RECENT DEVELOPMENTS IN BUSINESS LITIGATION

Van Cates, Court Walsh, Niall A. Paul, and Dennis Wall

Van Cates is Vice President and Assistant General counsel at Veolia North America in Tampa, Florida. Court Walsh is a litigation partner in the Columbia, SC, office of Nelson Mullins Riley & Scarborough LLP. Niall A. Paul is a Member at Spilman Thomas & Battle, PLLC in its Charleston, SC, office. Dennis Wall is an experienced litigator who is now working exclusively as a writer. He is the author of several books including Lender Force-Placed Insurance Practices, published by American Bar Association Publishing and sponsored by the Tort Trial and Insurance Practice Section. He is a member of the Tort Trial and Insurance Practice Section's Business Litigation Committee.

IV. REMEDIES

An Arizona district court decision in the last year established that states have supremacy over federal court decisions in expanding and contracting their own filed rate doctrines irrespective of what federal courts may decide.

In *Castillo v. Johnson*,[156] a group of defendants that the federal judge in that case called "the Bribery Defendants," were sued for racketeering, unjust enrichment, and "conspiring to unlawfully raise utility rates through racketeering, wire fraud, and bribery of a public servant."[157]

In response to these claims, the Bribery Defendants actually alleged that the bribery allegations against them were barred by the filed rate doctrine ("FRD").[158] In other words, the utility rates in question were allegedly subject to a merely ministerial approval by an authorized admin-istrative agency. That meant, they argued, that there was no remedy for their conduct related to their utility rates so long as their utility rates were authorized.[159]

The Bribery Defendants' argument was not entirely invented. In fact, their argument was based on decades of decisions by federal courts apply-ing the federal FRD.[160] From the inception of the FRD, the originating issue in the federal cases involved federal agencies regulating utilities.[161]

The utilities sued in those federal cases previously filed rates for approval by federal administrative agencies which had the power to regulate them.[162] The federal FRD was made by federal judges as a kind of blanket defense to throw over any perceived attack on rates approved by authorized agencies.[163] Federal courts have held accordingly that the FRD defense applies whether or not the attack on authorized rates is direct or collateral, including in litigation in which federal judges would have to evaluate or

155. McGovern & Rubenstein, *supra* note 153.
156. Castillo v. Johnson, No. CV-17-04688-PHX-DRY, 2019 WL 4222289 (D. Ariz. Sept. 5, 2019).
157. *Id.* at *1.
158. *Id.* at *2–4.
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* at *3.
163. *Id.*

calculate rates already approved as "reasonable" by authorized administrative agencies.[164]

Shorthand references in the federal case law of the FRD speak within a cryptic framework of "nonjusticiability" of the reasonableness of an authorized filed rate, and "nondiscrimination" among the parties which pay that rate.[165]

The federal judge rejected the Bribery Defendants' argument in *Castillo*, however. First, the federal FRD just could not apply in this case. "Because no federal rate is implicated here, the federal filed rate doctrine is inapplicable."[166]

Second, whether or not Arizona has its own FRD, and whether or not it would apply here anyway, the relevant Arizona administrative authority had already expressly rejected the idea that utility rates in Arizona can be obtained by bribery:

> The Court is unpersuaded that Arizona has adopted a version of the filed rate doctrine. Nor is the Court persuaded that the doctrine, assuming one has been adopted, would apply to the type of conduct at issue here. Nevertheless, even assuming that Arizona has adopted a filed rate doctrine and that it applies under these circumstances, the doctrine does not bar Plaintiffs' claims because the [Arizona Corporation] Commission repudiated the doctrine in this instance. The Court therefore denies the Bribery Defendants' motion to dismiss.[167]

The federal court's three-part analysis of state FRD in this case is instructive. The court's analysis tracks the development of the FRD in federal courts and how the doctrine might be anticipated in the state courts, if at all.

First, the court looked to whether the forum state has adopted a version of the FRD.[168] In the course of its opinion, the federal court cautioned that this first question cannot be answered simply by resorting to federal filed rate precepts.[169]

---

164. *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); Wegoland Ltd. v. Nynex Corp. Wegoland Ltd. v. Nynex Corp., 27 F.3d 17, 18 (2d Cir. 1994); *see, e.g.*, Dennis J. Wall, *An Update to: 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 25–26 (Summer 2019); Dennis J. 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 21–22 (Winter 2018).

165. *Wegoland*, 27 F.3d at 19. Wall, *Filed Insurance Rates*, *supra* note 164, at 23–27.

166. *Castillo*, 2019 WL 4222289, at *3.

167. *Castillo*, 2019 WL 4222289, at *8.

168. *Id.* at *3–7.

169. *Id.*

Second, the federal court looked to see whether a state FRD could be applied on the merits.[170] Even assuming that a state FRD could apply to these facts—after showing that the facts of this case could not support any filed rate doctrine here—the federal court turned to the last of the trio of questions.[171]

Third and finally, the relevant state administrative agency had already taken action that "repudiated the doctrine in this instance."[172] Simply put, no filed rate doctrine can ever be applied in the face of state administrative agency action that repudiates it in the case at bar.

If this decision from Arizona is followed elsewhere, it will require any state FRD limiting remedies to be left to the individual states to develop. State FRDs will simply not be left to federal judges to impose. The rules of state FRDs remain to be developed by the states.

170. *Id.*
171. *Id.*
172. *Id.* at *6.