

NO. A06-2275

State of Minnesota
In Supreme Court

Irene Hoffman, et al.,

Appellants,

v.

Northern States Power Company,
d/b/a Xcel Energy,

Respondent.

**BRIEF OF AMICUS CURIAE
NATIONAL ASSOCIATION OF CONSUMER ADVOCATES**

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Amicus Curiae National Association of Consumer Advocates (“NACA”) submits this brief in support of Appellants, purchasers of Northern States Power Company’s electricity-provision services.¹ NACA is an association of more than 1000 consumer advocates organized to help create and strengthen state and federal laws designed to protect purchasers from unscrupulous business practices in connection with consumer transactions. Our organization is concerned that the decision below will lead to diminished enforcement of consumer laws leading to an increase in deceptive and unfair trade practices in the marketplace, which disproportionately impact purchasers with the diminished bargaining power ever present in consumer transactions.

INTRODUCTION

No court in any jurisdiction has ever held that the filed rate doctrine bars a court from *interpreting* the terms of a filed rate—until now. The filed rate doctrine was first used to collect undercharges on behalf of rail carriers who had agreed to accept less than what their filed rates required them to charge. *See Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116,

¹ Pursuant to Minn. R. Civ. App. P. 129.03, NACA states that counsel for neither captioned party authored this brief, in whole or in part, and that no other person or entity made a monetary contribution or promise of contribution to the preparation or submission of the brief.

120-23 (1990) (citing *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915)). These cases were brought *in court* by the carriers' creditors against shippers to enforce the filed rates. *Id.* at 123. The jurisprudence spilled over into other regulated industries throughout the years, but never has a court decided that merely interpreting filed rates or tariffs would result in ratemaking. Rather, they saw it for what it is: rate enforcement.

If let stand, the appellate court's astonishing expansion of the filed rate doctrine will vest regulated industries with judicial immunity from enforcement of the terms of filed rates and the services associated with those rates. NACA and other consumer advocates have grown concerned over the utility and insurance industries' concerted, national strategy to broaden the filed rate doctrine to unrecognizable proportions, providing them with blanket immunity from legal claims regarding their failure to live up to their part of the bargain. Therefore, NACA stands shoulder to shoulder with Appellants and respectfully requests that this Court reverse the court of appeals and hold that courts may continue, as they have for over a century in Minnesota and elsewhere, to interpret the terms of rates and tariffs duly filed, when the rate seeker is alleged to have breached the terms of its rates.

STATEMENT OF FACTS

NACA adopts and incorporates the factual statement presented in Appellants' brief.

ARGUMENT

I. The Lower Court Created New Law When It Barred Judicial Rate Interpretation and Ignored This Court's Binding Precedent to the Contrary.

The lower court's ruling broadly expands the limited doctrine adopted by this Court in *Schermer v. State Farm Fire & Cas. Co.* There, this Court held that an insurance policyholder could not seek to alter the terms of a rate that had been duly filed with Minnesota's Department of Commerce. 721 N.W.2d 307, 314 (Minn. 2006). Such a challenge would upset "the regulatory scheme established by the legislature and with the ratemaking functions of the DOC." *Id.*

The point of error in the present case is clear: *Schermer* did not bar disputes regarding rate *interpretations*—it barred suits seeking to challenge the rates themselves as "unreasonable or unlawful." 721 N.W.2d at 314. In other words, *Schermer* dealt with the issue of whether the filed rate, which permitted State Farm to charge a subset of consumers a 6% surcharge, was legal. Whereas here, consumers are not claiming that the rate filed or the services promised in that rate are illegal or unreasonable; instead, they merely claim that NSP has failed to live up to the promises it made in its duly filed rates. In fact, *Schermer* had nothing to do with interpreting rates, which makes the lower court's avoidance of this Court's opinions that *do* discuss rate interpretation so damaging to this State's jurisprudence.

In *Merchants' Elevator Co. v. Great Northern Ry. Co.*, for instance, this Court held that state courts have jurisdiction to construe rates filed with regulatory agencies. 147 Minn. 251, 253, 180 N.W.105, 106 (1920), *aff'd*, *Great N. Ry. Co. v. Merchant's Elevator Co.*, 259 U.S. 285 (1922). Also, in *Reliance Elevator Co. v. Chicago, Milwaukee & St. Paul Ry. Co.*, this Court recognized that "it is thoroughly settled that" a party cannot "attack" the *validity* of rates filed as required by a regulatory agency in court "upon the ground that they are unreasonable, or discriminatory, or infringe the law in some other respect." 139 Minn. 69, 73, 165 N.W. 867, 869 (1917).

In that case, however, this Court determined that "where the validity of the published rate is conceded" and the purchaser "merely seeks to recover an excess which he alleges that the [rate filer] has exacted and collected over and above such a published rate," the purchaser has the right to "bring his action therefor in state court." *Id.* Because the pleadings presented "no question as to the validity of the rate fixed by the tariff," and the only issue was "whether defendant had collected an amount in excess of the prescribed rate," the Court held that the state court had jurisdiction. *Id.*² See also *Info Tel Comm'n*,

² *Reliance Elevator* was decided *prior* to the Supreme Court's decision in *Keogh v. Chicago & Nw. Ry. Co.*, 206 U.S. 156 (1922), which is the case most often cited as the origination of the filed rate doctrine and which was relied upon in *Schermer*. But *Keogh* acknowledged that the "stringent rule" that "tariffs cannot be varied or enlarged by either contract or tort" (the essence of the filed rate doctrine) actually dated back to 1906, citing *Texas & Pac. Ry.*

LLC v. Minnesota Public Utilities Comm'n, 592 N.W.2d 880, 884 (Minn. Ct. App. 1999) (finding that “Tariffs are interpreted no differently than any other contract. Contract interpretation is a question of law,” and finding that the regulatory agency’s interpretation was not reasonable).³

In the present case, Respondent’s attempt to construe Appellants’ claims as a “modification” to the rate is nothing more than Respondent saying that it disagrees with Plaintiff’s interpretation. In *Reliance Elevator*, the parties tussled before the court over the interpretation of a filed rate. The case, which adjudicated which amount should have been charged for shipping

Co. v. Mugg & Dryden, 202 U.S. 242 (1906). *Keogh*, 260 U.S. at 163. And the *Mugg & Dryden* decision points to *Gulf, Colorado & Santa Fe Ry. Co. v. Hefley*, 158 U.S. 98 (1895), as the progenitor of the stringent rule that would become known as the filed rate doctrine. The only wrinkle *Keogh* added to the then-27-year-old rule was to uphold the doctrine despite allegations of anti-trust violations. Thus, the function and consequences of the filed rate doctrine has not changed in Minnesota since *Reliance Elevator* (1917), and the only new holding of the *Schermer* decision is its extension of the filed rate doctrine from motor or rail carrier rate case to insurance rate cases where the legality of the rate is challenged.

³ In *Info Tel*, the court of appeals adopted rules of construction for tariffs and filed rates: “(1) the terms of a tariff must be taken in the sense in which they are used and accepted; (2) where there is ambiguity, the tariff language should be construed strictly against its author; (3) such ambiguity or doubt must be reasonable, not the result of straining the language; (4) rules relating to tariffs should be interpreted in such a way as to avoid unfair, unusual, absurd or improbable results; and (5) a strict construction against a tariff’s author is not justified where the construction would ignore a permissible and reasonable construction which conforms to the intentions of the framers of the tariff.” With such rules in place having gone unrebutted and not overruled, it is clearly erroneous to argue that courts have no jurisdiction to interpret the terms of filed rates.

between Strasburg and Minneapolis, hinged on the meaning of the words “intermediate station.” 165 N.W. at 868. The shipper argued that Strasburg was an intermediate station because it was between Minneapolis and Linton, while the carrier argued that Strasburg was not an intermediate station because Strasburg was expressly named in the tariff and assigned a specific rate. *Id.* The court adopted the carrier’s interpretation of the ambiguous provision based on evidence that “[n]ew shipping points are constantly being established,” necessitating a general provision applicable to new stations not yet expressly included in the tariff. *Id.* at 868-69. Thus, for as long as Minnesota courts have applied the rule that would become known as the filed rate doctrine, they have also interpreted the terms of service contained in filed rates. Because *Schermer* had nothing to do with rate interpretation, *Reliance Elevator* and its progeny remain intact and binding on the issue of rate interpretation.

The lower court’s invention of a “no-interpretation” rule therefore violates this Court’s longstanding precedent that filed rates can and should be interpreted by the courts of this State. Not only does the lower court’s decision ignore this Court’s precedent, but it is also out of step with unanimous authority recognizing that filed rates are nothing more than contracts, made publicly available, that define the sole terms of the agreement between a regulated entity and its customer. This Court in

Schermer cited cases decided by federal courts in determining how the filed rate doctrine should be applied.⁴ After all, the doctrine was created by the U.S. Supreme Court in order to prevent price discrimination in interstate trade. *Maislin Indus.*, 497 U.S. at 127 (citing *Louisville & Nashville R.R. Co.*, 237 U.S. at 97).

As uniformly recognized by these courts, the doctrine provides courts with the jurisdiction necessary to enforce the rate as written, forbidding suit when a plaintiff challenges the rate, and permitting suit when there has been a charge different from the rate, as evidenced by the following series of case quotations:

The filed-rate doctrine disallow[s] suits brought to enforce agreements to provide services *on terms different from those listed in the tariff*. *** [I]t need pre-empt *only those suits that seek to alter the terms and conditions provided for in the tariff*.

* * *

⁴ The Court relied on *Keogh*, 260 U.S. 156, *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981), *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17 (2d Cir. 1994), *Saunders v. Farmers Ins. Exchange*, 440 F.3d 940 (8th Cir. 2006), and many others. *Schermer*, 721 N.W.2d at 311-13. The Court specifically found that Minnesota law shared the same ratemaking, separation of powers, justiciability, and legislative intent concerns shared by other courts adopting the filed rate doctrine. *Id.* at 313-16.

The filed rate doctrine's purpose is to ensure that the filed rates are the *exclusive source of the terms and conditions* by which the common carrier provides to its customers the services covered by the tariff. *It does not serve as a shield against all actions based in state law.*

American Tel. & Tel. Co. v. Cent. Office Tel., Inc., 524 U.S. 214, 229, 230-31 (1998) (Rehnquist, C.J., concurring) (emphasis added).

[T]he rate of the carrier duly filed is the *only lawful charge*. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or *misquotation of rates is not an excuse for paying or charging either less or more than the rate filed*. This rule is undeniably strict

Louisville & Nashville R.R., 237 U.S. at 97 (emphasis added).

The filed rate doctrine, therefore, follows from the requirement that *only filed rates be collected*.

Maislin Indus., 497 U.S. at 128 (emphasis added).

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. *The rights* as defined by the tariff *cannot be varied or enlarged by either contract or tort of the carrier*"

Keogh, 260 U.S. at 163 (citations omitted; emphasis added).

At its core, the filed rate doctrine has two components. It prohibits a regulated entity from discriminating between customers by charging a rate for its services *other than the rate filed* with the regulatory agency, and it preserves the authority and expertise of the rate-regulating agency by barring a court from enforcing the statute in a way that substitutes the court's judgment as to the *reasonableness* of a regulated rate.

Saunders, 440 F.3d at 943 (emphasis added). *See also Arkansas Louisiana Gas Co.*, 453 U.S. at 577-78 (holding that once rate is adopted by regulator, filed rate doctrine forbids regulated entity from charging higher rates to its customers).

Thus, given that a filed rate is merely a contract binding a regulated entity and its customer, it is difficult to argue that courts have no business interpreting the binding terms. Certainly, just like contract terms cannot be altered after the fact by a court, the terms of the rate cannot be altered. But, just like contract terms must be interpreted by a court when there is a dispute, the terms of a filed rate must be interpreted by courts—it is

fundamental aspect of the judicial identity. This Court should therefore reverse the lower court's decision, which forbids Minnesota courts from interpreting plain English language in contracts between regulated entities and their customers.

II. The Lower Court's Ruling Would Deprive Minnesota Courts of the Ability to Adjudicate Insurance Coverage Disputes.

It is beyond question that this Court interprets insurance policies and determines what losses are thereby covered upon payment of the rates charged. *Nathe Bros., Inc. v. Am. Nat. Fire Ins. Co.*, 615 N.W.2d 341, 344 (Minn. 2000); *Am. Nat. Property & Cas. Co. v. Loren*, 597 N.W.2d 291, 292 (Minn. 1999). Because the filed rate doctrine bars challenges to both the price paid and services provided by the regulated entity, the filed rate doctrine applies equally to premiums and the coverage provided in the context of the insurance industry. If, as the court of appeals determined, the filed rate doctrine bars "interpretation" of the filings approved by the commissioner, no Minnesota court could ever interpret an insurance policy issued in this state again.

The statutory authority upon which this Court based its "separation of powers" analysis in *Schermer* is Minn. Stat., Chapter 70A. *Schermer*, 721 N.W.2d at 314. This Court stated, "One regulatory requirement is that all insurers must file their proposed rates with the DOC before the rates can

become effective. Minn. Stat. § 70A.06, subd. 1.” *Id.* at 309. The Court went on to state,

[The statutory] regulatory system specifically delegates to the DOC the responsibility to review all rates for reasonableness. Minn. Stat. [§] 70A.04, subd. 1. In performing that review, the DOC is directed to protect the interest of ratepayers against excessive rates, but also to balance the interests of ratepayers against the right of the regulated entity to charge adequate rates. Minn. Stat. §§ 70A.01, subd. 2, 70A.04, subd. 1.

Id.

Similarly, however, the same statutory sections require insurers to file, for the commissioner’s approval, all *policy forms* defining coverage. Minn. Stat. § 70A.06, subd. 2. “[A] policy or endorsement disapproved by or not filed with the commissioner, pursuant to section 70A.06, is void and unenforceable.” *Matter of State Farm Mut. Auto. Ins. Co.*, 392 N.W.2d 558, 564 (Minn. Ct. App. 1986). This form-filing prerequisite, which is found in the exact same section and subdivision as the rate filing prerequisite, is subject to the same public interest purposes the commissioner is bound to consider when approving rate filings. *See id.* at § 70A.01, subd. 2 (defining purposes of “this chapter” as avoiding excessive or inadequate rates). In fact, insurance rates, and the policy coverage they pay for, exist as two sides of the

same coin. This Court has made clear that premiums and policy forms are inextricably intertwined parts of the ratemaking process:

Under our statute the insurance companies are put under public supervision and the forms of policies are subject to public supervision. They are restricted in making contracts much as public utilities. *All the terms of their contracts must be in the policy. None can exist outside the policy.* There can be no discrimination in rates.

Coughlin v. Reliance Life Ins. Co., 161 Minn. 446, 451, 201 N.W. 920, 922 (1925) (emphasis added). This language parrots the services language of *AT&T*, discussed *infra* at 13, and it places insurance policies on equal footing with insurance premiums when it comes to applying the filed rate doctrine—whether couched in terms of services promised or pricing, the filed rate doctrine bars challenges to the terms that are duly filed with the agency.

In the insurance context, the reasonableness of a rate is a direct function of the amount of risk undertaken and the nature of the coverage provided. *See Sawyer v. Midland Ins. Co.*, 383 N.W.2d 691, 694 (Minn. Ct. App. 1986), *review denied*, 397 N.W.2d 893 (Jan. 2, 1987) (“Premium and rate charges can be evaluated only relative to the coverage afforded.”). In essence,

insurance rates equal premiums plus coverage.⁵ A rate is meaningless in the absence of what coverage it affords.

Unanimous filed rate doctrine jurisprudence confirms this. As the court below recognized (but incorrectly applied), “Rates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa.” *AT & T*, 524 U.S. 214, 223 (1998). Of course, that case had nothing to do with interpreting and enforcing the terms of the rates as written. Instead, the Court there rejected a purchaser’s attempt to enforce a contract that provided for *more* services—at the same rate—than the filed tariff allowed. *Id.* The Court reasoned,

“If ‘discrimination in charges’ does not include non-price features, then the carrier could defeat the broad purpose of the statute by the simple expedient of providing an additional benefit at no additional charge An unreasonable ‘discrimination in charges,’ that is, can come in the form of a lower price for an equivalent service or in the form of an enhanced service for an equivalent price.”

⁵ “Insurance’ is any agreement whereby one party, *for a consideration*, undertakes to indemnify another to a specified amount against *loss or damage from specified causes*, or to do some act of value to the assured in case of such loss or damage.” Minn. Stat. § 60A.02 (emphasis added).

Id. (quoting *Competitive Telecommunications Assn. v. FCC*, 998 F.2d 1058, 1062 (D.C. Cir. 1993)). Under the overly broad reading provided by the court below, therefore, if the filed rate doctrine forbids courts from interpreting rates, it likewise forbids them from interpreting the terms of service provided by insurers, i.e. policy coverage. After all, a court’s *interpretation* of an insurance policy—potentially different from how the Department of Commerce would interpret it—would have the identical impact on “ratemaking” that interpreting the terms of a rate would have.

The better, and legally supportable, view is that rates and coverage should be viewed the same way—immutable in the face of challenge to their reasonableness, but treated by courts as a matter of simple contract interpretation when regulated entities fail to charge the correct rate or to provide the services promised in their filings. This exact scenario played out in *Richardson v. Standard Guar. Ins. Co.*, where the appellate court in New Jersey held that the filed rate doctrine barred certain claims that sought to alter filed insurance rates *and policy coverage*. 853 A.2d 955, 963-967 (N.J. Super. Ct. App. Div. 2004). The court noted that New Jersey’s insurance scheme, like Minnesota’s, requires that an insurer file both its rates and the coverage language associated with them. *Id.* at 964. Conversely, the court held that a claim that the defendants *miscalculated premiums* should proceed. *Id.* at 967. Additionally, the court held that “the filed rate doctrine

does not preclude a consumer from suing for damages by having been *deprived of benefits which were promised*, and were consistent with the filed rate, but were not delivered.” *Id.* (emphasis added). The court did not avoid its responsibility to interpret the rates and policy coverage as duly filed.

The present case does not present the issue of policy coverage, but given the broad holding of the court and, as discussed below, the immediate impact it has had on an insurance rate case, the consequences of the lower court’s decision on insurance coverage cases is unavoidable. The decision has already had an impact on consumers in the context of insurance rates.⁶ This Court should, therefore, reverse the decision of the court of appeals in this matter.

III. Absent Courts’ Ability to Interpret Filed Rates and Services, There Is No Practicable Way for Consumers to Assert Their Right to Enforce Filed Rates.

The upshot of the lower court’s ruling in this case is that customers of regulated entities are barred from seeking legal damages or injunctive relief

⁶ In *Stepan v. Edina Realty Title, Inc.*, No. A07-0578 (Minn. Ct. App. May 13, 2008), the court of appeals relied on the lower court’s opinion in this case to support its holding that courts must refrain from interpreting the express terms of insurance rates.

Minnesota counsel for NACA also represent the plaintiff in *Stepan*. Counsel’s agreement to represent NACA in the present case, and this Court’s permission to allow NACA to participate as amicus curiae in this case, took place prior to the court of appeals’ decision in *Stepan*. NACA is not asking this Court to pass judgment on the merits of *Stepan*, but rather cites the *Stepan* matter to illustrate the breadth of application of the lower court’s decision.

when those entities fail to comply with the terms of the rates or tariffs they are required to file with the State of Minnesota. Citing the “separation of powers” concerns alluded to in this Court’s narrow holding in *Schermer v. State Farm Fire & Cas. Co.*, the lower court greatly expanded regulated corporations’ ability to avoid their duty to abide by the terms of their own filed rates. The lower court sought to soften the blow to consumers by asserting that “the MPUC is in the best position to determine” the meaning of filed rates and services, implying that justice will be done at the agency level. APP 10.

But, in reality, the judicially sanctioned class procedure is the only mechanism that will provide compensation to customers in rate and tariff dispute cases. The class action is most often needed in litigation in which individual claims are small. *Forcier v. State Farm Mut. Auto. Ins. Co.*, 310 N.W.2d 124, 130 (Minn. 1981); *Glen Lewy 1990 Trust v. Investment Advisors, Inc.*, 650 N.W.2d 445 (Minn. Ct. App. 2002). Where potential recovery is too small for complainants to justify individual litigation, “[i]t is unreasonable to assume that they will all litigate individually their just claims.” *Rathbun v. W. T. Grant Co.*, 300 Minn. 223, 241-42, 219 N.W.2d 641, 653 (1974). *See also Carnegie v. Household Intern., Inc.*, 376 F.3d 656, 661(7th Cir. 2004) (“The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”) “When

collective adjudication promises substantial efficiency benefits or makes it possible for class members with small claims to bring suit and enforce the substantive law, a class action is superior to other available methods for the fair adjudication of the controversy.” *Glen Lewy*, 650 N.W.2d at 457. The same logic applies to complaints before state agencies with regard to small claims. A consumer may write a letter to a state agency complaining about an incorrect charge or a failure of service. But a lone consumer will not practicably be able to hire a lawyer, initiate a full-blown adversarial proceeding, conduct the discovery necessary, and advocate a particular legal interpretation for what amounts to a small claim before the agency.

Even if a single customer had the wherewithal and the legal right to approach a public agency regarding a company’s failure to abide by its own filed rates, the reality is that, absent the class procedure, the consumer class will have no choice but to rely completely either on Minnesota agencies’ paternalistic efforts or on the Attorney General’s capacity to prosecute every violation. But even if Minnesota agencies had the capacity and the inclination to address an individual’s complaint against a regulated entity’s failure to charge the correct rate or live up to its terms of service filed therewith, there is no indication that there could be a class proceeding to recover past damages in that context. It is clear that such cases are negative value cases, in that the cost of proceeding individually far outweighs the

possible recovery. The effect will be to ensure that no such complaints result in meaningful compensation to the class of consumers impacted by the misfeasance alleged.

CONCLUSION

Based on the foregoing points and authorities, amicus curiae National Association of Consumer Advocates respectfully requests that this Court reverse the decision of the court of appeals, and hold that courts can and should interpret the terms of rates or tariffs filed by regulated industries when such entities are alleged to have violated the express terms of those rates or tariffs to the detriment of their customers.

Respectfully submitted,

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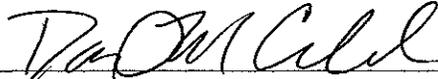
Northern States Power Company,
c/b/a Xcel Energy,

Respondent.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 4,314 words. This brief was prepared using Microsoft Word 2003, using 13-point, Century Schoolbook font.

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