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

By
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I. INTRODUCTION

This article updates an earlier article, *Filed Insurance Rates Do Not Belong to the Federal Government. They Belong to the States.*[2] When that article was published, a split federal appellate decision in the case of *Patel v. Specialized Loan Servicing LLC*[3] had just been released, which warrants further discussion here. In addition, recent decisions that have now applied *state* insurance filed rate doctrines will also be discussed.

II. REPRISE: THE FILED RATE DOCTRINE GENERALLY

A. Origins of the Filed Rate Doctrine

As the first article noted, the filed rate doctrine ("FRD") began long ago in federal courts. The central issue in all of these early federal cases involved federal agencies regulating utilities. The utilities in those cases filed rates for regulatory approval. Federal judges held that approved rates charged by the utilities were the only lawful rates.[4]

B. Two Strands of the FRD: Nonjusticiability in Federal Courts and Nondiscrimination

The FRD is employed as a defense.[5] It applies when the charge involved in the case is regulated as part of a filed rate by an agency authorized to regulate it.

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[2] Dennis Wall, *Filed Insurance Rates Do Not Belong to the Federal Government. They Belong to the States*, New Appleman on Insurance: Current Critical Issues in Insurance Law 21 (Winter 2018).

[3] Patel v. Specialized Loan Servicing LLC, 904 F.3d 1314 (11th Cir. 2018).

[4] *Filed Insurance Rates*, New Appleman on Insurance: Current Critical Issues in Insurance Law, *supra* note 2, at 21–22.

[5] An increasing number of federal judges have written that they view the most appropriate way to resolve questions concerning the FRD is with a fully developed record on a motion for summary judgment or at trial. *See, e.g.,* Krukas v. AARP, Inc., ___ F. Supp. 3d ___, No. 18-1124 (BAH), 2019 U.S. Dist. LEXIS 43023, at *33 (D.D.C. March 17, 2019); Harvey v. Centene Mgt. Co. LLC, 357 F. Supp. 3d 1073, 1084 (E.D. Wash. 2018).

The two essential elements of the FRD have long been known by their shorthand references of "nonjusticiability" of the reasonableness of a filed rate approved by an authorized agency, and "nondiscrimination" among parties paying that rate, respectively.[6]

III. THE FILED RATE DOCTRINE TODAY

A. The FRD, a Federal Court, and Lender Force-Placed Insurance: The Split Decision in *Patel v. Specialized Loan Servicing, LLC*

1. The Last Gasp of Federal Courts Applying the Federal Filed Rate Doctrine to State-Regulated Insurance?

As noted at the outset, the federal appellate court's decision in *Patel v. Specialized Loan Servicing, LLC*,[7] was issued just as the first article went to publication. Nonetheless, the original article included a brief survey of the decision at the time, relying on the future for more extended reviews of the case. This is one attempt at such a review.

The *Patel* case involved lender force-placed insurance in Florida litigated in federal court. It is a 2-to-1 decision. The majority opinion was written by a judge from Alabama in a case under Florida law imposing the federal filed rate doctrine.

The majority's detour into state insurance filed rate law was slight, at most. The majority opinion referenced a few Florida statutes and one Pennsylvania statute in the course of announcing that its "educated guess" as to Florida law and Pennsylvania law, respectively, was to apply the federal filed rate doctrine in this insurance case, which presented plaintiffs from Florida and from Pennsylvania.[8]

The dissenting judge, Judge Jordan, would apply state law to the question of whether a state administrative agency is empowered to regulate insurance rates.[9] In part here pertinent, the dissenting judge would have asked a potentially determinative question at the outset, which is whether the state whose insurance law was involved would adopt the FRD in this case by certifying that question to the supreme courts of Pennsylvania and Florida.[10]

In suggesting the use of certified questions from federal courts to state supreme courts when a state enables that procedure, Judge Jordan was not alone.

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[6] *Filed Insurance Rates*, New Appleman on Insurance: Current Critical Issues in Insurance Law, *supra* note 2, at 23–27.

[7] Patel v. Specialized Loan Servicing, LLC, 904 F.3d 1314 (11th Cir. 2018).

[8] *Patel*, 904 F.3d at 1324–25.

[9] The dissenting judge noted that the states whose insurance laws were implicated in the *Patel* case, Pennsylvania and Florida, had not adopted the filed rate doctrine "[d]espite its existence for over 100 years[.]" *Patel*, 904 F.3d at 1327 (Jordan, J., dissenting).

[10] *Patel*, 904 F.3d at 1328 (Jordan, J., dissenting).

2. Using Certified Questions Procedures When States Have Enabled Federal Courts by Those Procedures to Ask Case Dispositive Questions of State Supreme Courts

The two judges in the majority in *Patel* apparently did not consider the certified questions procedure as an option or, if they did, did not avail themselves of that option because they viewed the question as settled, i.e., that the filed rate doctrine applies to claims that, as they described them, directly attacked premiums allegedly approved by the respective state insurance commissioners.

Using similar reasoning, a federal judge in Washington reached the same result in November 2018, refusing to certify a question to the Washington Supreme Court because the question was already settled. However, in that case the federal judge ruled that the question was already settled applying the *state* filed rate doctrine.[11]

3. Even the Federal Filed Rate Doctrine Applies When Calculating the Claimed Damages Would Require a Federal Judge to Evaluate the Reasonableness of the Filed Rate

The chief judge of a federal district court outside the boundaries of the Eleventh Circuit wrote about *Patel* recently. As Judge Howell read it, the majority's decision in *Patel* stands only for applying a filed rate doctrine when the complaints at issue challenge the amount of the approved insurance rate (assuming for purposes of decision that the state recognizes a filed insurance rate doctrine):

> In reaching this conclusion, the Eleventh Circuit focused on "[t]he most obvious basis," *id.* at 1325, namely, "the fact that the plaintiffs repeatedly state that they are challenging [the insurance company's] premiums," *id.* at 1325–26, using language targeting "artificially inflated premiums," "unreasonably high force-placed insurance premiums," and "amounts charged for insurance coverage," *id.* at 1326, such that "[t]he plain language of the complaints therefore shows that the plaintiffs are challenging the reasonableness of [the insurance company's] premiums; and since these premiums are based upon rates filed with state regulators, plaintiffs are directly attacking those rates as being unreasonable as well," *id.* The court described these claims "directly challenging the rates . . . filed with state regulators" as "textbook examples of the sort of claims that we have previously held are barred by the nonjusticiability principle." *Id.*
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> The other circuit cases on which the defendants rely are distinguishable from the plaintiff's claims for precisely the reason *Patel* is: in each case, the plaintiffs directly challenged the filed rate.[12]

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[11] Harvey v. Centene Mgt. Co. LLC, ___ F. Supp. 3d ___, No. 2:18-CV-00012-SMJ, 2018 U.S. Dist. LEXIS 198773, at *19 (E.D. Wash. Nov. 21, 2018).

[12] Krukas v. AARP, Inc., ___ F. Supp. 3d ___, No. 18-1124 (BAH), 2019 U.S. Dist. LEXIS 43023, at *38–39 (D.D.C. March 17, 2019) (Howell, C.J.).

4. Reconciling the Views of Federal Judges Imposing the Federal Filed Rate Doctrine With the Views of Federal Judges Who Want to Seek Out State Law Concerning State-Regulated Insurance Operations

There may be a simple way to reconcile the views of the majority and the dissent in *Patel*, which is to focus on the purpose for which federal judges invented the FRD in the first place: to avoid recalculating rates in the courts when they were already approved by authorized agencies.

Since *Patel* was decided, we now have several recent decisions applying state filed insurance rate doctrines. These decisions embody the approach that the FRD is intended to avoid having judges recalculate filed rates approved by authorized agencies.

B. State Filed Insurance Rate Doctrines Have Been Applied When the Charge Involved in the Case is Regulated as Part of a Filed Insurance Rate by an Agency Authorized to Regulate It. State Filed Insurance Rate Doctrines Have Also Been Applied When the Plaintiffs Challenge Such an Approved Rate. The Two Approaches Come to the Same End.

1. The Experience in New Mexico

The federal district court's decision in New Mexico in the case of *Bhasker v. Kemper Casualty Insurance Co.*[13] was addressed on several grounds in the earlier article.[14]

Without following precisely the same reasoning as in *Bhasker*, the chief judge of the New Mexico federal district (but not the judge who decided *Bhasker*) held in a later case that *Bhasker* stands for the proposition that when a plaintiff "is not challenging the premium rate, but Defendant's representations and disclosure about the nature of the coverage," then New Mexico's filed insurance rate doctrine does not apply.[15]

2. The Experience in Washington State

In a ruling made in November 2018, a federal judge in Washington applied that state's filed rate doctrine in the case of *Harvey v. Centene Management Company LLC*.[16] The Harvey case was filed as a putative class action alleging claims for breach of contract and alleged violation of the Washington Consumer Protection Act ("CPA"). The federal judge concisely summarized the complaint by describ-

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[13] Bhasker v. Kemper Cas. Ins. Co., 284 F. Supp. 3d 1191 (D.N.M. 2018).

[14] *Filed Insurance Rates*, New Appleman on Insurance: Current Critical Issues in Insurance Law, *supra* note 2, at 29.

[15] Schwartz v. State Farm Mut. Auto. Ins. Co., No. 1:18-cv-00328-WJ-SCY, 2018 U.S. Dist. LEXIS 149153, at * 27 (D.N.M. Aug. 30, 2018).

[16] Harvey v. Centene Mgt. Co. LLC, 357 F. Supp. 3d 1073 (E.D. Wash. 2018).

ing the claims as based on allegations that the defendants " 'did not deliver the [health] insurance services for which the [Washington State Office of the Insurance Commissioner] approved [the] filed rates.' "[17]

The federal district judge ruled in *Harvey* that the affirmative defense of the filed rate doctrine simply did not apply. The damages requested by the plaintiff were "certainly related to health insurance premiums approved by the Insurance Commissioner," but her damages claims "do not require the Court to reevaluate the reasonableness of such premiums."[18]

"In this alternative type of case," the judge wrote, "the plaintiffs do not allege their premiums are too high but rather they allege either that they did not receive the services the defendants promised them or that the defendants committed some sort of consumer protection violation."[19]

3. The Experience in the District of Columbia

In March 2019, in Washington, D.C., the chief judge of the federal district court followed a similar approach to that followed in Washington state. In *Krukas v. AARP, Inc.*,[20] the federal judge began her analysis of the filed rate doctrine by noting that it was an open question in the District of Columbia.[21]

Helen Krukas filed a putative class action against AARP in her case in the District of Columbia. She alleged several claims, including an alleged violation of the District's Consumer Protection Procedures Act ("CPPA"). The factual basis alleged for all her claims is "that she was 'fooled into paying AARP an undisclosed 4.95% commission' " at the time she purchased a Medigap insurance policy marketed by AARP.[22]

Although the insurance was underwritten by UnitedHealth, Ms. Krukas did not sue UnitedHealth.

None of the damages Ms. Krukas requested against AARP would, if awarded, interfere with or change the rates charged by UnitedHealth, which were allegedly approved by various state insurance commissioners.[23] In pertinent part, she sought

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[17] *Id.* at *2. [All bracketed material in this quotation from the complaint in the *Harvey* case was inserted by the Court.]

[18] *Id.* at *20.

[19] *Id.* at *21.

[20] Krukas v. AARP, Inc., ___ F. Supp. 3d ___, No. 18-1124 (BAH), 2019 U.S. Dist. LEXIS 43023 (D.D.C. March 17, 2019) (Howell, Chief Judge).

[21] *Id.* at *30–31 & n.7.

[22] *Id.* at *2. "A Medigap policy is insurance offered by a private insurer to help pay for certain 'gaps' in Medicare coverage." *Id.* at *3.

[23] In effect, the court assumed without deciding in this case that the premiums which UnitedHealth charged for Medigap coverage were approved by the relevant state insurance commissioners who were authorized to review the rates, "without a full record regarding the information UnitedHealth filed concerning its rates and the precise role of the payments to AARP in each state in question[.]" The district judge and the defendants all declined the opportunity to

to require AARP "to restore all money or other property taken by means of unlawful acts or practices," and to require "the disgorgement of all sums taken from consumers by means of deceptive practices, together with all proceeds, interest, income, and accessions[.]"[24]

Returning to the roots of the federal filed rate doctrine, the district judge in *Krukas* held that "the critical policies" that gave birth to the doctrine did not apply here:

> Thus, the filed-rate doctrine operates to bar only claims, which, if successful, would undermine the critical policies underlying the filed-rate doctrine in the first place: nondiscrimination among customers and nonjusticiability as to the reasonableness of a rate.[25]

Viewed in that light, it was clear to the court that Ms. Krukas sought relief "that may be awarded without any alteration in the approved premiums collected by the regulated entity."[26]

C. One More Approach (With the Same Result): When Filed Insurance Rate Doctrines Yield to a Higher Public Policy

The *Bhasker* case filed in the New Mexico federal district court contains elements of a public policy rationale. As the same federal judge described his earlier decision in another iteration of the *Bhasker* case in February 2019, "[s]pecifically, the Court concluded that . . . the filed rate doctrine does not bar Bhasker's claims, because the Supreme Court of New Mexico would not apply the filed rate doctrine to bar claims against insurers for unfair or deceptive business practices[.]"[27]

There is facially contrary authority from the state of Washington. The Washington Supreme Court held in *McCarthy Finance, Inc. v. Premera,*[28] cited in the original article, that despite Washington's preference for allowing valid claims under the Washington Consumer Protection Act to proceed through Washington's courts,[29] the Washington state filed insurance rate doctrine barred their claims in

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convert the defendants' motion to dismiss into a summary judgment motion for purposes of disposition. *Id.* at *33.

[24] *Id.* at *13. It is unclear from the opinion, and almost certainly irrelevant to the outcome, how if at all "restoring" money is different from "disgorgement" of money, and what Ms. Krukas meant by making a prayer for "accessions," which is probably equally irrelevant to the outcome in this case.

[25] *Id.* at *26.

[26] *Id.* at *28. Different results concerning application of the FRD in other cases in which the AARP faced claims over its Medigap royalties, illustrate the point emphasized by the district judge in this case: "Those courts to address this issue have reached different outcomes, but closer scrutiny shows this is due to differences in the claims asserted." *Id.* at *41.

[27] Bhasker v. Kemper Cas. Ins. Co., 361 F. Supp. 3d 1045, 1059 (D.N.M. 2019) (footnote omitted).

[28] McCarthy Fin., Inc. v. Premera, 182 Wash. 2d 936, 347 P.3d 872 (2015) (en banc).

[29] *McCarthy*, 182 Wash. 2d at p. 943, ¶ 11, 347 P. 3d at 875, ¶ 11.

that specific case. The "specific damages" the plaintiffs requested in that case would require a court to reevaluate the reasonableness of insurance premiums approved by the Washington State Office of the Insurance Commissioner (OIC).[30]

Following the reasoning of the Washington Supreme Court in *McCarthy*, a Washington federal judge in late 2018 refused to apply the Washington filed rate doctrine to bar consumer damages claims related to health insurance premiums. The court's ruling was not because the claims included consumer protection claims or that they are protected by public policy. Instead, the Court ruled as it did because the claims in that case did not require the court to recalculate the approved rates:

> While [the plaintiff's] claims are certainly related to health insurance premiums approved by the Insurance Commissioner, they do not require the Court to reevaluate the reasonableness of such premiums.[31]

IV. CONCLUSION

Recently reported decisions in insurance cases involving the FRD have been based on state filed insurance rate doctrines. To that extent, the two-judge majority decision in *Patel*, applying the federal filed rate doctrine to state-regulated insurance, is an outlier.

A judicial ruling that the FRD does not apply because, as with New Mexico's filed rate doctrine, the particular rate at issue is not regulated or, perhaps, because applying the FRD would be against public policy in a given case, may be the same thing as saying that the FRD does not bar the damages claims in the case at bar because those claims do not require a judge to reevaluate a filed insurance rate approved by an authorized agency.

Alternatively, it can be said that a state filed insurance rate doctrine does not apply because the plaintiff is not challenging an approved filed insurance rate, as is true under the filed rate doctrine employed under Washington state law or the filed rate doctrine assumed to exist in Washington, D.C., for the purposes of reaching a decision. All these announced reasons for ruling end up in the same place. Whether or not they all mean the same thing may be debated, but the ultimate destination of each one is the same.

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[30] *McCarthy*, 182 Wash. 2d at p. 938, ¶ 1, 347 P. 3d at 873, ¶ 1.

[31] *Harvey*, 2018 U.S. Dist. LEXIS 198773, at *20.