

Nos. A04-2088 and A04-2054

State of Minnesota
In Supreme Court

Christopher P. Schermer, John V. Smith, Marjorie B. Smith,
 Reverend Albert Gallmon, on behalf of themselves
 and all others similarly situated,

Appellants,

vs.

State Farm Fire and Casualty Company,
 State Farm General Insurance Company,

Respondents.

**BRIEF AND APPENDIX OF AMICUS CURIAE
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INTRODUCTION¹

MTLA submits this amicus curiae brief in support of reversing the Court of Appeals' decision to adopt the filed rate doctrine in the insurance context. This court should reverse the broad-reaching holding for several reasons. First, Minnesota is known as a "file and use" state for insurance rate regulation purposes. The regulatory scheme at the Minnesota Department of Commerce is limited, not comprehensive. The Department does not "set" rates, and its procedures fail to provide any type of meaningful rate review. Accordingly a court's review of a rate surcharge for the purpose of determining whether it is illegal does not impact rate determining procedures at a state agency. The filed rate doctrine has no application in the context of such a scheme. Second, application of the filed rate doctrine conflicts with the jurisdiction of the Minnesota courts and their responsibility to adjudicate a consumer's claim that his or her insurer failed to comply with state statutes. In this case, the statute violated is Minnesota Statutes § 72A.20, subd. 13(b) (2002), which prohibits insurers writing property insurance from charging differential rates based upon the age of the primary structure (anti-redlining statute). Third, application of the filed rate doctrine to bar insurance consumers from seeking relief from the courts from an insurer who charged an illegal premium surcharge violates the fundamental right to a jury trial and right to a remedy guaranteed by the Minnesota Constitution.

¹ No party authored this brief. No entity other than the MTLA and its members made a monetary contribution to the preparation of this brief.

STATEMENT OF THE LEGAL ISSUE

Should Minnesota adopt the common law “filed rate” doctrine to bar a court action brought by Minnesota consumers against their insurance company in which they seek redress for an illegal premium surcharge?

ARGUMENT

I. THE HISTORICAL SCOPE AND PURPOSE OF THE FILED RATE DOCTRINE DOES NOT SUPPORT ITS APPLICATION TO A CLAIM BROUGHT BY INSURED CONSUMERS AGAINST THEIR OWN INSURER SEEKING REIMBURSEMENT FOR ILLEGAL OVERCHARGES.

The “filed rate” doctrine is a judicially created common law doctrine initially established by Justice Brandeis in 1922 in *Keough v. Chicago & N.W. Ry. Co.*² The doctrine was created to preserve the integrity of the ratemaking procedures of the Interstate Commerce Commission and to prevent interstate carriers from engaging in price discrimination. The filed rate doctrine forbids a regulated entity from charging rates other than those properly filed with the appropriate regulatory authority for its services.³ The United States Supreme Court has acknowledged that the application of the filed rate doctrine is “harsh.”⁴

Because of that harshness, the doctrine is properly applied only when its underlying policies and purposes are met. “The considerations underlying the doctrine . . . are preservation of the

² 260 U.S. 156 (1922).

³ *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981).

⁴ *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 128 (1990).

agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant."⁵ The doctrine was subsequently applied to the telecommunications industry⁶ and to utilities⁷ to prevent these heavily regulated entities from charging rates other than the rates filed by their respective federal agencies.

Not all regulated industries, however, warrant the application of the doctrine, particularly where the underlying reasons for its initial development are not met. Courts faced with the question of whether to extend the filed rate doctrine into new areas have focused upon a number of factors, including (1) the impact of the court's decision on agency procedures and rate determinations,⁸ (2) whether there is an

⁵ *Id.*; see also *Sun City Taxpayers Ass'n v Citizens Utils. Co.*, 847 F. Supp. 281, 288 (D. Conn. 1994) (observing that the purpose of the doctrine is to preserve the authority of the legislatively created agency to set reasonable and uniform rates to ensure that those rates are enforced, thereby preventing price discrimination), *aff'd* 45 F.3d 58 (2d Cir. 1995).

⁶ See generally *Am. Tel. & Tel. Co. v. Ins. Co.*, 524 U.S. 214, 224 (1998) (noting that the filed rate doctrine originated in cases interpreting the Interstate Commerce Act and has subsequently been applied to other utilities).

⁷ See generally *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981). However, the filed rate doctrine has not been applied in two recent electric utility rate cases. See, e.g., *Columbia Steel Casting Co. v. Portland Gen. Elec. Co.*, 103 F.3d 1446, 1465 (9th Cir. 1996), as amended on denial of rehearing, 111 F.3d 1427, 1446 (9th Cir. 1997); *Fla. Mun. Power Agency v. Fla. Power & Light Co.*, 64 F.3d 614, 616-17 (11th Cir. 1995). With increasing deregulation of the energy field, the filed rate doctrine should have decreasing application in this area.

⁸ See *H.J. Inc. v. N.W. Bell Tel. Co.*, 954 F.2d 485, 488 (8th Cir. 1992).

administrative agency to review the claim and provide a remedy,⁹ (3) whether there is meaningful review of rate increases,¹⁰ and (4) whether the damages requested require the court to engage in determining what a reasonable rate would be.¹¹

Historically the doctrine has not been applied to the insurance industry. It is a federal doctrine applied to federal agencies and the industries they regulate. Insurance, on the other hand, is regulated by the states, and that regulation generally does not square with the doctrinal foundations underpinning the filed rate doctrine. In fact, *amicus* MTLA is aware of no other Minnesota court, other than the district court and Court of Appeals in this case, that has applied the filed rate doctrine to a case involving a claim by an insured against an insurance company.¹² The doctrine ought not be adopted here.

⁹ See *Calico Trailer Mfg. Co. v. Ins. Co. of N. Am.*, 155 F.3d 976, 978 (8th Cir. 1998).

¹⁰ See *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 393-94 (9th Cir. 1992).

¹¹ See *H.J. Inc.*, 954 F.2d at 488.

¹² MTLA is aware that Minnesota district courts have rejected application of the filed-rate doctrine claims against insurance companies. See, e.g., *Mitchell v. Chicago Title Ins. Co.*, No. CT-02-17299, 2004 WL 2137815, at *2 (Henn. Co., Minn. Dist. Ct. Aug. 13, 2004) (AA569); *Arent v. State Farm Mut. Ins. Co.*, No. MC 00-16421, slip op. at 12-13 (Henn. Co., Minn. Dist. Ct. Apr. 20, 2001) (MTLA-12-13) (denying application the filed rate doctrine to class claim that insurer charged a premium in violation of state statute), slip op. at 8 (Henn. Co., Minn. Dist. Ct. June 26, 2003) (declining on summary judgment to reverse decision refusing to apply the filed rate doctrine) (MTLA-23).

A. The Department of Commerce Does not Set Insurance Rates, Thus Common Law Claims Against an Insurer for Reimbursement of Overcharges Based Upon the Application of an Illegal Surcharge Cannot and Does Not Interfere with the DOC's Legitimate Work and Authority.

The Commissioner of Commerce has limited authority, which is set forth in Chapter 70A (2002)¹³. The statute is “an aid and a guide to interpretation, but not an independent source of power.”¹⁴ Critically, the Commissioner and the Minnesota Department of Commerce (DOC) do not have the power to make or set insurance rates. The Commissioner is charged only with the enforcement of the provisions of Chapter 70A. Minnesota is what is known in the insurance business as a “file and use” state. Section 70A.06, subdivision 1 requires an insurer to file with the DOC any rate it wishes to use. The DOC may request the insurer to provide supportive or explanatory material setting forth the basis for the rate, but this is not mandatory.¹⁵ The DOC can disapprove of a filed rate, but is not in a position to propose an alternative.¹⁶ Chapter 70A provides that a rate increase of 25% or more in a twelve-month period is presumptively excessive, but even under these circumstances, there is no mandatory excessive rate hearing. Whether to hold such a

¹³ Reference is made to the 2002 version of the statute, which was the version in force at the time this case was commenced. The current version of the statute is identical in all pertinent respects.

¹⁴ Minn. Stat. § 70A.01, subd. 1.

¹⁵ Minn. Stat. § 70A.06, subd. 1.

¹⁶ Minn. Stat. § 70A.11.

hearing is discretionary with the Commissioner.¹⁷ Practically speaking, an insurer wishing to charge any given premium for a policy need only file the desired premium structure with the DOC. As long as it is filed, the rate stands.

The plaintiff class in this case seeks reimbursement of premium payments made due to a hidden surcharge on a premium rate filed by State Farm. They are not interfering in any way with the rate setting functions of the DOC. The DOC does not set rates. They are not interfering with any other regulatory functions of the DOC. No contested case hearing is mandated by Minnesota law, and none was held. Seeking court adjudication of a rescission claim based upon an unlawfully charged premium surcharge has no effect on the DOC's rate procedures. This fact, based on the nature of Minnesota's insurance administrative scheme, weighs against extending the filed rate doctrine to insurance in Minnesota.¹⁸

B. The Legislature Has Neither Compelled nor Provided Sufficient Funding to Enable the DOC to Engage in a Meaningful Review of All Filed Rate Increases.

Section 70A.11 provides that the DOC can disapprove of a rate filed by an insurer. This disapproval provision has no teeth, however, because it is discretionary. Section 70A.06 requires rates to be filed, but the filing need not include explanatory or supportive data. Again, the decision of whether to require any supporting documentation is discretionary with the DOC. Even when an insurer files a

¹⁷ Minn. Stat. § 70A.06, subd. 1a.

¹⁸ See, *supra*, n.8.

presumptively excessive rate (a 25% increase in twelve months), the statutory scheme does not require an excessive rate hearing. Nothing in the statutory scheme requires public notice of rate setting or provides for public hearings before premiums or rates are set.¹⁹ Thus, insurance consumers have absolutely no input into the process, and no forum in which to raise a challenge to a proposed premium even if they had notice. The lack of meaningful review of rate setting or rate increase weighs against application of the filed rate doctrine to insurance cases in Minnesota.²⁰

C. Application of the Filed Rate Doctrine Conflicts With Court Precedent that Renders Insurance Provisions that Conflict with Statutory Law Ineffective.

The filed rate doctrine should not be applied to bar suits by policyholders claiming their insurer has violated state statute. The appellate courts of Minnesota routinely have noted “[a]ny insurance policy provision that is contrary to statutory requirements is ineffective.”²¹ The appellate courts have repeatedly reformed automobile insurance contracts to remove terms that violate

¹⁹ See generally Minn. Stat. § 70A.06. The statutes only provide that all rates and supplemental information, if any, be open to public inspection once filed. Minn. Stat. § 70A.07.

²⁰ See, *supra*, n.9.

²¹ *Shank v. Fidelity Mut. Life Ins. Co.*, 221 Minn. 124, 128, 21 N.W.2d 235, 237 (1945), cited in *RLI Ins. Co. v. Pike*, 556 N.W.2d 1, 3 (Minn. Ct. App. 1996); see also *Ill. Farmers Ins. Co. v. Glass Serv. Co.*, 683 N.W.2d 792, 802 (Minn. 2004) (writing that “[i]f a term in an insurance contract conflicts with Minnesota statutes, the contract term becomes unenforceable”).

Minnesota's statutory automobile insurance scheme, the Minnesota No Fault Act.²² To apply the filed rate doctrine to insurance cases such as this one, where the policyholders claim an insurer has violated state statute, calls into question jurisprudence that empowers Minnesota courts to adjudicate and review suits by policyholders challenging an insurer's unlawful policy provision or practice by merely contending that the claim may involve a "rate."

D. The Minnesota Constitution Guarantees Insured Consumers the Right to a Remedy and to a Jury Trial, and Since the Powers and Procedures Delegated to the DOC Do Not Provide Consumers with an Administrative Remedy Against Their Insurer for Charging an Illegal Surcharge, the Filed Rate Doctrine Cannot be Applied to Deprive Them of a Remedy in the Courts.

Unlike the United States Constitution, the Minnesota Constitution begins in Article I with the Bill of Rights. It is far more explicit than the federal Bill of Rights. Two of those guaranteed and fundamental rights are placed squarely at issue by State Farm's argument that the filed rate doctrine should be adopted by Minnesota courts to preclude a recovery by Minnesota insurance policy holders for illegal charges. One is the right to trial by jury found at article I section 4. The other is right to a "certain remedy in the law" found in the "remedy clause" or "open courts" clause found at article I section 8. These two constitutional provisions set forth fundamental rights, reserved by the people of Minnesota for themselves. They cannot be

²² *Kwong v. Depositors Ins. Co.*, 627 N.W.2d 52, 55 (Minn. 2001) (stating that "policy terms that conflict with the No-Fault Act will be held invalid").

abridged by any legislative act, administrative agency or the adoption of a common law federal doctrine.

Article I section 4 of the Minnesota Constitution provides in pertinent part:

The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy.²³

One of the first cases to interpret this clause was *Whallon v. Bancroft*.²⁴ In *Whallon*, decided in 1860, two years after the 1858 constitution was enacted, the Minnesota Supreme Court held that the effect of the jury guarantee found in Article I, section 4 is:

First, to recognize the right of a trial by jury as it existed in the Territory of Minnesota at the time of the adoption of the state constitution; and second, to continue such right unimpaired and inviolate. It neither takes from nor adds to the right as it previously existed, but adopts it unchanged. Whatever the right of trial by jury could be had under the territorial laws, it may now be had, and the legislature cannot abridge it, and those cases which were triable by the court without the intervention of a jury may still be so tried.²⁵

Whallon and its progeny make it clear that a party is entitled to a jury trial if, at the time the Minnesota constitution was adopted, that party would have had such a right. In other words, under the Minnesota Constitution, the plaintiffs' class is entitled to a jury trial in their cause of action against State Farm if a party raising the same theory

²³ Minn. Const. art. I, § 4.

²⁴ 4 Minn. 109 (1860).

²⁵ *Whallon v. Bancroft*, 4 Minn. 109, 111 (1860).

for relief at the time the Minnesota Constitution was adopted would also have been entitled to a jury trial.²⁶ In 1858, actions at law – actions originating in the common law – entitled either party to demand a jury trial:

If [the action] is an action at law for the recovery of money only, the plaintiff is entitled absolutely to a trial by jury, although it involves the examination of a long account on either side, for the constitution guarantees to him this right. But if the action is equitable in nature . . . the plaintiff is not entitled to a jury trial . . . for in such cases, at the time of the adoption of the constitution, there was no absolute right of trial by jury.²⁷

To adopt the filed rate doctrine to bar insurance consumers from seeking a jury trial to redress unlawfully charged premiums, especially where they have no meaningful input at the file and use stage at the DOC, violates this specific constitutional right as well as traditional notions of due process.

Minnesota's Constitution also contains a remedies clause, or open courts clause, in article I section 8. Consisting of two phrases, article I section 8 provides:

Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws.²⁸

²⁶ *Olson v. Synergistic Techns. Business Sys., Inc.*, 628 N.W.2d 142, 149 (Minn. 2001).

²⁷ *Bond v. Welcome*, 61 Minn. 43, 43-44, 63 N.W. 3, 3-4 (1895); see also *Olson*, 628 N.W.2d at 150; *Morton Brick & Tile Co. v. Sodergren*, 130 Minn. 252, 254-55, 153 N.W.2d 527, 528 (1915).

²⁸ Minn. Const. art. I, § 8.

Minnesota's remedies clause is similar to and has common roots with similar provisions in at least 36 other states.²⁹ Like its counterparts, article I, section 8 is a restraint on legislative power, and was adopted for that purpose.³⁰ The interpretations of the remedies/open courts clauses in other states are useful models for the proper construction of article I, section 8, since they share common roots, and many are comprised of nearly identical language.

According to scholar David Schuman, "the most complex – and popular – interpretation of the remedy guarantee" is exemplified by *Kluger v. White*.³¹ In *Kluger*, the Florida Supreme Court announced an approach that

[W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State of Florida, the Legislature is without power to abolish such a right without providing a reasonable alternative . . . unless the Legislature can show an overpowering public necessity

²⁹ Jennifer Friesen, *State Constitutional Law* § 6.2(a) at 347 n.11 (1996).

³⁰ See *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 351 (Or. 2001) (detailing the origins of the right to remedy/open courts clauses and declaring, "that remedy must be by due course of law is a directive to courts, as the guardians of constitutional rights, to determine the constitutionality of legislatively created remedies respecting such rights.").

³¹ David Schuman, *The Right to a Remedy*, 65 Temp. L. Rev. 1197, 1216-17 (1992).

for the abolishment of such a right, and no alternative method of meeting such public necessity can be shown.³²

This approach, which relies on the common law to define the extent of protection, is consistent with the history and origins of the remedy/open court provision of the Minnesota constitution, as well as with the manner in which this Court has construed the right to trial by jury contained in article I, section 4.³³ It precludes the application of the filed rate doctrine to this case.

In a “file and use” state such as Minnesota, the legislature has afforded insurance consumers with no remedy for losses they have suffered at the hands of their insurer for charging them illegal insurance premiums. While the DOC has the authority to undertake investigations of an insurer such as State Farm,³⁴ to take legal action against State Farm,³⁵ to issue an injunction or a cease and desist order,³⁶ or even to deny, suspend or revoke and insurer’s license,³⁷ none of these powers provides the insureds who were the victims of the insurer’s malfeasance with a remedy.

³² 281 So. 2d 1, 4 (Fla. 1973).

³³ *Olson v. Synergistic Technologies Business Systems, Inc.*, 628 N.W.2d 142, 150 (Minn. 2001).

³⁴ *See, e.g.*, Minn. Stat. § 45.027; Minn. Stat. § 72A.21 (2002).

³⁵ Minn. Stat. § 45.027, subd. 5a.

³⁶ *Id.*

³⁷ *See, e.g.*, Minn. Stat. § 45.027, subd. 7; Minn. Stat. § 70A.21, subd. 2.

The procedural history of State Farm's dealings with the DOC in this case exemplifies the point. Despite a finding by the DOC in 2001 that State Farm had assessed certain policyholders an illegal surcharge, those policyholders who had been assessed the illegal surcharge had no voice in the investigation, had no input into the actions taken with and against State Farm, and received no relief for what was at that time held by the DOC to have been an illegal charge. The entire administrative proceeding involved only the agency and the insurer; the injured parties had no voice, no participation, and no remedy. The Minnesota Constitution guarantees the plaintiffs a remedy at law. Due to the way the insurance industry is regulated in Minnesota, plaintiffs' only remedy is to be found in the courts. Adoption of the filed rate doctrine under these circumstances would violate the Minnesota Constitution.

CONCLUSION

For these reasons, *amicus curiae* Minnesota Trial Lawyers Association respectfully requests this court to issue a decision reversing the Court of Appeals, holding that the filed rate doctrine does not apply to bar court action for claims by Minnesota insurance

consumers seeking reimbursement of unlawfully charged premium surcharges.

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font, 13 pt. Bookman Old Style. The length of this brief is 4,053 words. This brief was prepared using Microsoft Word 2000.

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