THE FILED RATE DOCTRINE AND THE INSURANCE ARENA

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The article discusses the modern application and jurisprudential background of the "filed rate doctrine." The filed rate doctrine is used by courts to uphold the validity of rates approved by regulatory agencies and as a bar to claims implicating those rates. The doctrine has enduring relevance to the field of insurance litigation and overrides certain common legal principles. The article focuses on the broad applicability of the doctrine and gives a comprehensive overview of the myriad issues impacting its usage.

The article discusses early cases establishing the doctrine decided earlier than the United Supreme Court's decision in Keogh v. Chicago & Northwestern Railway Co., which is often referenced in connection with the doctrine's origination. Based on grounds of legislative intent and the perceived unfairness of allowing certain plaintiffs to escape from a legislative scheme applicable to others, the article shows how the doctrine emerged from judicial deference to federal railroad rate regulations enacted by the Interstate Commerce Commission. The filed rate doctrine was later expanded to other federally regulated industries including energy and telecommunications.

The applicability of the filed rate doctrine to litigation impacting the insurance industry emerged in the mid-1980s. The article highlights a number of recent cases showing how various courts have applied the doctrine to the insurance industry and how various litigants have attempted to avoid the application of it.

The article delves into a number of issues regarding the filed rate doctrine that are specific to the insurance industry and conflicting authority regarding application of the doctrine in the insurance arena. The

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article also discusses the various ways the filed rate doctrine has been applied to claims for equitable relief. The article discusses the inapplicability of the filed rate doctrine to various claims, including claims that an insurer violated insurance regulations. The article also examines other typical claims including fraud, charges outside of the basic rate, antitrust claims, discrimination claims, Racketeer Influenced and Corrupt Organizations Act claims, breach of contract claims, and claims alleging the wrongful receipt of kickbacks. The article further discusses the issue of administrative review.

The article concludes by considering the future of the filed rate doctrine and predicts its future importance to insurance litigation.

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The filed rate doctrine upholds the validity of rates approved by a regulatory authority and is often applied to bar claims implicating authorized rates. The breadth of the doctrine is in hot dispute, and insurance cases address it with increasing frequency.[1] Cases interpreting the filed rate doctrine confront questions such as the following:

- An insurer refuses to honor a promise to charge a policyholder a lower rate than the filed rate charged to other policyholders. Will a court enforce the promise?
- An insurer promises a policyholder additional services without an increase in the filed rate? Is that promise enforceable?
- Will a state court consider the filed rate doctrine, or is it just a federal issue? Is the McCarran-Ferguson Act [2]

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[1] *See, e.g.*, Saunders v. Farmers Ins. Exch., 440 F.3d 940, 943-46 (8th Cir. 2006); Arroyo-Melecio v. P.R. Am. Ins. Co., 398 F.3d 56, 73 (1st Cir. 2005); Allen v. State Farm Fire & Cas. Co., 59 F. Supp. 2d 1217, 1227-30 (S.D. Ala. 1999); Schilke v. Wachovia Mortg., No. 09-CV-1363, 2011 WL 4501381, at *8 (N.D. Ill. Sept. 28, 2011); Rios v. State Farm Fire & Cas. Co., 469 F. Supp. 2d 727, 734-40 (S.D. Iowa 2007); Schermer v. State Farm Fire & Cas. Co., 721 N.W.2d 307 (Minn. 2006). *Compare* MacKay v. Superior Court, 115 Cal. Rptr. 3d 893, 910 (Cal. Ct. App. 2010) (approving application of the doctrine to property and casualty insurance), *with* Fogel v. Farmers Grp., Inc., 74 Cal. Rptr. 3d 61, 74 (Cal. Ct. App. 2008) (rejecting the doctrine's application to property and casualty insurance). *See also* Alexander v. Wash. Mut. Inc., No. 07-4425, 2008 WL 2600323, at *2-3 (E.D. Pa. June 30, 2008).

[2] 15 U.S.C. §§ 1011-15 (2006).

a consideration in relation to the doctrine?

- Can injunctive relief regulating future rate charges be obtained against an insurer?
- Will the doctrine be applied to bar enforcement actions by the government?
- Can an insurer take advantage of the filed rate doctrine if the regulatory agency is merely a "rubber stamp" performing an inadequate review of rates?
- An insurer wrongfully classifies an insured and charges an excessive premium. Is the policyholder entitled to a refund?
- Do policyholders have the right to sue for damages if an insurer defrauds a state regulatory agency in order to obtain favorable rates?
- What if the regulatory agency itself is involved in accepting bribes from an insurer pertaining to rates? Can policyholders go to court, obtain damages from the insurer, and have those rates rescinded?
- What if administrative charges are added in addition to a filed rate? Can policyholders use the filed rate doctrine to avoid such charges?
- What if insurers engage in wrongful price fixing? Will a court order refunds of illegally charged premiums?
- Will a court order a refund of excessive premiums wrongfully charged to a policyholder who is discriminated against on an illegal basis such as race?
- What about entities other than insurers? Does the doctrine, for example, affect suits against mortgage lenders who illegally accept kickbacks from property insurers?

Understanding the implications of the filed rate doctrine, which is also occasionally referenced as the filed tariff doctrine[3] or the *Keogh* doctrine,[4] is of crucial importance to attorneys confronted with issues such

[3] McCray v. Fid. Nat'l Title Ins. Co., 636 F. Supp. 2d 322, 326 (D. Del. 2009).

[4] The Supreme Court first applied the filed rate doctrine to the antitrust area in *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922), and some cases refer to the doctrine by that name. *E.g.*, Blaylock v. First Am. Title Ins. Co., 504 F. Supp. 2d 1091, 1099 n.6 (W.D. Wash. 2007); Amundson & Assoc's. Art

as those set forth above. The doctrine alters the application of many commonly accepted legal principles and must be considered in devising litigation strategy in any case implicating an insurer's approved rating structure. Establishing that the filed rate doctrine is not an antiquated relic living only to a limited extent as some contend,[5] this article discusses the background of the filed rate doctrine, case law interpreting it, and its modern application in the insurance arena.

Although separation of powers, comity, and legislative intent have all been referenced in support of the filed rate doctrine,[6] it is most often expressed as serving two interests: (1) the prevention of price discrimination that is threatened by a judicial determination of rates for litigants but not for other policyholders and (2) the preservation of the role of agencies in setting rates, often referred to as the "nonjusticiability" strand of the doctrine.[7] While judicial interest in fairness and nondiscrimination in relation to the application of rates is self-evident,[8] the "nonjusticiability" strand of the doctrine is conceptually more challenging. *Black's Law Dictionary* defines the term "justiciability" as "[t]he quality or state of being appropriate or suitable for adjudication by a court."[9] In accord with that definition, courts typically reference the concept in connection with avoiding the enmeshment of courts in the rate-making process.[10] For example, according to the Minnesota Supreme Court in *Schermer v. State Farm Fire & Casualty Company*, justiciability concerns establish that a court is not well-suited to retroactively reallocate rates and

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Studio, Ltd. v. Nat'l Council on Comp. Ins., Inc., 988 P.2d 1208 (Kan. Ct. App. 1999).

[5] *See, e.g.*, Amundson, 988 P.2d 1208 at 1213-16 (disagreeing with the position that the doctrine is weak and discredited); Richardson v. Standard Guar. Ins. Co., 853 A.2d 955, 963 (N.J. Super. Ct. App. Div. 2004) (disagreeing with the contention that the filed rate doctrine is a bankrupt theory inapplicable to the insurance industry).

[6] *Schermer*, 721 N.W.2d at 307-08.

[7] Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 19 (2d Cir. 1994); Schilke v. Wachovia Mortg., 705 F. Supp. 2d 932, 942-43 (N.D. Ill. 2010), *rev'd on other grounds*, 758 F. Supp. 2d 542 (N.D. Ill. 2010); Morales v. Attorneys' Title Ins. Fund, Inc., 983 F. Supp. 1418, 1428 (S.D. Fla. 1997).

[8] In *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 493 U.S. 116 (1990), the U.S. Supreme Court, for example, emphasized the nondiscriminatory strand of the doctrine, rejecting the application of rates obtained by secret negotiation and requiring the application of rates duly published and known to all. *Id.* at 130-31.

[9] BLACK'S LAW DICTIONARY 943 (9th ed. 2009).

[10] *E.g.*, *Wegoland Ltd.*, 27 F.3d at 19; Clark v. Prudential Ins. Co. of Am., 736 F. Supp. 2d 902, 913 (D.N.J. 2010).

determine what rate an agency would find appropriate in place of an unlawful rate.[11] According to the court in *Schermer*, rate regulation is an "intricate ongoing process," and judicial interference "may set in motion an ever-widening set of consequences and adjustments" that courts are powerless to address.[12] Similarly, relying on Supreme Court precedent and emphasizing the difficulty the judiciary would encounter in attempting to determine what reasonable rates in the past should have been, the court in *Wegoland Ltd. v. NYNEX Corp.* stated that "abstract" notions of reasonableness are best left for agency determination.[13]

The concept of nonjusticiability also encompasses the idea that filed rates are available to those affected by them, and that consumers are charged with knowledge of those rates. For example, in discussing the principle of nonjusticiability, the court in *Richardson v. Standard Guarantee Insurance Co.* stated that the principle "operates on the presumption that the plaintiff had knowledge of the filed rates and, thus, could not reasonably rely upon the regulated entity's misrepresentations or omissions of material facts."[14]

I. THE GENESIS OF THE FILED RATE DOCTRINE

Many authorities trace the origination of the filed rate doctrine to the United States Supreme Court decision of *Keogh v. Chicago & Northwestern Railway Co.*, in which the Supreme Court upheld rates duly filed and approved by the now abolished Interstate Commerce Commission (the "ICC")[15] against challenges under antitrust laws.[16] Case law prior to

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[11] *Schermer*, 721 N.W.2d at 311-12, (citing Keogh v. Chi. & Nw. Ry., 260 U.S. 156, 164-65 (1922)).

[12] *Id.* at 315 (quoting Peoples Natural Gas Co. v. Minn. Pub. Utils. Comm'n, 369 N.W.2d 530, 535 (Minn. 1985)).

[13] *Wegoland Ltd*., 27 F.3d at 19 (quoting Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 251 (1951)).

[14] Richardson v. Standard Guar. Ins. Co., 853 A.2d 955, 962 (N.J. Super. Ct. App. Div. 2004) (citing Weinberg v. Sprint Corp., 801 A.2d 281, 287-88 (N.J. 2002)).

[15] The Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (codified in scattered sections of 49 U.S.C.), abolished the ICC and created the Surface Transportation Board to perform many of the regulatory functions formerly performed by the ICC. *See* Friberg v. Kansas City S. Ry. Co., 267 F.3d 439, 442 (5th Cir. 2001).

[16] *E.g.*, Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 992 (9th Cir. 2000); *In re* N.J. Title Ins. Litig., No. 08-1425, 2009 WL 3233529, at *2 (D.N.J.

Keogh, however, establishes that the doctrine had its genesis in much earlier cases addressing the role of the ICC following its creation by the Interstate Commerce Act of 1887, also referred to as the Act to Regulate Commerce.[17] For example, the Eleventh Circuit in *Taffet v. Southern Co.*[18] and the federal district court in *McCray v. Fidelity National Title Insurance Co.*[19] trace the doctrine back as far as the 1907 Supreme Court case of *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*,[20] in which the rating system of the railway involved was challenged as being preferential, unjust, and unreasonable.[21] The railway in *Texas & Pacific Railway Co.* defended on the basis that the rates at issue had been approved by the ICC. In ruling in favor of the railway, although not referencing the filed rate doctrine by name, the Court applied its underlying principles noting the chaotic effect that would result if both the judiciary and the ICC were allowed to address rate disputes.[22]

The U.S. Supreme Court in *Arkansas Louisiana Gas Co. v. Hall*,[23] further referenced the 1913 case *Pennsylvania Railroad Co. v. International Coal Co.*,[24] as an early filed-rate case. The coal company in *Pennsylvania Railroad* sued the defending railway complaining that it wrongfully denied the coal company certain rebates granted to other shippers. The Supreme Court agreed that the railroad was bound by the filed rate and illegally deviated from it by granting rebates to some.[25] Nevertheless, the plaintiff was unable to adduce proof of damages based on the rate differential because, as the Court reasoned, the plaintiff "[h]aving paid only the lawful rate . . . was not overcharged, though the favored

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Oct. 5, 2009); Munoz v. PHH Corp., 659 F. Supp. 2d 1094, 1099 (E.D. Cal. 2009); *In re* Se. Milk Antitrust Litig., No. 2:08-MD-1000, MDL 1899, 2008 WL 2368212, at *3-4 (E.D. Tenn. June 06, 2008); *Schermer*, 721 N.W.2d at 311.

[17] Interstate Commerce Act of Feb. 4, 1887, Ch. 104, 24 Stat. 379 (codified as amended in scattered sections of 49 U.S.C.). *See* Kevin M. Decker, *The Filed-Rate Doctrine: Leaving Regulation to the Regulators*, 34 WM. MITCHELL L. REV. 1351, 1353-56 (2008) (referencing cases predating *Keogh* involving the filed rate doctrine).

[18] Taffet v. S. Co., 967 F.2d 1483, 1488 (11th Cir. 1992).

[19] McCray v. Fid. Nat'l Title Ins. Co., 636 F. Supp. 2d 322, 326 (D. Del. 2009).

[20] Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 436 (1907).

[21] *Id.* at 430.

[22] *Id.* at 441.

[23] Ark. La. Gas Co. v. Hall, 453 U.S. 571, 577 (1981).

[24] Penn. R.R. Co. v. Int'l Mining Co., 230 U.S. 184 (1913).

[25] *Id.* at 197.

shipper was illegally undercharged."[26]

Other early Supreme Court decisions, such as *Chicago & Alton Railroad Co. v. Kirby*,[27] further laid the groundwork for the modern filed rate doctrine.[28] *Kirby* demonstrates that the filed-rate doctrine may apply to complaints involving the provision of services, not just to the rates themselves.[29] *Kirby* involved a dispute between a shipper and a railroad arising after horses failed to arrive as scheduled by expedited delivery via a particular train. A railroad representative had promised the shipper a deviation from regularly published rates that did not provide for that expedited service. Even though upon contracting the shipper did not know of the deviation, the Supreme Court refused to enforce the agreement, stating that "[t]o guarantee a particular connection and transportation by a particular train was to give an advantage or preference not open to all, and not provided for in the published tariffs."[30]

II. THE CONTINUING VALIDITY OF THE *KEOGH* DECISION

Of course, not to be overlooked is the often cited *Keogh*[31] decision, which first applied the filed-rate doctrine in the context of antitrust.[32] The alleged antitrust violation in *Keogh* was that the defending railways had illegally agreed upon shipping rates for excelsior and tow.[33] The sole

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[26] *Id.* at 202.

[27] Chi. & Alton R.R. Co. v. Kirby, 225 U.S. 155 (1912).

[28] The U.S. Supreme Court also referenced *Louisville & Nashville Railroad Co. v. Maxwell*, 237 U.S. 94 (1915) as an early case applying the principles later to become known as the "filed rate doctrine." *See* Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc., 524 U.S. 214, 222 (1998); Ark. La. Gas Co., 453 U.S. at 582 (1981). The term "doctrine" was first used in conjunction with principles construing the effect of filed rates in *George N. Pierce Co. v. Wells Fargo & Co.*, 236 U.S. 278, 286 (1915).

[29] *See Kirby*, 225 U.S. at 166; *see also Am. Tel. & Tel. Co.*, 524 U.S. at 223 ("Any claim for excessive rates can be couched as a claim for inadequate services and vice versa.").

[30] *Kirby*, 225 U.S. at 166.

[31] Keogh v. Chicago & Nw. Ry., 260 U.S. 156 (1922).

[32] *See* Prentice v. Title Ins. Co. of Minn., 500 N.W.2d 658, 661 (Wis. 1993) (recognizing that *Keogh* first applied the filed rate doctrine in the antitrust context).

[33] *Keogh*, 260 U.S. at 160. In the context of this case, "excelsior" is used to mean a "fine curled wood shavings, used esp. for packing fragile items". MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 403 (Merriam Webster's, Inc., 10th ed. 1994). "Tow" is used in this context to mean a "short or broken fiber…that is used esp. for yarn, twine, or stuffing." *Id.* at 1248.

defense was that the rates had been filed with and approved by the Interstate Commerce Commission.[34] The Supreme Court acknowledged that the fact that the rates had been filed would not bar proceedings brought by the federal government against the carriers.[35] Expressing its concern as follows, the Court, however, refused to allow the plaintiff to proceed with an antitrust action for price fixing because allowing such actions would result in unfairness and discrimination:

> If a shipper could recover under section 7 of the Antitrust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors. It is no answer to say that each of these might bring a similar action under section 7. Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief.[36]

Another factor influencing the Court involved the responsibility of the ICC to address rates in the first instance. The Court rejected as unworkable the suggestion that it suspend proceedings pending a later determination of the discrimination issue by the ICC:

> The powers conferred upon the Commission are broad. It may investigate and decide whether a rate has been, whether it is, or whether it would be, discriminatory. But by no conceivable proceeding could the question whether a hypothetical lower rate would under conceivable conditions have been discriminatory, be submitted to the Commission for determination. And that hypothetical question is one with which plaintiff would necessarily be confronted at a trial.[37]

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[34] *Keogh*, 260 U.S. at 160.
[35] *Id.* at 162.
[36] *Id.* at 163.
[37] *Id.* at 164.

The final factor addressed by the *Keogh* Court was the likely impossibility of computing damages with any amount of accuracy.[38] Since the carriers were charging the legal rate, damages could not flow from the amount the charges exceeded the legal rate.[39] Additionally, had charges been lowered, all competitors would have been entitled to have been put on a parity with Keogh rendering speculative whether Keogh's business would have benefited at all by the lowering of rates.[40]

Over the years, acceptance of the *Keogh* decision diminished.[41] Following the Second Circuit's criticism of the filed-rate doctrine in *Square D Co. v. Niagara Frontier Tariff*,[42] an opinion authored by Judge Henry J. Friendly, the Supreme Court granted *certiorari* in order to address the doctrine's continuing validity.[43] The petitioners in *Square D* claimed that the defending motor carriers and a rating bureau engaged in illegal price fixing and other activities in violation of section one of the Sherman Act.[44] The Supreme Court addressed the argument that developments in the law undermined *Keogh*, including the rise of class actions, which arguably relieved some concern regarding unfair rebates; the emergence of support for treble damages; greater sophistication in evaluating damages; and the development of procedures to stay judicial proceedings pending regulatory action.[45] Nevertheless, the Court refused to overrule *Keogh* finding pertinent Congress' failure to disturb the principles set forth in *Keogh* during the intervening sixty-five years.[46] The Court relied heavily upon the fact that while Congress was clearly aware of the *Keogh* rule when it passed the Reed-Bulwinkle Act,[47] addressing rating systems of rail carriers, and enacted the Motor Carrier Act of 1980,[48] Congress did not overturn the

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[38] *Id.* at 164-65.

[39] *Id.* at 165.

[40] *Keogh*, 260 U.S. at 165.

[41] *See generally* McCray v. Fid. Nat'l Title Ins. Co., 636 F. Supp. 2d 322, 326-27 (D. Del. 2009) (discussing the history of the doctrine and questions regarding its continued validity).

[42] Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 760 F.2d 1347, 1352-54 (2d Cir. 1985), *aff'd*, 476 U.S. 409 (1986).

[43] *Square D Co.*, 476 U.S. at 417.

[44] 15 U.S.C. § 1 (1994) (current version at 15 U.S.C. § 1 (2006)).

[45] *Square D Co.*, 476 U.S. at 423.

[46] *Id.*

[47] Reed-Bulwinkle Act, Pub. L. No. 80-662, 62 Stat. 472 (1948) (codified as amended at 49 U.S.C. § 10706 (2006)).

[48] Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (codified as amended in scattered sections of 49 U.S.C.).

principles set forth in *Keogh*.[49] According to the Supreme Court, "[i]f there is to be an overruling of the *Keogh* rule, it must come from Congress, rather than from this Court."[50]

III. EXTENSION OF THE FILED RATE DOCTRINE TO THE ENERGY AND TELECOMMUNICATIONS INDUSTRIES

The principles underlying the filed rate doctrine, first spawned in disputes involving the ICC, were well established in other utilities prior to general recognition in the insurance industry. Courts addressing the role of the filed rate doctrine in insurance disputes often glean guiding principles from decisions involving other regulated industries.

The Supreme Court first applied the filed rate doctrine to the electrical industry in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*,[51] a case in which the plaintiff alleged that the defendant's fraudulent acts let to the imposition of excessive rates in violation of the Federal Power Act.[52] Although the rates involved had been approved by the Federal Power Commission, the plaintiff claimed that through a system of an interlocking directorate and joint officers, its predecessor was overcharged by the defendant. Refusing to accept that position and upholding the authority of the Commission, the Supreme Court stated that the complainant could claim "no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms."[53]

In rejection of a gas supplier's breach of contract claim, the filed rate doctrine was first applied by the Supreme Court in the natural gas arena in *Arkansas Louisiana Gas Co. v. Hall*.[54] The Supreme Court recognized that pursuant to the filed rate doctrine, the supplier was

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[49] *Square D Co.*, 476 U.S. at 418-20.

[50] *Id.* at 424.

[51] Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246 (1951).

[52] *Id.* at 250 n.6 (The plaintiff relied on a provision of the act requiring that rates be "just and reasonable.").

[53] *Id.*

[54] Ark. La. Gas Co. v. Hall, 453 U.S. 571, 599 (1981). According to the Justice Steven's dissent, although earlier cases had marked the contours of the doctrine, the case marked the first time the term "filed rate doctrine" had been used by the Supreme Court. *Id.* at 599 (Stevens, J., dissenting). No mention was made of the earlier case of *George N. Pierce Co. v. Wells Fargo & Co.*, 236 U.S. 278 (1915), cited in footnote 28, referencing "the doctrine of the conclusiveness of the filed rates." *Id.* at 286.

forbidden to charge rates for its services other than those properly filed with the appropriate regulatory authority and that the judiciary lacked authority to impose a different rate.[55] According to the Court, "under the filed rate doctrine, when there is a conflict between the filed rate and the contract rate, the file rate controls."[56]

In *American Telephone and Telegraph Co. v. Central Office Telephone, Inc*, a case often cited in disputes involving insurance, the Supreme Court applied the filed rate doctrine in the telecommunications context.[57] The case originated when Central Office Telephone, Inc. ("COT"), sued American Telephone and Telegraph Co. ("AT&T") for breach of contract and tortuous interference with contract following problems encountered with AT&T's provision of communication services for resale. Among the allegations were that AT&T failed to deliver various promised services and billing options in addition to those set forth in its filed rates.[58] AT&T defended on the basis that it was required by the Communications Act to file tariffs containing all charges and classifications and that COT's lawsuit seeking damages based upon unfiled criteria was barred by the filed rate doctrine.[59] Recognizing the importance of preventing unreasonable and discriminatory charges, the Supreme Court applied the filed rate doctrine and dismissed the claims.[60] The Court recognized that discrimination may exist in the form of a lower price for a service offered to some but not all, or in the form of enhanced services at a price not offered to all.[61] Supporting its decision, the Court cited cases arising under the Interstate Commerce Act, including *Chicago & Alton Railroad Co. v. Kirby*,[62] referenced above, in which the Court refused to enforce a shipper's contract promising a service not contained in the railroad's filed tariffs.

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[55] *Ark. La. Gas Co.*, 453 U.S. at 577-78 (majority opinion).

[56] *Id.* at 582.

[57] Am. Tel. & Tel. Co. v. Cent. Office Tel. Inc., 524 U.S. 214 (1998). This case is often cited in disputes involving insurance. *See, e.g.*, *In re* Title Ins. Antitrust Cases, 702 F. Supp. 2d 840 (N.D. Ohio 2010); Rios v. State Farm Fire and Cas. Co., 469 F. Supp. 2d 727, 735 (S.D. Iowa 2007); Lumpkin v. Farmers Grp., Inc., No. 05-2868 MA/V, 2007 WL 6996584 (W.D. Tenn. Apr 26, 2007); Allen v. State Farm Fire & Cas. Co., 59 F. Supp. 2d 1217 (S.D. Ala. 1999).

[58] *Am. Tel. & Tel. Co.*, 524 U.S. at 220.

[59] *Id.* at 221.

[60] *Id.* at 223.

[61] *Id.*

[62] *Id.* at 224 (citing Chi. & Alton R.R. Co. v. Kirby, 225 U.S. 155, 163, 165 (1912).

IV. EXTENSION OF THE FILED RATE DOCTRINE TO THE INSURANCE INDUSTRY

The first insurance cases addressing the application of the filed rate doctrine occurred in the latter 1980's and 1990's, with the majority decided within the last decade. This seems rather late in view of the fact that the doctrine had been applied for many years in other regulated areas. The 1986 decision of the Supreme Court in *Square D Co. v. Niagara Frontier Tariff*,[63] reaffirming the validity of the doctrine, may have resulted in increased attention to its applicability.

Although not referencing the term "filed rate doctrine," the 1986 decision of *Anzinger v. Illinois State Medical Inter-Insurance Exchange*,[64] was one of the first cases to apply the concepts underlying the filed rate doctrine in the context of insurance. The plaintiff physicians in *Anzinger* sought a refund of malpractice premiums collected pursuant to a rate schedule approved by the Illinois Director of Insurance but found to be excessive and unfairly discriminatory upon later judicial review.[65] The court refused to order a refund of the premiums believing that recognition of a private right of action would interfere with authority granted to the state's department of insurance.[66] The court recognized as follows that the filed rates were the only rates that could be charged at the time the premiums were paid:

> [W]hen the agency or body sets the rates, these then are the only lawful rates that can be charged and remain such until overturned or set aside by a court . . . [T]here is no basis

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[63] Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 424 (1986).

[64] Anzinger v. Ill. State Med. Inter-Ins. Exch., 494 N.E.2d 655, 657 (Ill. App. 1986). Interestingly, the decision in *Anzinger* was issued on May 27, 1986, the same day as the decision in *Square D Co. v. Niagara Frontier Tariff*. *See also* Prentice v. Title Ins. Co. of Minn., 500 N.W.2d 658, 663 (Wis. 1993) (applying the doctrine to state antitrust claims against insurers); *In re* Empire Blue Cross & Blue Shield Customer Litig. v. Weissman, 622 N.Y.S.2d 843 (N.Y. Sup. Ct. 1994), *aff'd sub nom.* Minihane v. Weissman, 226 A.D.2d 152 (N.Y. 1996) (applying the doctrine to bar claims of fraud and breach of contract); Calico Trailer Mfg. Co. v. Ins. Co. of N. Am., No. LR-C-93-717, 1994 WL 823554, at *3 (E.D. Ark. Oct. 12, 1994) (applying the doctrine to bar allegations of antitrust violations and other state law claims). Courts in these insurance cases relied heavily on cases from other industries approving application of the doctrine.

[65] *Anzinger*, 494 N.E.2d at 656.

[66] *Id.* at 658.

> for a refund under such circumstances if a rate was subsequently set aside because the government agency had determined that the initial rate was reasonable and that only this rate could be charged.[67]

In attempting to avoid the effects of the filed rate doctrine, plaintiffs may attempt to distinguish the insurance industry from other regulated industries. For example, the plaintiff in *Horwitz ex rel. Gilbert v. Bankers Life and Casualty Co.* argued against extending the filed rate doctrine to insurance disputes claiming that it was only appropriate in areas involving highly regulated and monopolistic activities, namely the shipping and power industries.[68] Recognizing, however, the lack of authority supporting the plaintiff's position, the court proceeded to apply the doctrine.[69] Similarly, in rejecting the plaintiff's position that the filed rate doctrine should be applied only to areas traditionally thought of as utilities, the federal district court in *Korte v. Allstate Insurance Co.* stated that the doctrine was "equally applicable to the insurance industry as to other industries where a state agency determines reasonable rates pursuant to a statutory scheme."[70]

In applying the doctrine to a controversy involving homeowner's insurance, the court in *Rios v. State Farm Fire and Casualty Co.* noted that while the doctrine's roots lie in cases decided under the Interstate Commerce Act, it has spread "across the spectrum of regulated utilities."[71] The following factors were referenced by the court as pertinent in determining the filed rate doctrine's application to a new area:

> (1) the impact the court's decision will have on agency procedures and rate determinations; (2) whether there is an administrative agency to review the claim and provide a remedy; (3) whether there is meaningful review of rate increases; and (4) whether the damages are based upon the difference between the filed rate and the rate that would have been charged absent some alleged wrongdoing.[72]

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[67] *Id.* at 657.

[68] Horwitz v. Bankers Life & Cas. Co., 745 N.E.2d 591, 601 (Ill. App. 2001).

[69] *Id.* at 604.

[70] Korte v. Allstate Ins. Co., 48 F. Supp. 2d 647, 651 (E.D. Tex. 1999).

[71] Rios v. State Farm Fire & Cas. Co., 469 F. Supp. 2d 727, 734 (S.D. Iowa 2007) (quoting Ark. La. Gas Co. v. Hall, 453 U.S. 571, 577 (1981)).

[72] *Rios*, 469 F. Supp. 2d at 736 (citing Allan Kanner, *The Filed Rate Doctrine and Insurance Fraud Litigation*, 76 N.D. L. REV. 1, 3 (2000)).

In ruling that the doctrine should be applied in the insurance industry, the South Carolina Supreme Court in *Edge v. State Farm Mutual Automobile Insurance Co.*, further discussed rationale supporting the doctrine as follows:

> Courts which have adopted the filed rate doctrine have given several reasons for doing so, including: (1) preserving the agency's authority to determine the reasonableness of rates; (2) recognizing the agency's expertise with regard to that industry, whereas courts do not; (3) allowing an action would undermine the regulatory scheme because the statute allows for enforcement by the appropriate state officers; and (4) allowing an action may result in different prices being paid by victorious plaintiffs than non-suing ratepayers, which violates the statutory scheme of uniform rates.[73]

As case law has developed, acceptance of the filed rate doctrine in the insurance arena is the norm rather than the exception. For example, recognizing the number of cases supporting the doctrine, the court in *Richardson v. Standard Guaranty Insurance Co.*, stated that "[w]e, thus, align our decision with the considerable weight of authority from other jurisdictions that have applied the filed rate doctrine to ratemaking in the insurance industry."[74] In support of its decision, the court relied on the extensive regulation of the insurance industry and its perception that courts are not institutionally suited to regulate insurance premium and benefit rates.[75] Similarly, in applying the filed rate doctrine in the context of property insurance, the court in the recent case of *Schilke v. Wachovia Mortg.* stated that "[n]umerous courts have held, contrary to Plaintiff's contention, that the filed rate doctrine applies to the insurance industry."[76]

Nevertheless, controversy regarding the application of the filed rate

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[73] Edge v. State Farm Mut. Auto. Ins. Co., 623 S.E.2d 387, 391-92 (S.C. 2005).

[74] Richardson v. Standard Guar. Ins. Co., 853 A.2d 955, 963 (N.J. Super. Ct. App. Div. 2004).

[75] *Id.*

[76] Schilke v. Wachovia Mortg., No. 09-CV-1363, 2011 WL 4501381, at *8 (N.D. Ill. Sep. 28, 2011) (citing Schermer v. State Farm Fire & Cas. Co., 702 N.W.2d 898, 907 (Minn. Ct. App. 2005); *Richardson*, 853 A.2d at 964; Horwitz v. Bankers Life & Cas. Co., 745 N.E.2d 591 (Ill. App. Ct. 2001); Anzinger v. Ill. State Med. Inter–Ins. Exch., 494 N.E.2d 655 (Ill. App. Ct. 1986)).

doctrine in insurance cases continues. For example, in *In re Title Insurance Antitrust Cases*, when confronted with a lack of case law on the subject in that jurisdiction, the federal district court for the Northern District of Ohio ruled that the filed rate doctrine should be applied in the insurance context to bar claims for damages arising under Ohio state, as well as federal, antitrust laws.[77] On the other hand, a year later, in *Clark v. Prudential Insurance Co. of America*, a federal district court in New Jersey recently disagreed and ruled that Ohio courts would not apply the filed rate doctrine to insurance disputes arising under Ohio law.[78] Controversy regarding the doctrine's application is further illustrated by the recent conflicting decisions of *MacKay v. Superior Court*[79] and *Fogel v. Farmers Group, Inc.*,[80] involving application of the doctrine to property and casualty insurance in California.

As discussed further in specific topics in this article, courts refusing to apply the doctrine in the insurance context reference reasons including concerns with federalism[81] and perceived insufficiency of administrative review.[82] The court in *Hanson v. Acceleration Life Insurance Co*. also raised the lack of opportunity for public input into rate determinations in support of its decision rejecting application of the doctrine to an insurance dispute.[83]

Furthermore, even after the doctrine is accepted in a jurisdiction in one area of insurance, opponents may resist its extension into other areas. For example, as set forth above, the *Anzinger* decision, arising in state court in Illinois, applied the principles underlying the filed rate doctrine to deny recovery to physicians who were overcharged for insurance. Later, in *Schilke v. Wachovia Mortgage, FSB*,[84] a case based on diversity jurisdiction and construing Illinois law, the plaintiff claimed that the doctrine should not be extended to insurance disputes involving property.

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[77] *In re* Title Ins. Antitrust Cases, 702 F. Supp. 2d 840, 861-64 (N.D. Ohio 2010).

[78] Clark v. Prudential Ins. Co. of Am., No. Civ. 08-6197 (DRD), 2011 WL 940729, at *12-14 (D.N.J. Mar. 15, 2011).

[79] MacKay v. Superior Ct., 115 Cal. Rptr. 3d 893 (Cal. Ct. App. 2010).

[80] Fogel v. Farmers Grp., Inc., 74 Cal. Rptr. 3d 61 (Cal. Ct. App. 2008).

[81] *See* Saunders v. Farmers Ins. Exch., 440 F.3d 940, 945 (8th Cir. 2006).

[82] *See, e.g.*, Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992); Blaylock v. First Am. Title Ins. Co., 504 F. Supp. 2d 1091 (W.D. Wash. 2007).

[83] Hanson v. Acceleration Life Ins. Co., No. CIV A3-97-152, 1999 WL 33283345, at *4 (D. N.D. Mar. 16, 1999).

[84] Schilke v. Wachovia Mortg., 705 F. Supp. 2d 932 (N.D. Ill. 2010), *vacated on other grounds*, 758 F. Supp. 2d 549 (N.D. Ill. 2010).

Citing a number of cases in support, the court recognized, however, that application of the doctrine in the context of property insurance was consistent with the weight of authority. [85] In support of its decision, the court cited the goal of preventing discrimination among policyholders and also the nonjusticiability strand of the doctrine placing authority for rates with the department of insurance, not the court system.[86]

V. THE RELATION OF THE FILED RATE DOCTRINE TO THE MCCARRAN-FERGUSON ACT

When considering claims against insurers, examination of the interplay between the filed rate doctrine and the McCarran-Ferguson Act[87] may be helpful. The McCarran-Ferguson Act provides in pertinent part that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance…unless the Act specifically relates to the business of insurance."[88] Certain exceptions involve the Sherman Act, the Clayton Act, and the Federal Trade Commission Act to the extent that state law fails to regulate the business of insurance.[89]

An example of the interplay between the two defenses is illustrated in the case of *Saunders v. Farmers Insurance Exchange* involving alleged discrimination in the provision of homeowners' insurance.[90] The court in *Saunders* declined to apply the filed rate doctrine to the claims of discrimination at issue but remanded the case for further consideration on the basis that it could not be determined on the record presented whether application of the federal anti-discrimination laws involved would impair the state's system of insurance rate regulation in violation of the McCarran-Ferguson Act.[91]

The defendants in *Sandwich Chef of Texas, Inc. v. Reliance*

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[85] *Id.* at 942 (citing Richardson v. Standard Guar. Ins. Co., 853 A.2d 955, 964 (N.J. Super. App. Div. 2004); Schermer v. State Farm Fire and Cas. Co., 702 N.W.2d 898, 907 (Minn. App. Ct. 2005); Horwitz v. Bankers Life & Cas. Co., 745 N.E.2d 591 (Ill. App. 2001); Anzinger v. Ill. State Med. Inter-Ins. Exch., 494 N.E.2d 655 (Ill. App. 1986)).

[86] *Schilke*, 705 F. Supp. 2d at 942-43.

[87] 15 U.S.C. §§ 1011-15 (2006).

[88] *Id.* at § 1012(b).

[89] *Id.*

[90] Saunders v. Farmers Ins. Exch., 440 F.3d 940 (8th Cir. 2006).

[91] *Id.* at 945-46. The ruling of the court in *Saunders* on the filed rate doctrine is discussed further in Section XVII, B, *infra*.

National Indemnity Insurance Co. also raised both the filed rate doctrine and the McCarran-Ferguson Act as defenses.[92] On the basis that the plaintiffs sought to apply, not avoid, the filed rate, the court refused to find that the filed rate doctrine barred the plaintiffs' RICO claims involving alleged overcharges for worker's compensation insurance.[93] In regard to the McCarran-Ferguson Act, the defendants claimed that awarding the plaintiffs treble damages under RICO for fraudulent departures from the filed rates would "frustrate non-discrimination policies declared in state insurance laws requiring insurers to collect the full amount of any applicable filed rate."[94] The court, however, disagreed ruling that the remedies available for fraud under RICO complemented, rather than conflicted, with state regulations.[95]

Another case highlighting the fact that both the filed rate doctrine and the McCarran-Ferguson Act should be considered as defenses in insurance cases is *In re Title Insurance Antitrust Cases*.[96] The court in that case ruled that the McCarran-Ferguson Act completely barred plaintiff's claims for both damages and injunctive relief although the court believed that the filed rate doctrine standing alone would have allowed claims for injunctive relief.[97]

Litigants in insurance cases involving interplay between federal and state law should consider both the filed rate doctrine and the McCarran-Ferguson Act, as either could provide grounds for dismissal. Although both may involve the regulatory processes involved in the setting of rates, the legal theories underlying the two defenses are distinct and separate.

VI. THE RELATION OF THE FILED RATE DOCTRINE TO THE STATE ACTION DOCTRINE

A theory referred to as the "state action doctrine" may bar an antitrust claim if the defense can establish the state's intent to replace competition with state regulation and the state's active supervision of the

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[92] Sandwich Chef of Tex. v. Reliance Nat'l Indem. Ins. Co., 111 F. Supp. 2d 867, 874-77 (S.D. Tex. 2000).

[93] *Id.* at 874-75.

[94] *Id.* at 872.

[95] *Id.* at 877.

[96] *In re* Title Ins. Antitrust Cases, 702 F. Supp. 2d 840 (N.D. Ohio 2010).

[97] *Id.* at 877-78.

conduct at issue.[98] As recognized in *Arroyo-Melecio v. Puerto Rican American Insurance Co.*,[99] in order to justify state action immunity, "[t]he state must manifest intent to intervene in the market, displacing antitrust laws and must engage in active supervision of the challenged conduct."[100] The doctrine requires first that the challenged restraint on trade "be one clearly articulated and affirmatively expressed as state policy" and second that the policy "be actively supervised by the State itself."[101]

The court in *In re Pennsylvania Title Insurance Antitrust Litigation* recognized that the filed rate doctrine and the state action doctrine constitute two independent bases for antitrust immunity.[102] A significantly lower standard of administrative review, however, is required in regard to the filed rate doctrine as compared to the state action doctrine.[103] Because the standard of administrative supervision required for application of the state action doctrine is higher, the filed rate doctrine would likely result in a viable defense in a larger number of cases.

The plaintiffs in *N.C. Steel, Inc. v. National Council on Compensation Insurance* presented a novel theory to the effect that the filed rate doctrine was subsumed and made inapplicable by the state action doctrine; that the second prong of the state action doctrine requiring active state regulation was not met under the circumstances of that case; and that their lawsuit was, therefore, viable.[104] The court, however, refused to follow the plaintiffs' reasoning and instead applied the filed rate doctrine to dismiss the claims.[105] No cases were cited in support of the plaintiffs'

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[98] *See* N.C. Steel, Inc. v. Nat'l Council on Comp. Ins., 496 S.E.2d 369, 374 (N.C. 1998).

[99] Arroyo-Melecio v. P.R. Am. Ins. Co., 398 F.3d 56 (1st Cir. 2005).

[100] *Id.* at 71 (citing I AREEDA AND HOVENKAMP, ANTITRUST LAW, ¶ 221c (2d ed. 2000)).

[101] *Id.* at 71 (quoting Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980)).

[102] *In re* Pa. Title Ins. Antitrust Litig., 648 F. Supp. 2d 663, 677 n.10 (E.D. Pa. 2009).

[103] *Arroyo-Melecio*, 398 F.3d at 71; *In re* Pa. Title Ins. Antitrust Litig., 648 F. Supp. 2d at 677 n.10; *In re* N.J. Title Ins. Litig., No. CIV.A. 08-1425, 2009 WL 3233529, at *3 (D.N.J. Oct. 05, 2009).

[104] N.C. Steel, Inc. v. Nat'l Council on Comp. Ins., 496 S.E.2d 369, 374 (N.C. 1998).

[105] *Id.* On the basis that neither prong of the defense was met, another case refusing to apply the state action doctrine to bar claims of anti-competitive activity is *State ex rel. Cooper v. McClure*, No. 03-CVS-005617, 2004 WL 2965983, at *10-11 (N.C. Super. Dec. 14, 2004), *rev'd on other grounds*, No. 03-CVS-005617, 2005 WL 3018635 (N.C. Oct. 28, 2005).

position that the state action subsumed the filed rate doctrine, and other cases do not hold as such.

VII. FILED RATES V. FILED FORMS

The filed rate doctrine is more appropriately viewed as applying to insurance rates, not insurance forms. For example, in *Peachtree Casualty Insurance Co., v. Sharpton*, the Supreme Court of Alabama rejected the insurer's position that based on regulatory approval of its policy provisions, the filed rate doctrine barred claims against it for uninsured motorist protection. [106] The insurer had issued a policy excluding uninsured motorist coverage for injuries incurred during the use of certain vehicles such as motorcycles. The problem for the insurer was that the exclusion conflicted with the Alabama statutory requirements for uninsured motorist protection.[107] Stating that no rate case was involved, the court refused to apply the filed rate doctrine to bar the claims for uninsured motorist protection.[108] Similarly, in rejecting a "filed form doctrine" defense, the court in *Southern Farm Bureau Life Insurance Co. v. Banko* observed that no cases were cited indicating that regulatory approval of a form barred a lawsuit over policy language.[109]

The background and history of the filed rate doctrine uphold the position that it fails to bar complaints implicating forms. The justiciability strand of the doctrine supports the belief that courts should not become enmeshed in the rate-making process through attempting to retroactively reallocate rates and determine what rate an agency would find appropriate in place of an unlawful rate in relation to all interested parties.[110] Complaints regarding forms are on a different footing and do not implicate the same concerns.

The existence of at least one case supporting a filed form type of doctrine, however, should be noted. In *AMEX Assurance Co. v. Caripides,*[111] the court upheld policy language contained in an insurance

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[106] Peachtree Casualty Ins. Co. v. Sharpton, 768 So. 2d 368, 373 (Ala. 2000).

[107] *Id.* at 372.

[108] *Id.* at 373.

[109] S. Farm Bureau Life Ins. Co. v. Banko, No. 8:06CV840T27EAJ, 2006 WL 2935281, at *2 (M.D. Fla. Oct. 13, 2006).

[110] *See* Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 19 (2nd Cir. 1994); Schermer v. State Farm Fire & Cas. Co., 721 N.W.2d 307, 312 (Minn. 2006) (citing Keogh v. Chi. & Nw. Ry. Co., 260 U.S. 156, 164-65 (1922)).

[111] AMEX Assur. Co. v. Carpides, 179 F. Supp. 2d 309 (S.D.N.Y. 2002), *aff'd*, AMEX Assur. Co. v. Carpides, 316 F.3d 154 (2d Cir. 2003).

policy against a claim that the policy violated state statutory requirements. In addition to finding no conflict with the statute involved, the court noted that "[a] line of cases on the 'filed rate doctrine' suggests that the Insurance Department's review and approval of a policy is presumptively valid and cannot be subsequently judicially challenged as unfair or violative of public policy."[112] Both cases cited in support of the court's statement, *City of New York v. Aetna Casualty & Surety Co*.,[113] and *Byan v. Prudential Insurance Co. of America*,[114] however, addressed filed rates, not filed forms.[115]

VIII. THE RELATION BETWEEN STATE AND FEDERAL LAW

During the evolution of the filed rate doctrine, issues involving the interplay between federal and state law have surfaced. One such area examined below involves the application of the doctrine to administrative review performed by state, as opposed to federal, agencies. This is a significant issue in the insurance area since the filing of insurance rates with state agencies is the norm. Other issues involve the application of the doctrine to claims based solely on state law, and the interplay between state and federal law as applied to disputes.

A. APPLICATION OF THE FILED RATE DOCTRINE TO RATES REGULATED BY STATE AGENCIES

There is authority that the filed rate doctrine should only be applied when rates are reviewed in conjunction with a federal regulatory system as opposed to a state regulatory system. For example, the Montana Supreme Court in *Williams v. Union Fidelity Life Insurance Co.,*[116] refused to apply the doctrine to an insurance dispute because the rates at issue were not set, reviewed, or filed with a federal regulatory authority.[117] Similarly, in

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[112] *Id.* at 319 n.5 (citing City of N.Y. v. Aetna Cas. & Sur. Co., 693 N.Y.S.2d 139 (N.Y. App. Div. 1999); Byan v. Prudential Ins. Co. of Am., 662 N.Y.S.2d 44, 45 (N.Y. App. Div. 1997)).

[113] City of N.Y. v. Aetna Cas. & Sur. Co., 693 N.Y.S.2d 139 (N.Y. App. Div. 1999).

[114] Byan v. Prudential Ins. Co. of Am., 662 N.Y.S.2d 44, 45 (N.Y. App. Div. 1997).

[115] *Aetna Cas. & Sur. Co.*, 693 N.Y.S.2d at 140; *Byan*, 662 N.Y.S.2d at 45.

[116] Williams v. Union Fid. Life Ins. Co., 123 P.3d 213 (Mont. 2005).

[117] *Id.* at 219.

Miletak v. Allstate Insurance Co.,[118] a case involving an insurance premium dispute, the court stated that "the doctrine does not directly apply to a situation, as here, involving potential interference with rates set by a state agency rather than a federal agency."[119]

As discussed below, the better and more prevailing view, however, is that the doctrine applies to rates reviewed by state insurance departments. There seems to be no logical reason to limit application of the doctrine to federal agency review only. In applying the filed rate doctrine to state agency review, the court in *Taffet v. Southern Co.*,[120] stated that "where the legislature has conferred power upon an administrative agency to determine the reasonableness of a rate, the rate-payer 'can claim no rate as a legal right that is other than the filed rate'."[121] According to the *Taffet* court, that central principle of the filed rate doctrine "applies with equal force" regardless of whether rate setting is done by a state or federal authority.[122]

Recognizing the weight of authority supporting application of the doctrine to rates authorized by state agencies, the court in *McCray v. Fidelity National Title Insurance Co.*,[123] stated that "we will preclude the recovery of treble damages for a Sherman Act claim predicated on the alleged excessiveness or otherwise unreasonableness of a rate filed with a state administrative agency."[124] Other insurance cases finding that the filed rate doctrine applies to state agency review include *In re Title Ins. Antitrust Cases*,[125] *In re Pennsylvania Title Insurance Antitrust Litigation*,[126] *Allen v. State Farm Fire & Casualty Co.*,[127] *Schermer v. State Farm Fire &*

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[118] Miletak v. Allstate Ins. Co., No. C 06-03778 (JW), 2010 WL 809579 (N.D. Cal. Mar. 05, 2010).

[119] *Id.* at *4.

[120] Taffet v. S. Co., 967 F.2d 1483 (11th Cir. 1992).

[121] *Id.* at 1494 (quoting Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 251 (1951)).

[122] *Id.*

[123] McCray v. Fid. Nat'l Title Ins. Co., 636 F. Supp. 2d 322 (D. Del. 2009).

[124] *Id.* at 328

[125] *In re* Title Ins. Antitrust Cases, 702 F. Supp. 2d 840, 861 (N.D. Ohio 2010).

[126] *In re* Pa. Title Ins. Antitrust Litig., 648 F. Supp. 2d 663, 672 (E.D. Pa. 2009).

[127] Allen v. State Farm Fire & Cas. Co., 59 F. Supp. 2d 1217, 1228 (S.D. Ala. 1999).

Casualty Co.,[128] *MacKay v. Superior Court*,[129] and *Commonwealth ex rel. Chandler v. Anthem Insurance Co.*[130]

B. APPLICATION OF THE FILED RATE DOCTRINE TO STATE LAW CLAIMS

Assuming that state agency review supports application of the filed rate doctrine, a separate issue is whether the doctrine applies to state law claims as well as to claims made under federal law. Of course, as recognized by the North Carolina Supreme Court in *N.C. Steel, Inc. v. National Council on Compensation Insurance*, federal law applying the filed rate doctrine is not controlling in a case involving violation of state law.[131] The doctrine, however, is often adopted and applied to state law claims, as was the case in *N.C. Steel, Inc*. in response to a challenge to the state's workers' compensation rating system.[132]

In re Title Insurance Antitrust Cases provides a comprehensive discussion of the court's decision to apply the principles underlying the filed rate doctrine to bar state law antitrust claims.[133] Ohio courts had not specifically ruled on whether the filed rate doctrine barred a suit for damages brought by a private plaintiff under state law alleging, for example, an antitrust violation.[134] The court found persuasive, however, Ohio Supreme Court authority barring regulated entities from charging rates higher than those properly filed.[135] According to the court, case law applying that "corollary to the filed rate doctrine," supported the conclusion

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[128] Schermer v. State Farm Fire & Cas. Co., 721 N.W.2d 307, 312 (Minn. 2006).

[129] MacKay v. Superior Court, 115 Cal. Rptr. 3d 893, 899 (Cal. Ct. App. 2010).

[130] Commonwealth *ex rel.* Chandler v. Anthem Ins. Co., 8 S.W.3d 48, 52 (Ky. Ct. App. 1999).

[131] N.C. Steel, Inc. v. Nat'l Council on Comp. Ins., 496 S.E.2d 369, 374 (N.C. 1998). *See also In re* Pa. Title Ins. Antitrust Litig., 648 F. Supp. 2d 663, 673 n.7 (E.D. Pa. 2009) (holding state law is the overriding authority in determining if the filed rate doctrine applies to state law claims).

[132] *N.C. Steel, Inc.*, 496 S.E.2d at 371.

[133] *In re* Title Ins. Antitrust Cases 702 F. Supp. 2d 840, 861-65 (N.D. Ohio 2010).

[134] *Id.* at 861-65.

[135] *Id.* at 862 (citing *In re* Investigation of Nat'l Union Fire Ins. Co., 609 N.E.2d 156 (Ohio 1993)).

that the Ohio Supreme Court would apply the filed rate doctrine to the state antitrust claims involved.[136]

Another example of the doctrine's application to state law claims occurs in *Amundson & Associates Art Studio, Ltd. v. National Council on Compensation Insurance, Inc.*, in which the plaintiff argued that the filed rate doctrine was a weak and discredited relic continuing to exist only at the federal level.[137] The court noted a California case cited by the plaintiff as authority for the proposition that the doctrine should not apply at the state law level.[138] Nevertheless, recognizing the importance of preserving the integrity of agency decision making, the court upheld application of the doctrine to claims that state antitrust statutes were violated.[139]

C. APPLICATION OF STATE AND FEDERAL LAW IN CONSTRUCTION OF THE FILED RATE DOCTRINE

Although state law is controlling in relation to state law claims,[140] courts addressing the doctrine's application in such cases typically find federal law relevant as well.[141] In addressing solely federal antitrust claims, the federal district court in *In re Pennsylvania Title Insurance Antitrust Litigation* also expressed the opinion that it could "fill in the interstices of the doctrine by drawing on state law."[142] In support of that conclusion, the court cited the United States Supreme Court decision of *Kamen v. Kemper Financial Services, Inc*.[143] In *Kamen*, the Court stated that"[t]he presumption that state law should be incorporated into federal common law is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards."[144]

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[136] *Id.*

[137] Amundson & Assocs. Art Studio, Ltd. v. Nat'l Council on Comp. Ins., Inc., 988 P.2d 1208, 1213 (Kan. App. Ct. 1999).

[138] *Id.* at 1214 (citing Cellular Plus, Inc. v. Super. Ct., 18 Cal. Rptr. 2d 308 (Cal. Ct. App. 1993)).

[139] *Id.* at 1215-16.

[140] *In re* Pa. Title Ins. Antitrust Litig., 648 F. Supp. 2d 663, 673 n.7 (E.D. Pa. 2009).

[141] *See* Allen v. State Farm Fire & Cas. Co., 59 F. Supp. 2d 1217, 1227-30 (S.D. Ala. 1999); Prentice v. Title Ins. Co. of Minn., 500 N.W.2d 658, 660-62 (Wis. 1993).

[142] *In re* Pa. Title Ins. Antitrust Litig., 648 F. Supp. 2d at 673.

[143] *Id.* (citing Kamen v. Kemper Fin. Serv., Inc., 500 U.S. 90 (1991)).

[144] *Kamen*, 500 U.S. at 98.

Finding pertinent the fact that the federal antitrust claims presented involved application of the filed rate doctrine to a Pennsylvania regulatory agency, the court in *In re Pennsylvania Title Insurance* found "especially relevant" the treatment of the filed rate doctrine under Pennsylvania state law.[145] In reliance on *Pennsylvania Title Insurance Antitrust Litigation*, the court in *Clark v. Prudential Insurance Co. of America* likewise recognized that in construing the filed rate doctrine, state law may be used to "fill in the interstices" of federal common law.[146]

IX. THE AVAILABILITY OF INJUNCTIVE RELIEF TO PRIVATE PLAINTIFFS

The foreclosure of damage claims under federal and state law through application of the filed rate doctrine may result in a focus on future injunctive relief. Jurisdictions vary in regard to the application of the filed rate doctrine to claims for equitable relief. The Kansas Court of Appeals in *Amundson & Associates Art Studio, Ltd. v. National Council on Compensation Insurance, Inc.*, a case involving alleged price fixing in violation of state antitrust law, ruled that "[a]ny claim for injunctive or equitable relief in this area is permissible by the *government*, not individuals."[147] The court in *Amundson* relied upon a decision of the North Carolina Supreme Court, *N.C. Steel, Inc. v. National Council on Compensation Insurance*,[148] a case in which the court refused to approve injunctive relief for private plaintiffs asserting state law claims stemming from charges imposed under the state's workers' compensation insurance structure.[149]

Better reasoned cases, however, indicate that private plaintiffs may proceed through injunctive relief in appropriate cases. Injunctive relief not implicating agency authority or previously filed rating schedules does not interfere with the twin concerns of the filed rate doctrine, justiciability and nondiscrimination. Notably, the Supreme Court in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc*. affirmed the ruling of the Second Circuit Court of Appeals that although the filed rate doctrine barred the private plaintiffs'

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[145] *Pa. Title Ins.*, 648 F. Supp. 2d at 673.

[146] Clark v. Prudential Ins. Co. of America, 736 F. Supp. 2d 902, 912 (D.N.J. 2010) (quoting *Pa. Title Ins.*, 648 F. Supp. 2d at 673).

[147] Amundson & Assocs. Art Studio, Ltd. v. Nat'l Council on Comp. Ins., Inc., 988 P.2d 1208, 1217 (Kan. App. Ct. 1999).

[148] *See id.* at 1215-16 (citing N.C. Steel, Inc. v. Nat'l Council on Comp. Ins., 496 S.E.2d 369 (N.C. 1998)).

[149] *Id.*

claims for monetary damages, a remand was appropriate for a determination as to whether the plaintiffs were entitled to injunctive relief.[150] The Supreme Court in *Square D* recognized the "critical distinction" between absolute immunity from all antitrust scrutiny and a prohibition against the private treble-damages remedy.[151] According to the Supreme Court, that distinction was highlighted by the Court of Appeal's remand on the issue of injunctive relief and the consent decree entered into between the parties enjoining certain acts. On the issue of the availability of injunctive relief, the Second Circuit in *Square D* further noted that the defendants had not moved for dismissal in regards to the claim for an injunction "a position well advised in light of *Georgia v. Pennsylvania Railroad Co.*,"[152] an earlier Supreme Court case upholding the availability of injunctive relief under the filed rate doctrine.[153]

Later case law generally acknowledges the availability of injunctive relief at least insofar as the filed rate is not affected.[154] For example, in *Saunders v. Farmers Insurance Exchange*, the Eighth Circuit Court of Appeals disagreed with the district court's dismissal of the plaintiffs' claims for injunctive relief stating that "[o]n appeal, defendants totally fail to support this seemingly unjustified expansion of the filed rate doctrine."[155] Likewise, in *Schilke v. Wachovia Mortgage, FSB*, a case

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[150] Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 414 (1986).

[151] *Id.* at 422 n.28.

[152] *Square D Co.*, 760 F.2d at 1364 (citing Ga. v. Pa. R.R. Co*.,* 324 U.S. 439, 454-55 (1945)).

[153] Although the state of Georgia was involved in *Georgia v. Pennsylvania Railroad Co.*, federal antitrust law was involved, and the state was not a federal governmental litigant. 324 U.S. 439, 443 (1945). Even if, however, due to the involvement of the state of Georgia, *Georgia v. Pennsylvania Railroad Co.*, loses some effect as precedent regarding the availability of injunctive relief to private litigants, the plaintiffs in *Square D* were certainly private litigants. *Square D Co.*, 760 F.2d at 1349.

[154] *See, e.g.*, Dolan v. Fid. Nat'l Title Ins. Co., 365 Fed. App'x 271, 276 (2d Cir. 2010), *cert. denied*, 131 S.Ct. 261 (2010); Saunders v. Farmers Ins. Exch., 440 F.3d 940, 944 n.1 (8th Cir. 2006); *In re* Title Ins. Antitrust Cases, 702 F. Supp. 2d 840, 865 (N.D. Ohio 2010); Schilke v. Wachovia Mortg., FSB, 705 F. Supp. 2d 932, 944-45 (N.D. Ill. 2010), *vacated on other grounds*, 758 F. Supp. 2d 549 (N.D. Ill. 2010); *In re* Pa. Title Ins. Antitrust Litig., 648 F. Supp. 2d 663, 686 (E.D. Pa. 2009); *see also* Prentice v. Title Ins. Co. of Minn., 500 N.W.2d 658, 663 n.7 (Wis. 1993) (recognizing that the filed rate doctrine does not protect against private suits seeking other than rate-related damages).

[155] Saunders v. Farmers Ins. Exch., 440 F.3d 940, 944 n.1 (8th Cir. 2006).

involving alleged wrongful kickbacks, the court refused to apply the doctrine to bar a claim for injunctive relief that sought the public disclosure of the portion of insurance premiums constituting commissions and brokerage fees.[156]

The court in *In re Title Insurance Antitrust Cases* distinguished between allowable types of injunctive relief as opposed to types of injunctive relief barred by the doctrine.[157] The court acknowledged Supreme Court precedent in *Georgia v. Pennsylvania Railroad Co*.[158] and *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*[159] affirming the continued viability of injunctive relief.[160] The court found, however, that the nonjusticiability strand of the doctrine barred injunctive relief that would alter a filed rate or that would "displace the statutory scheme and authority of the regulating agency to determine the reasonableness of rates."[161] Accordingly, the court found that claims in the case seeking to enjoin future collaboration between the defendants were allowed because the relief sought could only affect future rates, not any rate already filed.[162] On the other hand, the court ruled that the filed rate doctrine barred claims seeking to prohibit the defendants from filing rates containing both legitimate premium costs and fees from alleged kickbacks.[163] The problem in the court's view was that rather than seek to enjoin the kickbacks themselves, the plaintiffs sought an injunction addressing the way in which rates were submitted, as a single (or all inclusive) rate.[164] According to the court, allowing such relief would be substituting the court's judgment as to how rate filings should be made for that of the state's department of insurance, a direct conflict with the nonjusticiability strand of the doctrine.[165] Likewise, in *Dolan v. Fidelity National Title Insurance Co.*, a case in which the plaintiffs requested that the court enjoin price-fixing and

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[156] Schilke v. Wachovia Mortg., FSB, 705 F. Supp. 2d 932, 944-45 (N.D. Ill. 2010) (citing Marcus v. AT&T Corp., 138 F.3d 46, 62 (2d Cir. 1998); Green v. Peoples Energy Corp., No. 02C4117, 2003 WL 1712566, at *4 (N.D. Ill. Mar. 28, 2003), *vacated on other grounds*, 758 F. Supp. 2d 549 (N.D. Ill. 2010)).

[157] *In re* Title Ins. Antitrust Cases, 702 F. Supp. 2d 840 (N.D. Ohio 2010).

[158] Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1945).

[159] Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986).

[160] *In re Title Ins. Antitrust Cases*, 702 F. Supp. 2d at 865.

[161] *Id.* at 865-66 (citing Town of Norwood v. New Eng. Power Co., 202 F.3d 408, 420 (1st Cir. 2000)).

[162] *Id.* at 865.

[163] *Id.*

[164] *Id.* at 865-66.

[165] *Id.*

the inclusion in rates of costs for kick-backs and other illegal charges, the court stated that "[a]n injunction to remove particular costs from filed rates is exactly the sort of relief the doctrine bars."[166]

An apparent conflict in decisional law regarding the type of injunctive relief available is illustrated by *In re Pennsylvania Title Insurance Antitrust Litigation.*[167] The court in that case expressed approval of injunctive relief prohibiting the costs of illegal costs and kickbacks in newly filed rates on the basis that the relief sought was exclusively prospective and would not interfere with rates already on file.[168] The court's decision is contrary, however, to the decisions of *In re Title Insurance Antitrust Cases* and *Dolan v. Fidelity National Title Insurance Co.*, discussed above, expressing the opinion that the doctrine bars injunctive relief affecting the inclusion of alleged kickbacks in rates. It would seem that the better view is expressed in *In re Title Insurance Antitrust Cases* and *Dolan* based upon justiciability concerns and the accepted goal of the filed rate doctrine of avoiding involvement and conflict with state regulatory authorities.

In any event, as recognized in the recent case of *In re New Jersey Title Insurance Litigation*, an expansive request for injunctive relief could present a problem in regard to the filed rate doctrine.[169] The court in that case refused to grant injunctive relief recognizing that the plaintiffs' "broadly conceived request for injunctive relief" attacked previously filed rates in addition to seeking prospective relief.[170] Without attempting to separate any allowable prospective relief from the perceived overly broad request, the court stated that granting the requested injunctive relief would interfere with the authority of the state's insurance department.[171]

X. THE EFFECT OF THE FILED RATE DOCTRINE ON GOVERNMENTAL LITIGANTS

There is a lack of consensus in regard to the effect of the filed rate doctrine on governmental litigants. The better and more prevalent view is that the Supreme Court decisions of *Square D Co. v. Niagara Frontier*

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[166] Dolan v. Fid. Nat'l Title Ins. Co., 365 F. App'x. 271, 276 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 261 (2010).

[167] *In re* Pa. Title Ins. Antitrust Litig., 648 F. Supp. 2d 663 (E.D. Pa. 2009).

[168] *Id.* at 686.

[169] *In re* N.J. Title Ins. Litig., Consolidated Civil Action No. 08-1425, 2009 WL 3233529, at *3 (D.N.J. Oct. 5, 2009).

[170] *Id.*

[171] *Id.*

Tariff Bureau, Inc., and *Keogh v. Chicago & Northwestern Railway Co*. uphold governmental enforcement actions.[172] In recognizing rights of the government to enforce the Sherman Act, the Supreme Court in *Square D* quoted *Keogh* for the proposition that "[t]he fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the Government."[173]

Cases upholding the principle that the filed rate doctrine allows for enforcement activity by the government include *In re Title Insurance Antitrust Cases*, recognizing that the doctrine does not "prohibit the Government from seeking civil or criminal redress;"[174] *Prentice v. Title Insurance Co. of Minnesota*, recognizing that the "filed rate doctrine does not protect against suits by the government;"[175] and *Edge v. State Farm Mutual Automobile Insurance Co.*, recognizing that "[t]he filed rate doctrine bars only collateral attacks brought by private parties and not direct reviews in ratemaking cases or actions brought by a governmental agency."[176]

Nevertheless, decisions are not unanimous regarding application of the filed rate doctrine to governmental enforcement efforts. The Kentucky Court of Appeals in *Commonwealth ex rel. Chandler v. Anthem Insurance Companies, Inc*. ruled that the filed rate doctrine barred an action brought by the Attorney General of Kentucky insofar as it sought damages based on alleged wrongdoing in violation of that state's consumer protection law.[177] The court primarily relied on its interpretation of federal precedent, not on any type of more restrictive reading of the filed rate doctrine limited to that state.[178]

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[172] Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 419 (1986); Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156 (1922).

[173] *Square D Co.*, 476 U.S. at 416 n.17 (quoting Keogh v. Chicago & N. W. Ry. Co., 260 U.S. 156, 162 (1922)).

[174] *In re* Title Ins. Antitrust Cases, 702 F. Supp. 2d 840, 849 (N.D. Ohio 2010).

[175] Prentice v. Title Ins. Co. of Minn., 500 N.W.2d 658, 663 n.7 (Wis. 1993).

[176] Edge v. State Farm Auto. Ins. Co., 623 S.E.2d 387, 391 (S.C. 2005); *accord* Saunders v. Farmers Ins. Exch., 440 F.3d 940, 944 (8th Cir. 2006) (approving statements made in *Square D* that the filed rate doctrine does not affect governmental rights).

[177] Commonwealth *ex rel*. Chandler v. Anthem Ins. Cos., Inc., 8 S.W.3d 48, 53 (Ky. Ct. App. 1999). The court, however, approved the Attorney General's action for injunctive relief or civil penalties as allowed by statute under the state's consumer protection law. *Id.* at 53-54.

[178] *Id.* at 52.

Another case implying that the filed rate doctrine may be applied to bar actions brought by the government is *State ex rel. Cooper v. McClure*, a case involving an action by the state of North Carolina against one of its vendors. Rather than find that the filed rate doctrine was inapplicable to actions instituted by the government, the court allowed the case to proceed for reasons including its determination that an action against a state vendor was not the type of action involving the typical concerns of the filed rate doctrine.[179]

The majority of cases finding that the filed rate doctrine allows governmental enforcement action set forth the better view. The court in *In re Title Insurance Cases* characterized the doctrine as "a judicially created restriction on remedies and standing under which private plaintiffs are barred from suing for a damage recovery."[180] In rejecting the plaintiff's position that application of the filed rate doctrine would illegally extend antitrust immunity, the court relied on its determination that the filed rate doctrine allowed for governmental enforcement actions and for injunctive relief.[181] As the case makes clear, allowing governmental enforcement action may prevent violators from escaping consequences of illegal action. Additionally, governmental action does not raise the same concerns regarding discrimination between similarly situated individuals as would a private action by an individual plaintiff benefiting only that plaintiff.

XI. THE EFFECT OF THE FILED RATE DOCTRINE ON ENTITIES OTHER THAN INSURERS

Many cases assume without discussion that the filed rate doctrine applies to entities other than insurers when complaints are made involving rates filed with a state's Department of Insurance. This is logical because the filed rate doctrine applies to rates set or approved by a regulatory agency, and there seems to be no reason to distinguish between insurers and other entities. For example, without discussing the status of the defendants, the court in *Steven v. Union Planters Corp.* applied the doctrine to bar claims that the bank-affiliated defendants placed required hazard insurance on plaintiff's mortgaged property at an excessive premium

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[179] State *ex rel.* Cooper v. McClure, No. 03-CVS-005617, 2004 WL 296598, at *11-12 (N.C. Super. Dec. 14, 2004), *rev'd on other grounds*, No. 03-CVS-005617, 2005 WL 3018635 (N.C. Super. Oct. 28, 2005).

[180] *In re* Title Ins. Antitrust Cases, 702 F. Supp. 2d 840, 849 (N.D. Ohio 2010).

[181] *Id.*

enabling the defendants to receive wrongful kickbacks from insurers.[182] As recognized by the court in *Steven*, "[u]nder the filed rate doctrine, an allegation that a forced placed premium is excessive, is barred as a matter of law when the rate is declared reasonable by an independent entity."[183] Without further analysis of the status of the defendants, other courts have also assumed the doctrine's application to defendants other than insurers.[184]

A case specifically addressing the application of the doctrine to defendants other than insurers is *Roussin v. AARP, Inc.,* in which the plaintiff claimed that AARP, a non-profit group targeting retirees, improperly received an allowance from an insurer for reasons including its sponsorship of the insurer's policy offerings.[185] Noting a lack of contrary authority, the court applied the filed rate doctrine to bar the plaintiff's claims stating as follows:

> Here, although Defendants did not file the rates, Roussin [the plaintiff] indisputably seeks to challenge the reasonableness of the rates. Because she is "seeking relief for an injury allegedly caused by the payment of a rate on file with a regulatory commission," albeit indirectly, her claims are barred by the filed rate doctrine.[186]

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[182] Steven v. Union Planters Corp., No. Civ.A. 00-CV-1695, 2000 WL 33128256, at *3 (E.D. Pa. Aug. 22, 2000).

[183] *Id.* at *2.

[184] *See* Alston v. Countrywide Fin. Corp., 585 F.3d 753, 764 (3d Cir. 2009) (applying the doctrine to the defending lender but finding that it did not bar claims of illegal kickbacks); Hooks v. Am. Med. Sec. Life Ins. Co., No. CIV. 3:06cv71, 2008 WL 3911130 (W.D.N.C. Aug. 19, 2008) (applying the doctrine to bar claims against a non-profit organization); Harrison v. Commercial Credit Corp., No. CIV.A. 4:01CV151LN, 2002 WL 548281, at *6 (S.D. Miss. Mar. 29, 2002) (finding that the doctrine barred claims against the defending lender's employees); Gipson v. Fleet Mortg. Grp., Inc., 232 F. Supp. 2d 691 (S.D. Miss. 2002) (applying the doctrine to the defending lender but finding that it did not bar claims related to a lender's right to place insurance in such a manner as to cause its borrowers' payment on unnecessary fees).

[185] Roussin v. AARP, Inc., 664 F. Supp. 2d 412, 416-19 (S.D.N.Y. Oct. 15, 2009), *aff'd*, No. 09-4932-cv, 2010 WL 2101912, at *1 (2d Cir. May 26, 2010) (stating that the affirmation was based on the district court's "well-reasoned opinion").

[186] *Id.* at 419 (quoting Porr v. NYNEX Corp., 660 N.Y.S.2d 440, 442 (App. Div. 1997)).

There is authority, however, distinguishing between insurers and other entities in the application of the filed rate doctrine. In *Richardson v. Standard Guaranty Insurance Co.*, a case involving alleged fraud committed in the sale of credit insurance policies, the court found that the claims against the defendant CitiBank, which marketed and sold the policies, should be viewed differently in relation to the filed rate doctrine because Citibank was not an insurer and did not file rates.[187] The court found the filed rate doctrine would only apply to bar claims against such a defendant if the defendant acted as an agent of the insurer.[188]

The better reasoned conclusion is that application of the filed rate doctrine is unaffected by the status of the defendant. As recognized in *Roussin v. AARP, Inc.*, the pertinent inquiry is whether the claimed injury is based on an approved rate, not the nature of the defending entity.[189] The primary concerns of the filed rate doctrine, nondiscrimination and the avoidance of interference with agency rate making is unaffected by the identity of the defendant.

XII. APPLICATION OF THE FILED RATE DOCTRINE TO CLAIMS INVOLVING THE IMPROPER CALCULATION AND APPLICATION OF RATES AND RESERVES, AND OTHER ALLEGED FAILURES REGARDING REGULATORY REQUIREMENTS

A. CLAIMS THAT RATES VARIED FROM ALLOWABLE RATES

There is authority that the filed rate doctrine is inapplicable to claims alleging that the rates charged exceeded filed rates. For example, in *Birmingham Hockey Club, Inc. v. National Council on Compensation Insurance, Inc.*, the Supreme Court of Alabama found the doctrine inapplicable to a claim that rates were assessed in excess of those approved by the state's department of insurance.[190] Similarly, the court in *Sandwich Chef of Texas, Inc. v. Reliance National Indemnity Insurance Co.*, refused to apply the filed rate doctrine to bar a complaint regarding premiums

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[187] Richardson v. Standard Guaranty Ins. Co., 853 A.2d 955, 969-70 (N.J. Super. Ct. App. Div. 2004).

[188] *Id.* at 969 (citing Smith v. SBC Comm. Inc., 839 A.2d 850, 858 (N.J. 2004)).

[189] *See Roussin*, 664 F. Supp. 2d at 419.

[190] Birmingham Hockey Club, Inc. v. Nat'l Council on Comp. Ins., Inc., 827 So.2d 73, 83 (Ala. 2002).

charged in excess of filed rates.[191] The court reached its conclusion based upon the logical principle that the purpose of the filed rate doctrine is to prevent challenges to filed rates, not efforts to enforce rates on file.[192]

The filed rate doctrine was recently raised in a novel way in *Blackburn & McCune, PLLC v. Pre-Paid Legal Services, Inc.*, a case in which a law firm hired to provide services to insureds under legal insurance plans sued claiming that the fees paid to the firm by the insurer varied from the amount the insurer filed as expenses for such costs with the state.[193] The law firm claimed that under the filed rate doctrine it was entitled to recover the difference between what it was paid and the amount the insurer allegedly represented to the state that it incurred in expenses for the services.[194] The court, however, determined that the filed rate doctrine is intended to protect the relationship between an insurer and consumers, not providers.[195]

B. CLAIMS THAT RATE CATEGORIES WERE IMPROPERLY APPLIED

Generally, courts have refused to apply the filed rate doctrine to bar claims that filed rates were applied in an improper manner. For example, in *White v. Conestoga Title Insurance Co.*, Pennsylvania's intermediate court refused to apply the doctrine to bar the plaintiff's claim that, although the rate charged was a filed rate, it was the wrong rate.[196] The court relied on the fact that the plaintiff sought to obtain a discounted

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[191] Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co., 111 F. Supp. 2d 867, 874-75 (S.D. Tex. 2000). On appeal, class certification was revoked, however, the court recognized that a plaintiff's knowledge of the imposition of a rate other than the filed rate may be used to negate a claim of fraud. *See* Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co., 319 F.3d 205, 217 n.10 (5th Cir. 2003).

[192] *Sandwich Chef of Tex.*, 111 F. Supp. 2d at 874 (citing Drew v. MCI Worldcom Mgmt. Co., Inc., No. Civ. A.3: 99-CV-1355-D, 1999 WL 1087470 (N.D. Tex. Dec. 1, 1999); Black Radio Network, Inc. v. NYNEX Corp., 44 F. Supp. 2d 565, 574 (S.D.N.Y. 1999)).

[193] Blackburn & McCune, PLLC v. Pre-Paid Legal Servs., Inc., No. M2009-01584-COA-R3-CV, 2010 WL 2670816, at *1 (Tenn. Ct. App. June 30, 2010), *appeal denied*, (Dec. 07, 2010).

[194] *Id.* at *29.

[195] *Id.* at *32.

[196] White v. Conestoga Title Ins. Co., 982 A.2d 997, 1009 (Pa. Super. 2009), *appeal granted*, 994 A.2d 1083 (Pa. 2010) (appeal granted on an issue pertaining to class certification).

rate to which she claimed entitlement, not challenge the insurance rates themselves.[197] A number of other insurance cases also recognize that the filed rate doctrine is unavailable as a defense to bar claims involving the calculation of rates.[198]

There is authority, however, supporting the application of the doctrine to claims involving the assessment of rates. For example, after adopting the filed rate doctrine in the jurisdiction, the South Carolina Supreme Court in *Edge v. State Farm Mutual Automobile Insurance Co.*, ruled that the doctrine barred claims that surcharges were improperly imposed based upon wrongful determinations of fault made in regard to motor vehicle accidents.[199] On the other hand, the dissent in *Edge* strongly and persuasively argued that the doctrine should not have been applied in that situation because the case was not a rate case.[200]

The dissent recognized that the filed rate doctrine, first outlined in *Keogh*, protects duly authorized and filed rates from collateral attack in court.[201] That was not the situation in *Edge* in which the plaintiffs complained that they were charged the wrong rate among possible rates. The dissent provided the following persuasive example in clarifying the difference between a complaint that a lower rate should have been adopted, which the filed rate bars, as opposed a complaint alleging the improper assessment of a rate from among other possible rates, which the dissent argued was allowable:

> To distinguish this case from a "rate case," it is perhaps helpful to use the following illustration: If Plaintiff claims, "in the exercise of discretion, the agency should have adopted some lower rate instead of a rate of X," then Plaintiff is effectively asking the court to substitute its discretion for the administrative agency's. If instead, a rate scheme authorizes a base rate of X, and further provides

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[197] *Id.* at 1007-08 (citing Charles v. Lawyers Title Ins. Corp., No. CIV.A.06 2362 JAG, 2007 WL 1959253 (D.N.J. July 3, 2007)).

[198] *See* Randleman v. Fid. Nat'l Title Ins. Co., 465 F. Supp. 2d 812, 823 (N.D. Ohio 2006); Robinson v. Fountainhead Title Grp. Corp., 477 F. Supp. 2d 478, 487 (D. Md. 2006); Richardson v. Standard Guar. Ins. Co., 853 A.2d 955, 967 (N.J. Super. Ct. App. Div. 2004).

[199] Edge v. State Farm Mut. Auto. Ins. Co., 623 S.E.2d 387, 392-93 (S.C. 2005).

[200] *Id.* at 393 (Toal, C.J., dissenting).

[201] *Id.* at 393-94 (Toal, C.J., dissenting) (citing Keogh v. Chi. & N.W. Ry. Co., 260 U.S. 156 (1922)).

> that, if certain additional conditions exist, then a rate of Y, Plaintiff is free to argue that he does not meet the requirements for issuance of the higher rate; Plaintiff is merely disputing the rate's validity "as applied" to him.[202]

It seems that the dissent in *Edge* had the better argument that the filed rate doctrine allowed claims that rates were improperly applied.[203] The rationale behind the filed rate doctrine supports plaintiff rights in regard to rate enforcement. For example, recognizing the purposes of the filed rate doctrine to prevent price discrimination and to preserve the role of agencies in approving reasonable rates, the court in *Charles v. Lawyers Title Ins. Corp.* refused to apply the doctrine to bar enforcement of the defendant's filed rates.[204] The plaintiffs claimed that the defending insurer charged more than the allowable rating schedule it submitted. According to the court in *Charles*, the defendant attempted "to turn this doctrine on its head" by arguing that pursuant to the filed rate doctrine, the plaintiff's constructive knowledge of rates barred claims to enforce filed rates.[205] Enforcement of filed rates does not result in discrimination against policyholders nor does it interfere with agency decision making.

C. CLAIMS THAT RESERVES WERE IMPROPERLY SET

There is disagreement regarding whether the filed rate doctrine bars claims regarding the improper setting of insurance reserves retained for the payment of future claims. The North Carolina Court of Appeals in *Lupton v. Blue Cross & Blue Shield of North Carolina* found that the filed rate doctrine barred claims alleging the existence of excessive reserves.[206] By statute a regulated insurer in that state was required to retain a percentage of certain gross annual collections from membership dues until the reserve retained equaled three times the insurer's average monthly expenditures for claims and other expenses.[207] Reserves, however, were prohibited by statute from exceeding six times the amount of such average

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[202] *Id.* at 394 n.8 (Toal, C.J., dissenting).

[203] *Id.* at 394 (Toal, C.J., dissenting).

[204] Charles v. Lawyers Title Ins. Corp., No. 06-2361 (JAG), 2007 WL 1959253, at *9 (D.N.J. July 3, 2007).

[205] *Id.* at *6.

[206] Lupton v. Blue Cross & Blue Shield of N.C., 533 S.E.2d 270, 273 (N.C. Ct. App. 2000).

[207] *Id.* at 271 (citing N.C. GEN. STAT. § 58-65-95(b) (2009)).

monthly expenditures.[208] In ruling that the filed rate doctrine barred claims that the defendant accumulated excessive reserves, the court recognized that the state's Commissioner of Insurance initially approved the defendant's reserve amount and that, thereafter, the retention of reserves was governed by statute.[209] The court stated that the Commissioner had the authority to recalculate approved rates, thereby affecting the amount of the reserve and that "[a]ny allegation that Blue Cross accumulated an excessive reserve requires the recalculation of approved rates."[210] According to the court, "the plaintiffs cannot prove their claim without the rates set by the Commissioner being questioned."[211]

The Supreme Court of Pennsylvania, however, in *Ciamaichelo v. Independence Blue Cross*, refused to apply the filed rate doctrine to dismiss a complaint alleging the defendant's wrongful accumulation of excessive reserves.[212] The plaintiffs in that case alleged that the defendant violated the state's nonprofit corporation law and breached contractual and fiduciary duties through accumulating surplus funds for purposes inconsistent with its non-profit status.[213] Alleged violations included the use of excess funds for possible acquisitions, mergers, conversions, benefits to officers and directors, and investments in for-profit subsidiaries.[214] The court stated that it was unwilling, on preliminary objections, to rule that the complaint amounted to only second-guessing an approved rate. Instead, the complaint was viewed as raising the issue of whether the defendant "violated the Non-Profit Law and committed breaches of contractual and fiduciary duties in amassing a fund designated as surplus that was in amount, over and

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[208] *Id.* (citing N.C. GEN. STAT. § 58-65-95(c) (2009)).

[209] *Id.* at 273.

[210] *Id.*

[211] Lupton v. Blue Cross & Blue Shield of North Carolina, 533 S.E.2d 270, 273 (N.C. Ct. App. 2000) (quoting N.C. Steel, Inc. v. Nat'l Council on Comp. Ins., 496 S.E.2d 369, 374 (N.C. 1998)). The court did not address the fact that apparently excessive reserves could be computed based on the prohibition that reserves not exceed six times the amount of average monthly expenditures. Subsection (d) of the statute at issue, N.C. Gen. Stat. § 58-65-95 (2009), however, granted the Commissioner authority to increase reserves under certain circumstances to more than six times average monthly expenditures. Although not cited by the court, that section could conceivably have provided additional support for the application of the nonjusticiability strand of the filed rate doctrine.

[212] Ciamaichelo v. Independence Blue Cross, 909 A.2d 1211, 1217 (2006).

[213] *Id.* at 1212-13 (citing Nonprofit Corporation Law of 1988, 15 PA. CONS. STAT. ANN. §§ 5101-10 (West 1995)).

[214] *Id.* at 1213.

above that necessary for IBC [the defendant] to operate properly, meet its legal obligations, or secure its financial solvency . . . ."[215] The court rejected the reasoning that "allegations in a complaint that could lead to an adjustment of an insurer's approved rate invariably amount to a rate injury claim."[216]

While little case law exists on this issue, the goal of the filed rate doctrine to avoid enmeshing courts in agency rate-making procedures supports the application of the filed rate doctrine to claims regarding insurance reserves.[217] Typically, state departments of insurance disapprove rates that are inadequate, unfairly discriminatory, or excessive, and oversee reserves set aside for contingencies.[218] The accumulation of excessive reserves would necessarily involve rates because the remedy would likely be a recalculation of premium from which reserves are obtained.[219] Therefore, rates and reserves are inextricably intertwined. The better view is that under the contours of the filed rate doctrine, issues involving reserves, as well as rates, are within the province of state departments of insurance.

D. CLAIMS OF UNMET REGULATORY REQUIREMENTS

In *Richardson v. Standard Guaranty Insurance Co.*, the court addressed the defense that the filed rate doctrine barred the plaintiffs' allegations that benefits and policy terms were inconsistent with governing regulations of the state's department of insurance.[220] Specifically, the plaintiffs claimed that the defendant violated state regulations by failing to include refund provisions in policy terms, by failing to remit premium refunds, and through use of a nonconforming form.[221] The court determined

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[215] *Id.* at 1217.

[216] *Id.* at 1218. The court declined to address whether the filed rate doctrine would have applied if the complaint had specifically raised a rate injury claim. Ciamaichelo v. Independence Blue Cross, 909 A.2d 1211, 1218 n.8 (2006).

[217] *See, e.g.*, Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 19 (2d Cir. 1994) (expressing the opinion that courts should not become enmeshed in the rate-making process).

[218] *See* Rios v. State Farm Fire & Cas. Co., 469 F. Supp. 2d 727, 736 (S.D. Iowa 2007); *Ciamaichelo*, 909 A.2d at 1216; Lupton v. Blue Cross & Blue Shield of N.C., 533 S.E.2d 270, 273 (N.C. Ct. App. 2000).

[219] *See Lupton*, 533 S.E.2d at 273.

[220] Richardson v. Standard Guar. Ins. Co., 853 A.2d 955, 961 (N.J. Super. App. Div. 2004).

[221] *Id.* at 968.

that "[r]ather than conflict with the doctrine, these alternative claims actually assume the application of the filed rate and filed policy terms."[222] The court's ruling is consistent with principles underlying the filed rate doctrine and cases refusing to apply the filed rate doctrine as a bar to claims seeking to recover charges imposed in excess of allowable filed rates.

XIII. THE EFFECT OF NONCOMPLIANT FILING

Litigants opposed to application of the filed rate doctrine may raise the failure of insurers to meet administrative rate filing requirements. In addressing the issue of improper filing, courts place importance on the language of the statutory scheme involved. A crucial issue is whether the applicable regulations provide that a rate failing to comply with filing requirements is void. Assuming that improperly filed rates are not declared void, a practitioner seeking to benefit from the filed rate doctrine would likely rely upon the "technical defect" rule.[223] As recognized by the court in *In re Pennsylvania Title Insurance Antitrust Litigation*, "the Supreme Court has long held that technical or formal errors do not invalidate an otherwise properly filed rate that sufficiently notices the rate to be charged."[224] Additionally, the court in *In re Title Insurance Antitrust Cases* stated that even if the rates in that case were improperly filed, "no statute *voids* those filed and approved rates so as to preclude application of the filed rate doctrine . . . ."[225] Other cases applying the same reasoning include *Dolan v. Fidelity National Title Insurance Co.* and *In re Pennsylvania Title Insurance Antitrust Litigation*.[226]

On the other hand, if an improperly filed rate is declared void, then there is no filed rate and no basis to rely upon the filed rate doctrine as a shield. The court in *In re Pennsylvania Title Insurance Antitrust Litigation* stated that the U.S. Supreme Court in *Security Services, Inc. v. K Mart*

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[222] *Id.*

[223] *See* Sec. Srvs., Inc. v. K Mart Corp., 511 U.S. 431, 442 (1994).

[224] *In re* Pa. Title Ins. Antitrust Litig., 648 F. Supp. 2d 663, 678-79 (E.D. Pa. 2009) (citing Berwind-White Coal Mining Co. v. Chi. & Erie R.R. Co., 235 U.S. 371, 375 (1914)).

[225] *In re* Title Ins. Antitrust Cases, 702 F. Supp 2d 840, 861 (N.D. Ohio 2010).

[226] Dolan v. Fid. Nat'l Title Ins. Co., 365 F. App'x 271, 273 (2d Cir. 2010), *cert. denied*, 131 S.Ct. 261 (2010); *In re* Pa. Title Ins. Antitrust Litig., 648 F. Supp 2d at 679.

Corp "delineated the scope of the properly filed requirement."[227] In that case, following its bankruptcy, Security Services, as debtor-in-possession, sued KMart for undercharges allegedly owed based on the difference between the contract rate KMart paid for shipment and the tariff the carrier, Security Services, had on file with the Interstate Commerce Commission.[228] Security Services relied on its filed rate supported by a mileage guide, purportedly filed by an agent, as the basis for mileage computation and charges. Under applicable regulations, however, the rate filing was void because of Security Service's failure to remit costs for using the mileage guide as its filing.[229] As recognized by the Court, recovery may not be based on "filed, but void, rates."[230] The Court referenced the filing as "an incomplete tariff insufficient to support a reliable calculation of charges."[231] Consistent with *Security Services*, the court in *In re Pennsylvania Title Insurance Antitrust Litigation* recognized that the filed rate doctrine may be inapplicable in insurance cases if filing deficiencies result in an inability to calculate a rate.[232]

XIV. THE EXTENT OF ADMINISTRATIVE REVIEW REQUIRED

Courts vary on the type of administrative review required to trigger enforcement of the filed rate doctrine. Some courts find the type of review process irrelevant, some require an active review process, and some find the doctrine applicable so long as a process for administrative review is available. Additionally, rebate systems may affect the effectiveness of administrative review in regard to the filed rate doctrine.

The better view is that so long as a state department of insurance retains authority to review and disapprove rates, the filed rate doctrine should apply. Efforts by the judiciary to determine the extent and effectiveness of administrative review would result in the very threat the filed rate doctrine is designed to avoid, enmeshment of the courts in the rate-making process. Of course, the filed rate doctrine should only have application in situations in which administrative review is available. The

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[227] *In re Pa. Title Ins. Antitrust Litig.*, 648 F. Supp. 2d at 678 (citing Security Serv., Inc. v. KMart Corp., 511 U.S. 431, 440 (1994)).

[228] *See Sec. Servs., Inc.*, 511 U.S. at 434.

[229] *Id.* at 436. As noted by Justice Ginsburg in dissent, "[t]he fee involved was approximately $83." *Id.* at 457 n.2 (Ginsburg, J., dissenting).

[230] *Id.* at 444.

[231] *Id.* at 443.

[232] *See Pa. Title Ins. Antitrust Litig.*, 648 F. Supp. 2d at 678 (citing *In re* Olympia Holding Corp., 88 F.3d 952, 961-62 (11th Cir. 1996)).

court in *Clark v. Prudential Insurance Co. of America* correctly recognized that the filed rate doctrine is inapplicable if a rate is filed with an agency with no authority to approve or reject it.[233] Further rationale and authority regarding these issues and the type of administrative review required is discussed below.

A. THE POSITION THAT THE FILED RATE DOCTRINE IS APPLICABLE REGARDLESS OF MEANINGFUL ADMINISTRATIVE REVIEW

Recognizing that "[d]efining the contours of an agency's review of a filed rate is a task best left to the legislative branch," the federal district court in *In re Title Insurance Antitrust Cases*, approved the application of the filed rate doctrine even under the assumption that insurance filings lacked meaningful regulatory oversight.[234] In support of its decision, the court relied upon *Square D Co. v. Niagara Frontier Tariff Bureau*, a case in which the U.S. Supreme Court refused to require a hearing before the ICC prior to the institution of rates as a prerequisite for application of the doctrine.[235] According to the court in *In re Title Insurance Antitrust Cases*, "it is the *filing* of the rates with the regulating agency that triggers the filed rate doctrine not any minimum level of review undertaken by the agency."[236]

Based upon similar reasoning, and in reliance on the Supreme Court's decision in *Square D*, the court in *In re Pennsylvania Title Insurance Antitrust Litigation* concluded that "as long as the regulatory scheme requires the filing of rates with a government agency that has legal authority to review those rates, the filed rate doctrine applies regardless of the actual degree of agency review of those filed rates."[237] Other cases reaching similar results include *In re New Jersey Title Insurance Litigation*, where the court stated that "application of the filed rate doctrine does not

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[233] *See* Clark v. Prudential Ins. Co. of Am., No. Civ. 08-6197 (DRD), 2011 WL 940729, at *14-15 (D.N.J. Mar. 15, 2011).

[234] *In re* Title Ins. Antitrust Cases, 702 F. Supp. 2d 840, 855 (N.D. Ohio 2010).

[235] *See* Square D Co v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 417 (1986).

[236] *In re Title Ins. Antitrust Cases*, 702 F. Supp. 2d. at 852-53.

[237] *In re* Pennsylvania Title Ins. Antitrust Litig., 648 F. Supp. 2d 663, 674-75 (E.D. Pa. 2009).

depend upon meaningful agency review of filed rates"[238] and *Schilke v. Wachovia Mortgage, FSB* where the court found agency power to disapprove rates sufficient for application of the filed rate doctrine.[239]

B. CASES FINDING ADEQUATE ADMINISTRATIVE REVIEW

Finding the presence of adequate administrative oversight, some courts stop short of stating that meaningful review is irrelevant for purposes of the filed rate doctrine. For example, in *McCray v. Fidelity National Title Insurance Co.*, the court cited authority to the effect that meaningful administrative review may be unnecessary for the doctrine's application[240] but found that the review process of Delaware, the jurisdiction involved, was indeed "meaningful and competent."[241]

The administrative scheme at issue in *McCray* was a "file and use" system, whereby rates are filed with the appropriate administrative authority and charged after their effective date unless agency objection is made.[242] Referencing the Supreme Court's pronouncement in *Montana-Dakota Utilities Co. v. Northwestern Public Services Co.* that parties "can claim no rate as a legal right that is other than the filed rate, whether fixed *or merely accepted by* the [regulatory body]," the court upheld application of the filed rate doctrine to that type of system.[243] The court in *McCray* found persuasive the fact that neither the rating system involved in *Keogh* nor the one at issue in *Square D* required prior regulatory approval before going into effect.[244] Other cases approving file and use systems to support application of the filed rate doctrine include the Minnesota Supreme Court decision of *Schermer v. State Farm Fire & Casualty Co.*, *Anzinger v. Illinois State Medical Inter-Insurance Exchange*, decided by the Illinois Court of Appeals, and *Horwitz ex rel. Gilbert v. Bankers Life and Casualty*

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[238] *In re* N.J. Title Ins. Litig., Consolidated Civil Action No. 08-1425, 2009 WL 3233529, at *2 (D.N.J. Oct. 05, 2009) (citing Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 417 n.19 (1986)).

[239] *See* Schilke v. Wachovia Mortgage, FSB, 758 F. Supp. 2d 549, 560-61 (N.D. Ill. 2010).

[240] McCray v. Fidelity Nat'l Title Ins. Co., 636 F. Supp. 2d 322, 330 (D. Del. 2009) (citing Wegoland, Ltd. v. NYNEX Corp., 806 F. Supp. 1112, 1120 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 17 (2d Cir. 1994)).

[241] *Id.* at 330.

[242] *Id.* at 325.

[243] *McCray*, 636 F. Supp. 2d at 329 (quoting *Mont.-Dakota Util. Co.,* 341 U.S. at 251) (alteration in original)).

[244] *See id.* at 329.

Co., also decided by the Illinois Court of Appeals but applying Colorado law.[245]

In an unpublished decision, citing *Square* D, the Second Circuit in *Dolan v. Fidelity National Title Insurance Co.,* stated that "[i]t is well-established that the doctrine applies to all filed rates, not merely those rates investigated before their approval."[246]

"Use and file" systems under which an insurer begins using rates before they are filed for regulatory review have also supported application of the filed rate doctrine. For example, the Wisconsin Supreme Court in *Prentice v. Title Insurance Co. of Minnesota* applied the filed rate doctrine to a use and file system under which insurers were required to file rates within thirty days after their effective date.[247] Refusing to distinguish between the doctrine's application to use and file systems as opposed to file and use systems, the court interpreted Supreme Court precedent as follows: "Under *Keogh*, as interpreted by *Square D*, the existence of a regulatory remedy bars a private rate-related suit for damages under the antitrust laws regardless of whether the regulatory body approved the rates before or after the rates became effective."[248] Noting that the state's insurance commissioner had authority to disapprove rates, the court recognized that additionally granting courts authority over rates "would place insurers in a procrustean bed where one rate must conform to the requirements of both the Insurance Commissioner and a trier of fact."[249]

C. CASES REQUIRING SIGNIFICANT ADMINISTRATIVE REVIEW

While some insurance cases indicate that the nature of the review is not a critical concern,[250] others require meaningful administrative review prior to application of the filed rate doctrine. For example, in *Rios v. State*

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[245] *See, e.g.*, Schermer v. State Farm Fire & Cas. Co., 721 N.W.2d 307, 309 (Minn. 2006); Anzinger v. Illinois State Medical Inter-Ins. Exchange, 494 N.E.2d 655, 658 (Ill. App. Ct. 1986); Horowitz *ex rel.* Gilbert v. Bankers Life & Casualty Co.,745 N.E.2d 591, 605 (Ill. App. 2001).

[246] Dolan v. Fid. Nat'l Title Ins. Co., 365 Fed. App'x. 271, 274 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 261 (2010) (citing Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 417 & n.19 (1986)),.

[247] Prentice v. Title Ins. Co. of Minn., 500 N.W.2d 658, 662 (Wis. 1993).

[248] *Id.*

[249] *Id.* at 663.

[250] *See* McCray v. Fid. Na'l Title Ins. Co., 636 F. Supp. 2d 322, 330 (D. Del. 2009) (citing Wegoland, Ltd. v. Nynex Corp., 806 F. Supp. 1112, 1120 (S.D.N.Y. 1992)).

Farm Fire & Casualty Co. the court recognized the necessity of meaningful review as follows:

> That is, without the ability to meaningfully regulate the rates at issue, the rationale behind applying the filed rate doctrine (rates approved by an agency are deemed to be per se reasonable and nondiscriminatory) may not be appropriate. For example, if a regulatory agency is so powerless that it only rubber-stamps the rates filed, then it may be inappropriate to apply the filed rate doctrine.[251]

Brown v. Ticor Title Insurance Co.,[252] addressing title insurance rates in Arizona and Wisconsin, is often cited for the view that only significant administrative review justifies application of the filed rate doctrine.[253] In finding that prior administrative approval of rates is necessary for application of the filed rate doctrine, the court in *Brown* relied on *Wileman Brothers & Elliott, Inc. v. Giannini*, a case addressing alleged state law antitrust violations in connection with the sale of fruit.[254] The plaintiffs in *Wileman Brothers* claimed that the defendants conspired to wrongfully enact heightened standards for maturity of fruit before it could be marketed.[255] The defendants in *Wileman Brothers* claimed that they could not be held liable for the alleged violations because although the Secretary of Agriculture did not affirmatively approve the standards at issue, the Secretary tacitly approved them by failing to object as allowed by regulation.[256] *Brown* quoted with approval *Wileman Brothers'* disagreement with that proposition as follows:

> The mere fact of failure to disapprove, however, does not legitimize otherwise anticompetitive conduct. . . . [Nondisapproval] does not guarantee any level of review

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[251] Rios v. State Farm Fire & Cas. Co., 469 F. Supp. 2d 727, 736 (S.D. Iowa 2007) (citing Hanson v. Acceleration Life Ins. Co., No. CIV A3-97-152, 1999 WL 33283345, at *4 (D.N.D. Mar. 16, 1999)).

[252] 982 F.2d 386 (9th Cir. 1992).

[253] *E.g.*, *In re* Title Ins. Antitrust Cases, 702 F. Supp. 2d 840, 854 (N.D. Ohio 2010); *McCray*, 636 F. Supp. 2d at 329; Schermer v. State Farm Fire & Cas. Co., 721 N.W.2d 307, 317-18 (Minn. 2006).

[254] Wileman Bros. & Elliott, Inc. v. Giannini, 909 F.2d 332, 333-34 (9th Cir. 1990).

[255] *Id.*

[256] *Id.* at 337.

> whatsoever. . . . [T]here is no affirmative process of non-disapproval which can be relied upon fairly to evaluate a committee's regulations. Second, non-disapproval is equally consistent with lack of knowledge or neglect as it is with assent.[257]

In the *Brown* court's view, the absence of meaningful review allowed insurers to file any rates they wanted.[258] The court in *Brown* did not address *Square D Co. v. Niagara Frontier Tariff Bureau*, in which the U.S. Supreme Court approved application of the filed rate doctrine although rates were not reviewed by the Interstate Commerce Commission prior to their adoption.[259]

Other insurance cases have also referenced a concern with perceived insufficiency in rate review in relation to application of the filed rate doctrine.[260] For example, in *Richardson v. Standard Guaranty Insurance Co.*, the court recognized that a criticism of the filed rate doctrine is its application without the filed rates being rigorously examined or challenged.[261] Although finding the type of regulatory review at issue in the case sufficient, the court stated, "as a general matter, under-enforcement of ratemaking regulations may constitute a basis for a less rigorous application of the filed rate doctrine."[262]

Another case refusing to apply the doctrine to an insurance dispute is *Blaylock v. First American Title Insurance Co.*,[263] a federal district court case in which the plaintiff homeowners sued providers of title insurance complaining of kickbacks in violation of the Washington Consumer Protection Act[264] and the federal Real Estate Settlement Procedures Act.[265]

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[257] *Brown*, 982 F.2d at 393 (quoting *Wileman Bros.*, 909 F.2d at 337-38).

[258] *Id.* at 394.

[259] Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 417 (1986).

[260] *E.g.*, Blaylock v. First Am. Title Ins. Co., 504 F. Supp. 2d 1091, 1102-03 (W.D. Wash. 2007); Hanson v. Acceleration Life Ins. Co. No. CIV A3-97-152, 1999 WL 33283345, at *4 (D.N.D. Mar. 16, 1999); Richardson v. Standard Guar. Ins. Co., 853 A.2d 955, 964 (N.J. Super. Ct. App. Div. 2004).

[261] Richardson v. Standard Guar. Ins. Co., 853 A.2d 955, 964 (N.J. Super. Ct. App. Div. 2004).

[262] *Id.*

[263] *Blaylock*, 504 F. Supp. 2d at 1102-03.

[264] WASH. REV. CODE §§ 19.86.010-19.86.920 (1999 & Supp. 2012).

[265] 12 U.S.C. §§ 2601-17 (2006).

In addition to criticizing the filed rate doctrine in general,[266] the *Blaylock* court noted that a factor supporting its decision was that title insurance rates were subject to less comprehensive regulation than other insurance rates in the state.[267] According to the court, title insurance rates were subjected "only to superficial regulation" with no requirement that they receive any review by the insurance commissioner.[268] Therefore, the court left open an issue regarding the applicability of the doctrine to other forms of insurance, such as property and casualty insurance, subjected to more comprehensive regulation.

It is curious that the court in *Blaylock* did not cite another federal district court decision arising in the Western District of Washington decided the previous year, albeit an unpublished one, *Heaphy v. State Farm Mutual Automobile Insurance Co.*, in which the court recognized Washington's adoption of the filed rate doctrine in the insurance industry.[269] The plaintiffs in *Heaphy* alleged that State Farm failed to properly pay diminished value property damage claims on uninsured motorist policies.[270] Citing *Hardy v. Claircom Communications Group*,[271] distinguished in *Blaylock* on the basis that it involved a rate set by a federal agency in the telecommunications context,[272] the court in *Heaphy* stated that "[t]here is ample authority in this and other jurisdictions to the effect that the reasonableness of a rate cannot be challenged where that rate was required to be (and was) filed with a regulatory agency authorized to review it."[273] Finding the doctrine applicable in the insurance arena, the court proceeded to rule that while some claims would be allowed to proceed, premium-based claims were barred by the filed rate doctrine.[274]

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[266] *Blaylock*, 504 F. Supp. 2d at 1100 (stating that the doctrine has repeatedly been called into question since its inception).

[267] *Id.* at 1102-03. The more stringent regulatory procedures discussed by the court for other types of insurance included property and casualty insurance. *See* WASH. REV. CODE § 48.19.010 (2010); *Blaylock*, 504 F. Supp. 2d at 1095-96.

[268] *Blaylock*, 504 F. Supp. 2d at 1102.

[269] Heaphy v. State Farm Mut. Auto. Ins. Co., No. C05 5404RBL, 2006 WL 278556, at *2 (W.D. Wash. Feb. 2, 2006).

[270] Heaphy v. State Farm Mut. Auto. Ins. Co., No. C05-5404RBL, 2005 WL 2573340 (W.D. Wash. Oct. 12, 2005) (setting forth background information on the claims).

[271] Hardy v. Claircom Commc'ns, 937 P.2d 1128 (Wash. Ct. App. 1997).

[272] *Blaylock*, 504 F. Supp. 2d at 1101 n.8.

[273] *Heaphy*, 2006 WL 278556, at *2 (citing *Hardy*, 937 P.2d 1128, 1131).

[274] *Id.* at *3.

D. THE EFFECT OF REBATES

In a dispute involving fees imposed in connection with the provision of homeowners, automobile, and umbrella insurance, the California Court of Appeals in *Fogel v. Farmers Group, Inc.* addressed the effect of sections of the California Insurance Code allowing insurers to rebate excess premiums to policyholders.[275] Based on the rebate option, the court expressed the opinion that the defending insurers were not required to charge any certain rate and that the filed rate doctrine was therefore inapplicable.[276] According to the court, "even if the filed rate doctrine applied in the context of a rate approved by a state regulatory agency (defendants have pointed to no cases in which it was), it nevertheless would have no application here."[277] The federal district court in the recent unreported decision of *Miletak v. Allstate Insurance Co.* cited with approval the reasoning of *Fogel* regarding the filed rate doctrine.[278]

Significantly, in *MacKay v. Superior Court*, a division of the California Court of Appeals other than the division in *Fogel* disagreed with *Fogel* in regard to the filed rate doctrine.[279] Allegations in *MacKay* that illegal criteria were considered in setting automobile insurance rates and issues involving the availability of a private right of action implicated the same chapter of the state's insurance code as did the claims in *Fogel*.[280]

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[275] Fogel v. Farmers Grp., Inc., 74 Cal. Rptr. 3d 61, 75 (Ct. App. 2008) (construing CAL. INS. CODE §§ 1420, 1860 (West 2005)).

[276] *Id.* The primary basis of the complaint was that the defending insurers charged excessive fees included in premium rates for acting as attorneys-in-fact for the plaintiffs in regard to insurance transactions. *Id.* at 65-66.

[277] *Id.* at 75. Several cases extending the doctrine to state administrative review are cited in Section VIII of this article although a number were issued after the 2008 *Fogel* decision.

[278] Miletak v. Allstate Ins. Co., No. C 06-03778 JW, 2010 WL 809579, at *4 (N.D. Cal. Mar. 5, 2010).

[279] MacKay v. Superior Court, 115 Cal. Rptr. 3d 893 (Ct. App. 2010). *Fogel* was decided by Fourth Division of the Second District of the Court of Appeal whereas *MacKay* was decided by the Third Division of the Second District.

[280] In addition to sections of the state's insurance code involving rebates, both *Fogel* and *MacKay* construed sections of Chapter 9, Article 10 of the state's insurance code entitled "Reduction and Control of Insurance Rates" and the effect of sections added by Proposition 103 approved by voters in 1988. CAL. INS. CODE §§ 1861.01-1861.16 (2005); *MacKay*, 115 Cal. Rptr. 3d at 903; *Fogel*, 74 Cal. Rptr. 3d at 66-68. With some exceptions, the statutory scheme involved pertains to insurance policies issued in the state including property and casualty policies. CAL. INS. CODE § 1851 (2005).

The court in *MacKay* found that the filed rate doctrine supported its conclusion that there could be no tort liability for charging a rate approved by the state's department of insurance expressing disagreement with *Fogel* "to the extent that it rejected the application of the filed rate doctrine to California insurance rates."[281] The *MacKay* court did not see the rebate system referenced in *Fogel* as a bar to application of the doctrine stating as follows in regard to the rebate system:

> We do not see this as a bar to the application of the filed rate doctrine. Indeed, as a plan for rebating excess premiums to policyholders "shall not be deemed a rating plan or system," the fact that an excess premium may be rebated does not in any way impact the controlling fact that, once a rating plan has been approved, the insurer may charge no other rate.[282]

Of courts, rates higher than the filed rate would be barred. The court in *MacKay*, however, did not address the effect of the rebate system resulting in insureds paying less than the rate initially filed and approved. Regulatory authorities are concerned with inadequate as well as excessive rates because inadequate rates may lead to insufficient funds with which to pay claims.[283] An issue exists as to whether a possible lack of administrative oversight regarding rebates and reserves reduces concerns regarding the justiciability strand of the filed rate doctrine involving the preservation of agency authority.[284] An interesting note is that the court in *Fogel* cited, but did not analyze, a section of the state's code providing that savings may be returned to subscribers "whenever such returns do not constitute an impairment of the assets or reserves required to be maintained."[285] Presumably, this section would provide a method by which

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[281] *MacKay*, 115 Cal. Rptr. 3d at 910.

[282] *Id.* at 910 n.18 (quoting CAL. INS. CODE § 1860 (West 2005)). Property and casualty insurers in California operate under a prior approval system whereby rates must be approved by the state's insurance commissioner prior to use. *See Fogel*, 74 Cal. Rptr. 3d at 66 (construing CAL. INS. CODE § 1861.01(c) (2005)).

[283] *See In re* N.Y. Conference of Blue Cross & Blue Shield Plans v. Muhl, 684 N.Y.S.2d 312 (App. Div. 1999).

[284] *See* Rios v. State Farm Fire & Cas. Co., 469 F. Supp. 2d 727, 738 (S.D. Iowa 2007) (recognizing the filed rate doctrine's application if a court decision would impact agency procedures and rate determinations).

[285] *Fogel*, 74 Cal. Rptr. 3d at 75 (citing CAL. INS. CODE § 1420 (West 2005)).

rebates could be policed, thus providing support for application of the filed rate doctrine.

XV. ISSUES OF FRAUD AND INEQUITY

Should the filed rate doctrine be disregarded when claims are based on fraud or inequity directed toward either policyholders or the administrative agency involved? The majority of insurance cases hold that claims of fraud do not prevent application of the doctrine. For example, the court in *Richardson v. Standard Guaranty Insurance Co.* reasoned that the doctrine "precludes fraud claims because it operates on the presumption that the plaintiff had knowledge of the filed rates and, thus, could not reasonably rely upon the regulated entity's misrepresentations or omissions of material facts."[286] Some courts, as discussed below, clarify that the filed rate doctrine bars claims of fraud only if rates are specifically implicated.

While refusing judicial intervention in the face of fraudulent conduct may seem inequitable, application of the doctrine in such cases avoids discrimination among policyholders and interference by the judiciary in agency affairs. As acknowledged in *Rios v State Farm Fire and Casualty Co.*, in regulatory matters of federal law, the Supreme Court recognizes that the filed rate doctrine "may seem harsh in some circumstances"[287] but accepts that result in order to prevent courts from upsetting agency authority.[288] Consideration should also be given to the fact that policyholders subjected to fraud may have redress through the agency system in the form of rebates or premium deductions granted to all similarly situated policyholders.[289]

A. CASES FINDING THE DOCTRINE NOT BARRED BY ALLEGATIONS OF FRAUD OR INEQUITY

The federal district court for the District of Delaware in *McCray v. Fidelity National Title Insurance Co.* relied on Third Circuit precedent in the telecommunications industry in stating "that there is no fraud-in-the-

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[286] Richardson v. Standard Guar. Ins. Co., 853 A.2d 955, 962 (N.J. Super. Ct. App. Div. 2004) (citing Weinberg v. Sprint Corp., 801 A.2d 281, 286 (N.J. 2002)).

[287] *Rios*, 469 F. Supp. 2d at 739 (quoting AT&T Co. v. Cent. Office Tel., Inc., 524 U.S. 214, 223 (1998)).

[288] *Id.* at 739-40 (citing H.J. Inc. v. Nw. Bell Tel. Co., 954 F.2d 485, 492 (8th Cir. 1992)).

[289] *See* H.J. Inc. v. Nw. Bell Tel. Co., 954 F.2d 485, 491 (8th Cir. 1992).

rate-setting exception to the filed rate doctrine."[290] Similarly, the federal district court in *In re Title Insurance Antitrust Cases* broadly stated that "[e]ven assuming as true that the rates submitted by the Defendant were fraudulent or the product of unlawful conduct, the filed rate doctrine still applies to bar Plaintiffs' claim for damages."[291]

In refusing to find an exception to the doctrine based upon alleged commission of fraud upon the regulating authority, the court in *Gipson v. Fleet Mortgage Group, Inc.* stated that "by far" the majority of courts considering the issue have refused to find a fraud exception.[292] The court in *Korte v. Allstate Ins. Co.* also recognized that the doctrine applies to claims of fraud "with courts rejecting the idea that there is a fraud exception to its application."[293] Pointing out that equity does not rule the day when the filed rate doctrine is at issue, the court in *Dolan v. Fidelity National Title Ins. Co.* stated that a court should not consider "'the culpability of the defendant's conduct or the possibility of inequitable results' when applying the doctrine."[294] Several other insurance cases also apply the filed rate doctrine to claims involving either allegations of fraud or inequitable conduct.[295]

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[290] McCray v. Fid. Nat'l Title Ins. Co., 636 F. Supp. 2d 322, 332 (D. Del. 2009) (citing AT&T Corp. v. JMC Telecom, L.L.C., 470 F.3d 525, 535 (3d Cir. 2006)).

[291] *In re* Title Ins. Antitrust Cases, 702 F. Supp. 2d 840, 857 (N.D. Ohio 2010).

[292] Gipson v. Fleet Mortg. Grp., Inc., 232 F. Supp. 2d 691, 705 (S.D. Miss. 2002) (citing Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 20 (2d Cir.1994); Taffet v. S. Co., 967 F.2d 1483, 1488-90 (11th Cir. 1992); *H.J. Inc.*, 954 F.2d at 494; Marco Supply Co. v. AT&T Commc'ns, Inc., 875 F.2d 434, 436 (4th Cir. 1989)).

[293] Korte v. Allstate Ins. Co., 48 F. Supp. 2d 647, 650 (E.D. Tex. 1999) (citing Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 20 (2d Cir. 1994)); *see also* Transp. Data Interchange, Inc. v. AT&T Corp., 920 F. Supp. 86, 89-90 (D. Md. 1996).

[294] Dolan v. Fid. Nat'l. Title Ins. Co., No. 08-CV-00466 (TCP)(WDW), 2009 WL 3934153, at *3 (E.D.N.Y. 2009) (quoting Marcus v. AT&T Corp., 138 F.3d 46, 58 (2d Cir. 1998)) *aff'd*, 365 Fed. App'x 271 (2d Cir. 2010).

[295] *E.g.*, Roussin v. AARP, Inc., 664 F. Supp. 2d 412, 415 (S.D.N.Y. 2009), *aff'd*, No. 09-4932-CV, 2010 WL 2101912 (2d Cir. May 26, 2010); *In re* N.J. Title Ins. Litig., No. 08-1425, 2009 WL 3233529, at *2 (D.N.J. Oct. 5, 2009); Hooks v. Am. Med. Sec. Life Ins. Co., No. 3:06CV71, 2008 WL 3911130, at *5-6 (W.D.N.C. Aug. 19, 2008); Alexander v. Washington Mut., Inc., No. 07-4426, 2008 WL 2600323, at *2 (E.D. Pa. June 30, 2008); Anderson v. City Fin. Co., No. Civ.A. 3:02CV1074LN, 2003 WL 21788947, at *4 n.9 (S.D. Miss. July 14, 2003); Bender v. Friedman's Inc., No. Civ.A. 4:02CV509LN, 2003 WL 21497487, at *2

Additionally, although not an insurance case, *H.J. Inc. v. Northwestern Bell Telephone Co.*, a RICO case from the telecommunications industry, is significant in regard to the relation between fraud and the filed rate doctrine.[296] In response to allegations that agency officials accepted bribes in regard to rate setting, the court in *H.J. Inc.* ruled as follows that even improper activity on the part of agency officials did not prevent application of the doctrine:

> It is true that the Supreme Court has not considered the question of whether the filed rate doctrine applies when plaintiffs complain that the regulatory agency itself was involved in the alleged fraudulent conduct. We are convinced, however, that 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.[297]

In rejecting the position that the filed rate doctrine should be disregarded because the court was not asked to engage in ratemaking, the court in *H.J. Inc.* noted that damages could only be determined by measuring the difference between approved rates and rates that should have been approved absent the alleged wrongful conduct.[298] Making such a determination would, by definition, involve the court in ratemaking procedures.

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n.2 (S.D. Miss. May 30, 2003); Strong v. First Family Fin. Servs., Inc., 202 F. Supp. 2d 536, 545 (S.D. Miss. 2002); Kirksey v. Am. Bankers Ins. Co. of Fla., 114 F. Supp. 2d 526, 529 (S.D. Miss. 2000); Uniforce Temp. Pers., Inc. v. Nat'l Council on Comp. Ins., Inc., 892 F. Supp. 1503, 1511-12 (S.D. Fla. 1995), *aff'd on other grounds*, 87 F.3d 1296 (11th Cir. 1996); Horowitz *ex rel.* Gilbert v. Bankers Life & Cas. Co., 745 N.E.2d 591, 605 (Ill. App. 2001); Commonwealth *ex rel.* Chandler III v. Anthem Ins. Co's., Inc., 8 S.W.3d 48, 53 (Ky. App. 1999); Stepan v. Edina Realty Title, Inc., No. A07-0578, 2008 WL 2020434, at *2-3 (Minn. Ct. App. 2008); Byan v. Prudential Ins. Co. of Am., 662 N.Y.S.2d 44, 45 (App. Div. 1997); *In re* Empire Blue Cross & Blue Shield Customer Litig., 622 N.Y.S.2d 843, 848 (Sup. Ct. 1994), *aff'd sub nom.* Minihane v. Weissman, 640 N.Y.S.2d 102 (App. Div. 1996).

[296] H.J. Inc. v. Nw. Bell Tel. Co., 954 F.2d 485 (8th Cir. 1992).

[297] *Id.* at 489.

[298] *Id.* at 494.

B. CASES CLARIFYING THAT THE DOCTRINE APPLIES TO RATE-RELATED FRAUD ONLY

The court in *Rios v. State Farm Fire & Casualty Co.* clarified that the filed rate doctrine bars only rate-related allegations of fraud.[299] The court discussed the history of and the reasoning behind the doctrine as well as its relationship in regard to challenges to services. The court recognized, for example, that the doctrine is implicated when a claim for excessive rates is couched as a claim for inadequate services.[300] In regard to the applicability of the filed rate doctrine, the court further stated that the label placed on a claim, such as fraud, is not the appropriate issue and that instead 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."[301]

The dispute in *Rios* stemmed from State Farm's policy regarding the timing of payments for roof repair. In the states involved, State Farm's initial policy was that it would pay only for a roof overlay when damage was initially incurred,[302] withholding payment for full replacement cost until an entirely new roof was actually in place. If a policyholder did not fully replace a damaged roof within a specified time period, the policyholder never got full replacement cost reimbursement.[303] Later, however, for marketing purposes, State Farm decided to pay the full replacement cost "upfront" when the damage was incurred and issued policies to that effect.[304] After incurring significant unexpected losses, State Farm attempted to remove the upfront payment provision from policies.[305] Of course, outstanding policies retained the provision, and regulatory approval was required before State Farm could legitimately revert to the earlier policy provisions.[306] The plaintiffs alleged that State Farm continued to sell the upfront endorsement policies, although never intending to honor them, and that State Farm fraudulently reverted to the two-part payment system without obtaining regulatory approval.[307]

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[299] Rios v. State Farm Fire & Cas. Co., 469 F. Supp. 2d 727 (S.D. Iowa 2007).

[300] *Id.* at 735.

[301] *Id.* at 737 (quoting *H.J. Inc.*, 954 F.2d at 489).

[302] A roof overlay involves laying new roof shingles on top of existing roof shingles. *Rios*, 469 F. Supp. 2d at 731.

[303] *Id.*

[304] *Id.* at 731-32.

[305] *Id.* at 732.

[306] *Id.*

[307] *Id.*

Under the theory of fraudulent inducement, damages in the form of rescission and disgorgement of premiums for the upfront endorsement were sought by the class of plaintiffs who had not actually sustained roof damage.[308] The court in *Rios* recognized that the plaintiffs could sue for "damages by having been deprived of benefits which were promised, and were consistent with the filed rate, but were not delivered."[309] The court found, however, that the damages sought, return of the premiums paid for the upfront endorsement, would necessarily and plainly "challenge the rates previously approved by the Commission[er]."[310] In other words, the plaintiffs' problem was that their damages could only be measured by comparing the difference between the rates the Commissioner approved with the ones that allegedly should have been approved without the upfront endorsement.[311] The court in *Rios* further discussed the need for and application of the filed rate doctrine in relation to the plaintiffs' claims as follows:

> While Plaintiffs argue that the Court would not be involved in any rate making or be required to second guess the rate making agency because they merely seek the full return of all premiums for the Upfront Endorsement, the Court disagrees . . . . As stated above, to appropriately measure Plaintiff's and Class I members' damages, the Court would first have to determine the premiums paid for the Upfront Endorsement provision (as opposed to the premiums paid for the entire homeowner's policy), and then the Court would have to "second guess" what rate the Commissioner would have charged for each relevant Class Period for the homeowners' policies less the Upfront Endorsement provision.[312]

According to the court, the relief sought by the plaintiffs "falls squarely

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[308] *Rios*, 469 F. Supp. 2d at 733.

[309] *Id.* at 739 (quoting Richardson v. Standard Guar. Ins. Co., 853 A.2d 955, 967 (N.J. Super. App. Div. 2004)).

[310] *Id.* at 738 (quoting H.J. Inc. v. Nw. Bell Tel. Co., 954 F.2d 485, 493 (8th Cir. 1992)).

[311] *Id.* at 739 (citing Ark. La. Gas Co. v. Hall, 453 U.S. 571, 577 (1981); H.J. Inc. v. Nw. Bell Tel. Co., 954 F.2d 485, 494 (8th Cir. 1992)).

[312] *Rios*, 469 F. Supp. 2d at 739 (citations omitted).

within the filed rate doctrine."[313]

Another case closely examining the filed rate doctrine in connection with allegations of wrongdoing, including fraud, is *American Bankers' Insurance Co. of Florida v. Wells*, a case in which the Supreme Court of Mississippi addressed claims that the defending lender and insurer improperly profited from insurance the lender purportedly obtained to protect its security interest in automobiles sold to the claimants.[314] The court in *Wells* distinguished between allegations of wrongdoing committed in connection with performance of a contract as opposed to claims challenging policy rates. In finding that the claimants sought some premium-related damages barred by the doctrine, the court noted that one of the central allegations of the case was that the lender obtained a credit protection policy with excessive rates and provisions slanted in favor of the lender.[315] The court also recognized that the actual damages claimed by the plaintiffs closely paralleled the premium charges imposed.[316] In remanding the case, the court provided the following instructions to the trial judge.

> We remand this case to the trial court for a new trial with directions that Wells and Oliver [claimants] be limited to recovery for damages (if any) resulting from tortious conduct in the performance, rather than the rates and terms, of the contract in question. The trial judge should also be careful, however, to prevent the jury from imposing liability based upon the rates of the policies in question which are subject to oversight by the Department of Insurance in the exercise of its statutory mandate.[317]

Following are claims in *Wells* that the court found arguably fell outside the ambit of the filed rate doctrine:

- Backdating and charging for insurance coverage that was worthless because no damage had occurred during the period.

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[313] *Id.* (quoting *H.J. Inc.*, 954 F.2d at 492). The court noted an unresolved issue, however, involving the state law to be applied to the proposed nationwide class and its effect on the application of the filed rate doctrine. *Id.* at 740.

[314] Am. Banker's Ins. Co. of Fla. v. Wells, 819 So. 2d 1196 (Miss. 2001).

[315] *Id.* at 1204.

[316] *Id.*

[317] *Id.* at 1205 (citation omitted) (emphasis omitted).

- Requiring and charging for automobile insurance based upon an incorrect amount owed.
- Improperly requiring repossession of damaged vehicles.
- Committing fraud by basing premiums on an inaccurate time period and improperly adding surcharges to premiums.[318]

C. THE EFFECT OF A FAILURE TO DISCLOSE

After addressing both the nondiscrimination and the nonjusticiability strands of the doctrine, the court in *Lentini v. Fidelity National Title Insurance Co. of New York* found the filed rate doctrine inapplicable to claims that the defendant, through its agent, wrongfully failed to disclose the availability of discounted rates for insurance to which plaintiffs were allegedly entitled.[319] Regarding the nonjusticiability strand of the doctrine involving the conclusiveness of agency decision making, the court recognized that the plaintiff was simply attempting to require that the defendant adhere to the approved rates.[320] In regard to the nondiscrimination strand of the doctrine, the court stated that the plaintiff

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[318] *Id.* at 1204-05. Interestingly, the court in *Wells* referenced another Mississippi Supreme Court decision decided the same year, *Am. Bankers Ins. Co. of Fla. v. Alexander*, 818 So. 2d 1073 (Miss. 2001), *overruled on other grounds by Capital City Ins. Co. v. G.B. "Boots" Smith Corp*., 889 So. 2d 505 (Miss. 2004), which seemed to take a stronger position regarding justification for disregard of the filed rate doctrine in the face of allegations of fraud. *See Am. Bankers Ins. Co. of Fla.*, 818 So.2d at 1083-85. The *Wells* court distinguished *Alexander* on the basis that *Alexander* was reviewed on an interlocutory appeal rather than after a trial on the merits. The court in *Wells* believed the evidence presented at trial established that certain claims were based on excessive premiums in violation of the filed rate doctrine. *Wells*, 308 So.2d at 1205 n.2. The dissent in *Wells,* however, was of the opinion that *Alexander* established that the filed rate doctrine failed to bar the claims at issue in the case involving breach of fiduciary duty, breach of the duty of good faith and fair dealing, and fraud. *Id.* at 1211 (McRae, J., dissenting).

[319] Lentini v. Fid. Nat'l Title Ins. Co. of N.Y., 479 F. Supp. 2d 292 (D. Conn. 2007).

[320] *Id.* at 301 (citing Randleman v. Fid. Nat'l Title Ins. Co., 465 F. Supp. 2d 812 (N.D. Ohio 2006)); Zanagara v. Travelers Indem. Co. of Am., 423 F. Supp. 2d 762, 776 (N.D. Ohio 2006), *vacated on other grounds*, No. 1:05CV731, 2006 WL 825231 (N.D. Ohio Mar. 30, 2006) (previous order vacated based on an issue involving subject matter jurisdiction)).

was seeking to enforce the filed rate, not obtain a lower rate than that charged to other consumers.[321] Of course, whether the defendant had a duty to disclose the information at issue was a question of fact for the jury.[322] The point of the court's ruling was that the filed rate doctrine did not bar the plaintiff from proceeding with proof.

Another case finding that allegations of nondisclosure fell outside the ambit of the filed rate doctrine is *Chambers v. Union National Life Insurance Co.*, an unreported federal district court decision.[323] In that case the court refused to apply the doctrine to bar claims that the defendants wrongfully failed to tell the plaintiff insureds that their policies contained waiver of premium provisions for the disabled.[324] The result of these cases seems correct because the rate enforcement aspect of the doctrine is not served by allowing circumvention of rates by defendants.

XVI. CHARGES OUTSIDE THE BASIC RATE – INSTALLMENT PAYMENTS, RENEWALS, AND OTHER FEES AND CHARGES

A. INSTALLMENT PAYMENTS

There is authority to the effect that disputes involving contractual provisions by which insureds, for a fee, may pay insurance premiums by installment are not affected by the filed rate doctrine. For example, in *Farmers Texas County Mutual Insurance Co. v. Romo*, the plaintiffs claimed that by virtue of the filed rate doctrine, the only lawfully prescribed charges were those filed with the state's department of insurance and that because the defending insurers did not file installment payment plan fees, the fees were illegal.[325] The court, however, found in favor of the defendants ruling that the statutes at issue did not require the filing of installment plan charges rendering moot the argument regarding the filed rate doctrine.[326] The case raises the issue, however, of whether the filed rate doctrine would bar judicial relief in regard to installment fees in a state requiring the filing of such fees.

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[321] *Lentini*, 479 F. Supp. 2d at 302.

[322] *Id.* at 301.

[323] Chambers v. Union Nat'l Life Ins. Co., No. Civ.A. 301CV452WS, 2002 WL 32397267 (S.D. Miss. Mar. 29, 2002).

[324] *Id.* at *4.

[325] Farmers Tex. Cnty. Mut. Ins. Co. v. Romo, 250 S.W.3d 527, 533 (Tex. App. 2008).

[326] *Id.* at 538.

The court in *Lapenna v. Government Employees Insurance Co.* an unreported federal district court decision, also found that the filed rate doctrine failed to bar claims regarding the improper assessment of installment payments.[327] According to the court, "the filed rate doctrine is inapplicable here because this dispute centers on installment fees, which are distinct from premium rates."[328] The installment payment charges at issue in *Lapenna* were governed by statute,[329] and there was no indication that the state required the filing of fees for installment payments with the state department of insurance.

B. RENEWALS

In *Hooks v. American Medical Security Life Insurance Co.*, the court refused to accept the plaintiffs' position that the filed rate doctrine was inapplicable to claims of excessive premium charges for policy renewals.[330] The court recognized that, by statute, readjustment of the premium rate was allowed based on an insurer's "experience thereunder," and that the phrase "experience thereunder" referred back to initial rate filings.[331] The court, therefore, reasoned that any decision regarding renewal rates would have to refer back to the initial rates; and that the filed rate doctrine applied as a bar because "[t]he plaintiffs cannot prove their claim without the rates set by the Commissioner being questioned."[332]

The plaintiffs in *Hooks* also claimed that the defendants wrongfully increased premiums by retaining portions of membership fees.[333] The plaintiffs thought the membership fees at issue were to be paid to another organization they believed they had joined in order to obtain group rates.[334] The court, however, determined that the claim was barred by the filed rate doctrine because the doctrine prohibits the recovery of damages measured by comparing the approved rate and the rate that would have been charged

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[327] Lapenna v. Gov't Emps. Ins. Co., No. 8:05-cv-904-T-24MSS, 2007 WL 4199580 (M.D. Fla. Nov. 26, 2007), *aff'd*, 316 F. App'x 894 (11th Cir. 2009).

[328] *Id.* at *2 n.3.

[329] *Id.* at *3-4.

[330] Hooks v. Am. Med. Sec. Life Ins. Co., No. 3:06cv71, 2008 WL 3911130 (W.D.N.C. Aug. 19, 2008).

[331] *Id.* (construing N.C. GEN. STAT. § 58-51-80(g) (2009)).

[332] *Id.* at *5 (citing Lupton v. Blue Cross & Blue Shield of N.C., 533 S.E.2d 270, 273 (N.C. Ct. App. 2000)).

[333] *Id.*

[334] *Id.* at *6.

absent the alleged improper conduct.[335]

The *Hooks* court referenced *Euclid Insurance Agencies, Inc. v. American Association of Orthodontists*,[336] cited by the plaintiffs, recognizing that the court in that case "found that a claim for breach of contract for failing to adjust rates pursuant to the contract was not precluded by the filed rate doctrine."[337] The court, however, did not discuss that theory further on the basis that the plaintiffs in *Hooks* had not raised a breach of contract claim.[338] *Hooks* raises the issue of whether in some cases by artful pleading, a litigant may be able to avoid the effects of the filed rate doctrine.

C. OTHER ADMINISTRATIVE FEES

The Supreme Court of Texas in *Mid-Century Insurance Co. of Texas v. Ademaj* approved the assessment of a fee outside the insurer's filed rates imposed to cover the costs of a state anti-theft program.[339] The state's insurance commissioner had specifically authorized the imposition of the charge[340] and had promulgated a rule under which insurers were not required to include the fee in rate filings.[341] The plaintiffs claimed that the fee was wrongfully imposed because it was not included in premium rates filed with the state.[342] Although acknowledging that the filed rate doctrine was applied in the state,[343] the court recognized the absence of authority that charges validly approved by the commissioner would be barred by the doctrine and upheld the imposition of the fee.[344] The plaintiffs in *Ademaj* did not assert the filed rate doctrine as it is generally understood—as a bar to challenges of approved rates. The case illustrates, however, the various ways in which the doctrine may be asserted.

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[335] *Id.*

[336] Euclid Ins. Agencies, Inc. v. Am. Assoc. of Orthodontists, No. 95 C 3308, 1997 WL 548069 (N.D. Ill. Sept. 3, 1997).

[337] *Hooks*, 2008 WL 3911130, at *5 n.6.

[338] *Id.*

[339] Mid-Century Ins. Co. of Tex. v. Ademaj, 243 S.W.3d 618 (Tex. 2007).

[340] *Id.* at 620.

[341] *Id.* at 624 (citing 28 TEX. ADMIN. CODE § 5.205(b) (1992)).

[342] *Id.* at 625.

[343] *Id.* (citing Sw. Elec. Power Co. v. Grant, 73 S.W.3d 211, 216-17 (Tex. 2002)).

[344] *Id.*

XVII. APPLICATION OF THE FILED RATE DOCTRINE IN SPECIFIC AREAS

While the filed rate doctrine is not limited to specific realms, it does seem to appear more frequently in relation to certain types of claims. Following is a discussion of the doctrine as applied to antitrust claims, discrimination claims, alleged violations of the Racketeer Influenced and Corrupt Organizations Act,[345] breach of contract claims, and to allegations regarding the wrongful receipt of kickbacks or unearned premiums—all areas in which the doctrine is commonly raised.

A. RESTRAINT OF TRADE AND ANTITRUST CLAIMS

The filed rate doctrine arises frequently in conjunction with claims of antitrust and restraint of trade violations in the insurance industry. For example, in *Allen v. State Farm Fire & Casualty Co.* the court recognized that the gravamen of the plaintiffs' claims was that the defending insurers concertedly and in restraint of trade agreed not to offer homeowners' insurance coverage in coastal areas unless a percentage-based hurricane deductible was allowed.[346] In ruling that the claims were barred for reasons including the filed rate doctrine, the court recognized that the doctrine "prohibits a party from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in issue."[347] The court further set forth its reasoning as follows:

> Allowing the plaintiffs to circumvent the established statutory process for approval of insurance rates by allowing the Court to become enmeshed in the rate-making process would undermine Alabama's current regulatory regime, which, through its statutory administrative remedies, is designed to be self-policing. If this Court strikes the hurricane deductible, thereby increasing coverage under the policies, that necessarily affects a decrease in the defendants' effective rates and disturbs the commissioner's rate-making authority. Therefore, pursuant

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[345] 18 U.S.C. §§ 1961-68 (2006 & Supp. III 2009).

[346] Allen v. State Farm Fire & Cas. Co., 59 F. Supp. 2d 1217, 1230 (S.D. Ala. 1999).

[347] *Id.* at 1227 (quoting Calico Trailer Mfg. Co. v. Ins. Co. of N. Am., 155 F.3d 976, 977 (8th Cir. 1998)).

> to the filed-rate doctrine, this Court concludes that plaintiffs' claims challenging the unlawfulness of the defendants' rate filing, which include the hurricane deductible, are due to be dismissed.[348]

Many other cases have also relied on the filed rate doctrine in dismissing claims of antitrust violations arising under federal and state law,[349] although there is contrary authority.[350]

The following sections address exceptions in the insurance field that have been claimed in relation to application of the doctrine in antitrust cases. Of course, as discussed in Section V of this article, litigants in insurance cases involving interplay between state and federal law should consider the impact of the McCarran-Ferguson Act[351] as well as the filed rate doctrine.

1. Issues Involving Alleged Non-Rate Anticompetitive Activity

Citing *In re Lower Lake Erie Iron Ore Antitrust Litigation*,[352] the court in the insurance case of *In re Pennsylvania Title Insurance Antitrust*

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[348] *Id.* at 1229.

[349] *E.g.*, Winn v. Alamo Title Ins. Co., 372 F. App'x 461, 462-63 (5th Cir. 2010); Dolan v. Fid. Nat'l Title Ins. Co., 365 F. App'x 271, 272-73 (2d Cir. 2010); *In re* Title Ins. Antitrust Cases, 702 F. Supp. 2d 840, 890 (N.D. Ohio 2010); *In re* N.J. Title Ins. Litig., No. 08-1425, 2009 WL 3233529, at *2-4 (D.N.J. Oct. 5, 2009); Uniforce Temp. Pers., Inc. v. Nat'l Council on Comp. Ins., Inc., 892 F. Supp. 1503, 1511-12 (S.D. Fla. 1995), *aff'd on other grounds*, 87 F.3d 1296, 1301 (11th Cir. 1996); Calico Trailer Mfg. Co., Inc. v. Ins. Co. of N. Am., LR-C-93-717, 1994 WL 823554, at *1-2, *8 (E.D. Ark. Oct. 12, 1994); Amundson & Assocs. Art Studio, Ltd. v. Nat'l Council on Comp. Ins., Inc., 988 P.2d 1208, 1213, 1216-17 (Kan. Ct. App. 1999) (applying the doctrine to claims arising under state antitrust claims); N.C. Steel, Inc. v. Nat'l Council on Comp. Ins., 496 S.E.2d 369, 372 (N.C. 1998) (applying the doctrine to state antitrust claims); Prentice v. Title Ins. Co. of Minn., 500 N.W.2d 658, 659, 663-64 (Wis. 1993) (applying the filed rate doctrine to antitrust action arising under state law).

[350] *See* Brown v. Ticor Title Ins. Co., 982 F.2d 386, 393-94 (9th Cir. 1992). *Brown* is discussed in detail in Section XIV C. of this article, addressing the type of administrative review required for imposition of the doctrine. *See supra* pp. 42-48.

[351] 15 U.S.C. §§ 1011-15 (2006).

[352] *In re* Pa. Title Ins. Antitrust Litig., 648 F. Supp. 2d 663, 680 (E.D. Pa. 2009) (citing *In re* Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1159-61 (3d Cir. 1993)).

Litigation recognized that the Third Circuit has "carved out a non-rate anticompetitive activity exception" to the filed rate doctrine's preclusive effect in antitrust actions. Under that exception, the filed rate doctrine does not apply to situations, such as that occurring in *Lower Lake Erie*, in which it was found that the defendants acted to inhibit lower cost competitors from entering the shipping market following technological advances enabling shipment of iron ore by means other than rail.[353] Specifically, the railroads illegally conspired and acted to prevent the movement of iron ore by trucking through, for example, restricting the lease and sale of railroad-owned dock property.[354] The plaintiffs contended that absent the conspiracy, they would have paid lower costs for the transportation of iron ore.[355] Addressing the fact that rates were filed with the ICC, the court in *Lower Lake Erie* explained the non-rate activity exception to the filed rate doctrine as follows:

> We recognize that the success of anticompetitive non-rate activity would coincidentally implicate rates promulgated under the jurisdiction of the ICC. It is fully consistent with *Keogh* [*v. Chicago & Northwestern Railway Co*], however, to accept these rates as lawful and nonetheless to conclude that through non-rate activities, particularly the restriction on the sale or lease of dock space and the refusal to deal with potential competitors, the railroads effectively retarded entry of lower cost competitors to the market. The instrument of damage to the steel companies was the absence of the lower-cost combination. In contrast, the Supreme Court in *Keogh* made it clear that "the instrument by which Keogh is alleged to have been damaged is rates approved by the Commission."[356]

The court in *Lower Lake Erie* recognized that "[i]t was the railroads' hindering the development of the market which defines this antitrust litigation."[357]

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[353] *See Lower Lake Erie*, 998 F.2d at 1159-61; *In re Pa. Title Ins. Antitrust Litig.*, 648 F. Supp. 2d at 680 (citing Bar Techs., Inc. v. Conemaugh & Black Lick R.R. Co., 73 F. Supp. 2d 512, 518 (W.D. Pa. 1999)).

[354] *Lower Lake Erie*, 998 F.2d at 1152-53.

[355] *Id.* at 1154.

[356] *Id.* at 1159 (quoting Keogh v. Chicago & Nw. Ry., 260 U.S. 156, 161 (1922)).

[357] *Id.* at 1160.

On the other hand, the court in *In re Pennsylvania Title Insurance Antitrust Litigation* cited *Utilimax.com, Inc. v. PPL Energy Plus, LLC*[358] as an example of the type of situation to which the non-rate anticompetitive activity exception is inapplicable.[359] In *Utilimax* the plaintiff, a retail supplier of electricity, claimed that the defendant, through its monopolistic position, exerted undue market influence over the wholesale electricity market enabling it to charge excessive rates.[360] The court in *Utilimax* distinguished *Lower Lake Erie* on the basis that the dispute in *Lower Lake Erie* dealt with activities wholly separate from rates.[361] The *Ultimax* court was of the opinion that the plaintiff, in simply claiming that the defendant "exploited its market position by raising its rates," failed to allege non-rate anticompetitive activity and, therefore, the filed rate doctrine barred the claims.[362]

The court in *In re Pennsylvania Title* found that the alleged wrongdoing in that case fell closer to market exploitation, which the *Ultimax* court considered rate-related, than market exclusion, which the *Lake Erie* court considered non-rate related. The determining factor in the court's opinion was that the plaintiffs challenged the rates themselves, not activity separate from the rates.[363] This exception to the filed rate doctrine is not frequently referenced in insurance cases. As the doctrine continues to develop, it would not be unexpected for plaintiffs to focus on non-rate activities in an effort to avoid the effects of the doctrine.

2. The Impact of "Price Squeeze" Cases

The plaintiffs in *McCray v. Fidelity National Title Insurance Co.* claimed that the filed rate doctrine was inapplicable to claims of price fixing in relation to insurance rates because the insurance regulatory regime involved was insufficiently comprehensive.[364] Specifically, the plaintiffs

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[358] 378 F.3d 303 (3d Cir. 2004).

[359] *In re* Pa. Title Ins. Antitrust Litig., 648 F. Supp. 2d 663, 680 (E.D. Pa. 2009) (citing *Utilimax,* 378 F.3d at 308).

[360] *Utilimax*, 378 F.3d at 306.

[361] *Id.* at 308.

[362] *Id.* Although finding it inapplicable, the court in *Ultimax* also referenced a competitor exception to the filed rate doctrine. The reasoning for such a rule is that competitors are not the intended beneficiaries of rate regulation. *Id.* at 307. That exception has not been analyzed in insurance cases.

[363] *In re Pa. Title Ins. Antitrust Litig.*, 648 F. Supp. 2d at 680.

[364] McCray v. Fid. Nat'l Title Ins. Co., 636 F. Supp. 2d 322, 330 (D. Del. 2009).

complained that the regulations failed to provide claimants with monetary relief for rates initially accepted by the state's department of insurance but later found to be unreasonable or fraudulent.[365] According to the plaintiffs, their claims fell into a type of "regulatory lacuna" counseling against the application of the filed rate doctrine.[366] The court noted that the plaintiffs primarily relied on "price squeeze" cases in support of their argument.[367]

The court in *Borough of Lansdale v. PP & L, Inc.*, a case arising in the electric industry cited by the *McCray* court,[368] explained that a price squeeze case generally involves a defending monopolist who supplies the plaintiff at one level, such as at the wholesale level; competes with the plaintiff on another level, such as at retail; and then seeks to destroy the plaintiff by charging the plaintiff a higher wholesale price than other retail customers.[369] The court in *Borough of Lansdale* recognized that when no one regulatory agency has complete jurisdiction over the rating system at issue in a price squeeze claim, the filed rate doctrine is inapplicable.[370] On the basis that two agencies were involved in the rating system at issue, the court refused to apply the filed rate doctrine to bar the plaintiff's price squeeze claims stating that application of the doctrine would result in "no mechanism to reiew overall ratemaking and its potential anticompetitive effects."[371]

The court in *McCray* correctly reasoned that the situation presented in that case did not qualify for any such exception stating: "The plaintiffs' claim falls into no regulatory lacuna. There is but one regulatory authority here . . . and it is fully empowered to regulate the one rate at issue here that involves title insurance premiums."[372] The court, however, stopped short of ruling that a price squeeze situation involving, for example, competing regulatory authority would fail to qualify as an exception to the filed rate

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[365] *Id.*

[366] *Id.*

[367] *Id.* (citing Kirkwood v. Union Elec. Co., 671 F.2d 1173, 1176 (8th Cir. 1982); City of Mishawaka v. Ind. & Mich. Elec. Co., 560 F.2d 1314, 1321 (7th Cir. 1977)).

[368] *McCray*, 636 F. Supp. 2d at 330-31 (citing Borough of Lansdale v. PP & L, Inc., 503 F. Supp. 2d 730, 736 (E.D. Pa. 2007)).

[369] Borough of Lansdale v. PP & L, Inc., 503 F. Supp. 2d 730, 735 (E.D. Pa. 2007).

[370] *Id.* at 742. The court, however, recognized the existence of contrary authority on the issue of whether the filed rate doctrine bars price squeeze claims implicating the jurisdiction of more than one set of rate regulations. *Id.* at 736.

[371] *Id.* at 742.

[372] *McCray*, 636 F. Supp. 2d at 331.

doctrine.

3. Allegations of Illegal Boycotts

Claims of boycott are typical in the antitrust arena although there is little case law addressing the relationship between boycotts and the filed rate doctrine. The court in *Arroyo-Melecio v. Puerto Rican American Insurance Co.* refused to apply the filed rate doctrine to bar allegations that private insurers, who allegedly benefited from the placement of compulsory insurance with a state-created agency, engaged in a boycott to punish an insurance broker for aiding in the private placement of compulsory insurance.[373] Quoting the First Circuit decision of *Town of Norwood v. New England Power Co.* for the proposition that "[t]he law on the filed rate doctrine is extremely creaky,"[374] the court stated that "[w]e think that boycott has little to do with the filed rate doctrine, a famously complex and sometimes criticized set of rules."[375] In reaching its conclusion, the court focused on aspects of the filed rate doctrine prohibiting contractual agreements or other claims seeking rates different from those reflected in agency filings, not activity associated with boycotts.[376] Arguably, however, because agency procedures and rate determinations would be affected, if the gravamen of a claim is that excessive rates were charged due to a boycott, the filed rate should be applicable in jurisdictions recognizing its application in the insurance arena.[377]

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[373] Arroyo-Melecio v. P.R. Am. Ins. Co., 398 F.3d 56, 69, 73 (1st Cir. 2005).

[374] *Id.* at 73 (quoting Town of Norwood v. New England Power Co., 202 F.3d 408, 420 (1st Cir. 2000)).

[375] *Arroyo-Melecio*, 398 F.3d at 73. *See also In re* Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1159 (3d Cir. 1993).

[376] *Arroyo-Melecio*, 398 F.3d at 73 (citing Town of Norwood v. Fed. Energy Regulatory Comm'n, 217 F.3d 24, 28 (1st Cir. 2000)).

[377] *See, e.g.*, Roussin v. AARP, Inc., 664 F. Supp. 2d 412, 416-17 (S.D.N.Y. 2009) (recognizing that because the plaintiff was actually complaining of rates, the filed rate doctrine applied to claims styled as breach of fiduciary duties and gross negligence), *aff'd*, 379 F.App'x 30, 31 (2d Cir. 2010); Rios v. State Farm Fire & Cas. Co., 469 F. Supp. 2d 727, 735 (S.D. Iowa 2007) (refusing to countenance avoidance of the doctrine through styling a claim for excessive rates as a claim for inadequate service).

B. DISCRIMINATION AGAINST PROTECTED CATEGORIES

Cases of unlawful discrimination in the area of insurance may involve claims of "redlining" involving allegations that a defendant refused to insure properties located in districts with a high population of minorities.[378] Plaintiffs have also alleged the subjection of minorities to illegal discrimination through the use of credit scores to set insurance rates.[379] Plaintiffs in cases alleging discrimination have had varying degrees of success when confronted with the filed rate doctrine defense. Based on the following case law, depending on the jurisdiction involved, it seems that plaintiffs may fare better in regard to avoiding the effects of the filed rate doctrine when proceeding under federal law and also when proceeding under broad based anti-discrimination laws as compared to anti-discrimination regulations specifically impacting insurance.[380]

1. Authority that the Filed Rate Doctrine Bars Discrimination Claims

Schermer v. State Farm Fire & Casualty Co., decided by the Minnesota Supreme Court, involved a class action alleging that a surcharge imposed on older homes was racially discriminatory and a form of redlining.[381] The plaintiffs sued on the basis of a Minnesota statute prohibiting the charge of differential rates for homeowner's insurance solely because of the age of the structure but allowing rating standards based on the age of components of the residence, such as the electrical system, affecting the risk of loss.[382] The plaintiffs alleged that the rate differential was illegally based on home age rather than electrical system age, as claimed by the defending insurer.[383] Upholding the filed rate

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[378] *See, e.g.*, Schermer v. State Farm Fire & Cas. Co., 721 N.W.2d 307 (Minn. 2006).

[379] *See, e.g.*, Lumpkin v. Farmers Grp., Inc., No. 05-2868 Ma/V, 2007 WL 6996584 (W.D. Tenn. Apr. 26, 2007).

[380] *Compare Schermer*, 721 N.W.2d 307 (Minn. 2006) (applying the doctrine to bar claims under state laws specifically prohibiting discrimination in the provision of home owner's insurance), *with* Saunders v. Farmers Ins. Exch., 440 F.3d 940 (8th Cir. 2006) (refusing to apply the doctrine to bar claims under federal anti-discrimination laws).

[381] *Schermer*, 721 N.W.2d 307 (Minn. 2006).

[382] The court referred to the statute involved, MINN. STAT. ANN. § 72A.20 (West 2011), as the "anti-redlining" statute. *Schermer*, 721 N.W.2d at 309.

[383] *Schermer*, 721 N.W.2d at 309.

doctrine, the court ruled that the claims were barred even assuming the truth of the plaintiffs' allegations.[384]

In discussing exceptions to the filed rate doctrine, the court in *Schermer* referenced *Saunders v. Farmers Insurance Exchange*,[385] an Eighth Circuit decision discussed further below, for the proposition that "where a rate filed with a state regulatory agency violates a federal antidiscrimination statute, the federal statute predominates under the Supremacy Clause and the filed rate doctrine is inapplicable."[386] The *Schermer* court did not specifically express agreement or disagreement with the holding in *Saunders*. An issue exists, however, as to whether the court in *Shermer* would have ruled differently had a claim under federal anti-discrimination law been raised as opposed to a claim under state law specifically addressing insurance rates. Additionally, the court in *Schermer* recognized that the plaintiffs in that case had not filed a claim under the Minnesota Human Rights Act[387] thereby leaving open the issue of whether the filed rate doctrine would have applied in that instance.[388]

2. Authority that the Filed Rate Doctrine is Inapplicable to Discrimination Claims

In *Saunders v. Farmers Insurance Exchange*, plaintiffs sued numerous insurers under the federal Fair Housing Act[389] and under Sections 1981[390] and 1982[391] of the Civil Rights Acts, alleging race discrimination in connection with the provision of homeowners' insurance coverage.[392] The court stated that on the record involved, state regulation of insurance rates did not support applying the filed rate doctrine to bar damage claims arising under federal civil rights statutes.[393] In reliance on the Supremacy Clause of the United States Constitution,[394] the court

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[384] *Id.* at 319.

[385] Saunders v. Farmers Insurance Exchange, 440 F.3d 940 (8th Cir. 2006).

[386] *Schermer*, 721 N.W.2d at 317 (citing Saunders v. Farmers Ins. Exch., 440 F.3d at 944-45).

[387] MINN. STAT. ANN. §§ 363A.01-41 (2011).

[388] *Schermer*, 721 N.W.2d at 317 n.6.

[389] 42 U.S.C. §§ 3601-19 (2000).

[390] *Id.* § 1981 (2012).

[391] *Id.* § 1982.

[392] Saunders v. Farmers Ins. Exch., 440 F.3d 940 (8th Cir. 2006).

[393] *Saunders*, 440 F.3d at 943.

[394] U.S. CONST. art. VI, cl. 2.

distinguished *Keogh v. Chicago & Northwestern Railway Co.*[395] and *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*,[396] stating that in those cases the Supreme Court "harmonized two federal statutes with competing purposes, the Sherman Act and the Interstate Commerce Act, whereas here the Supremacy Clause tips any legislative competition in favor of the federal anti-discrimination statutes."[397]

A perplexing issue acknowledged by the court in *Saunders* involves the effect of the number of decisions applying the filed rate doctrine based on rates filed with state regulatory agencies to bar, for example, federal RICO and antitrust claims.[398] The court distinguished those cases as follows based on an issue of standing:

> But RICO and the Sherman Act require a plaintiff to prove injury to "his business or property." 18 U.S.C. § 1964(c). Thus, the no-injury principle of *Keogh* applies to deprive a RICO or antitrust plaintiff of standing under federal law to challenge a filed rate that must be charged under state law. But standing to sue under federal anti-discrimination statutes such as the Fair Housing Act is far broader. *See Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972).[399]

No other cases have been located adopting the court's reasoning regarding standing.[400]

A case in which the filed rate doctrine was raised in an unusual context in regard to a discrimination claim is *Lyons v. First American Title Insurance Co.*[401] The plaintiffs in *Lyons* claimed that the defendant

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[395] Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156 (1922).

[396] Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986).

[397] *Saunders*, 440 F.3d at 944.

[398] *See id.* at 944 (citing Texas Commercial Energy v. TXU Energy, Inc., 413 F.3d 503 (5th Cir. 2005); Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17 (2d Cir. 1994); H.J. Inc. v. Nw. Bell Tel. Co., 954 F.2d 485 (8th Cir. 1992); Taffet v. S. Co., 967 F.2d 1483 (11th Cir. 1992)).

[399] *Saunders*, 440 F.3d at 944.

[400] *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972), quoted by *Saunders*, involved the standing of tenants who were not themselves denied housing to enforce rights under federal law prohibiting housing discrimination. *Id.* at 211. The filed rate doctrine was not at issue.

[401] Lyons v. First Am. Title Ins. Co., No. C09-4156(PJH), 2009 WL 5195866 (N.D. Cal. Dec. 22, 2009).

discriminated against minority homeowners in the provision of insurance.[402] The defendant relied on a section of the state's code providing that acts taken pursuant to authority conferred by the rate regulation section of the state's code failed to provide grounds for civil proceedings.[403] The plaintiffs countered with the claim that the defendants actually relied on the filed rate doctrine, a theory that had been discredited.[404] The court found the plaintiffs' argument unpersuasive, stating that the filed rate doctrine is "traditionally employed as a bar to actions in the antitrust context, not the discrimination context."[405]

In a case involving allegations of race discrimination in connection with the use of credit scoring information to set rates, the Fifth Circuit in *Dehoyos v. Allstate Corp.* addressed the effect of the filed rate doctrine in dicta in an interlocutory appeal primarily involving the application of the McCarran-Ferguson Act[406] to federal anti-discrimination statutes.[407] Although noting that it was not required to address the issue because it was initially raised during the appeal, the court found the defendant's filed rate argument unpersuasive, expressing the opinion that application of anti-discrimination laws would not supplant the state rate controls at issue.[408] Likewise, in *Lumpkin v. Farmers Group, Inc.*,[409] the court refused to find the plaintiff's claims of racial discrimination based on the use of credit scores in pricing homeowners' insurance barred by the doctrine, stating that "[w]here consumers do not challenge the reasonableness of the insurance rates…the filed rate doctrine does not apply."[410]

C. CLAIMS UNDER THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

The filed rate doctrine may provide a basis upon which to oppose claims under the Racketeer Influenced and Corrupt Organizations Act

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[402] *Id.* at *2.
[403] *Id.* at *5 (citing Cal. Ins. Code 12414.26 (West 2005)).
[404] *Id.* at *5.
[405] *Id.* at *7.
[406] 15 U.S.C. §§ 1011-15 (1994).
[407] Dehoyos v. Allstate Corp., 345 F.3d 290 (5th Cir. 2003).
[408] *Id.*
[409] No. 05-2868(Ma/V), 2007 WL 6996584 (W.D. Tenn. Apr. 26, 2007).
[410] *Lumpkin*, 2007 WL 6996584 at *8 (citing Zangara v. Travelers Indem. Co. of Am., 423 F. Supp. 2d 762, 775 (N.D. Ohio 2006)).

("RICO")[411] allegedly impacting a state's insurance rating system. Prevailing on the doctrine as a defense to a RICO claim, however, is not a certainty. For example, in addressing defenses under the McCarran-Ferguson Act and the filed rate doctrine to RICO claims, the federal district court in the recent case of *In re American Investors Life Insurance Co. Annuity Marketing and Sales Practices Litigation*, stated that "[t]hese arguments raise difficult issues, the outcome of which is uncertain."[412] The logical conclusion is that RICO claims in the insurance industry would be analyzed in the same manner as other theories with the filed rate doctrine applying in situations in which the insurance rating system is implicated.

1. Authority Applying the Doctrine to RICO Claims

Two unpublished federal court decisions from the Southern District of New York applied the filed rate doctrine to bar RICO claims in the insurance industry. In *In re EVIC Class Action Litigation*, the plaintiffs sued on various theories complaining about insurance charges imposed by United Parcel Service, Inc.[413] Based on the filed rate doctrine, the court dismissed a number of counts, including RICO claims, alleging damages during the time period that the defendant was required to file tariffs with the ICC.[414] Similarly, the court in *Fersco v. Empire Blue Cross/Blue Shield of New York* found that the filed rate doctrine barred plaintiffs' RICO allegations that the defendant obtained approval of its rates through the use of fraud.[415] The court relied heavily upon *Wegoland Ltd. v. NYNEX Corp.*,[416] involving RICO claims in the telecommunications industry, for the proposition that there is no fraud exception to the filed rate doctrine.[417] In rejecting the argument that consideration of the rate-making process was

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[411] 18 U.S.C. §§ 1961-68 (2006 & Supp. III 2009).

[412] *In re* Am. Inv. Life Ins. Co. Annuity Mktg. & Sales Practices Litig., 263 F.R.D. 226, 242 (E.D. Pa. 2009), *enforced in part*, 695 F. Supp. 2d 157 (E.D. Pa. 2010). The court made the quoted statement in connection with the approval of a proposed class action settlement without further analysis of the filed rate doctrine. *Id.*

[413] *In re* Evic Class Action Litig. v. United Parcel Serv., Nos. 00-CIV-3811(RMB), 02-CIV-2703(RMB), M-21-84(RMB), MDL-1339, 2002 WL 1766554, at *1 (S.D.N.Y. July 31, 2002).

[414] *In re* EVIC Class Action Litig., 2002 WL 1766554 at *5-7.

[415] Fersco v. Empire Blue Cross/Blue Shield of N.Y., No. 93 Civ. 4226 (JFK), 1994 WL 445730, at *1 (S.D.N.Y. Aug. 17, 1994).

[416] Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17 (2d Cir. 1994).

[417] *Fersco*, 1994 WL 445730, at *2 (citing *Wegoland,* 27 F.3d at 21).

not needed in order to determine if fraud was the basis for the challenged rate increase, the court stated that ascertaining damages and determining a reasonable rate "are hopelessly intertwined."[418]

A number of insurance cases indicate in dicta that the filed rate doctrine applies to RICO claims.[419] For example, although not a RICO case, the court in *Allen v. State Farm Fire & Casualty Co*. cited with approval *Taffet v. Southern Co.*,[420] a RICO case arising in the electric industry, for the proposition that the filed rate doctrine applies even if the regulated entity defrauded the regulatory agency to obtain a filed rate.[421] Additionally, although disapproving the application of the filed rate doctrine to claims of discrimination, the Eighth Circuit in *Saunders v. Farmers Insurance Exchange* referenced with approval cases from other industries applying the doctrine to alleged RICO violations.[422]

2. Authority Refusing to Apply the Doctrine to RICO Claims

The federal district court for the Southern District of Florida in *In re Managed Care Litigation* addressed claims asserted under RICO that through misrepresentations and omissions contained in advertising, marketing, and membership materials, managed care insurers manipulated the meaning of the term "medical necessity" when encouraging plaintiffs to enroll in managed care organizations (MCO's).[423] The defendants asserted that the plaintiffs' use of wire and mail fraud as a predicate act was foreclosed by the filed rate doctrine. The court, however, refused to apply

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[418] *Id.* (quoting *Wegoland,* 27 F.3d at 21).

[419] *See, e.g.*, Saunders v. Farmers Ins. Exch., 440 F.3d 940, 944 (8th Cir. 2006); Jader v. Principal Mut. Life Ins. Co., 975 F.2d 525, 527 (8th Cir. 1992); Gipson v. Fleet Mortg. Grp., Inc., 232 F. Supp. 2d 691, 705 (S.D. Miss. 2002); Allen v. State Farm Fire & Cas. Co., 59 F. Supp. 2d 1217, 1228 (S.D. Ala. 1999); Morales v. Attorneys' Title Ins. Fund, Inc., 983 F. Supp. 1418 (S.D. Fla. 1997); Amundson & Ass'n Art Studio, Ltd. v. Nat'l Council on Comp. Ins., Inc., 988 P.2d 1208, 1213 (Kan. App. 1999); Kentucky *ex rel.* Chandler v. Anthem Ins. Cos., 8 S.W.3d 48, 53-54 (Ky. App. 1999).

[420] *Taffet v. Southern Co*, 967 F.2d 1483 (11th Cir. 1992).

[421] Allen v. State Farm Fire & Cas. Co*.,* 59 F. Supp. 2d at 1228 (citing *Taffet*, 967 F.2d at 1494-95).

[422] *Saunders*, 440 F.3d. at 944 (citing Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17 (2d Cir.1994); H.J. Inc. v. Nw. Bell Tel. Co., 954 F.2d 485 (8th Cir. 1992); Taffet v. S. Co., 967 F.2d 1483 (11th Cir. 1992)).

[423] *In re* Managed Care Litigation, 150 F. Supp. 2d 1330, 1334-35. (S.D. Fla. 2001).

the doctrine stating as follows:

> The filed rate doctrine does not apply to the present case because these states do not appear to conduct administrative oversight in the extensive manner typical of situations implicating the doctrine. For example, unlike utility customers, MCO subscribers (or their employers) presumably have some flexibility to search for varying amounts of coverage at various rates other than a flat rate set by a regulatory regime.[424]

The court also noted that even if the doctrine applied, the plaintiffs did not challenge the rate structure itself.[425] Notably, the court did not entirely foreclose application of the filed rate doctrine in all RICO cases.

D. BREACH OF CONTRACT

Courts adopting the filed rate doctrine in the insurance area seem in agreement that it is applicable to breach of contract actions implicating the filed rate.[426] For example, the plaintiff in *Kirksey v. American Bankers Insurance Co. of Florida*, claimed that he was charged more than the amount to which he contractually agreed to pay for personal property insurance.[427] The court, however, found the claim barred stating that "[p]laintiff's argument that the contract . . . should control is of no consequence since the filed rate controls."[428] The court recognized that while it "might disagree with the amount that is allowed for this type of insurance, it has no power or authority to set legislative policy of the State of Mississippi, to usurp the duties and responsibilities of the Mississippi Department of Insurance."[429] Similarly, the court in *Rios v. State Farm Fire*

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[424] *Id.* at 1344.

[425] *Id.*

[426] *See*, *e.g.*, Rios v. State Farm Fire & Cas. Co., 469 F. Supp. 2d 727 (S.D. Iowa 2007); Allen v. State Farm Fire & Cas.Co., 59 F. Supp. 2d 1217 (S.D. Ala. 1999); Korte v. Allstate Ins. Co., 48 F. Supp. 2d 647, 652 (E.D. Tex. 1999); *In re* Empire Blue Cross & Blue Shield Customer Litig., 622 N.Y.S.2d 843 (App. Div. 1994), *aff'd sub nom.* Minihane v. Weissman, 640 N.Y.S.2d 102 (App. Div. 1996); Stutts v. Travelers Indem. Co., 682 S.E.2d 769 (N.C. App. 2009).

[427] Kirksey v. Am. Bankers Ins. Co. of Fla., 114 F. Supp. 2d 526 (S.D. Miss. 2000).

[428] *Id.* at 530.

[429] *Id.*

& Casualty Co. recognized that "[o]nce the rates are filed and approved, the 'rights as defined by the [rate] cannot be varied or enlarged either by contract or tort of the [regulated entity]'."[430]

There is case law to the effect, however, that the filed rate doctrine does not bar claims regarding either interpretation of or enforcement of a contract of insurance consistent with the filed rate. For example, although finding some of the plaintiff's claims barred by the filed rate doctrine, the court in *Horwitz ex rel. Gilbert v. Bankers Life and Casualty Co.* disregarded the doctrine in relation to a breach of contract claim involving the interpretation of ambiguous language.[431] The language at issue involved the number of times the plaintiff's premium could be increased yearly.[432]

Similarly, although finding some of the plaintiff's claims barred by the filed rate doctrine, the court in *Richardson v. Standard Guaranty Insurance Co.* allowed others to proceed.[433] The court found that the doctrine barred claims that the defendants misrepresented the costs and benefits to be received from the purchase of the policies at issue. The court's reasoning was that under the filed rate doctrine, the plaintiff was presumed to have knowledge of the filed rates and also that the doctrine required the conclusion that the plaintiff had suffered no ascertainable loss.[434] The court recognized, however, that the plaintiff could proceed on claims that the defending credit card issuers breached the terms of credit insurance policies. Allowable claims included that the defendants misconstrued contractual provisions in order to minimize benefits, failed to make timely payments, miscalculated premiums, and ignored cancellation notices.[435] The court explained its ruling as follows:

> There is nothing about the filed rate doctrine which would preclude a consumer from suing for damages on a claim that the insurer breached the policy as written. While the doctrine precludes a claim for damages which would indirectly cause the application of rates different from the

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[430] Rios v. State Farm Fire & Cas. Co., 469 F. Supp. 2d 727, 735 (quoting Keogh v. Chicago & Nw. Ry, 260 U.S. 156, 160 (1922)).

[431] Horwitz v. Bankers Life & Cas. Co., 745 N.E.2d 591, 606 (Ill. App. 2001) (defendant conceded that the filed rate doctrine did not apply to the claim focusing on ambiguities in the insurance contract itself).

[432] *Id.*

[433] Richardson v. Standard Guar. Ins. Co., 853 A.2d 955 (N.J. Super. App. Div. 2004).

[434] *Id.* at 967.

[435] *Id.*

> filed rates, and would also preclude plaintiff from seeking relief, whether equitable or legal, for having been misled by unconscionable sales practices which caused plaintiff to enter into a contract consistent with the filed rate, the filed rate doctrine does not preclude a consumer from suing for damages by having been deprived of benefits which were promised, and were consistent with the filed rate, but were not delivered.[436]

Other insurance cases also express the opinion that the doctrine allows actions to enforce contractual provisions not conflicting with filed rates.[437] A case reaching an interesting result on a motion for partial summary judgment involving a contractual dispute is *Euclid Insurance Agencies, Inc. v. American Ass'n of Orthodontists*.[438] The insurer in that case raised the filed rate doctrine as a defense to the claim that it had failed to honor a contractual agreement to make "adjustments…over time based on experience and actuarial calculations."[439] The court, however, stated that although the reasonableness of the rates and the fact that they were governed by regulatory agencies "may be factors in deciding this issue, they are not dispositive."[440] Noting that no statute or case had been cited prohibiting the insurer's ability to fulfill its commitment, the court ruled that the issue of whether the insurer complied with the agreement by appropriately adjusting rates was one for the jury.[441] The court did not expand upon how it believed rates should be used as factors in deciding such a dispute.

E. Claims Involving Kickbacks or Unearned Premiums

Plaintiffs complaining of kickbacks paid by insurers to lenders for the placement of insurance on mortgaged properties have sued under

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[436] *Id.*

[437] *See*, *e.g.*, U.S. Steel Corp. v. Lumbermens Mut. Cas. Co., No. CIV.A. 02-2108, 2005 WL 2106580, at *8 (W.D. Pa. Aug. 31, 2005); Randleman v. Fid. Nat'l Title Ins. Co., 465 F. Supp. 2d 812, 823 (N.D. Ohio 2006); Beller v. William Penn Life Ins. Co. of N.Y., 778 N.Y.S.2d 82, 84-85 (App. Div. 2004).

[438] Euclid Insurance Agencies, Inc. v. American Ass'n of Orthodontists, No. 95 C 3308, 1998 WL 60775, at *4 (N.D. Ill. Feb. 5, 1998).

[439] *Id.*

[440] *Id.*

[441] *Id.*

various legal theories. As set forth below, cases conflict on whether the filed rate doctrine bars such claims. Perhaps the better view is that while the filed rate doctrine bars claims for damages based on filed rates that are purportedly excessive, it would not prevent injunctive relief prohibiting the payment of future kickbacks not affecting current rates. Such action would not unreasonably interfere with the nonjusticiabilitystrand of the doctrine or result in discrimination among policyholders. It should also be noted that, depending on the jurisdiction involved, plaintiffs may fare better if relief is sought under the federal Real Estate Settlement Procedures Act (hereinafter "RESPA").[442]

1. The Filed Rate Doctrine Applied to Bar Claims

In *Schilke v. Wachovia Mortgage, FSB*, the plaintiff filed various state law claims, including fraud, against the defending insurer.[443] The plaintiff complained of undisclosed fees in the form of kickbacks paid by the insurer to plaintiff's bank in connection with the forced placement by the bank of hazard insurance on mortgaged property.[444] Referencing its concern with preserving agency authority, the court found plaintiff's claims for money damages barred by the filed rate doctrine.[445] The court noted that plaintiff's allegations of illegality in relation to the kickbacks did not interfere with application of the doctrine.[446]

Similarly, the court applied the filed rate doctrine in *Roussin v. AARP, Inc.*, to bar claims that AARP improperly received an allowance for its sponsorship of insurance plans.[447] The plaintiffs claimed that the filed rate doctrine was inapplicable because the complaint involved gross negligence and a breach of fiduciary duties, not the filed rate.[448] The court disagreed, however, stating that "[i]t has repeatedly been held that a consumer's claim, however disguised, seeking relief for an injury allegedly caused by the payment of a rate on file with a regulatory commission, is viewed as an attack upon the rate approved by the regulatory

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[442] 12 U.S.C. §§ 2601-17 (2006).

[443] Schilke v. Wachovia Mortg., FSB, 758 F. Supp. 2d 549 (N.D. Ill. 2010).

[444] *Id.* at 561. The bank was contractually entitled to purchase insurance at the plaintiff's expense because the plaintiff failed to maintain insurance on the property. *Id.*

[445] *Id.*

[446] *Id.* at 561-62.

[447] Roussin v. AARP, Inc., 664 F. Supp. 2d 412 (S.D.N.Y. Oct. 15, 2009), *aff'd*, 379 Fed. App'x 30 (2d Cir. 2010).

[448] *Id.* at 414.

commission."[449] The court was persuaded that the plaintiff was seeking recovery based on the difference between what she paid in premiums and what she contended she should have paid – the type of accounting barred by the filed rate doctrine.[450]

In *Morales v. Attorneys' Title Insurance Fund, Inc.*, the federal district court applied the filed rate doctrine to bar class action claims that the defending insurers violated RESPA[451] through the use of kickbacks and fee splitting with mortgage brokers, lenders, and other agents. The court found the doctrine applicable even assuming the correctness of the plaintiffs' position that the proper measure of damages was the return of all premiums paid, not damages measured by the difference between the actual rate and the rate charged.[452] Stating that "the class action nature of the proceeding in no way affects the important concerns of agency authority, justiciability, and institutional competence," the court in *Morales* dispensed with the plaintiffs' position that class actions reduce concerns of discrimination thereby negating the need for the filed rate doctrine.[453] According to the court, the plaintiffs had no legal right to pay anything but the promulgated rates; they had no injury; and, therefore, they lacked standing to complain.[454] As set forth below, not all courts agree with the *Morales* decision.

2. The Filed Rate Doctrine Found Inapplicable

Noting disagreement with *Morales v. Attorneys' Title Insurance Fund, Inc.*, discussed above, the Third Circuit in *Alston v. Countrywide Financial Corp.*,[455] declined to apply the doctrine to bar claims of illegal

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[449] *Id.* at 416 (quoting Porr v. NYNEX Corp., 230 A.D.2d 564, 660 (App. Div. 1997)).

[450] *Id.* at 416-17.

[451] Morales v. Att'ys Title Ins. Fund, Inc., 983 F. Supp. 1418 (S.D. Fla. 1997); 12 U.S.C. §§ 2601-17 (2006).

[452] *Morales*, 983 F. Supp. at 1428.

[453] *Id.* (quoting *Wegoland*, 27 F.3d at 22).

[454] *Id.* at 1429. Although the plaintiff did not name lenders as defendants, the court in *Steven v. Union Planters Corp.*, No. 00-cv-1695, 2000 WL 33128256 (E.D. Pa. Aug. 22, 2000) likewise applied the filed rate doctrine to bar claims under RESPA that the defending bank-related defendants improperly received kickbacks from the plaintiff's property insurer.

[455] 585 F.3d 753 (3d Cir. 2009).

kickbacks under RESPA.[456] The court in *Alston* was of the opinion that the plaintiffs challenged illegal kickbacks or fee splitting, not the fairness of rates.[457] In support of its decision, the court quoted *Kay v. Wells Fargo & Co.*[458] as follows:

> Statutes like RESPA are enacted to protect consumers from unfair business practices by giving consumers a private right of action against service providers. Plaintiffs may not sue under the veil of RESPA if they simply think that the price they paid for their settlement services was unfair. Alternatively, plaintiffs bringing a suit under RESPA may allege a violation of fair business practices through the use of illegal kickback payments. The filed-rate doctrine bars suit from the former class of plaintiffs and not the latter.[459]

The court in *Alston* further cited the following four factors in support of its decision: (1) The measure of damages was set by RESPA, so there was no need to second guess rates; (2) All consumers affected were to be protected by RESPA, not just those bringing suit; (3) Congress intended that RESPA apply to mortgage insurance; and (4) RESPA, as a remedial statute, should be construed broadly.[460] The court concluded by stating that it was clear that the plaintiffs challenged defendant Countrywide's allegedly wrongful conduct, "not the reasonableness or propriety of the rate that triggered that conduct."[461]

Another case leaving open the possibility that claims brought under RESPA may survive application of the filed rate doctrine is *Schilke v. Wachovia Mortgage, FSB*.[462] The court in *Schilke* relied on the filed rate doctrine in dismissing state law claims for damages made against the defending insurer in relation to alleged wrongful kickbacks. The court, however, distinguished *Alston* on the basis that the plaintiff was not "suing

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[456] 12 U.S.C. §§ 2601-17 (2006); *Alston*, 585 F.3d at 764 (expressing disagreement with *Morales*).

[457] *Alston*, 585 F.3d at 764 (citing Alexander v. Wash. Mut., Inc., No. 08-8043, 2008 WL 2600323, at *3 (E.D. Pa. June 30, 2008); Kay v. Wells Fargo & Co., 247 F.R.D. 572 (N.D. Cal. 2007)).

[458] Kay v. Wells Fargo & Co., 247 F.R.D. 572, 576 (N.D. Cal.2007).

[459] *Alston*, 585 F.3d at 764 (quoting *Kay*, 247 F.R.D. at 576).

[460] *Id.*

[461] *Id.* at 765.

[462] Schilke v. Wachovia Mortg., FSB, 758 F. Supp. 2d 549, 562 (N.D. Ill. 2010).

under RESPA or any other federal law stemming from Congressional intent to circumvent the filed rate doctrine."[463]

Additionally, the court in *Gipson v. Fleet Mortgage Group, Inc.* refused to apply the file rate doctrine to bar a complaint that the defending lender wrongfully entered into an arrangement with an insurer by which the lender received fees and commissions recouped from borrowers through the payment of higher insurance premiums.[464] The plaintiff claimed that by doing so, the lender breached its contract and also violated its duty of good faith and fair dealing. In refusing to apply the filed rate doctrine, the court stated that the challenge was "not so much a challenge to the rate itself as it is to the lender's right under the lending contract to place insurance in such a manner as to cause its borrowers' payment of unnecessary fees."[465]

XVIII. THE FUTURE OF THE FILED RATE DOCTRINE

What about the future of the filed rate doctrine? At the federal level, Congress has taken no action to abrogate the doctrine. Additionally, the U.S. Supreme Court recently denied certiorari in a case involving the filed rate doctrine, *Dolan v. Fidelity National Title Insurance Co.*,[466] which is not surprising in view of the Court's pronouncement in *Square D Co. v. Niagara Frontier Tariff* that "[i]f there is to be an overruling of the *Keogh* rule, it must come from Congress, rather than from this Court."[467]

As previously mentioned, ongoing disagreement regarding the doctrine's application in the insurance arena is illustrated by the recent cases of *In re Title Insurance Antitrust Cases*[468] and *Clark v. Prudential Insurance Co. of America*[469] reaching conflicting decisions regarding application of the doctrine to claims arising under Ohio state law.[470]

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[463] *Id.* at 560.

[464] Gipson v. Fleet Mortg. Grp., Inc., 232 F. Supp. 2d 691 (S.D. Miss. 2002).

[465] *Id.* at 707. The court in *Gipson* did, however, apply the doctrine to bar a claim that the defending insurer illegally obtained rates through committing fraud on the state's department of insurance. *Id.* at 703.

[466] 365 Fed. App'x 271 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 261 (2010).

[467] Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 408, 424 (1986).

[468] 702 F. Supp. 2d 840 (N.D. Ohio 2010).

[469] Clark v. Prudential Ins. Co. of Am., No. Civ. 08-6197 DRD, 2011 WL 940729 (D.N.J. Mar. 15, 2011).

[470] *Compare In re Title Ins. Antitrust Cases*, 702 F. Supp. 2d at 861-65 (adopting the filed rate doctrine in regard to claims under Ohio state law), *with*

Disagreement regarding the doctrine is further illustrated by the conflicting decisions of *MacKay v. Superior Court*[471] and *Fogel v. Farmers Group, Inc.*,[472] involving the application of the filed rate doctrine to property and casualty insurance in California.

An issue, however, on which consensus could likely be reached is the importance of the doctrine in the area of insurance law. For example, although the parties had provided notification of a tentative settlement, the *MacKay* court exercised its discretion to issue an opinion stating that one reason for doing so was that the issues "are of major importance to both insurers and policy holders in California and are clearly of continuing public interest and are likely to recur."[473] Although the filed rate doctrine was not the only issue considered by the court, it was a significant matter addressed in depth.[474]

A review of cases cited in this article illustrates the large number decided in the last few years as well as the fact that many courts have struggled with the interpretation and the application of the doctrine. A primary difference in rationale seems to occur between courts expressing the opinion that the doctrine applies to bar claims whenever a rate must be consulted in order to determine damages versus courts that allow claims to continue so long as the claims themselves do not implicate the filed rate.[475]

Clark, 2011 WL 940729 at *12-14 (rejecting application of the filed rate doctrine to claims arising under Ohio state law).

[471] MacKay v. Superior Court, 115 Cal. Rptr. 3d 893 (Cal. Ct. App. 2010).

[472] Fogel v. Farmers Group, Inc., 74 Cal. Rptr. 3d 61 (Cal. Ct. App. 2008).

[473] *MacKay*, 115 Cal. Rptr. 3d at 912 n.21.

[474] *Id.* at 910-11.

[475] *Compare* H.J. Inc. v. Nw. Bell Tel. Co., 954 F.2d 485, 489 (8th Cir. 1992) (stating that the underlying conduct does not control whether the doctrine applies and that the appropriate focus is the impact the court's decision would have on agency procedures and rate determinations), *In re* Pa. Title Ins. Antitrust Litig., 648 F. Supp. 2d 663, 680 (E.D. Pa. 2009) (finding that plaintiffs complaint of kickbacks actually went to rates), Rios v. State Farm Fire & Cas. Co., 469 F. Supp. 2d 727, 735 (S.D. Iowa 2007) (recognizing that the filed rate doctrine extends to complaints about services as well as to complaints about rates), Morales v. Attorneys' Title Ins. Fund, Inc., 983 F. Supp. 1418, 1429 (S.D. Fla. 1997) (recognizing that complaints regarding kickbacks and fee splitting actually went to the state's rate structure), *and* Uniforce Temp. Pers., Inc. v. Nat'l Council on Comp. Ins., Inc., 892 F. Supp. 1503, 1511-12 (S.D. Fla. 1995) (recognizing that the filed rate doctrine barred claims that the defendants forced the plaintiff into the assigned risk market), *aff'd on other grounds*, 87 F.3d 1296 (11th Cir. 1996), *with* Arroyo-Melecio v. Puerto Rico Am. Ins. Co., 398 F.3d 56, 73 (1st Cir. 2005) (expressing the opinion that the doctrine fails to bar any action which might

Another basic difference in outlook is expressed in cases construing the doctrine as applied to claims of illegal discrimination in violation of federal law based on criteria such as race.[476]

The issue of administrative review and action may be another fertile ground for litigation. As discussed in Section XIV of this article, many courts have discussed the type of administrative review required for application of the doctrine. Interestingly, however, in determining whether the doctrine should be applied, neither litigants nor the courts have delved into the enthusiasm with which state agencies have taken action against alleged wrongdoing. Of course, that would involve quite an undertaking and large amounts of discovery. Additionally, obtaining such proof in and of itself may impact the nonjusticiability strand of the doctrine involving the principle that courts should refrain from interfering with the affairs of agencies entrusted by the legislative branch with authority over rate issues.[477]

Considering the number of cases construing the filed rate doctrine in the insurance arena in the last few years coupled with the significant disagreement in existence regarding the specific contours of the doctrine, it appears that the filed rate doctrine will be a significant source of future litigation. Issues impacted by the doctrine are far reaching with puzzling and complex disputes involving the role of state departments of insurance, the interests of insurers, and the rights of consumers.

"arguably and coincidentally implicate rates"), Alston v. Countrywide Fin. Corp., 585 F.3d 753, 764 (3d Cir. 2009) (recognizing that the plaintiffs did not directly challenge any rate and refusing to apply the doctrine); *In re* Managed Care Litig., 150 F. Supp. 2d 1330, 1334 (S.D. Fla. 2001) (refusing to apply the doctrine as a bar and recognizing that the plaintiffs did not challenge the rate structure per se), *and* Ciamaichelo v. Independence Blue Cross, 909 A.2d 1211, 1218 (Pa. 2006) (rejecting the position that allegations that could lead to an adjustment of an insurer's rate "invariably amount to a rate injury claim").

[476] *Compare Schermer*, 721 N.W.2d at 307 (applying the doctrine to claims of race discrimination), *with Saunders*, 440 F.3d at 940 (refusing to apply the doctrine to claims of race discrimination).

[477] *See, e.g.*, *Wegoland Ltd.*, 27 F.3d at 19 (asserting that courts should not become enmeshed in the rate-making process).