

THE RHA REVIEW

ROUTE TO:

Vol. 5, No. 1, Fourth Quarter 1998

A publication of Robert Hughes Associates, Inc., an international litigation support, actuarial, risk management and insurance consulting company.

THE FILED RATE DOCTRINE: A TROJAN HORSE FOR INSURERS?

By Tim Ryles, Ph.D.

“Be careful what you ask for; you may get it” is a dictum of special relevance to insurance companies as they continue carving out new defenses to fend off policyholder lawsuits. This is especially applicable to a new defense that is occurring with increasing frequency in litigation — the “filed rate doctrine.” Originating in utility regulation, the filed rate 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.” (See *Wegoland Ltd. v. NYNEX Corp.*, 27F.3d, 17, 18 2d Cir. 1994.)

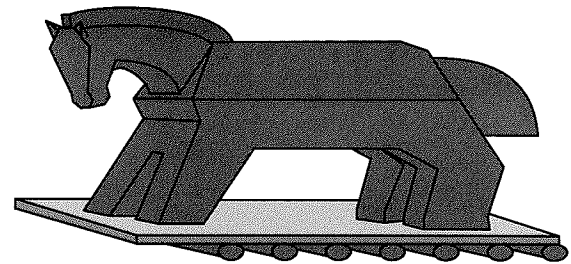
The insurance version of this is that if the rates insurers charge have been approved by regulators, plaintiffs are without standing to sue, even if they cloak their challenges in allegations of fraud, conspiracy, breach of contract, or some other basis common to insurance disputes. If applied as defense counsel often plead, the filed rate doctrine would exonerate insurers from a plague of challenges and force disgruntled policyholders to beg for mercy at the citadels

of regulators and legislators.

Plaintiffs, on the other hand, are dumbfounded at having to face this novel defense. Plaintiffs' attorneys wonder how battles with phone, gas and electric companies apply to insurance. Except for adopting the doctrine in a few cases (*Morales v. Attorney's Title Insurance Fund*, U.S. District Court, Southern District of FL, 1997 LEXIS 18247; *N.C. Steel, Inc. v. National Council on Compensation Insurance*,

“... should courts continue applying the filed rate doctrine to insurance, insurers and regulators should prepare for a very different regulatory scheme in the future.”

North Carolina Supreme Court, Electronic Citation, March 6, 1998; *Uniforce Temporary Personnel, Inc. v. National Council on Compensation Insurance*, 11th Cir. 1996), the courts have made little effort to explain how filed rate doctrine and insurance rate regulation are marriageable partners. My view is that insurance rate regulation and filed rates for utilities are quite distinguishable. Furthermore, should courts continue applying the filed rate doctrine to insurance, insurers and regulators should prepare for a very



different regulatory scheme in the future — a regulatory scheme that may be inhospitable to insurers.

FILED RATES AND INSURANCE RATES ARE DIFFERENT

Several factors distinguish utility rates from insurance rates. First, utility rates are user-determined, whereas insurance is based on risk. For example, I pay a set fee per minute or fraction thereof for long-distance phone usage and so much per kilowatt hour for electricity. There is no risk element involved. Logically, then, the filed rate doctrine is not even of the same genre as insurance.

Second, utility rates are individualized, whereas insurance risks are pooled. In a sense, utility services are community-rated and guarantee issue services. One doesn't have to be an authority on insurance matters to know that these two principles are not popular among insurers.

Third, utility rates are nontransferable; I do not pay a share of my neighbor's power bill, nor does he pay mine. The very essence of insurance, on the other hand, is a transfer of risk (some prefer to say “sharing of risk” instead, nowadays) from the individual to the insurer, the ultimate objective of the insurer's risk selection process being to take advantage of the law of large numbers so that average loss is substituted for actual loss in projecting the

(Doctrine, continued inside)

IN THIS ISSUE:

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Season's Greetings

from the staff
of
Robert Hughes Associates, Inc.

(Doctrine, continued from cover)

rate structure.

Fourth, courts repeatedly hold that no property interest attaches to utility rates, whereas insurance contracts are a choice in action (a right enforceable in court). So policyholders, unlike ratepayers, have a property interest at stake in an insurance contract. It is noteworthy that, consistent with this view, insurance contracts are universally considered to be contracts of utmost good faith placing special burdens on the parties to it. Conversely, ratepayers have no contractual commitments or rights other than those bestowed upon them by the public utility regulatory statutes.

Fifth, utility companies are licensed on the basis of "public convenience and necessity." Insurance companies are licensed on the basis of their ability to demonstrate sufficient capital and to satisfy a few other regulatory tests, none of which require showing

that either the company or its products serve the public convenience or necessity. Theoretically, you can't have too many insurance companies or insurance products in the same market; however, the public might be inconvenienced by 300 utility wires strung along a suburban street.

Indeed, one reason for strict rate regulation of public utilities stems from the fact that utility services have until recently been considered natural monopolies; consequently, there is strong public policy interest in closely monitoring their rates.

Sixth, utility rates are based upon anticipated costs and usage along with lesser factors; insurance rates are based upon projected losses and expenses.

Ironically, given the current thrust toward deregulation of utility industries, utility rate regulation is likely to move more in the direction of traditional insurance regulatory practices at the same time that insurers are relying

upon antiquated notions of utility regulation to defend their rating practices.

CAN YOU GET JUST HALF A LOAF?

Insurers strongly defend their existing rates against attack with the armor of the filed rate doctrine. But if insurers insist that a doctrine drawn from utility practices is a defense for their rates, why can't plaintiffs insist that insurers play by the same rules as utilities with respect to the rate approval process and the way utilities are regulated in the interest of public convenience and necessity? Is it equitable for insurers to adopt part of what underlies

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the filed rate doctrine while omitting the parts they judge unpalatable? These questions call attention to a few other rate-setting guides for utilities that are not common to insurance rate regulation. For example, utility regulators examine the quality of the service to be provided in licensing and rate-setting decisions. If such a principle (quality of service or product) were applied in insurance regulation, how many whole life insurance policies would pass the test? Long term care policies? Home

(Doctrine, continued on opposite pg)

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service products? Any product with an investment component?

Utility regulators may reduce rate increase proposals because of imprudent management practices of the utility; some states even mandate a periodic management audit of utilities. Think about that as a principle for regulating insurance companies. In addition to financial and market conduct exams, insurance management might have its own separate scrutiny under a filed rate system. Perhaps this would be the best means of preventing future Executive Life, Mutual Benefit Life, Confederation Life, and vanishing premium scandals (assuming the vanishing premium policies could get past the product quality regulator). Furthermore, would insurance regulators permit executives of poor-performing companies to enjoy the salaries and perks now common in the industry, or would the filed rate doctrine be applied to punish incompetent management?

Utilities have been forced into providing lifeline services subsidized by the wealthier ratepayers to assure service for poor people. Applying this principle to insurance, the filed rate doctrine could require everyone above a certain income to pay more for insurance so the less fortunate could have adequate health, auto, dwelling and other insurance. Consequently, risk-bearing insurers might eventually become a means for redistributing the wealth of policyholders, substantially altering the nature of insurance as we know it while nevertheless satisfying reformers who believe insurers should aid the less fortunate.

Most states authorize a consumer advocate, a public utility rate counsel, or some other public official to represent the public in utility rate-setting matters, an idea that is almost universally condemned by insurers. (Texas is one exception to the pattern, and

California's Proposition 103 mandated public participation in rate proceedings.) In fact, the *Morales* case cites the public's right to participate in the rate-setting process in Florida as a major advantage to utility regulation. Is the filed rate doctrine the consumer advocate's solution to gaining more meaningful participation in insurance regulation? If a state did not involve the public in insurance rate setting, is it

“Although both determine the final bill we will pay for services and products, utility rate setting and insurance rate setting are quite different phenomena.”

legally appropriate to permit use of the filed rate doctrine as a defense?

Ultimately, the filed rate doctrine may result in insurance regulatory adoption of another utility concept that is anathema to insurers, i.e., limiting insurers to a fair rate of return. Insurance rate-setting statutes usually specify that rates cannot be “excessive, inadequate or unfairly discriminatory,” so one may argue that regulators already have the authority to cut insurer profit. The problem is that “excessive” has little objective reference, and even if

rates are declared to be excessive, regulatory ability to provide remedies is limited. However, if reference could be made to the “fair rate of return” standard in utility law, a much different result might emerge. Possibly, regulators, policyholders and legislative oversight committees could be emboldened considerably if they are handed a filed rate standard with more concrete foundations to justify rate controls.

CONCLUSION

Although both determine the final bill we will pay for services and products, utility rate setting and insurance rate setting are quite different phenomena. It is way past the time when courts should recognize appropriate distinctions. Furthermore, repeated reliance upon filed rate doctrine defenses may be a Trojan Horse for insurers who may eventually discover that, as we Southerners sometimes say, “the fleas come with the dog.” I’m not quite sure that insurance executives have thought far enough beyond their lawyers’ briefs to consider the size of the fleas hiding under the fur of the filed rate doctrine. RHA

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FROM NEAR & FAR



The past few months have been filled with weather-related disasters. We've seen hurricanes, tropical storms, flooding and drought — and that's in Texas alone.



Hurricane Georges hit hardest, causing more than \$2.5 billion in insured losses throughout the Caribbean and along the U.S. Gulf Coast. The majority of the insured losses were in Puerto Rico, Florida and Mississippi.



The Texas drought finally broke over the weekend of October 17-18. Storms ravaged the southern and eastern parts of the state, causing severe flooding and spawning tornadoes. In some areas around San Antonio and Austin, more than 20 inches of rain fell, swelling rivers and creeks by record amounts. Interstate 35 just south of San Antonio was closed when floodwaters in excess of five feet made the busy highway impassable. Dozens of deaths have been attributed to the storms.

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Michele S. Martin is once again moving up. She was recently named senior vice president at Robert Hughes Associates, Inc. In addition to her new position, Michele is RHA's chief financial officer, the lead consultant on all of RHA's insurance company management and accounting projects, and the lead consultant on a number of general insurance consulting matters.



Michele S. Martin,
CPCU, ARM, CIC
Sr. Vice President

Since joining the company in 1989, Ms. Martin has gained valuable experience in many areas of the insurance industry. She works extensively with the company's self-insured clients and has wide-ranging expertise in the financial and accounting areas of insurance, including GAAP and all statutory filing and regulatory reports.



THE RHA REVIEW

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The RHA Review is published quarterly by Robert Hughes Associates, Inc. — an independent international litigation support, actuarial, risk management and insurance consulting company based in Dallas, Texas, with offices in Houston, Texas, and London, England. The purpose of this publication is to offer insurance-related information and critical comment pertinent to the clients, friends and fellow professionals of Robert Hughes Associates, Inc. This publication is available free to interested parties. The information contained in this publication is intended to be general in nature; readers should obtain professional counsel before taking any action on the basis of this material.

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