INSURANCE LITIGATION™ Reporter

Volume 37 • Number 16 • October 6, 2015

CONTENTS

Directors & Officers Insurance

Bancinsure, Inc. v. Federal Deposit Insurance Corporation (10th Cir.) **424**
"Insured vs. Insured" exclusion barred coverage of FDIC's suit against bank's directors and officers

Burks v. XL Specialty Ins. Co. (Tex. App.) **426**
D & O insurer was required to advance defense expenses in suit seeking disgorgement

Duty to Settle/Control of Settlement

21st Century Ins. Co. v. Superior Court **428**
Defending insurer must approve settlements in California

Fidelity National Title Ins. Co. v. Centerpoint Mechanic Liens Claims, LLC (Ariz. App.) **429**
Settlement agreement between insureds and wholly owned entity was not enforceable

Duty to Settle/Multiple Claims

Mesa v. Clarendon National Ins. Co. (11th Cir.) **432**
Liability insurer's attempt to use policy limits to settle multiple claims arising out single accident did not constitute bad faith

Extra Expense Coverage

Midwest Regional Allergy v. Cincinnati Insurance Co. (8th Cir.) **434**
Extra expense covered under two different policy provisions

Force-Placed Insurance

Rothstein v. Balboa Insurance Co. (2d Cir.) **435**
Filed rate doctrine imported from utilities regulation to insurance law

Life Insurance/ERISA

Huang v. Life Insurance Co. of North America (8th Cir.) **441**
Insured's failure to disclose cancer diagnosis after the date of the application but before the effective date of the coverage justified ERISA plan administrator's denial of coverage

Notice-Prejudice/Voluntary Payments

Rent-A-Roofer, Inc. v. Farm Bureau Property & Casualty Insurance Co. (Neb.) **442**
Contractor's failure to notify insurer of claim until after settlement prejudiced insurer as a matter of law

Professional Liability Insurance

Edwards v. Continental Casualty Co. (W.D. La.) **444**
Professional liability insurance policy covered claim seeking to recover attorneys' fees received as part of settlement entered into due to misconduct by attorney's client

WEST®

(Continued on Inside Page)

Force-Placed Insurance

Filed Rate Doctrine Imported from Utilities Regulation to Insurance Law

Second Circuit Court of Appeals Panel Applies Doctrine to Texas, New Hampshire, and New York Lender Force-Placed Insurance Practices

Rothstein v. Balboa Insurance Co., 794 F.3d 256 (2d Cir. 2015)

Case at a Glance

On interlocutory appeal of an order certified by a District Judge under 28 U.S.C.A. § 1292(b), which denied the defendants' motion to dismiss in part and granted the motion to dismiss in part, a panel of the Second Circuit addressed what it described as "[t]he principal issue on appeal—and the only issue we decide—is whether the filed rate doctrine bars Plaintiffs' claims." *Rothstein v. Balboa Ins. Co.*, 794 F.3d 256, 261 (2d Cir. 2015).

The *Rothstein* plaintiffs alleged a putative class action consisting of Texas, New York, and New Hampshire plaintiffs. Although they did not allege any particular classes or subclasses, their operative complaint alleged claims for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") and the Real Estate Settlement Procedures Act ("RESPA"). The factual predicate underlying all of their alleged claims was that the plaintiffs were mortgagors who were forced to pay insurance premiums as a part of their monthly mortgage payment for insurance which their loan servicer, GMAC as it was then known, purchased from Balboa Insurance Company or, in some instances, from Meritplan Insurance Company.

There is a real question whether force-placed insurance premiums can be allocated to each borrower at all, or whether they are simply arbitrary charges.[1] This article assumes for purposes of this discussion that force-placed insurance premiums are theoretically subject to the filed rate doctrine. The question of whether the force-placed insurance premium charges at issue in *Rothstein* were ever subject to the filed rate doctrine does not appear to have been raised in the District Court or in the Second Circuit.

Unknown to the plaintiffs at the time when the insurance and its premiums were placed on them by force, the insurance company defendants allegedly provided "rebates" to GMAC on the premium charges which were not passed on to the plaintiffs. The plaintiffs further alleged that the insurance companies' rebates were actually kickbacks paid to the mortgage servicer in exchange for the mortgage servicer's preferred selection of the particular insurance companies' force-placed insurance product. *Rothstein v. Balboa Ins. Co.*, 794 F.3d 256, 260 (2d Cir. 2015).

The Second Circuit recognized that in the order appealed, the District Court denied the defendants' motion to dismiss all of the plaintiffs' claims based on the filed rate doctrine, and also denied the defendants' motion to dismiss the plaintiffs' RICO claims because those claims "were adequately pleaded," while granting the motion to dismiss the RESPA claim "as inadequately pleaded." With regard to the filed rate doctrine, the appellate panel took the view that the District Court's essential conclusion was "that the filed rate doctrine did not apply because Plaintiffs were not direct customers of the rate filer, Balboa." *Rothstein v. Balboa Ins. Co.*, 794 F.3d 256, 261 (2d Cir. 2015).

There is a conflict in the case law whether defendants other than rate filers are capable of raising the filed rate doctrine as a defense. The District Court's conclusion represents the majority view that a defendant which is not the rate-filer cannot defend on the ground that someone else obtained a filed rate.[2] The appellate panel's view on this point is in the minority, although that is by no means clear from the appellate panel's opinion.

The Second Circuit panel translated the appeal into a single question of law, as noted: "The principal issue on appeal—and the only issue we decide—is whether the filed rate doctrine bars Plaintiffs' claims." Ultimately, the only issue decided on appeal was

1. *See generally* DENNIS J. WALL, LENDER FORCE-PLACED INSURANCE PRACTICES (AMERICAN BAR ASSOCIATION 2015).

2. *Id.*, § 6.2, pp. 212-215.

streamlined into the much more narrow legal issue of whether the filed rate doctrine "should be limited to direct transactions between the ratepayer [here, GMAC] and the rate filer [here, Balboa and Meritplan]." The appellate panel decided this narrow issue in the negative, holding that the filed rate doctrine should be applied "even when the rate has passed through an intermediary [here, also apparently GMAC]." *Rothstein v. Balboa Ins. Co.*, 794 F.3d 256, 264 (2d Cir. 2015). The court held that "[t]he filed rate doctrine is not limited to transactions in which the ratepayer deals directly with the rate filer. The doctrine operates notwithstanding an intermediary that passes along the rate." *Rothstein v. Balboa Ins. Co.*, 794 F.3d 256, 264 (2d Cir. 2015).

After the Second Circuit panel answered this narrow legal question by stating that the filed rate doctrine should be applied regardless of whether the plaintiffs in any given case are ratepayers, the Second Circuit panel reversed and remanded the case with instructions to dismiss. *Rothstein v. Balboa Ins. Co.*, 794 F.3d 256, 266 (2d Cir. 2015).

Summary of Decision

As noted, the Second Circuit panel in *Rothstein* construed the District Court's certification of appealability of its dismissal order as an appeal of one issue. This appears to be a misconception both of the law and of the posture of this case on appeal.

Interlocutory Orders Are Appealable, Not Issues

The statute authorizing appealability of an otherwise non-appealable interlocutory order like the one in this case, contains a requirement that a District Judge must certify that her or his otherwise non-appealable interlocutory order presents a controlling question of law as to which there is substantial ground for difference of opinion. However, the existence of such a certification presents a basis for exercising appellate jurisdiction over the otherwise non-appealable interlocutory order short of an appeal from a final judgment, and not merely a basis for exercising appellate jurisdiction over an issue. The statute which furnished the legal basis for immediate federal appellate jurisdiction in *Rothstein* addresses an appeal being "taken from such order." 28 U.S.C.A. § 1292(b). The District Court (Dkt. No. 92, filed April 3, 2014), granted the defendants' motion for interlocutory appeal of its "Opinion & Order granting in part and denying in part their motion to dismiss," even though at the same time the District Court certified that the order presented a controlling issue of law because of "the [District] Court's conclusion that the filed rate doctrine does not bar Plaintiffs' claims." This was not a certified *question* but a certified *appeal*.

When the *Rothstein* case reached the Second Circuit, the appellate panel treated the appeal as though it presented a certified question. It then reworked the question in the course of its opinion. The panel declined to answer the question of simply whether the filed rate doctrine does, or does not, bar the plaintiffs' claims in this case. The panel narrowed the issue on appeal even further to the question of whether, as a matter of law, the filed rate doctrine would bar plaintiffs' claims even though the plaintiffs were not the ratepayers.

In answering in the affirmative, that the filed rate doctrine would bar plaintiffs' claims as a matter of law even though the plaintiffs were not the ratepayers, the appellate panel's opinion reflects no concern that the panel was addressing the limited appeal of a trial court's denial of a motion to dismiss. It must be remembered in analyzing everything that came afterward in this panel opinion, that the panel acted without reference to a fully developed record in this peculiar case.

Filed Rate Doctrine, Judge-Made Immunity

In the abstract view, the filed rate doctrine is a unique application of immunity. It surfaced in the defenses of utilities to suits which, the utilities successfully argued, would have the effect of judicial review of rates already set by authorized agencies in the field of utilities regulation. A recent addition to insurance cases, this court-created rule or doctrine has had two primary recognized elements from its inception, with other factors being added as the doctrine is imported further into other fields of jurisprudence. The two elements recognized from the inception of the filed rate doctrine are "nonjusticiability" and "nondiscrimination."

The first, "nonjusticiability," means that courts will not hear suits that undermine statutorily authorized agency ratemaking authority by upsetting approved

rates. The second, "nondiscrimination," means that courts will refuse to allow individual lawsuits filed by individual "ratepayers" to sue for preferential rates.

A more recent addition to the field of analysis where the filed rate doctrine is raised as an immunity defense is whether the agency in question has been authorized to perform meaningful review of rate increases, or not. Administrative, regulatory agencies are creatures of legislation; they can act only with the authority granted them by the governing legislative body. This is what the courts mean, and what the *Rothstein* panel must have meant in its citation to Second Circuit precedent, that a filed rate is per se reasonable and unassailable in lawsuits filed by ratepayers when the rate is one that is approved by the "'governing regulatory agency,'" i.e., by an agency that is authorized to regulate the rate at issue. *Rothstein v. Balboa Ins. Co.*, 794 F.3d 256, 261 (2d Cir. 2015).

The *Rothstein* panel addressed this concern with a "*see*" cite to Texas, New York, and New Hampshire statutes as support for the proposition that the insurance premium rates at issue were approved by regulators based on rate filings in their respective states. *Rothstein v. Balboa Ins. Co.*, 794 F.3d 256, 260 (2d Cir. 2015). The panel did not otherwise mention these statutes in its opinion.

The appellate panel in *Rothstein* concentrated on the twin "principles" of nonjusticiability and nondiscrimination. Its only foray into the question of whether any of the agencies in question—the Texas Department of Insurance, the New Hampshire Insurance Department, and the New York State Department of Financial Services—had received the authority from a legislative body to set insurance premium rates, was not an analysis of concrete facts but an abstraction drawn from these twin principles. The panel declared that "under the nonjusticiability principle, it is squarely for the regulators to say what should or should not be included in a filed rate." *Rothstein v. Balboa Ins. Co.*, 794 F.3d 256, 262 (2d Cir. 2015). And, "under the nonjusticiability principle, the question is reserved exclusively to the regulators." *Rothstein v. Balboa Ins. Co.*, 794 F.3d 256, 263 (2d Cir. 2015). The panel's source for these abstract assertions was the Second Circuit's seminal filed-rate-decision in *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17 (2d Cir. 1994).

The *Wegoland* case was the quintessential case for applying the filed rate doctrine. It was a suit against a regulated utility. In *Wegoland*, the Second Circuit applied the filed rate doctrine to bar a suit against a regulated utility defendant: "The filed rate doctrine bars suits against regulated utilities grounded on the allegation that the rates charged by the utility are unreasonable." *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994). Far from abstractly asserting that every defendant which raises the filed rate doctrine as an immunity must necessarily be immunized from suit, without further proof, the *Wegoland* Court made it clear that the rates of the utility before it were in fact regulated before the Court applied the filed rate doctrine in that case.

In importing the filed rate doctrine from *Wegoland* and from the field of utility rate regulation into the field of insurance law, and in particular into the field of lender force-placed insurance, it is respectfully submitted that the *Rothstein* appellate panel missed the mark. The essence of *Wegoland* was stated in the *Wegoland* case itself: The plaintiffs in that case complained of fraud in the RICO context perpetrated upon the regulator, and the Second Circuit held that under the filed rate doctrine, "regulators who are intimately familiar with the industry are best situated to discover when regulated entities engage in fraud on the agency and to remedy the wrongdoing when the specter of fraud arises." *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 21 (2d Cir. 1994).

In contrast, in *Rothstein* the plaintiffs complained of fraud in the RICO context perpetrated on *them*, not on any agency. Under filed rate doctrine precedent including *Wegoland*, before applying the filed rate doctrine the courts have required something more than a rate and a filing with an administrative agency. That "something more" includes an analysis performed by other courts of whether there is proof in the record that the given agency has been authorized or enabled by statute to both approve and reject requested rates including the charges at issue.[3]

However, nothing more seems to have been required by the *Rothstein* panel. The panel recognized that the filed rate doctrine frequently leads to injustice, and that while applying the doctrine may seem harsh it must still be applied even if it leads to injustice. It was undisputed that in that case there was a "filed rate," and so the doctrine was applied.[4]

Filed Rate Doctrine Is Not a Creature of Just the

Federal Courts, Particularly When Based on the Decisions of State Agencies

Nor did the appellate panel in *Rothstein* examine whether the laws of any of the states in which the plaintiffs are citizens, and in which the insurance company defendants filed what they called their "rate filings," would permit the application of the filed rate doctrine under the factual allegations and legal contentions in that case. The appellate panel never posed the question whether Texas, New York, or New Hampshire law would require or permit the filed rate doctrine to be applied. The only cases cited by the panel in this regard were decided in the Second Circuit, which is not in any case the final word for whether the filed rate doctrine applies in every case, even those filed within the geographical confines of the Second Circuit. Although the *Rothstein* panel would in hindsight have found the same Texas and New York precedent which the author was able to find through independent research, they would also have found that the question is apparently open under New Hampshire law whether the filed rate doctrine applies in insurance cases, let alone to lender force-placed insurance charges.

The Proof Is Not in the Record

With reference to the concrete case before it, the Second Circuit panel in *Rothstein* did quote from a document filed by Balboa Insurance Company in New Hampshire which indicated to the panel that New Hampshire regulators would allow the defendants to charge the plaintiffs for the costs of the rebates in this case, but which may and almost certainly does indicate the opposite.

The appellate panel quoted from a part of one page of a Balboa Insurance Company letter in "Balboa's New Hampshire filing" as follows:

> This insurance is to cover real property when it is required by the Mortgage Contract between the lender and the borrower. That agreement does not allow the lender to require a borrower to pay for coverage on items not mortgaged to secure the loan or for coverage that exceeds the coverage required in amount or peril by the mortgage contract. *This program is designed so that the lender pays the insurer for all premium and charges back only those parts of the premium which are allowed to be charged to the borrower.*

A. 595 (emphasis added).

Rothstein v. Balboa Ins. Co., 794 F.3d 256, 265-66 (2d Cir. 2015). (The Second Circuit's opinion does not explain the "A" reference and it is the only reference of its kind in the panel's opinion. Presumably the "A" refers to the defendants' Joint Appendix on appeal.) The panel opinion describes the quoted language of Balboa Insurance Company as suggesting "that the New Hampshire regulators expressly contemplated that the approved LPI [Lender-Placed Insurance] rates would be 'charged to the borrower.'" *Rothstein v. Balboa Ins. Co.*, 794 F.3d 256, 266 (2d Cir. 2015). Respectfully, the quoted language suggests nothing of the kind if by "rates" the panel meant to include the hidden rebates alleged by the plaintiffs in this case.

Looking for evidentiary support for the panel's legal conclusion, the author checked the Trial Court's File on PACER ("Public Access to Court Electronic Records"). The defendants' motion to dismiss the second amended complaint because of the filed rate doctrine was based on a declaration filed with an earlier motion to dismiss. (Docket No. 32, filed Dec. 13, 2012.) In the declaration, an employee of QBE testified that at some point he was "previously" an employee of defendant Balboa, that he had personal knowledge and that he "could and would competent-

---

3. Illustrating the importance of whether the governing administrative or regulatory agency has been authorized to review and set rates, some jurisdictions do not provide a meaningful review of insurance premium rate applications. In some other jurisdictions it may be an open question whether to extend the filed rate doctrine to insurance rate regulation. North Dakota is a frequently cited example of a jurisdiction without an established structure for meaningful review of insurance rates. Iowa is an example of a jurisdiction in which until recently the question was open whether the filed rate doctrine could or would be extended to insurance rate regulation under Iowa law. Rios v. State Farm Fire & Cas. Co., 469 F. Supp. 2d 727, 736 (S.D. Iowa 2007).

4. Many courts' dispositions of the "filed rate doctrine" frankly bring to mind then-Judge Holmes's admonition in Ryalls v. Mechanics' Mills, 150 Mass. 190, 22 N.E. 766, 767 (1889): "General maxims are oftener an excuse for the want of accurate analysis than a help in determining the extent of a duty or the construction of a statute." This is tough to say, but Holmes's admonition seems to apply once again.

ly testify" to the defendant Meritplan's filings with the Texas Department of Insurance and with the New York Department of Insurance, and to the defendant Balboa's filings with the New Hampshire Insurance Department.

The declarant did not testify, however, that the lender force-placed insurance policies at issue in the case resulted from these filings. No-one testified to that, at least on the record.

The defendants also based their motion to dismiss on previously filed exhibits which they had attached to their earlier memorandum supporting their previous motion to dismiss. The exhibits, which can only be described as the evidentiary equivalent of a "document dump," are respectively 85, 225, and 49 pages long. (Docket Nos. 31-1, 31-2, and 31-3.) They purport to be materials filed with the State Insurance Commissioners by the defendant Meritplan in Texas and New York, and by the defendant Balboa in New Hampshire. Of these 359 pages, a part of one page was cited by the panel. The panel's integration of that excerpt into the panel's opinion is quoted in full above. Notably, the same page was read and interpreted by the District Judge as supporting the contention that even if New Hampshire law would extend the filed rate doctrine to insurance cases, in this case Balboa's insurance rate filing supported the plaintiffs' argument that the New Hampshire regulators were never asked to approve the hidden rebates at issue.

It is revealing also to expand the description of the case that confronted the District Judge when she ruled on the defendants' motion to dismiss. She addressed the state of the record at that time, as indeed she was required to do. In that light, this is what she also saw.

None of the exhibits is authenticated by anyone's testimony. None was even referenced in anyone's testimony. Whether the documents were self-authenticating and admissible does not appear to have been raised or argued.

The defendants mentioned in a footnote to their memorandum that "[t]he Court may take judicial notice of filings with government agencies that are a matter of public record," but the Court file does not disclose any request for judicial notice in the District Court. (Apparently, the defendants did file a request for judicial notice in the Second Circuit after they filed their notice of appeal. The Second Circuit panel denied the request for judicial notice on appeal as moot after the panel issued its opinion.)

These things would of course have been known to the District Judge, who denied the defendants' motion to dismiss in part because "the Court concludes that Defendants have not demonstrated that dismissal is appropriate at this point in litigation pursuant to the filed rate doctrine." *Rothstein v. GMAC Mortgage, LLC*, No. 12 Civ. 3412(AJN), 2013 WL 543678, *4 (S.D.N.Y. Sept. 30, 2013), *rev'd,* 794 F.3d 256 (2d Cir. 2015).

Burden of Proving Issue Should Be on Party Raising It

Further, the filed rate doctrine is not a challenge to subject matter jurisdiction. It is instead an affirmative defense. Affirmative defenses are dependent on proof of facts, unless the defense affirmatively appears from the face of the complaint. The burden is of course on the defendant to establish an affirmative defense in any case. Parenthetically, even if the filed rate doctrine presented an issue of subject-matter jurisdiction here, the burden of proving that the doctrine applied still belong to the defendants who raised it.

The District Judge in this case referred repeatedly, although obliquely it is true, to the procedural posture by mentioning several times that the defendants had not met their burden on the issue of dismissal based on the filed rate doctrine. *Rothstein v. GMAC Mortgage, LLC*, No. 12 Civ. 3412(AJN), 2013 WL 543678, *7, *8 & *9 (S.D.N.Y. Sept. 30, 2013), *rev'd,* 794 F.3d 256 (2d Cir. 2015).

The appellate panel's opinion does not mention even once that the defendants have the burden to prove their filed rate doctrine defense. Although this was an appeal from a denial of a motion to dismiss, the appellate panel had available to it an "ELECTRONIC INDEX, in lieu of record," filed on the same date as the defendants' Notice of Appeal, according to PACER. The Electronic Index in lieu of record contains hyperlinks to the materials in the record before the District Court. To say again, the panel opinion is bereft of any reference to the record.

Concluding Thoughts

The *Rothstein* case undoubtedly will be raised as precedent in future cases. Ironically, the panel decision in the *Rothstein* appeal presents many issues,

whereas the Second Circuit tried its best to decide a narrow issue.

The filed rate doctrine may not apply to lender force-placed insurance premium rates on the facts. Readers of this publication will recognize force-placed insurance policies as inventory policies. The task of allocating a particular part of the premium under an inventory policy to a particular piece of the inventory under coverage has rarely, if ever, been seen. Perhaps it simply cannot be done. In any event, by their very nature force-placed insurance premium rates do not seem a good fit for the filed rate doctrine.

In this decision, the Second Circuit panel seems to have over-reached with the filed rate doctrine. In order to have precedential value, other courts faced with other cases in which this decision is raised as precedent will have to accept the unsettled quality of proof that was accepted by the panel in this case, which is not usually the case.

Besides making spaces for judges and lawyers familiar with insurance coverage issues, and for judges and lawyers familiar with trying cases, this appellate decision also provides a role to play for judges and other lawyers familiar with federal appellate practice. The panel in this appeal took jurisdiction over an issue rather than an appeal. If this was an authorized certified question proceeding, the panel's approach in this case may have had some persuasive effect, but it was not an authorized certified question proceeding.

In the final analysis, the Second Circuit panel's resolution of this appeal suggests that the question which the panel wanted to answer was going to be the question it answered, and nothing would stand in the way of that goal. This would explain the contorted treatment which the panel gave to the one and only "fact" in the "appellate record" that the panel seems to have viewed as potentially significant to the outcome, which was an excerpt from one page in what was proffered as a multi-page rate request filed by Balboa Insurance Company in New Hampshire. That the panel opinion ends abruptly by remanding with directions to dismiss, after an otherwise lengthy and abstract discussion of a legal issue, tends to confirm that the end result of this highly philosophical appeal was inevitable.

One final thought. The *Rothstein* panel observed, as many courts which have applied the filed rate doctrine have observed before it, that applying the filed rate doctrine often leads to injustice. If a judge-made rule is destructive of the end of justice in a system of justice, it is probably time to change that rule. // Wall

[Editor's Note: Dennis J. Wall is the author of "Lender Force-Placed Insurance Practices" (American Bar Association 2015).]