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THE FILED RATE DOCTRINE AS A DEFENSE TO NON-RISK BASED PRICING AUTO INSURANCE LITIGATION

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This article discusses automobile insurance "price optimization" or "non-risk based pricing" legislation and litigation and the "filed rate" doctrine defense. Given increasing legislative and regulatory scrutiny and the potential for private litigation, the authors suggest that insurers closely analyze applicable precedent to determine whether the filed rate doctrine applies in non-risk based pricing litigation

In the past year, consumer groups, state legislators, state insurance commissioners and private litigants have focused on the alleged use of so-called "price optimization" or "non-risk based pricing" by automobile insurers. Under this theory, insurers are alleged to set automobile insurance rates for their customers based on the customers' willingness to tolerate a price increase, despite state laws and regulations allegedly prohibiting insurers from using such factors in setting insurance rates. Insurers may be able to defend these lawsuits based on the "filed rate" doctrine, under which an insurer cannot be sued for insurance rates that have been previously approved by state insurance authorities.[1] With increasing legislative and regulatory scrutiny and the potential for private litigation, automobile insurers should be aware of this important issue and potential defenses in such litigation.

Price Optimization Legislation

In 2014, the Consumer Federation of America ("CFA") began to focus on the alleged use of price optimization, arguing that "millions of drivers are possibly being charged a premium that is higher than the amount considered appropriate and fair for their risk profile."[2] The CFA sent letters to dozens of state insurance officials urging them to affirmatively ban the practice, claiming that many insurers are currently utilizing price optimization (either directly, by considering how much a customer is willing to pay, or indirectly, by placing greater weight on factors that correlate with a customer's willingness to pay higher prices).[3] The National Association of Insurance Commissioners also announced that it is examining the practice and that it plans to issue a white paper on price optimization sometime in 2015.[4]

Insurance commissioners in Maryland,[5] Ohio,[6] and California[7] have all issued bulletins over the past year stating that price optimization is prohibited under state law. The Maryland bulletin described how Maryland state law prohibits "unfair discrimination" between insureds,[8] which the Maryland Court of Appeals has defined as "discrimination among insureds of the same class based on something other than actuarial risk."[9] The bulletin stated that "[b]y its nature, price optimization involves discriminating among policyholders of the same class based on factors other than actuarial risk."[10] Citing a National Association of Insurance Commissioners presentation, the bulletin described how an insurer utilizing price optimization might, for example, consider whether a customer has ever complained to the insurer; if a policyholder has complained, this may indicate that the policyholder is unsatisfied and not likely to accept a premium increase.[11] The bulletin required every insurer currently using price optimization to file a "corrective action plan" describing how the insurer would change its policies.[12]

The Ohio bulletin similarly declared that price optimization involves "discriminat[ing] between individuals of the same class and of essentially the same hazard" based on factors that allegedly do not have a demonstrable "probable effect upon losses or expenses."[13] While noting that price optimization has no absolute definition, the bulletin described how price optimization generally refers to a practice of varying premiums based upon factors that are unrelated to risk of loss in order to charge each insured the highest price that the market will bear.[14] The bulletin requested that insurers file new regulatory filings compliant with the bulletin, stating that failure to submit these filings could result in administrative action.[15]

The California bulletin defined price optimization as "any method of taking into account an individual's or class's willingness to pay a higher premium relative to other individuals or classes."[16] The bulletin declared that price optimization was unfairly discriminatory in violation of California law,[17] that insurers should cease the practice, and that insurers should remove the effect of such practices in any future filings submitted to the California Department of Insurance.[18]

Legislation has also been introduced this year in the Connecticut General Assembly to prohibit auto insurers from using price optimization.[19]

Price Optimization Litigation

Price optimization has also caught the attention of private litigants. For instance, one class action lawsuit was filed against the Allstate Corporation, Allstate Insurance Company and Allstate Indemnity Company (collectively, "Allstate") in Washington state asserting claims for violations of the Washington Consumer Protection Act and unjust enrichment, and seeking compensatory damages and disgorgement of ill-gotten gains.[20] While the parties recently stipulated to the dismissal of the case,[21] the complaint against Allstate (and Allstate's defenses) may be representative of other price optimization litigation and useful for insurers defending such suits. The complaint alleged that Allstate used price optimization, charging higher insurance premiums to customers whose demand for insurance is "inelastic," meaning that the customer is relatively non-sensitive to price changes and is relatively unlikely to seek insurance elsewhere in response to a price increase.[22] The complaint further alleged that Allstate concealed its use of price optimization; in setting rates, Allstate allegedly would place greater weight on rating characteristics that are *associated with* a willingness to tolerate a price increase.[23] The complaint also alleged that Allstate relied on a price optimization software package from a company called Earnix, alleging that Earnix had pitched its software as a way for insurers to use price optimization to increase their profits.[24] Prior to the stipulated dismissal of the case, Allstate's primary argument in moving for dismissal of the complaint was the filed rate doctrine.

The Filed Rate Doctrine

Under the filed rate doctrine, an insurer generally cannot be sued for charging rates that have been previously approved by the state insurance commissioner.[25] Insurers defending against price optimization suits should consider the filed rate doctrine as a defense in such actions. A number of courts in various states, relying on the filed rate doctrine, have dismissed suits challenging insurers' rates because those rates had been previously approved by state insurance authorities.[26] For example, the Alabama Supreme Court has described the filed rate doctrine as "a limitation on judicial review of rates approved by the commissioner."[27] As a result, the auto insurer defendant's insurance rates for vehicles in that case were "per se reasonable and [. . .] unassailable in judicial proceedings."[28] In another case, a California appeals court affirmed dismissal of a class action against an insurer for alleged improper consideration of prior automobile insurance coverage in setting rates, holding that "the filed rate doctrine supports our conclusion that there is no tort liability for charging a rate that has been approved by the commissioner."[29]

"Prior Approval" States

One issue to determine is whether a state is a "prior approval" state, where a state regulatory authority must approve insurance rates, or a "file and use" state, where an insurer may simply file insurance rates with the authorities and begin charging those rates.[30] While courts have fairly consistently applied the filed rate doctrine in prior approval states, courts have been less consistent in its application in "file and use" states.[31] The policy dispute behind this split is whether the filed rate doctrine should apply in a state that does not significantly review the insurance rates that an insurer submits for filing.[32] Some courts have held that the filed rate doctrine applies even in the absence of meaningful review of insurance rates by a state insurance authority.[33] Other courts have held that the filed rate doctrine only applies when there is meaningful review of rates, but have held that "file and use" states provide such review.[34] Further complicating the issue, some courts have held that even in prior approval states, the availability of rebates to consumers for excessive premiums may render the filed rate doctrine inapplicable.[35]

Conclusion

Given the complexity of state insurance regulations and statutes, insurers should closely analyze applicable precedent to determine whether the filed rate doctrine applies in non-risk based pricing litigation. The National Association of Insurance Commissioners has compiled a comprehensive list of "file and use" and prior approval jurisdictions, which may be helpful in this analysis.[36]

(Endnotes)

1. *See, e.g., MacKay v. Superior Court*, 115 Cal. Rptr. 3d 893, 910 (Cal. Ct. App. 2010), *as modified* (Oct. 20, 2010), *as modified* (Oct. 22, 2010) (affirming dismissal of challenge to auto insurance rates, as "the filed rate doctrine supports our conclusion that there is no tort liability for charging a rate that has been approved by the commissioner.").

2. Consumer Federation of America, *Consumer Alert! New Auto Insurer Pricing Scheme Makes it Important for All Policyholders to Shop Around* (Aug. 27, 2014), *available at* http://www.consumerfed.org/pdfs/PO-Consumer-Alert-PR-8-27-14.pdf.

3. *See* Consumer Federation of America, *Auto Insurance: Testimony and Comments, available at* http://www.consumerfed.org/financial-services/insurance/autoinsurance.

4. Don Jergler, *Price Optimization Allegations Challenged, NAIC Investigating Practice*, INS. J. (Dec. 18, 2014), *available at* http://www.insurancejournal.com/news/national/2014/12/18/350630.htm.

5. Maryland Insurance Administration, *Bulletin 14-23: Unfair Discrimination in Rating: Price Optimization* (Oct. 31, 2014), *available at* http://www.mdinsurance.state.md.us/sa/docs/documents/insurer/bulletins/bulletin-14-23-unfair-discrimination-in-rating.pdf.

6. Ohio Department of Insurance, *Bulletin 2015-01: Price Optimization* (Jan. 29, 2015), *available at* https://insurance.ohio.gov/Legal/Bulletins/Documents/2015-01.pdf.

7. State of California, Department of Insurance, *Notice Regarding Unfair Discrimination in Rating: Price Optimization* (Feb. 18, 2015), *available at* https://insurance.ohio.gov/Legal/Bulletins/Documents/2015-01.pdf.

8. *See supra* note 5, at 2 (citing MD. CODE ANN., INS. § 27-212 (West)).

9. *Id.* (quoting *Insurance Commissioner v. Engelman*, 345 Md. 402, 413 (Md. 1997)).

10. *Id.*

11. *Id.* at 2 n.1 (citing Presentation of Towers Watson to the NAIC Auto Insurance (C/D) Study Group on July 28, 2014).

12. *See id.* at 3.

13. *See supra* note 6, at 2 (quoting OHIO REV. CODE ANN. §§ 3901.21(M), 3937.02(C) (West)).

14. *Id.* at 1.

15. *See id.* at 2.

16. *See supra* note 7.

17. *See id.* n.1 (citing CAL. INS. CODE §§ 1861.05(a), 1861.137(b), 11732.5, 12120, and 12401.3(a) (West)).

18. *See id.*

19. S.B. 237, 2015 Reg. Sess. (Ct. 2015).

20. *See* Class Action Complaint, *Slocombe v. Allstate Corp.*, No. 2:15-cv-00526 (W.D. Wash Apr. 3, 2015) [Dkt. 1-1 at 20-25].

21. *See* Stip. and Prop. Order of Voluntary Dismissal, No. 2:15-cv-00526 (W.D. Wash May 27, 2015) [Dkt. 32].

22. *See id.* ¶ 37, 38.

23. *See id.* ¶ 48 (emphasis added).

24. *See id.* ¶¶ 49-73.

25. *See* Defs. Allstate Ins. Co. & Allstate Indemn. Co.'s Mot. to Dismiss, *Slocombe v. Allstate Corp.*, No. 2:15-cv-00526 (W.D. Wash) [Dkt. 9 at 2] (citing *McCarthy Finance, Inc. v. Premera*, No. 90533-9, 2015 WL 1510543 (Wash. April 2, 2015)). Allstate also argued that plaintiffs had not yet exhausted their administrative remedies, which is a "jurisdictional prerequisite to resort to the courts" under Washington law. *Id.* at 15 (citing *Retail Store Emps. Union v. Wash. Surveying & Rating Bureau*, 558 P.2d 215, 227 (Wash. 1976)). Allstate further claimed that other state courts had dismissed suits against insurers challenging their rates when plaintiffs had failed to exhaust their administrative remedies prior to filing suit. *Id.* at 15-16 n.3 (citing *Tindle v. State Farm Gen'l Ins. Co.*, 826 So.2d 144, 149 (Ala. Civ. App. 2001) ("Because the [insurance] statutes provide for an administrative review of a dispute regarding a rating system such as State Farm's fire protection classification, we conclude that the administrative review must be exhausted before the trial court can have jurisdiction over the dispute."); *Prentiss v. Allstate Ins. Co.*, 548 S.E.2d 557, 559-60 (N.C. Ct. App. 2001); *McLiechey v. Bristol W. Ins. Co.*, 408 F. Supp. 2d 516, 525 (W.D. Mich. 2006)).

26. *See id.* at 9 n.1 (citing *Peacock v. Cincinnati Ins. Co.*, 51 So.3d 298, 309 (Ala. 2010) (affirming dismissal of claims and finding that "by alleging that [the insurer] 'overcharges' for UM coverage, [plaintiff] claims that [the insurer's] rates are excessive – a matter squarely within the exclusive jurisdiction of the commissioner."); *Sapuppo v. Allstate Floridian Ins. Co.*, Case No. 4:12-cv-00382, 2013 WL 6925674, at *6 (N.D. Fl. March 12, 2013) (dismissing putative class action on basis of the filed rate doctrine and that Florida did not recognize any private right of action to enforce rates), *aff'd* 739 F.3d 678 (11th Cir. 2014); *Rios v. State Farm Fire & Cas. Co.*, 469 F. Supp. 2d 727, 739-40 (S.D. Iowa 2007) (dismissing claims for alleged premium damages under the filed rate doctrine); *Kirksey v. Am. Bankers Ins. Co. of Fl.*, 114 F. Supp. 2d 526, 529-30 (S.D. Miss. 2000) (granting motion to dismiss claim against insurer for alleged overcharging of personal property premiums based on the filed and approved rates); *Hooks v. Am. Med. Sec. Life Ins. Co.*, Civ. Case

No. 3:06 cv 71, 2008 WL 3911130, at *6 (W.D.N.C. Aug. 19, 2008) (applying the filed rate doctrine and concluding that there is no private right of action to challenge premiums based on rates approved by the Department of Insurance)).

27. *Peacock*, 51 So.3d at 309.

28. *Id.* at 310 (internal citations omitted).

29. *See MacKay*, 115 Cal. Rptr. 3d 893 at 910.

30. For a comprehensive review of "file and use" and prior approval jurisdictions, see National Association of Insurance Commissioners, *NAIC Compendium Chart Compilation* (2014), *available at* http://www.naic.org/documents/committees_ex_speed_to_market_clwg_140429_compiled_survey_results.pdf.

31. *See* Vonda Mallicoat Laughlin, *The Filed Rate Doctrine and the Insurance Arena*, 18 CONN. INS. L.J. 373, 378 (2012) (describing states that have held that the filed rate doctrine applies in "file and use" states).

32. *See id.*at 410-11.

33. *See id.* at 411-12 (citing *In re Title Ins. Antitrust Cases*, 702 F. Supp. 2d 840, 855 (N.D. Ohio 2010); *In re Pennsylvania Title Ins. Antitrust Litig.*, 648 F. Supp. 2d 663, 674-75 (E.D. Pa. 2009); *In re N.J. Title Ins. Litig.*, No. CIV.A. 08-1425, 2009 WL 3233529, at *2 (D.N.J. Oct. 5, 2009).

34. *See id.* at 412-13 (*McCray v. Fidelity Nat'l Title Ins. Co.*, 636 F. Supp. 2d 322, 330 (D. Del. 2009), *aff'd*, 682 F.3d 229 (3d Cir. 2012); *Schermer v. State Farm Fire & Cas. Co.*, 721 N.W.2d 307, 309 (Minn. 2006); *Anzinger v. Illinois State Med. Inter-Ins. Exchange*, 494 N.E.2d 655, 658 (Ill. App. Ct. 1986); *Horowitz ex rel. Gilbert v. Bankers Life & Casualty Co.*, 745 N.E.2d 591, 605 (Ill. App. 2001)).

35. *See id.* 417-19.

36. *See supra* note 30.

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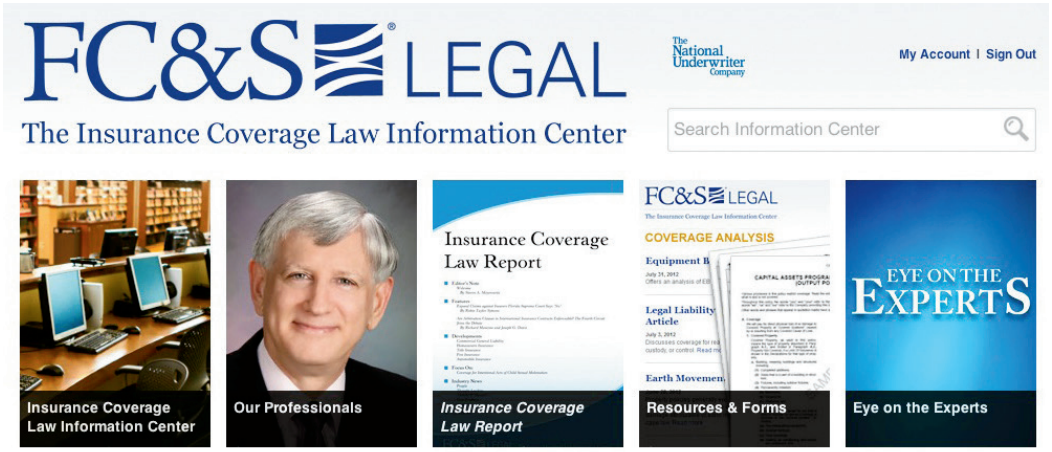

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