F.3d at 494-95 ("the [kind of] present economic harm [plaintiffs] allege to have suffered necessarily is contingent upon the impact of events in the future").

Plaintiffs argue that the "entire insurance industry is based on the premise" that policies can be valued before a claim is made. Br. at 17. As their own brief recognizes, when someone buys an insurance policy he or she is purchasing the "insurer's *obligation"* to pay in the event of a loss. Br. at 20 (emphasis in original).

But plaintiffs' abstract argument sheds no light on their claim because any determination of an insurer's obligation depends on the promises the insurance company makes in its policy. If the terms of the policy allow the company to repair with non-OEM parts, there is no overcharge. If the policy requires OEM parts, and none are supplied, there might be an overcharge, but neither a tort, contract nor antitrust claim could accrue "unless and until the promisor actually breaches the contract." *Impress Commc'ns,* 335 F. Supp. 2d at 1061.

As a result, plaintiffs' claims of antitrust injury are entirely dependent on the insurance company's failure to perform the "obligation" on which the premium was based. If the insurer materially breaches the contract, the policy might not be worth what the insured paid for it. But there is no way to determine either the fact of injury or the amount of any overcharge unless and until that breach occurs. Moreover, there is not even any allegation here that any of the defendants' insurance contracts require the use of OEM parts, even if some future accident occurs and some future claim is made.

Plaintiffs claim that they have pleaded "standard overcharge claims." Br. at 17. According to plaintiffs, the injury to purchasers occurs at the time of purchase and the statute of limitations then commences to run. Br. at 1719. They also claim that courts routinely award antitrust damages without necessarily finding a breach of contract. Br. at 22.

The inapposite cases plaintiffs cite, however, do not demonstrate that they have Article III standing. *E.g.,* *Amey, Inc. v. Gulf Abstract & Title, Inc.,* 758 F.2d 1486, 1500 (11th Cir. 1985); *In re Domestic Air Transp. Antitrust Litig.,* 137 F.R.D. 677, 683 (N.D. Ga. 1991); *City of El Paso v. Darbyshire Steel Co.,* 575 F.2d 521, 523 (5th Cir. 1978). Rather, the plaintiffs in those cases had suffered actual financial injury at the time they filed the lawsuits. The defendants had completed their performance and no contingencies remained. In contrast, plaintiffs' claim here is dependent on the future occurrence of contingent events before any injury could be certain.

In *Amey,* for example, the plaintiff alleged that it was overcharged for legal services and mortgage financing as a result of an alleged conspiracy among law firms, banks and others. 758 F.2d at 1491. By the time the plaintiff filed suit, it had already paid defendants for their services and defendants had provided the services. *Id.* Thus, plaintiffs claimed harm did not depend upon the future occurrence of some contingent event.

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Similarly, in *In re Domestic Air Transportation Antitrust Litigation* airline ticket purchasers sought to certify a class of consumers who claimed that they overpaid for airline tickets as a result of price fixing by the airlines. 137 F.R.D. at 683. There was nothing future or conditional about the services for which plaintiffs paid - airline tickets - and they suffered harm immediately upon paying inflated ticket prices.[FN4]

FN4. The court also ruled that defendants' argument that plaintiffs lacked standing as indirect purchasers went to the merits of plaintiffs' claims and could not be addressed at the certification stage. 137 F.R.D. at 696.

In *City of El Paso v. Darbyshire Steel Co.,* the City alleged that steel fabricators had conspired to rig the bidding for a contract. 575 F.2d at 52223. Article III standing was not an issue in that case either. Unlike here, there was nothing contingent about what the steel companies would provide, and the City had already suffered identifiable financial harm when it filed suit. Specifically, the contract between the city and the steel companies fixed the parties' future obligations, including "the price, the quantity, and the delivery schedule" and the City had paid for the steel when it filed suit. *Id.* at 523.[FN5]

FN5. The other cases plaintiffs cite are similarly inapposite. *See In re Visa Check/MasterMoney Antitrust Litig.,* 280 F.3d 124, 136 (2d Cir. 2001) (merchants alleged that credit card companies required them to accept debit cards and pay elevated fees in order to have access to credit cards; plaintiffs had paid elevated fees and received access to the credit cards at the time of suit); *Kaiser Aluminum & Chem. Sales. Inc. v. Avondale Shipyards, Inc.,* 677 F.2d 1045, 1054-55 (5th Cir. 1982) (affirming dismissal of antitrust counterclaims alleging illegal tying; defendant had supplied both tied and tying products at the time of suit); *In re Auction Houses Antitrust Litig.,* 193 F.R.D. 162, 163 (S.D.N.Y. 2000) (art purchasers and sellers alleged conspiracy among auctioneers resulting in higher fees; allegedly-inflated fees charged and paid at time of sale and prior to lawsuit); *Collins v. Int'l Dairy Queen,* 186 F.R.D. 689, 693 (M.D. Ga. 1999) (restaurant franchises alleged illegal tying to require purchase of products at inflated price; products provided at time of purchase); *Image Tech. Servs., Inc. v. Eastman Kodak Co.,* 1994 WL 508735 (N.D. Cal. Sept. 2, 1994) (copier purchasers alleged illegal tying of copiers and copier services).

Thus, plaintiffs are quite wrong to suggest that the District Court's order immunizes services from antitrust law. Br. at 20. Anticompetitive conduct that directly affects the price, such as bid-rigging, is actionable at the time of the purchase. *E.g., City of El Paso,* 575 F.2d at 523. For alleged anticompetitive conduct that may affect only the quality of a potential future service, however, it is impossible to determine if a purchaser has suffered actual injury until the service is provided.

Plaintiffs also attempt to recharacterize their claims as alleging a conspiracy to limit supply, resulting in higher prices, which they argue is a form of price fixing. Br. at 27-28. Their complaint says nothing about any such theory. There is no allegation that defendants conspired to limit the number of collision insurance policies in the market so as to extract a higher price. The only allegation is that defendants conspired to use low-quality parts "whenever possible" to repair damaged automobiles.

Moreover, to preserve a theory for appeal, plaintiffs have to fairly present it to the District Court. A "vague" or "cursory reference" to some legal theory does not suffice. *United States v. $22,474.00 in U.S. Currency,* 246 F.3d 1212, 1218 (9th Cir. 2001). Plaintiffs did not present this theory to the District Court in any meaningful way, so they cannot rely on it here. *RUI One Corp. v. City of Berkeley,* 371 F.3d 1137, 1152 (9th Cir. 2004), *cert. denied,* 543 U.S. 1081 (2005).

In any event, the premise of this theory - that there is a market for "high quality" OEM part insurance and a separate market for "low quality" non-OEM part insurance - is false. California insurance regulations prohibit the use of non-OEM parts unless they are of "like kind and quality" to the original part. Cal. Code Regs. tit. 10, § 2695.8(g).

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Thus, there is no California market for the "low quality" insurance that this argument hypothesizes.

Plaintiffs' final salvo is *National Macaroni Manufacturers Ass'n v. FTC,* 345 F.2d 421 (7th Cir. 1965), a case that supports the District Court's opinion a lot more than it does this appeal. The Association's members produced about 70% of the pasta sold in the United States. The best ingredient for high quality pasta is semolina, which is derived from durum wheat.

In 1961, a drought led to substantial reductions in the harvest of durum wheat. In response, the members of the Association agreed to reduce the semolina content in their pasta to 50% and to use other forms of wheat for the other 50%. The purpose of this agreement was to "ward off price competition **for durum wheat"** during the shortage. 345 F.2d at 426 (emphasis added).

The FTC held that this was a form of price fixing, and the Seventh Circuit agreed. 345 F.2d at 426. The product whose price was fixed, however, was durum wheat, not pasta, and the victims of the conspiracy were not the purchasers of pasta. Nothing in *Macaroni* suggests that there was any conspiracy to affect the price of the pasta.

Moreover, pasta is a tangible product. If pasta made with less than 100% semolina is an inferior product in color and cooking tolerances, 345 F.2d at 424, the customer can detect immediately whether she has received what she paid for. In this case, plaintiffs have yet to explain how one can possibly determine the "actual value" of the insurance before a claim is made and the claims adjustment process is complete.

The District Court correctly held that plaintiffs had not alleged the kind of concrete injury necessary for Article III standing. Accordingly, this Court should affirm that judgment of dismissal.

II. THE RATE-APPROVAL SCHEME EMBODIED IN CHAPTER 9 OF THE CALIFORNIA INSURANCE CODE BARS PLAINTIFFS' CLAIMS.

Even if plaintiffs could overcome their obvious standing deficiencies, the Court should still affirm the judgment dismissing the complaint because plaintiffs' claims are barred by Division 1, part 2, chapter 9 of the California Insurance Code.[FN6]

FN6. California Insurance Code §§ 1850 - 1861.16. All future statutory citations are to the California Insurance Code unless otherwise noted.

Chapter 9 establishes "a comprehensive administrative scheme" for regulating insurance rates. *Farmers Ins. Exch. v. Superior Court,* 137 Cal. App. 4th 842, 855 (2006). Substantively, Insurance Code section 1861.05(a) provides that "[n]o rate shall be approved or remain in effect which is excessive, inadequate, unfairly discriminatory, or otherwise in violation of this chapter." Ins. Code § 1861.05(a) Procedurally, section 1861.01(c) provides that no rate may be used without the prior approval of the Commissioner. *Id.* § 1861.01(c). To obtain such approval, the insurer must file a detailed rate application and demonstrate that the requested rate is justified and satisfies other statutory provisions. *Id.* § 1861.05(b). *See also* page 9, note 3, *supra.* Once the Commissioner has approved a rate, *"the insurers must charge the approved rate* and cannot be held civilly liable for so doing." *Walker,* 77 Cal. App. 4th at 756 (emphasis added).

After a rate has been approved, "[a]ny person aggrieved by any rate charged" may file a complaint with the Commissioner requesting investigation and a public hearing. Ins. Code § 1858(a). The Commissioner's powers include discontinuing approval of the rate. *Id.* §§ 1861.10, 1861.05(a). The "sole remedy" for an aggrieved person who is dissatisfied with the Commissioner's handling of a post-approval complaint is a "timely petition for writ of administrative mandamus" to compel the Commissioner to approve or disapprove a rate or to conduct a further hearing. *Id.* § 1861.055(b); *Walker,* 77 Cal. App. 4th at 756, 757 n.5.

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Significantly, Chapter 9 authorizes only "prospective, not retrospective, relief," even by the Commissioner. *Walker,* 77 Cal. App. 4th at 756; Ins. Code §§ 1861.10, 1861.05(a). As a result, any claim in civil litigation that would result in a retroactive change in approved rates is forbidden. *See Walker,* 77 Cal. App. 4th at 756 ("If section 1860.1 has any meaning whatsoever ... the section must bar claims based upon an insurer's charging a rate that has been approved by the commissioner pursuant to" Chapter 9.).

Section 1860.1 provides that an insurer is **not** subject to civil suit for charging a rate approved by the Commissioner unless the underlying statute on which the suit is based refers to insurance:
No act done, action taken or agreement made pursuant to the authority conferred by this chapter shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this State heretofore or hereafter enacted which does not specifically refer to insurance.

Ins. Code § 1860.1. Obviously, the "act" of charging and collecting premiums based on rates that have been approved by the Commissioner is done "pursuant to the authority conferred by" Chapter 9.

Further, section 1860.2 provides that the enforcement scheme established in Chapter 9 is the exclusive method for regulating insurance rates:
The administration and enforcement of [Chapter 9] shall be governed solely by the provisions of this chapter. Except as provided in this chapter, no other law relating to insurance and no other provisions in this code heretofore or hereafter enacted shall apply to or be construed as supplementing or modifying the provisions of this chapter unless such other law or provision expressly so provides and specifically refers to the sections of this chapter which is intends to supplement or modify.

Id. § 1860.2. Neither of the statutes upon which plaintiffs rely - the UCL or the Cartwright Act - relate to insurance, much less contain the "specific references" necessary to evidence and effect a legislative intent to supplement or modify Chapter 9 of the Insurance Code.

As summarized in *Walker,* the courts have
jurisdiction over allegations that the commissioner has not properly applied the applicable regulations. Nothing in the statutory scheme, however, supports an action in the court to reopen ratemaking decisions years after the time for judicial review of those decisions has passed in an effort to recoup premiums collected in accordance with the commissioner's final decisions.

77 Cal. App. 4th at 757 n.5. *See also* Ins. Code § 1861.055(b).

A. Plaintiffs' Claims Directly Challenge The Commissioner's Authority By Seeking Retroactive Rate Revision Through A Premium Refund.

A review of the complaint readily establishes that plaintiffs are seeking a prohibited retroactive revision of their insurance rates and a prohibited premium refund. *See Gilchrist,* 390 F.3d at 1332 ("we must eschew the parties' characterization of the claim and examine the allegations of the complaint"). The complaint makes clear that plaintiffs are (1) challenging as excessive the premiums that the defendants charge on the basis of approved rates, and (2) seeking to recover a portion of those premiums. Specifically, plaintiffs allege:
By conspiring to deceive, and not to compete as to the quality of their repair services, the conspirators **have been able to charge premiums substantially above those competitively warranted** for the actual inferior quality of the coverages actually provided. These **premium overcharges** have unfairly and unlawfully harmed the four Classes of California policyholders alleged herein.

EOR 2 ¶ 4 (emphasis added).
Such price-overcharge injury can be shown in a common, formulaic manner allowing class treatment of all claims.

EOR 3 ¶ 9 (emphasis added).

These [alleged questions of law and fact] include ... whether Defendants' deceptive and anticompetitive conduct has caused at least **some price or premium injury** to members of the Class **warranting injunctive restitution**....

EOR 6 ¶ 25(b) (emphasis added).

To reduce dramatically their repair costs and **realize premiums significantly above those warranted** by the quality of crash part coverages provided, named and un-named insurance conspirators have conspired to provide inferior crash parts to meet their insurance repair obligations.

EOR 12 ¶ 48 (emphasis added).

The conspirators' conduct has the effect of causing members of the four California Classes of policyholders to pay **above-competitive premiums** for the inferior insurance repair coverages they have actually received.

EOR 18 ¶ 80 (emphasis added).

[Putative class members] receive substantially inferior repair coverage which would command **substantially lower premiums** “but for” the conspiracy, and its unlawful deception and anticompetitive conduct.

EOR 18 ¶ 81 (emphasis added).

The overpayment of premiums paid by the members of the California Classes to the named insurance conspirators constitute moneys acquired by the named insurance conspirators by means of unfair competition.

EOR 19 ¶ 86.

The conspiracy has had the effect of **raising and maintaining premiums** for automobile insurance coverages above the competitive levels that would have prevailed for the actual vehicle repairs provided using inferior crash parts.

EOR 20 ¶ 91 (emphasis added).

Defendants' anticompetitive conduct has restrained and injured competition in California in the sale of automobile insurance coverages and, as a consequence, has **caused the premiums or prices charged to the members of the California Classes to be above competitive premiums** for the actual inferior repair coverages provided by Defendants.

EOR 20 ¶ 96 (emphasis added).

Further, plaintiffs seek to recover “restitution and/or disgorgement of all revenues, earnings, profits, compensation, and benefits which may have been obtained by Defendants as a result of such unlawful business acts or practices.” EOR 21, Prayer ¶ C.

As noted above, plaintiffs **do not** allege that their vehicles were repaired with non-OEM parts. Accordingly, none of the plaintiffs seeks to recover compensatory damages based on any defendant's alleged failure to restore a vehicle to pre-loss condition. Rather, the only relief sought in this case is based on the return of allegedly excessive premiums.

That relief would require the courts, not the Commissioner, to determine what proper rates should have been and to order what amounts to a refund. There is simply no way to grant that relief without engaging in a retroactive rate revision back to 2002, and that would invade the exclusive province of the Commissioner. *Walker,* 77 Cal. App. 4th at 757 n.5 (“Nothing in the statutory scheme, however, supports an action in the court to reopen ratemaking decisions years after the time for judicial review of those decision has passed in an effort to recoup premiums collected in accordance with the commissioner's final decisions.”).

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B. Under The Analogous Filed Rate Doctrine, Courts Should Not Become Involved In Ratemaking.

Chapter 9 "is analogous" to the federal filed rate doctrine. *Walker,* 77 Cal. App. 4th at 757 n.4. One of the principal purposes of the filed rate doctrine is to keep the "courts out of the rate-making process" because that is "a function that [government] agencies are more competent to perform." *Gallivan v. AT&T Corp.,* 124 Cal. App. 4th 1377, 1382 (2004).

As this Circuit observed in *Transmission Agency of Northern California v. Sierra Pacific Power Co.,* 295 F.3d 918; 930 (9th Cir. 2002) *("TANC"):*

As further developed, the filed rate doctrine has prohibited not just a state court (or a federal court applying state law) from setting a rate different from that chosen by FERC [the Federal Energy Regulatory Commission], but also from assuming a hypothetical rate different from that actually set by FERC. In *Arkansas Louisiana Gas Co.,* 453 U.S. at 579, 101 S. Ct. 2925, the Court stated:

It would undermine the congressional scheme of uniform regulation of rate regulation to allow a state court to award as damages a rate never filed with the Commission and thus never found to be reasonable within the meaning of the [Natural Gas] Act. Following that course would permit state courts to grant regulated sellers greater relief than they could obtain from the Commission itself.

The Court has also expanded the reach of the filed rate doctrine beyond just rates. In *Nantahala Power,* the Supreme Court held that "the filed rate doctrine is not limited to rates *per se."*

Id. at 930 (internal citations omitted) (quoting *Arkansas Louisiana Gas Co. v. Hall,* 453 U.S. 571, 579 (1981) & *Nantahala Power & Light Co. v. Thornburg,* 476 U.S. 953, 966 (1986)).

TANC's discussion of the undesirability of having a court "assume a rate which would be charged other than the rate adopted by the federal agency in question," was cited with favor and followed in *Public Utilities District No. 1 of Grays Harbor County Washington v. Idacorp, Inc.,* 379 F.3d 641, 650-51 (9th Cir. 2004) *("Grays Harbor").* Earlier this year, the California Court of Appeal cited with favor and followed that portion of Grays Harbor. *See In re Wholesale Elec. Antitrust Cases I & II,* No. D047697, 2007 WL 572249 (Cal. Ct. App. Feb. 26, 2007) (certified for publication at 55 Cal. Rptr. 3d 253).

In *Wholesale Electricity,* the Court agreed with *TANC* and *Grays Harbor* that the filed rate doctrine should be expanded to include market-based rates that have not been filed with the FERC. *Id.* at *8. The *Wholesale Electricity* opinion went on to hold that the penalties sought by plaintiffs were barred by the filed rate doctrine because they "potentially would interfere with FERC supervision of market-based rates and any enforcement activities allowed under FERC procedures. We are reluctant to engage in policy analysis to the extent that plaintiff requests in this fast-changing and highly regulated area." *Id.* at *16.

For the same reasons, this Court should decline plaintiffs' invitation to become a surrogate Insurance Commissioner and undertake to determine the rates and premiums that Defendants should have charged for their policies.

C. There Is No "Antitrust Or Unfair Practices" Exception To California's Premium Refund Prohibition.

Plaintiffs cannot avoid statutory bars to recovery (such as the immunity afforded approved rates by section 1860.1) simply "'by relabeling the nature of the action as one brought under"' another statute. *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.,* 20 Cal. 4th 163, 182 (1999) (citation omitted). *Accord Rubin v. Green,* 4 Cal. 4th 1187, 1201 (1993) (plaintiff may not "'plead around' absolute barriers to relief by relabeling the nature of the action as one brought under the unfair competition statute").

Thus, it is of no moment that plaintiffs seek to recover under the UCL and Cartwright Act. "What is fundamentally at issue, despite the antitrust overlay of [the plaintiffs'] complaint, is whether excess premium rates were charged by [the

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defendants] at the time they were established." *Karlin v. Zalta,* 154 Cal. App. 3d 953, 983 (1984), *disapproved on other grounds, Mfgs. Life Ins. Co. v. Superior Court,* 10 Cal. 4th 257, 267 (1995).[FN7]

FN7. *Cf also H.J. Inc. v. Northwestern Bell Tel. Co.,* 954 F.2d 485, 489 (8th Cir. 1992) ("the underlying conduct does not control whether the filed rate doctrine applies. Rather, the focus for determining whether the filed rate doctrine applies is the impact the court's decision will have on agency procedures and rate determinations.") Significantly, the Eighth Circuit in *H.J. Inc.* distinguished its prior decision in *City of Kirkwood v. Union Elec. Co.,* 671 F.2d 1173 (8th Cir. 1982), upon which plaintiffs rely. Br. at 34 n.4. *Kirkwood,* a price squeeze case, was an action for antitrust damages by **competitors** of the defendant, not rate payers. *See H.J. Inc.,* 954 F.2d at 490. In contrast with *Kirkwood,* the court held that the *H.J.* plaintiffs' claims that they paid too much for services received fell "squarely within the filed rate doctrine." *Id.* at 492.

Plaintiffs acknowledge that section 1860.1 provides that **nothing** done "pursuant to the authority conferred by" Chapter 9 constitutes "grounds for prosecution or civil proceedings under any other law of this State heretofore or hereafter enacted which does not specifically refer to insurance." Br. at 36. Similarly, plaintiffs acknowledge that section 1860.2 provides that even other laws "relating to insurance" do not "apply to or be construed as supplementing or modifying the provisions of [Chapter 9] unless such other law or other provision expressly so provides and specifically refers to the sections of [Chapter 9] which it intends to supplement or modify." *Id.* It is, of course, undisputed that neither of the laws upon which plaintiffs predicate the complaint - the Cartwright Act and the UCL - "so provides" or "specifically refers" to sections of Chapter 9.

Plaintiffs argue, however, that these prohibitions have no effect on their claims because section 1861.03(a) provides that "[t]he business of insurance shall be subject to ... the antitrust and unfair business practices laws" of California. Br. at 37. Not so. After analyzing the "interplay between section 1861.03 and sections 1860.1 and 1860.2," however, the *Walker* Court held: "If section 1860.1 has any meaning whatsoever (which under the accepted rules of statutory construction it must), the section must bar claims based upon an insurer's charging a rate that has been approved by the commissioner...." 77 Cal. App. 4th at 756.

Plaintiffs seek to distinguish *Walker* as not involving "antitrust or price-fixing claims...." Br. at 37. But *Walker* clearly holds that sections 1860.1 and 1860.2 and the "statutory scheme" of which those Sections are a part bar civil claims, **regardless of the underlying theory,** when they involve "a rate that has been approved by the commissioner." 77 Cal. App. 4th at 756.

No amount of word wizardry can alter the fact that plaintiffs are seeking a prohibited refund of paid premiums based on approved rates. The Insurance Code therefore bars their claims.

D. Plaintiffs' "Non-Rate Activity" Argument Is Baseless And Has Been Rejected Repeatedly.

Plaintiffs also seek to distinguish *Walker* as not involving "any claim of misconduct occurring outside of the rate-setting process...." Br. at 37. Plaintiffs contend that "the conduct complained of here - defendants' exclusion of quality-based competition as well as their wrongful use of third parties such as CAPA to further their scheme - was certainly not 'pursuant to the authority conferred by [Chapter 9].'" Br. at 39.

In fact, the "conduct complained of here" is that defendants supposedly charged **excessive premiums.** The only aspect of defendants' conduct that plaintiffs claim affected them adversely was defendants' charging supposedly **excessive premiums.** As plaintiffs explain: "In an unrestrained market, Defendants would have lost business to competitors that provided true OEM-quality policies, at least **unless they cut prices for their policies,** which would be known to be inferior." Br. at 31 (emphasis added).

Defendants were able - indeed required - to charge the "prices" *(i.e.,* premiums) they did only because they obtained

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approval from the Commissioner to do so. As plaintiffs acknowledge, in granting that approval "the Insurance Commissioner's task with regard to filed rates is to determine whether they are **excessive,** inadequate, unfairly discriminatory, or in violation of Chapter 9 of the Insurance Code, Calif. Ins. Code 1861.05(a) - not whether they are in violation of any other statute." Br. at 40 (emphasis added). In short, plaintiffs are seeking to recover "excessive premiums" that the Commissioner has found are **not excessive.**

The Eleventh Circuit rejected an almost identical argument in *Gilchrist,* a case brought by some of the same attorneys who represent the plaintiffs in this case. In *Gilchrist,* the defendants moved to dismiss the complaint, arguing that the McCarran-Ferguson Act deprived the federal courts of jurisdiction because plaintiffs' claims were aimed at the business of insurance.[FN8] The *Gilchrist* defendants argued that the plaintiffs' attempt to use the antitrust laws to recover alleged premium overcharges "attack ... both their rate-making and the performance of their insurance contracts." 390 F.3d at 1330-31.

FN8. The McCarran-Ferguson Act, 15 U.S.C. § 1012, "expressly exempts insurer activities from the reach of the Sherman Act when three elements are met: (1) the challenged activity is part of the 'business of insurance'; (2) the challenged activity is regulated by state law; and (3) the challenged activity does not constitute a boycott of unrelated transactions." *Gilchrist,* 390 F.3d at 1330.

Plaintiffs argued that they were challenging the business practices of the insurers, not the business of insurance. According to plaintiffs, they were:

attacking a conspiracy, entirely outside the rate-making process, in which Insurers agreed to avoid OEM parts and worked with third parties to disseminate false information about such parts in order to exclude competition from other insurers who would have provided OEM-quality repair policies[.]

Id. at 1331-32.

The "heart" of the *Gilchrist* complaint was that defendants had "lowered the quality and cost of repairs by specifying the use of non-OEM parts and not passing along the savings to their policyholders through reduced premiums." *Id.* at 1333. The Eleventh Circuit held that plaintiffs' theory was "a direct attack on the integrity of Insurers' rate-making." *Id.* at 1332.

Plaintiffs here attempt to distinguish *Gilchrist* on the ground that the court was only discussing McCarran-Ferguson issues. Br. at 18 n.2. That completely misses the point. To determine whether McCarran-Ferguson barred plaintiffs' claim, the court had to decide the same issue presented here, *i.e.,* whether the allegations of the complaint implicate the rate-making authority of the Commissioner:

We have previously rejected attempts to avoid McCarran-Ferguson by plaintiffs who creatively disguised what was fundamentally an attack on insurance premiums by masking it with a barrage of antitrust verbiage.... [W]e rejected plaintiffs' attempts to disguise what were basically attacks on premiums and rate-making by alleging conspiracies to stabilize or inflate profits.

390 F.3d at 1332-33. *See also* *Morales v. Attorneys' Title Ins. Fund, Inc.,* 983 F. Supp. 1418 (S.D. Fla. 1997); *Wegoland, Ltd. v. NYNEX Corp.,* 806 F. Supp. 1112 (S.D.N.Y. 1992).

E. Plaintiffs' Non-Insurance Cases Do Not Create A "Non-Rate Activities" Exception To The Premium Refund Prohibition.

Plaintiffs claim *Cellular Plus v. Superior Court,* 14 Cal. App. 4th 1224 (1993), created a "non-rate activities" exception to California's prohibition of the refund of paid premiums based on approved rates. Br. at 32-35. *Cellular Plus* was not an insurance case and never mentioned Chapter 9.

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The PUC rate regulations in *Cellular Plus* contained nothing comparable to section 1860.1's prohibition against civil proceedings based on acts done pursuant to the rule-making authority conferred on the Commissioner by Chapter 9. To the contrary, in *Cellular Plus* the defendants "acknowledge [d] and agree [d] that existence of PUC regulatory authority over rates does not immunize them from, or otherwise preclude a claim against them for, a violation of the Cartwright Act." 14 Cal. App. 4th at 1243.

Plaintiffs also cite *Knevelbaard Dairies v. Kraft Foods, Inc.,* 232 F.3d 979 (9th Cir. 2000) and *In re Lower Lake Erie Iron Ore Antitrust Litig.,* 998 F.2d 1144 (3d Cir. 1993), neither of which involved insurance or mentioned Chapter 9. In addition, the plaintiffs in those cases were not seeking a refund of monies that they had paid pursuant to a rate approved by some governmental agency.

In *Knevelbaard,* the plaintiffs, who were milk producers, alleged that the defendants, who were cheese makers, "rigged the price for bulk cheese in order to depress their acquisition costs both for that commodity and for milk" and, "as a result [plaintiffs] received less for that product than they would have received but for the unlawful price restraint." 232 F.3d at 982.

In *In re Lower Lake Erie,* the plaintiffs, which were steel-making, docking and trucking companies, alleged that the defendants, which were railroads, had conspired "to preclude potential competitors from entering the market of lake transport, dock handling, storage and land transport of iron ore." 998 F.2d at 1151. To be sure, the railroads' rates were governed by the Interstate Commerce Commission. *Id.* at 1152. The plaintiffs were not, however, seeking a refund of anything they had paid the railroads. In fact, some of the plaintiffs were not even railroad customers. *Id.* at 1152-53. ("[t]he steel company plaintiffs requested damages for the savings ... that would have resulted from swifter development of self-unloader technology"; "[t]he dock company plaintiffs claimed injury due to the railroads' refusal to permit them entry into the iron ore unloading business"; and "[t]he trucking companies' claim for damages is similar. Had they not been precluded from entering the market of the land transport of ore, they would have engaged in such operations and realized significant profits)." *Id.* at 1154.[FN9]

FN9. In addition, the exception to the filed rate doctrine recognized in *Lower Lake Erie* is narrow and does not apply where a defendant allegedly uses anticompetitive conduct to charge excessive rates. *See Ultimax.com, Inc. v. PPL Energy Plus, LLC,* 378 F.3d 303, 308 (3d Cir. 2004) *("Lower Lake Erie* dealt with the defendant railroads' activities related to a technological innovation wholly separate from rates"). *See also County of Stanislaus v. Pacific Gas & Elec. Co.,* 114 F.3d 858, 865 (9th Cir. 1997) (holding that *Lower Lake Erie* was not relevant to claims that defendants' anticompetitive conduct denied plaintiffs access to less expensive gas); *Goldwasser v. Ameritech Corp.,* No. 97 C 6788, 1998 WL 60878, at *5 (N.D. Ill. Feb. 4, 1998), *aff'd,* 222 F.3d 390, 402 (7th Cir. 2000) (observing that the issue of hypothetical lower rates in *Lower Lake Erie* was ancillary to the question of damages because the allegedly excluded competitors "would not have been subjected to the same rate-setting regulatory review").

F. *Donabedian* **Did Not Create A Right To Recover Paid Premiums Based On Approved Rates.**

Plaintiffs contend that *Donabedian v. Mercury Insurance Co.,* 116 Cal. App. 4th 968 (2004), establishes that section 1860.1 does not "provide a blanket immunity for any otherwise unlawful conduct that could affect rates." Br. at 40.

The *Donabedian* opinion emphasizes that the case arose out of the sustaining of a demurrer without leave to amend, so all of the allegations of the complaint had to be accepted as true. 116 Cal. App. 4th at 993. Those allegations included a claim that "Mercury violated a specific prohibition of Proposition 103," that the absence of prior insurance cannot be used, in and of itself, as a criterion for determining eligibility for. a Good Driver Discount. *Id.* at 991-92. The plaintiff further alleged that "the Insurance Commissioner **did not approve** Mercury's use of the lack of prior insurance to determine, for example, eligibility for the Good Driver Discount or insurability." *Id.* at 992 (emphasis added). The Insurance Commissioner filed an amicus curiae brief agreeing with plaintiffs allegations. *Id.* at 99293.

The *Donabedian* opinion neither criticizes nor purports to limit the scope of *Walker*. Rather, *Donabedian* found *Walker* to be readily distinguishable. *Donabedian* also noted that each cause of action asserted in *Walker* would have required "redetermination" of premium rates that had been in effect for a number of years and "'a refund of the premiums collected in excess of the redetermined amounts."' 116 Cal. App. 4th at 991.

That is, of course, the situation in the present case, where plaintiffs are alleging that the defendants have, with the Commissioner's approval, been able to charge premiums substantially above those competitively warranted thus requiring "redetermination" of premium rates and granting plaintiffs the restitutionary refund of some portion of the premiums they have paid. EOR 2 ¶ 4, 3 ¶ 9, 6 ¶ 25(b), 12 ¶ 48, 18 ¶ 80, 18 ¶ 81, 19 ¶ 86, 20 ¶ 96, 21, Prayer ¶ C. Thus, as a matter of law, Chapter 9 and *Walker* bar plaintiffs' UCL and Cartwright Act claims, and *Donabedian* is not to the contrary.

CONCLUSION

For these reasons, defendants respectfully pray that the Court affirm the judgment of dismissal.

Appendix not available.

Sarah PEREZ, Michelle Lackney, Rachel Stewart, and Rachel Hardyck, Plaintiffs-Appellants, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Allstate Indemnity Company, Geico General Insurance Company, Certified Automotive Parts Association, and Liberty Mutual Fire Insurance Company, Defendants-Appellees.
2007 WL 1231992 (C.A.9) (Appellate Brief)

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