Filed Insurance Rates Do Not Belong to the Federal Government. They Belong to the States.

By Dennis Wall, Esquire*

On September 24, 2018, as this article was going to publication, a panel of the Eleventh Circuit Court of Appeals issued its 2-to-1 decision in the combined Patel and Fowler appeals. The author has reviewed a copy of this decision, which affirmed the two lower court decisions cited in this article, Patel and Fowler. The Eleventh Circuit's divided decision does not change the outcome. Any points raised by the 2-judge majority or by the dissenting judge in the panel decision can be addressed in a future article. The panel's decision has now been published at 904 F.3d 1314 (11th Cir. 2018).

I. INTRODUCTION

The filed rate doctrine began long ago in federal courts. At the beginning, federal judges held that when federal agencies regulated rates charged by utilities, the rates approved by the federal agencies represented the only lawful rates. In the earliest cases involving the filed rate doctrine, federal courts held that the approved rates could not even be collaterally challenged by claims that would require courts to recalculate rates approved by federal agencies.

More recently, federal courts imported the doctrine into insurance cases. When they have done so, however, they have generally imposed federal concepts of the filed rate doctrine. They ignore the status of insurance as a matter regulated by state agencies, not federal agencies.

State law applies to the filed rate doctrine in insurance cases. Some state courts have joined federal judges in applying the filed rate doctrine in insurance cases. Many have not. And in most states whether the filed rate doctrine applies to insurance is an open question.

With respect to insurance, the filed rate doctrine belongs to the states. It is the states that will decide whether and when the filed rate doctrine applies to insurance, if it applies to insurance at all.

II. THE FILED RATE DOCTRINE GENERALLY

A. Origins of the "doctrine"

1. *Keogh* and earlier precedent of the United States Supreme Court

In 1922, Mr. Justice Brandeis wrote the unanimous opinion for the Court in a case which decided that rates (or "tariffs") fixed by interstate carriers and

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approved by a federal agency authorized by Congress to review and approve or disapprove those rates, could not be challenged by a manufacturer, one John W. Keogh, who was forced to pay those approved rates:

> All the rates fixed were reasonable and nondiscriminatory. That was settled by the proceedings before the [Interstate Commerce] Commission.
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> * * *
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> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper.
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> * * *
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> Under these circumstances, no court or jury could say that, if the rate had been lower, Keogh would have enjoyed the difference between the rates or that any other advantage would have accrued to him.[1]

The decision in Mr. Keogh's case is generally taken to be the starting point of the filed rate doctrine because Justice Brandeis wrote "that every rate complained of had been duly filed" in the course of his opinion,[2] but earlier precedent existed. In 1907, for example, the Supreme Court held that without the "uniform standard of rates" prescribed by the Interstate Commerce Commission, the inevitable results would be "preferences and discrimination[.]"[3] Moreover, the Court held in that same case that the fixing of uniform rates was a duty delegated by Congress to the agency, and that the courts were not the place in which to establish these uniform rates.[4]

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[1] Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156, 161, 163, 165, 43 S. Ct. 47, 49, 50 (1922).

[2] The quotation from *Keogh* is found in 260 U.S. at 160, 43 S. Ct. at 48. The relevant commentary that *Keogh* is usually taken as the starting point of the filed rate doctrine includes Allan Kanner, *The Filed Rate Doctrine and Insurance Fraud Litigation*, 76 N.D.L. REV. 1, 2 n.2 (2000), and Vonda Mallicoat Laughlin, *The Filed Rate Doctrine and the Insurance Arena*, 18 CONN. INS. L.J. 373, 373, 378 (2012). Mr. Kanner is something of a policyholder proponent in his writing, while Ms. Laughlin is for her part something of an insurance company spokesperson in her writing, so that these two commentators are pretty well balanced in that sense.

[3] Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 440, 27 S. Ct. 350, 355 (1907).

[4] *Id.* at 444, 27 S. Ct. at 356–57. It has been pointed out that some later federal courts have viewed *Abilene Cotton* as perhaps the 'real' genesis of the filed rate doctrine, Vonda Mallicoat Laughlin, *The Filed Rate Doctrine and the Insurance Arena*, 18 CONN. INS. L.J. at 378, but the *Abilene Cotton* Court's opinion could easily be aligned with the "primary jurisdiction doctrine," a close cousin of the filed rate doctrine. Both doctrines recognize that agencies authorized to regulate rates are "primarily" the place "to determine the reasonableness of rates," and that a party "seeking reparation predicated upon the unreasonableness of the established rate," must "primarily invoke redress" through the agency in question. *See Abilene Cotton*, 204 U.S. at 448, 27 S. Ct. at 358.

B. The two strands of the filed rate doctrine ("FRD"): Nonjusticiablility and nondiscrimination

1. Nonjusticiability and nondiscrimination concepts have been the bases announced from the beginning to support the FRD

The filed rate doctrine is applied with much the same considerations in the present day as it was in the distant mists of the early 20th Century. The way in which modern federal courts have applied the FRD for more than a century, has been summarized as follows:

> The filed rate doctrine bars suits against regulated utilities grounded on the allegation that the rates charged by the utility are unreasonable. Simply stated, the doctrine holds that any "filed rate"—that is, one approved by the governing regulatory agency—is per se reasonable and unassailable in judicial proceedings brought by ratepayers.[5]

Two "strands" or "corresponding interests" have ever since been perceived by the federal courts as the bases of the FRD, *nondiscrimination* and *nonjusticiability*. "Since *Keogh*, these two corresponding interests, one concerned with potential 'discrimination' in rates as between ratepayers and the other concerned with the 'justiciability' of determining reasonable rates," have been the twin foundations of applying the FRD in the federal courts beginning with the U.S. Supreme Court.[6]

2. Either one is enough

When the analysis of whether the FRD applies has gone far enough to implicate either one of its underlying concepts, either nonjusticiability or nondiscrimination, the FRD has been applied.[7]

3. Nonjusticiability rules the day

"[U]nder the nonjusticiability principle, it is squarely for the regulators to say what should or should not be included in a filed rate."[8] It has therefore been held that where the nonjusticiability principle is implicated in an authorized agency's approval of a filed rate, that is enough. The court's inquiry stops and the FRD applies to bar any action that might directly or indirectly challenge the reasonableness of the approved rate.[9]

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[5] Wegoland Ltd. v. Nynex Corp., 27 F.3d 17, 18 (2d Cir. 1994). *Accord*, Rothstein v. Balboa Ins. Co., 794 F.3d 256, 261 (2d Cir. 2015). *E.g.*, Saunders v. Farmers Ins. Exch., 440 F.3d 940, 943 (8th Cir. 2006); Hill v. Bellsouth Telecomm's, Inc., 364 F.3d 1308, 1316 (11th Cir. 2004).

[6] *Wegoland*, 27 F.3d at 19.

[7] *E.g.*, *In re* New Jersey Title Ins. Litig., 683 F.3d 451, 457–58 (3d Cir. 2012); *see, e.g.*, Coll v. First Am. Title Ins. Co., 642 F.3d 876, 886–87 (10th Cir. 2011); Morales v. Attorneys Title Ins. Co., 983 F. Supp. 1418, 1428–29 (S.D. Fla. 1997). In the *Morales* case, the court announced its view that standing is the "fountainhead" of the FRD. *Morales*, 983 F. Supp. at 1429. This view is still extant, but has for the most part been rejected in the intervening case law. The split among the courts is interesting, but beyond the scope of this article at this time.

[8] *Rothstein*, 794 F.3d at 262.

[9] *E.g, id*. at 263 ("Because that is forbidden under the principle of nonjusticiability, the claims

4. The Filed Rate Doctrine and Insurance Cases

The importation of the FRD into insurance cases is probably a done deal at this point. If there was a clean slate, we might write a different story but there have probably been too many insurance cases in which the FRD was already applied, to totally reverse the trend.

One lesson to be learned from the case law, however, is that whether the filed rate doctrine applies to insurance, and whether the FRD applies at all, are still open questions in many states.

A corresponding lesson from the case law is that there ***is*** in fact a blank slate on some or all of the questions surrounding the FRD under any particular state's law, including whether the FRD applies to insurance under the law of a given state.

C. The Filed Rate Doctrine Applies Where the Damages Sought Implicate the Approved Rates, But Not When They Don't

1. The FRD applies when the judge perceives that the damages sought would require the judge herself or the jury to readjust an approved filed rate

Where the plaintiffs in a lawsuit seek damages, and any award of damages in that case would require the judge or the jury to reevaluate a rate previously approved by an agency authorized to do so, the FRD applies and the lawsuit is barred.[10]

2. The FRD does not apply when the damages sought do not implicate the filed rate involved in the case

a. When the filed rates are not challenged, but the *placement* of them is challenged in the first instance: Unnecessary or duplicate insurance, for example

"However, the 'filed rate' doctrine does not bar claims that allege that the rates have been applied in an incorrect manner, or claims brought to enforce a contract that contained an approved rate."[11] In the quoted case, Mr. Alvin Gelfound challenged MetLife's continued billing to him of premiums for an endorsement to his long-term care insurance policy even though the endorsement long ago ceased to apply to him and from which he no longer received any insurance coverage. He filed a lawsuit challenging the premium charged for the endorsement as completely unnecessary.

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are barred."); *see* In re *New Jersey Title Insurance Litigation*, 683 F.3d at 457–58.

[10] *E.g.*, Uniforce Temp. Personnel, Inc. v. National Council on Comp. Ins., Inc., 892 F. Supp. 1503, 1512 (S.D. Fla. 1995), aff'd on other grounds, 87 F.3d 1296 (11th Cir. 1996); N.C. Steel, Inc. v. National Council on Comp. Ins., 347 N.C. 627, 636, 496 S.E.2d 369, 374–75 (1998); McCarthy Fin., Inc. v. Premera, 182 Wash. 2d 936, ¶ 12, at 943, 347 P.3d 872, ¶ 12, at 876 (2015) (en banc).

[11] Gelfound v. Metlife Ins. Co. of Connecticut, 998 F. Supp. 2d 1356, 1360 (S.D. Fla. 2014).

However, Mr. Gelfound did not challenge the amount of the premium for the allegedly unnecessary endorsement:

> Here, Plaintiff does not challenge the amount of premiums charged. Rather, Plaintiff argues that the premiums should not have been charged at all after he turned 86 because MetLife ceased to provide any benefit in exchange for the payments. The "filed rate" doctrine does not bar Plaintiff's claims.[12]

Similarly, when the charge at issue is for a product or service that duplicates one already in place, the challenge is not to the filed rate for it, where the plaintiff is instead challenging the imposition of a duplicative product or service, such as duplicate insurance for the same coverage period.[13]

III. THE FRD DOES NOT APPLY WHEN AN "ESSENTIAL ELEMENT" IS MISSING FROM THE RATE FILING, OR THE CHARGE AT ISSUE IS NOT THE SUBJECT OF REGULATION

A. The FRD does not apply when an "essential element" is missing from the rate filing

This concept comes from Justice Souter's opinion for the eight-justice majority deciding *Security Services, Inc. v. K Mart Corporation*,[14] that a carrier could not recover for the amounts falling between the lower amounts it actually charged, and the higher filed rate, "even though in effect it had no rates on file because its tariff lacked an essential element."[15] In other words, the bankrupt carrier's debtor-in-possession could not recover the greater amount of approved rates even though the bankrupt carrier had, despite the filed rate, allowed a party whose goods the carrier transported, to pay a lower price. The filed rate controlled and any other rate was unacceptable because, in effect, any other such rate was missing an essential element.

B. The FRD does not apply when the charge at issue is not the subject of regulation

The Security Services "missing essential element" concept was carried forward by the Eleventh Circuit in a decision effectively holding that the FRD only applies to ***valid*** rate filings, in *Florida Municipal Power Agency v. Florida Power & Light*

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[12] *Id.*

[13] Wahl v. American Sec. Ins. Co., No. C 08-0555 RS, 2010 U.S. Dist. LEXIS 123914 at *9 (N.D. Cal. Nov. 1, 2010). In that case, the plaintiff, Michelle Wahl, was clearly challenging

> . . . the practice of force placing insurance at a moment in time where the coverage would be duplicative. . . . Accordingly, it is apparent from the Record that she has not attacked the practice of *rate setting* . . . .

Id. at *3–*4 (emphasis by the court).

[14] 511 U.S. 431, 114 S. Ct. 1702 (1994).

[15] *Id.* at 440, 114 S. Ct. at 1708. *Accord*, Florida Mun. Power Agency v. Florida Power & Light Co., 64 F.3d 614, 616 (11th Cir. 1995).

Co.[16] The issue in that case was whether the defendant utility's regulated rates for electric transmission service included the network transmission service that the plaintiff sought to buy. The Eleventh Circuit panel reiterated three holdings that were crucial to the outcome of the ultimate question of whether the FRD barred the plaintiff's claims in that case.

First, the appellate court opened its analysis with a concise statement of the FRD:

> The filed rate doctrine provides that where a regulated company has a rate for service on file with the applicable regulatory agency, the filed rate is the only rate that may be charged.[17]

The appellate panel's second significant observation was of a factor common to all filed rate cases:

> The characterization of the plaintiff's claim is therefore critical to whether the filed rate doctrine will apply.[18]

The third and final significant thing that the Eleventh Circuit did in *Florida Municipal Power Agency* was its holding that the network transmission charges at issue in the case had to be examined to see if the FRD even applied to them:

> There needs to be a factual determination of whether network transmission is such a different product from point-to-point transmission that reasonable rate-making would require the filing of separate network transmission rates.[19]

Clearly, if the filing of separate network transmission rates would be required, then the filed rate approved by the federal agency in question would not have the effect of barring the plaintiff's claim. If that proved to be the case, then in that event the trial court "may, for the limited purpose of calculating damages, estimate the rate that would have been in effect but for the violation[.]"[20]

The Supreme Court of Washington, *en banc*, delivered a similar ruling in another case involving a federal regulatory agency, *Tenore v. AT & T Wireless Services*.[21] The high court of Washington State began its analysis of the FRD question in a very similar way, by concisely summarizing the FRD at the outset of its discussion:

> The "filed rate" doctrine, also known as the "filed tariff" doctrine, is a court-created rule to bar suits against regulated utilities involving allegations concerning the reasonableness of the filed rates. This doctrine provides, in essence, that any "filed rate"—a rate filed with and approved by the governing

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[16] 64 F.3d 614 (11th Cir. 1995).

[17] *Id.* at 615.

[18] *Id.* at 616.

[19] *Id.*

[20] *Id.* at 617.

[21] 136 Wash. 2d 322, 962 P.2d 104 (1998) (en banc), *cert. denied*, 525 U.S. 1171, 119 S. Ct. 1096 (1999).

> regulatory agency—is per se reasonable and cannot be the subject of legal action against the private entity that filed it. The purposes of the "filed rate" doctrine are twofold: (1) to preserve the agency's primary jurisdiction to determine the reasonableness of rates, and (2) to insure that regulated entities charge only those rates approved by the agency.[22]

As in the *Florida Municipal Power Agency* case, in *Tenore* the FRD simply did not apply "[b]ecause there is no tariff filing requirement" for the charges put at issue by the plaintiff's claims in that case.[23]

The moment has arrived to illustrate how these basic FRD principles are applied, if at all, to the state regulation of insurance.

IV. STATE REGULATION OF INSURANCE AND THE STATE FILED INSURANCE RATE DOCTRINE, IF ANY

A. The FRD originated in federal courts, but the FRD applies to rates validly filed with state agencies that are authorized to regulate them

In general terms, the FRD has been applied to rates filed with state agencies that are authorized to review the rate filings and either to affirmatively approve the requested rates, or to allow the rates to go into effect without opposing them.[24]

B. The states regulate insurance, so state law controls the FRD regarding insurance rates

It is established that inasmuch as state agencies regulate insurance, then to the extent that insurance is regulated, state law controls regarding whether and when the FRD applies to insurance rates.[25]

C. If insurance rates are regulated by a state, then that state's law regulates the filed rate doctrine

1. Generally

A state's filed rate doctrine bars an award of damages for "past charging of allegedly improper rates and an injunction ordering defendants to reduce the rates they charge" in the future, where "the rates at issue were filed with, and approved by, the Superintendent of Insurance pursuant to [state law]."[26]

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[22] *Id.* at 331, 962 P.2d at 108 (citations omitted).

[23] *Id.* at 334, 962 P.2d at 109–10.

[24] *See, e.g.*, Commonwealth v. Anthem Ins. Cos., 8 S.W.3d 48, 52 (Ky. Ct. App. 1999); *McCarthy Finance, Inc.*, 182 Wash. 2d ¶ 1, at p. 938, ¶¶ 9 & 10, at pp. 941–42, 347 P.3d ¶ 1, at p. 873, ¶¶ 9 & 10, at p. 875.

[25] *See, e.g.*, *Commonwealth*, 8 S.W.3d at 53; City of New York v. Aetna Cas. & Sur. Co., 264 A.D.2d 304, 304–05, 693 N.Y.S.2d 139, 140 (N.Y. App. Div., 1st Dep't, 1999) (ruling based only on New York state court decisions); *N.C. Steel, Inc.*, 347 N.C. at 632, 496 S.E.2d at 372 (adopting filed rate doctrine in North Carolina law).

[26] *City of New York*, 264 A.D.2d at 304–05, 693 N.Y.S.2d at 140.

2. Title insurance cases where the FRD was applied

Illustrations of the point that the FRD applies to insurance rates only where a state regulates the rates for a particular line of insurance, come from the large number of cases involving regulated rates for title insurance. Where title insurance rates are regulated by a governing state agency, i.e., by a state agency authorized to review the rate filings and approve or disapprove the rates, the FRD has been applied in the states to bar claims which directly or indirectly challenge approved rates except as permitted by state law which is usually limited to administrative review.[27] In some states, such as New Mexico, title insurance rates are regulated separately from rates for other insurance products. It is the existence of the state regulation of rates that matters to application of the FRD, and so a federal court has applied the New Mexico FRD to title insurance rates and has predicted that in relevant aspects, the New Mexico Supreme Court would too.[28]

D. If insurance rates are not regulated by the state, then there is no filed insurance rate doctrine to apply

1. Outside of regulation

When the judge perceives that a recovery of damages in the case at bar would not implicate a filed rate because the rate filed with the regulating agency included elements that the regulator was not authorized to regulate as a part of the filed rate, such as undisclosed agent commissions, then the filed rate doctrine has not been applied to bar the suit in which such damages are sought.[29] I will have more to say about this issue in my discussion of lender force-placed insurance cases, below.

Similarly, if the state regulatory scheme for insurance simply does not regulate the rates in question, then once again there is no FRD to apply.[30]

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[27] *See, e.g.*, In re *New Jersey Title Insurance Litigation*, 683 F.3d at 457–58; McCray v. Fidelity Nat'l Title Ins. Co., 636 F. Supp. 2d 322, 330–31 (D. Del. 2009), *aff'd with opinion*, 682 F.3d 229, 241–42 (3d Cir. 2012) (affirming application of FRD for different reasons), *cert. denied*, 568 U.S. 1186, 133 S. Ct. 1242 (2013); *Morales*, 983 F. Supp. at 1428–29.

[28] *Coll*, 642 F.3d at 881–82, 886–890. The Tenth Circuit Court of Appeals panel noted as follows in its opinion in this case:

> New Mexico's pervasive regulation of title insurance differs significantly from its regulation of other types of insurance under its general insurance code.

Id. at 882.

[29] *E.g.*, Friedman v. AARP, Inc., 283 F. Supp. 3d 873, 878–79 (C.D. Cal. 2018); *see* Levay v. AARP, Inc., No. 17-090401 DDP (PLAx), 2018 U.S. Dist. LEXIS 116585 at *18–*19 (C.D. Cal. July 12, 2018):

> As in *Friedman*, the court deems that the claims in this case are essentially about false or misleading advertising, and not challenges to the reasonableness of the actual rates that were approved by the California Department of Insurance ("DOI").

The *Friedman* and *Levay* cases were decided by the same judge.

[30] *See* Hanson v. Acceleration Life Ins. Co., No. A3-97-152, 1999 U.S. Dist. LEXIS 23836 at *7–*12 (D.N.D. March 16, 1999).

A unique application of this rationale was made in 2018 in the District of New Mexico, in the case of *Bhasker v. Kemper Casualty Insurance Co*.[31] That case involved underinsured motorist insurance coverage and the plaintiff's contention that her UIM insurance was "illusory" or worthless. Somewhat unusual for a federal court, the FRD question was analyzed under principles of New Mexico state law.

The district court concluded that the New Mexico supreme court would not uphold the application of the FRD to the case at bar. The plaintiff in that case was a consumer who "alleges that an insurer misrepresents material facts about a policy when making the sale."[32] Her claim was brought under New Mexico's consumer protection statutes which expressly authorized claims like the plaintiff's.[33]

Under these circumstances, the district court concluded "that the Supreme Court of New Mexico would not expand its filed rate doctrine" to cases like the one at bar:

> The Court concludes that the Supreme Court of New Mexico would not expand its filed rate doctrine to cases where, as here, a consumer alleges that an insurer misrepresents material facts about a policy when making the sale. Although some courts in other jurisdictions apply the filed rate doctrine to bar claims against insurers and claims brought under consumer protection statutes, the Court determines that the Supreme Court of New Mexico would allow such suits to proceed. . . . The Court concludes, nonetheless, that its ruling is the correct one in New Mexico's case, given that (i) the New Mexico Legislature expressly permits such suits; (ii) New Mexico case law gives no indication that the Supreme Court of New Mexico would expand its filed rate doctrine beyond the public utilities context to bar consumer protection claims against insurers; (iii) the Tenth Circuit's decision in Coll v. First Am. Title Ins. Co.[, 642 F.3d 876 (10th Cir. 2011] does not require the Court to bar such claims; and (iv) other jurisdiction's rulings do not persuade the Court that the Supreme Court of New Mexico would bar such claims.[34]

2. Title insurance cases where the state's FRD was rejected

A specific example of applying the rationales behind all of the cases in the immediately preceding section is provided by an opinion marked "NOT FOR CITATION" in the case of In re *California Title Insurance Antitrust Litigation*.[35] Taking this opinion at its word as instructive while not intended to be persuasive enough for citation in a court, the federal judge in this case effectively held that

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[31] 284 F. Supp. 3d 1191 (D.N.M. 2018).

[32] *Id.* at 1226.

[33] *Id.*

[34] *Id.* The district court amplified these same reasons for this holding later in its opinion. *Bhasker*, 284 F. Supp. 3d at 1230–31, and 1234–35.

[35] No. C 08-01341 JSW, 2009 U.S. Dist. LEXIS 103407 (N.D. Cal. Nov. 6, 2009).

even if California had a filed rate doctrine at the times complained of, still it would not apply where kickbacks were allegedly included in the title insurance rate filing.[36]

V. THE FILED RATE DOCTRINE IN CALIFORNIA VS. THE SOUTHERN DISTRICT OF FLORIDA

A. California

1. Conflict in the California courts

There is a conflict in the California courts over whether there is a filed rate doctrine in California law that applies to insurance. More specifically, the conflict in California law arose from a conflict between rulings of two divisions of the same district court of appeal.

In one case, *Fogel v. Farmers Group, Inc.*,[37] Division 4 of California's Second District Court of Appeal rejected the argument of defendants that California's system of "prior approval" of insurance rates is "analogous to the federal rate doctrine" so that the plaintiff's lawsuit was "barred because the relief he seeks is effectively a premium refund."[38] In the *Fogel* case, the plaintiffs sued for allegedly excessive fees, dubbed by the defendants as attorney-in-fact or AIF fees, which the defendants contended were a part of the approved insurance rate.[39]

The *Fogel* panel replied by holding in the alternative. Its first alternative holding regarding the FRD was that the federal system operated differently in its application of the FRD than California operated with respect to its system of regulating insurance rates.[40]

The *Fogel* panel's second holding was that even if California followed an FRD like the FRD fashioned by federal courts, it would not apply in this case:

> Thus, 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),

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[36] In re California Title Insurance Antitrust Litigation, 2009 U.S. Dist. LEXIS 103407 at *25–*26. As the court put it, in that case the Plaintiffs . . .

> . . . contend that the Defendants improperly included the costs of kickbacks into the title insurance premium rates, thereby inflating those rates. Plaintiffs further allege that but for the improper kickbacks they would have paid less for the insurance. Accordingly, Plaintiffs have set forth facts sufficient to state a Section 17200 ["Unfair Competition"] claim on this basis.

Id. at *26. This case was ultimately sent to arbitration when the district court granted the Defendants' joint motion to compel arbitration. *In re* California Title Ins. Antitrust Litig., No. 08-01341 JSW, 2011 U.S. Dist. LEXIS 71621 (N.D. Cal. June 27, 2011).

[37] 160 Cal. App. 4th 1403, 74 Cal. Rptr. 3d 61 (Cal. 2d DCA, Div. 4, 2008), *review den.* (unreported), (Cal. June 11, 2008).

[38] *Id.* at 1418, 74 Cal. Rptr. 3d at 74.

[39] *Id.* at 1406, 74 Cal. Rptr. 3d at 65.

[40] *Id.* at 1418, 74 Cal. Rptr. 3d at 74–75.

> it nevertheless would have no application here.[41]

Thus, under either of *Fogel's* alternative holdings, the FRD was no bar to the plaintiffs' cause of action.

In contrast to the *Fogel* decision by a panel in the Fourth Division of California's Second District Court of Appeal, a panel in the Third Division of the same appellate court held in the case of *MacKay v. Superior Court*,[42] that California did have an FRD and that it barred a challenge to rating factors used in an automobile insurance rate request approved by the California Department of Insurance. "We thus must disagree with *Fogel*[.]"[43] As the panel from the Third Division wrote at the outset of its opinion:

> In California, a casualty insurance company cannot charge a rate unless the rate is part of a rate plan which has been approved in advance by the Department of Insurance.[44]

The FRD thus barred the plaintiff's, Ms. Amber MacKay's, lawsuit challenging an allegedly illegal but approved automobile insurance rate, even though her lawsuit was based on a rate filing which included an impermissible rating factor.[45] This ruling did not extend, the court said, "to insurer conduct *not* taken pursuant to [the authority conferred by the ratemaking chapter of the California Insurance Code]."[46]

In any event, there is the California conflict over whether California has an FRD, or not. Federal courts in California have recognized the conflict in California law, particularly where filed insurance rates are concerned.

2. FRD and filed insurance rates in federal courts in California

Federal courts in California have tended to recognize that California law controls the answer to whether the FRD applies in cases where regulation is committed to California agencies rather than to federal agencies. In cases involving filed rates, including filed insurance rates, which are committed to California agencies to regulate or not, federal courts tend to pursue twin approaches to decision-making. First, they tend to recognize that there is a conflict in California case law over whether the FRD exists in California law. Second, federal courts in California then rule as though there were a California FRD and hold either that the claims at issue would not be barred by the FRD or that the claims at bar are governed by some other legal principles.[47]

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[41] *Id.* at 1418, 74 Cal. Rptr. 3d at 75 (emphasis by the court).

[42] 188 Cal. App. 4th 1427, 115 Cal. Rptr. 3d 893 (Cal. 2d DCA, Div. 3, Oct. 6, 2010).

[43] *Id.* at 1449, 115 Cal. Rptr. 3d at 910.

[44] *Id.* at 1431, 115 Cal. Rptr. 3d at 896.

[45] *Id.* at 1448–49, 115 Cal. Rptr. 3d at 910–11.

[46] *Id.* at 1449, 115 Cal. Rptr. 3d at 910–11 (emphasis by the court).

[47] *See, e.g.*, *Levay*, 2018 U.S. Dist. LEXIS 116585, at *18–*19 (a state filed rate doctrine did not bar "the plaintiff's challenges to the marketing of AARP-branded Medigap insurance policies," as

3. Lender force-placed insurance ("LFPI") and the FRD in federal courts in California

Two federal LFPI decisions concerning the FRD in California are far and away the most significant decisions in this context.

One is *Wahl v. American Security Insurance Co.*, decided in 2010.[48] Later citing cases have viewed *Wahl* as an FRD case, and the court in *Wahl* discussed the FRD cases in conflict in California. Nonetheless, *Wahl* may be better viewed as a decision on the FRD's close cousin, the primary-agency-jurisdiction-doctrine.

In any event, in *Wahl*, the federal court tossed aside ASIC's argument that the plaintiff was limited to administrative remedies and could not recover damages for the placement of allegedly duplicative insurance.

The federal court replied to this argument by focusing on the allegations actually made by the plaintiff. She complained about the lender force-placed insurance which was forced upon her during a period when she already had insurance. The damages she sought for this conduct were "restitution equal to the amount of the FPI premiums relating to" the forced placement of insurance premiums.[49]

The federal judge saw Ms. Wahl's argument as being directed "at ASIC's allegedly unfair conduct and not at the Commissioner's rate."[50] Simply put, she was not challenging "a charged rate as excessive per se," nor was she asking a court to recalculate the rate to an alternative rate that the court "deemed more 'fair.' "[51]

The federal court in this case recognized the conflict over whether California law recognizes the FRD,[52] mentioning and addressing both *Fogel*[53] and *MacKay*,[54] discussed earlier. The federal court treated those decisions and the defendant's argument as advancing a defense of primary agency jurisdiction, a close cousin of the FRD as has been noted.

The federal court determined that the plaintiff's LFPI claim in this case was not barred because the damages she sought were directed to the forced placement of

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in *Friedman* which was decided earlier by the same court); *Friedman*, 283 F. Supp. 3d at 877–79.

[48] No. C 08-0555 RS, 2010 U.S. Dist. LEXIS 123914 (N.D. Cal. Nov. 1, 2010).

[49] *Wahl*, 2010 U.S. Dist. LEXIS at *9–*10 n.1.

[50] *Id.* at *9.

[51] *Id.*

[52] *Id.* at *4–*9.

[53] Fogel v. Farmers Grp., Inc., 160 Cal. App. 4th 1403, 74 Cal. Rptr. 3d 61 (Cal. 2d DCA, Div. 4, 2008), review denied (unreported), (Cal. June 11, 2008).

[54] MacKay v. Superior Ct., 188 Cal. App. 4th 1427, 115 Cal. Rptr. 3d 893 (Cal. 2d DCA, Div. 3, Oct. 6, 2010).

duplicative insurance coverage which was of no use to her, rather than to the rates charged for that insurance.[55]

The other federal decision of note in an LFPI case concerning the FRD was *Cannon v. Wells Fargo Bank, N.A.*[56] This case is particularly noteworthy because the federal judge cited and reviewed an order issued in another matter by the California Insurance Commissioner which governed the issue of applying the filed-rate doctrine in the lender force-placed insurance context.

In his decision in another matter regarding charges for LFPI premiums, the California Insurance Commissioner "expressly noted that he lacked jurisdiction to consider whether it was proper for Wells Fargo to pass the commissions and tracking expenses onto the borrower."[57]

Further, although the Commissioner cited California Insurance Regulations in his decision pertaining to "commissions," this did not indicate approval to the federal judge as ASIC was apparently hoping when it relied on the Commissioner's decision for dismissal. Instead, in the federal court's eyes those citations did not immunize the defendants' alleged inclusion of unauthorized charges which they called "commissions" in LFPI premiums shifted to the California homeowners suing ASIC and other defendants in that case:

> These regulations demonstrate that the Commissioner's inquiry was limited in scope to determine whether the overall rate exceeded the permitted earned premiums; that determination is different from what is at issue here—whether the lender committed fraud on the borrower by mischaracterizing the nature of the charges.[58]

As a result, no filed rate doctrine barred the plaintiffs' claims in the *Cannon* case in federal court in California:

> Here, the gravamen of the complaint is not the premium rate per se, but the failure to disclose the fraudulent nature of the alleged commission charged to borrowers by Wells Fargo.
>
> In view of the limited scope of the Insurance Commissioner's determination, the Court declines to apply the filed rate doctrine.[59]

In sum, the federal judge's decision in the *Wahl* case illustrates the awareness of federal judges in California that whether the FRD applies or even exists in California is an issue of California state law, not a doctrine imposed by the federal courts. Federal judges in California are aware of this probably because they are aware also of a conflict in the California case law as to whether there is an FRD in California law or not.

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[55] *Wahl*, 2010 U.S. Dist. LEXIS at *3.

[56] No. C-12-1376 EMC, 2014 U.S. Dist. LEXIS 11163 (N.D. Cal. Jan. 29, 2014).

[57] *Cannon*, 2014 U.S. Dist. LEXIS at *15.

[58] *Id*. at *16.

[59] *Id.* at *18.

The federal judge's decision in the *Cannon* case also illustrates the awareness of federal judges in California that the FRD is a state issue in insurance cases, but for different reasons. The federal judge did not cite the conflicting California FRD decisions in his opinion. Rather, he went straight to the source so to speak. He cited the California Insurance Commissioner in support of his decision to decline to apply the filed rate doctrine in *Cannon*, an insurance case.

The similar but differing approaches taken by two different federal judges in California carried them to the same result in two LFPI cases. Their approaches stand in contrast to the approaches taken in some other federal courts including the Southern District of Florida.

B. The only FRD cases found in Florida were decided in the Southern District of Florida, without discussion in those cases of whether Florida has a filed rate doctrine for insurance rates

1. No Florida state court FRD case has been found, not just regarding insurance rates, but regarding any filed rates

No Florida state court case has been found in which the filed rate doctrine was even raised, let alone discussed or applied to any filed rates, including but not limited to insurance rates.

The only FRD cases decided in Florida that have been found, are all federal decisions from the Southern District of Florida. All of the Southern District of Florida decisions are from federal courts, of course.

Apparently not one of them cites any Florida state court cases on any issue of applying the filed rate doctrine, including to insurance rates.[60]

2. Lender force-placed insurance ("LFPI") and the FRD in the Southern District of Florida

It bears repeating that the outcomes of these decisions, in the sense of whether they barred LFPI claims or not, is not the focus of this article. While a survey of those outcomes might be useful at some future date, the focus of this article at this time is more narrow, namely, whether federal courts in the Southern District of Florida have consulted Florida state case law in cases involving filed insurance rates regulated (if at all) by the Florida Office of Insurance Regulation (which was previously known as the Florida Insurance Commissioner's Office).

Those are the outcomes that matter here. The question is simply whether federal courts in the Southern District of Florida look at Florida law to determine the

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[60] *See, e.g.*, *Gelfound*, 998 F. Supp. 2d at 1359–60 (declining to apply filed rate doctrine to claims related to premiums charged for long-term care coverage; consulting one case decided in a New Jersey state court, otherwise the cases consulted were all decided in federal courts); *Uniforce Temp. Personnel, Inc.*, 892 F. Supp. at 1511–12 (applying federal rate doctrine to bar claims related to charging worker's compensation insurance premiums; the only cases consulted were decided by federal courts), aff'd on other grounds, 87 F.3d 1296 (11th Cir. 1996); *Morales*, 983 F. Supp. at 1426–29 (applying filed rate doctrine to bar claims concerning charging of title insurance premiums; the only cases consulted were decided by federal courts).

existence or application of a filed insurance rate doctrine. For purposes of this article, whether the federal courts in those cases decide for or against a given set of insurance or LFPI claims is beside the point at this time. The purpose here is just to examine whether the federal courts in those Southern District of Florida cases consulted Florida law, including Florida case law, concerning the filed insurance rate doctrine, if any.

Whether Southern District decisions permit or bar lender force-placed insurance claims, they do not reflect any consultation of Florida state law cases concerning any FRD issues. These conclusions are based on a relevant sample of cases decided in the Southern District of Florida, all of which are cited below. It would be of interest to conduct a survey of all LFPI cases decided in the Southern District at some future date, but the cases presented here are numerous enough to display the likely results from an even broader survey of similar cases.

If the Southern District decisions permit LFPI claims, they do not consult Florida state court cases concerning FRD issues,[61] and likewise they do not consult Florida state court cases if they hold that LFPI claims in any given case are barred by the FRD which, as a result, they fashion from only federal case law.[62]

If the reader is aware of any Florida state court decision involving the FRD, or of any decision from the Southern District which involves both filed insurance rates and the filed rate doctrine, the author invites the reader to share that information on the off-chance that it somehow exists, for which the author would be most grateful.

Perhaps the judges sitting in the Southern District of Florida believe that the filed rate doctrine is a federal doctrine. That would explain why a Second Circuit Court of Appeals decision in New York, *Rothstein v. Balboa Insurance Co.*,[63] was

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[61] *E.g.*, Wilson v. Everbank, N.A., 77 F. Supp. 3d 1202, 1232–34 (S.D. Fla. 2015) (declining to apply filed rate doctrine at the motion to dismiss stage in an LFPI case, and for other reasons; consulting one case decided in Illinois, the case involving several Illinois plaintiffs, and all other cited cases were decided by federal courts); Jackson v. U.S. Bank, N.A., 44 F. Supp. 3d 1210, 1216 (S.D. Fla. 2014) (declining to apply filed rate doctrine to "lenders, servicers, or insurers in the force-placed insurance context," following the lead of other Southern District decisions; every case consulted was decided by a federal court); *Abels*, 678 F. Supp. 2d at 1277 (declining to apply filed rate doctrine in an LFPI case; the only cases consulted were decided by federal courts).

[62] *E.g.*, Fowler v. Caliber Home Loans, Inc., 277 F. Supp. 3d 1324 (S.D. Fla. 2016), *aff'd with opinion sub nom*, Patel v. Specialized Loan Servicing, LLC, 904 F.3d 1314 (11th Cir. 2018); Patel v. Specialized Loan Servicing LLC, 183 F. Supp. 3d 1238 (S.D. Fla. 2016), *aff'd with opinion*, 904 F.3d 1314 (11th Cir. 2018); Trevethan v. Select Portfolio Servicing, Inc., 142 F. Supp. 3d 1283, 1287–88 (S.D. Fla. 2015) (precedent for both the *Fowler* and *Patel* decisions cited immediately above, to bar LFPI claims based on federal filed rate doctrine, all cases cited having been decided only in federal courts, no mention of Florida state law except, as was done later in *Patel*, to take judicial notice that ASIC's insurance rates were ostensibly approved by Florida OIR).

[63] Rothstein v. Balboa Ins. Co., 794 F.3d 256 (2d Cir. 2015). All cases relied on by the *Rothstein* court, too, were decided in federal courts. Although the *Rothstein* case involved issues of filed

followed in both of the following two cases decided in the Southern District in Florida in the absence of Eleventh Circuit precedent on point, which would actually govern.

As with the above discussion of decisions by federal courts in California, time and space will allow discussion of two potentially significant decisions in the Southern District of Florida. In fact, the two cases were consolidated for purposes of oral argument. As was noted at the beginning of this article, both were affirmed on the basis of federal case law as this article went to press.

In the first of these two cases, a judge in the Southern District decided in the Spring of 2016 that LFPI plaintiffs' claims were barred by the FRD in *Patel v. Specialized Loan Servicing LLC*.[64] In the court's eyes, "[t]he reasonableness of the commissions, reimbursements, reinsurance costs, and services calculated into those [LFPI] rates is a question reserved for the regulators."[65] In the *Patel* case, however, the gravamen of the plaintiffs' claim was that costs of this kind, although calculated into the insurance rates, were concealed from the regulators as well as from the plaintiffs.

In any event, the *Patel* decision of the Southern District relied only on decisions of federal courts regarding the filed rate doctrine. This includes the *Rothstein* Circuit Court of Appeals' decision from outside of the *Patel* district court's governing circuit in the absence of controlling circuit court precedent.[66] *Patel* contains no discussion of any Florida state court cases regarding the filed rate doctrine. The only instance when the federal court acknowledged in *Patel* that LFPI insurance rates are regulated by the Florida Office of Insurance Regulation ("OIR"), was when the court took judicial notice of exhibits filed by the LFPI carrier "documenting OIR's approval of ASIC's premium rates in Florida[.]"[67]

The other decision of the two potentially significant Southern District decisions under discussion, came in the case of *Fowler v. Caliber Home Loans, Inc.* in the Fall of 2016.[68] In this case, the court reviewed the FRD at length in an LFPI case. The court in the *Fowler* case held that the FRD barred the plaintiffs' LFPI claims, following its lengthy review and discussion of FRD decisions.[69]

During the *Fowler* court's review of FRD decisions which runs over the course of nearly 15 full pages in Federal Supplement Third, the court did not cite or

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insurance rates under the laws of New Hampshire, New York, and Texas, the *Rothstein* panel did not cite a single case decided by any state's courts.

[64] 183 F. Supp. 3d 1238 (S.D. Fla. April 25, 2016), appeal docketed, No. 16-121200 (11th Cir. May 2, 2016).

[65] *Patel*, 183 F. Supp. 3d at 1243.

[66] *Id.* at 1242–44.

[67] *Id.* at 1241.

[68] 277 F. Supp. 3d 1324 (S.D. Fla. 2016), appeal docketed, No. 16-16585 (11th Cir. Oct. 13, 2016).

[69] *Fowler*, 277 F. Supp. 3d at 1332–46.

discuss even one Florida case or even one order issued by the Florida Office of Insurance Regulation regarding lender force-placed insurance.

Every FRD decision discussed in *Fowler* relative to filed insurance rates in Florida was decided in a federal court. That of course includes the *Rothstein* decision of the Second Circuit Court of Appeals in New York, which this court followed in Florida.[70]

The author filed an amicus brief in the appeal taken from the district court's decision in *Fowler*. The amicus brief was filed in the consolidated *Fowler* and *Patel* appeals to advise the appellate court that the Florida Office of Insurance Regulation has taken the position that so-called "commissions" or, alternatively, "kickbacks" and similar unauthorized costs included in insurance premiums force-placed upon Florida homeowners, are never approved as a part of filed insurance rates for LFPI premiums in Florida.

The amicus brief provided the appellate court with links to all the orders of the Florida Insurance Commissioner taking this position, that unauthorized charges such as alleged "kickbacks" are never included in rates approved by the Commissioner.[71]

Neither the OIR's position nor the Florida Insurance Commissioner's orders in this regard have been cited in any previous case decided in the Southern District of Florida, so far as is known.

Whether the appellate court in *Fowler/Patel*, the Eleventh Circuit Court of Appeals, addresses them or not is of course a decision in the hands of the appellate court. But they cannot claim that they did not know about either the OIR's position or the Florida Insurance Commissioner's orders.

In the final analysis, the issue of whether there is such a thing as a filed *insurance* rate doctrine goes beyond the result in any one case or even in a handful of cases. The focus of this section matches the focus of this article, which is to explore how courts interpret and apply the extension of a filed rate doctrine developed by federal courts as an outgrowth of federal agency regulation, to a topic regulated by state agencies and not by federal agencies. The particular field of state regulation chosen for the subject of this article is insurance.

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[70] The *Fowler* court counted 22 "important points" which it listed from the *Rothstein* "appellate ruling[.]" *Id*. at 337–38. It seems to have applied them all in following *Rothstein*. *Id*. at 1340–46.

[71] *See* In re: *American Modern Insurance Group, Inc.*, No. 174210-15-CO, Consent Order (Fla. O.I.R. Sept. 16, 2015), accessible online at http://www.floir.com/siteDocuments/American_Modern_Insurance_Group_Inc%20_Consent_Order_174210-15-CO.pdf; In re: *American Security Insurance Company*, No. 14-141841-13, Consent Order (Florida O.I.R. October 7, 2013), accessible online at http://www.floir.com/siteDocuments/AmericanSecurity141841-13-CO.pdf; In re: *Praetorian Insurance Company*, No. 141851-13-CO, Consent Order (Fla. O.I.R. April 12, 2014), accessible online at http://www.floir.com/siteDocuments/Praetorian141851-13-CO.pdf.

VI. CONCLUSION

It is probably too late in some jurisdictions to contest whether the filed rate doctrine should apply to filed insurance rates, so as to bar claims of any kind in insurance cases.

However, there is little question of whether and how courts have applied the filed rate doctrine in cases across the country to date. One book and several articles make that pretty clear nationally.[72]

So does this article.

And something more. It should now be clear that it is up to the states to determine under state law, whether and when the filed rate doctrine exists in the field of insurance rate regulation because state agencies and not the federal government regulate insurance rates whenever insurance rates are regulated at all. In some states, moreover, the questions are still open for arguments as to whether the filed rate doctrine applies to some or any filed insurance rates involved in particular cases.

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[72] E.g., DENNIS J. WALL, LENDER FORCE-PLACED INSURANCE PRACTICES (American Bar Association Publishing 2015); Dennis J. Wall, *Defenses to Claims Based on Lender Force-Placed Insurance Practices*, 51 TORT TRIAL & INSURANCE PRACTICE LAW JOURNAL 911 (American Bar Association Spring 2016); Dennis J. Wall, *They Probably Have to Treat You in Good Faith and Deal Fairly With You: Lender Force-Placed Insurance in the Case Law*, AMERICAN BAR TIPS BUSINESS LITIGATION COMMITTEE NEWSLETTER (Spring, 2016); Dennis J. Wall, *Prosecuting and Defending Force-Placed Insurance Cases*, 35 INSURANCE LITIGATION REPORTER 221 (May 2013).