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Lender-Placed Insurance, Foreclosure Defenses and the Filed Rate Doctrine

By Geoffrey K. Milne*

In this article, the author explores the implications of lender-placed insurance in contested mortgage foreclosure actions.

Contested mortgage foreclosures involving lender-placed insurance (LPI) have been increasing recently. Some borrowers allege special defenses that directly or indirectly seek to contest the real or actual cost of LPI charged to their account. These cases involve some interesting legal issues, not the least of which is the filed-rate doctrine. Climate change is increasing flood risk, which may cause more litigation in this area. America's coastal geography is rapidly being altered by climate change. In 2023, flood losses in the United States were $226,830, 266.51, or about a quarter of a billion dollars.[1]

THE FILED-RATE DOCTRINE

The filed-rate doctrine has been applied regarding a host of LPI or forced placed insurance cases.[2] The application of the doctrine includes attacks couched in equitable legal terms. If the mortgagee charges the borrower the rate filed with a state insurance department, the doctrine acts to prohibit challenges to the filed-rate. As stated in *Rothstein v. Balboa Ins. Co.*:[3]

> Under the filed rate doctrine, "any 'filed rate' – that is, one approved by the governing regulatory agency – is per se reasonable and unassailable in judicial proceedings brought by ratepayers." *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994). The doctrine is grounded on two rationales: first, that courts should not "undermine[] agency rate-making authority" by upsetting approved rates (the principle of "nonjusticiability"); and, second, that litigation should not become a means for certain ratepayers to obtain preferential rates (the principle of "nondiscrimination"). *Marcus v. AT&T Corp.*, 138 F.3d 46, 58, 61 (2d Cir. 1998); see generally *Keogh v. Chi. & Nw. Ry. Co.*, 260 U.S. 156, 43 S. Ct. 47, 67 L. Ed. 183 (1922).

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1 NFIP Pivotal Reporting Tool.

2 Fowler v. Caliber Home Loans, Inc., 2016 U.S. Dist. LEXIS 123970 (S.D. Fla. Sept. 13, 2016); Rothstein v. Balboa Ins. Co., 794 F. 3d 256 (2015).

3 Rothstein v. Balboa Ins. Co., 794 F. 3d 256 (2015).

> The doctrine reaches both federal and state causes of action and protects rates approved by federal or state regulators. *Wegoland,* 27 F.3d at 20. Its application does not "depend on the nature of the cause of action the plaintiff seeks to bring" or "the culpability of the defendant's conduct or the possibility of inequitable results." *Marcus*, 138 F.3d at 58. Whenever a ratepayer's claim against a rate filer would implicate either the nonjusticiability principle or the nondiscrimination principle, it is barred. *Id*. at 59.
>
> The nonjusticiability principle arises out of the recognition that--unlike regulators, who "employ their peculiar expertise to consider the whole picture regarding the reasonableness of a proposed rate" – courts are "simply ill-suited" to decide whether a rate is appropriate. *Wegoland*, 27 F.3d at 21. Accordingly, courts must not "systematically second guess the regulators' decisions and overlay their own resolution." *Id*. The doctrine "prevents more than judicial rate-setting; it precludes any judicial action which undermines agency rate-making authority." *Marcus,* 138 F.3d at 61. Thus, a claim may be barred even if it can be characterized as challenging something other than the rate itself. *Id*.; see also *Fax Telecommunicaciones Inc. v. AT&T*, 138 F.3d 479, 489 (2d Cir. 1998) (rejecting plaintiff's "attempts to recharacterize its argument in order to avoid the harsh inequities occasioned by application of the filed rate doctrine"); *Wegoland*, 27 F.3d at 21 ("The fact that the remedy sought can be characterized as damages for fraud does not negate the fact that the court would be determining the reasonableness of rates." (emphasis and internal quotation marks omitted)).

Expertise exists within both federal and state insurance departments regarding risk, loss severity, and claim history, which makes them uniquely qualified to make such determinations. When the filed-rate being challenged was approved by a state insurance department, courts are addressing whether state law recognizes the filed-rate doctrine.

IN THE COURTS

Connecticut has yet to formally adopt the filed-rate doctrine.[4] In *M & T v. Lewis,* the Connecticut Supreme Court reversed a trial court ruling which struck equitable defenses challenging the cost of LPI, and held that such defenses met the *Blowers* test involving a defense to a foreclosure. Notably, the court did not decide whether Connecticut recognizes the filed-rate doctrine, but held that the doctrine did not require dismissal of the appeal. The case was remanded to the trial court for further proceedings.

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[4] M & T Bank v. Lewis, 349 Conn. 9 (2024).

Many courts have applied the filed-rate doctrine under state law in this area.[5]

A federally regulated lender making a loan secured by real property in a designated flood zone is required to have insurance as a condition of making the loan under the National Flood Insurance Act (NFIA).[6] The NFIA requires the lender to perform a flood zone determination, notify the borrower whether the property is located in a flood zone and require flood insurance before making, increasing, extending or renewing any loan.[7] The terms of Standard Flood Insurance Policies (SFIP) are determined by FEMA.[8] Payments on SFIP claims[9] come ultimately from the federal treasury.[10]

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[5] See Hong v. Bank of Am. NA, 2022 U.S. App. LEXIS 17236 (9th Cir. June 22, 2022) (holding filed-rate doctrine barred the plaintiff's claims for damages and injunctive relief under Washington state law based on allegations that defendants engaged in a kickback scheme that inflated homeowner insurance rates); Leo v. Nationstar Mortg. LLC, 964 F.3d 213, 216 (3d Cir. 2020) (holding plaintiff's New Jersey state law claims were barred by the filed-rate doctrine because "an insurance rate is filed with the appropriate regulatory body, we have no ability to effectively reduce it by awarding damages for an alleged overcharge: the filed-rate doctrine prevents courts from deciding whether the rate is unreasonable or fraudulently inflated"); Patel v. Specialized Loan Servicing, LLC, 904 F.3d 1314, 1324 (11th Cir. 2018) (applying filed-rate doctrine to Florida's insurance regulatory scheme to bar state law claims); Rothstein v. Balboa Ins. Co., 794 F.3d 256, 261 (2d Cir. 2015) (applying filed-rate doctrine to state claims in insurance context); In re New Jersey Title Ins. Litig., 683 F.3d 451, 453 (3d Cir. 2012) (affirming dismissal of state antitrust claims against New Jersey title insurance companies on the ground that suits were based on rates that had been filed with New Jersey's Department of Banking and Insurance and, thus, were barred by the filed-rate doctrine); Coll v. First Am. Title Ins. Co., 642 F.3d 876, 887 (10th Cir. 2011) (New Mexico's filed-rate doctrine precluded the plaintiffs' claims against the defendant insurers for damages relief, including claims seeking restitution, recovery for unjust enrichment, and disgorgement of the excessive amounts of premiums); Winn v. Alamo Title Ins. Co., 372 F. App'x 461, 463 (5th Cir. 2010) (affirming dismissal of plaintiff's Texas state law claims against title insurance company based on the filed-rate doctrine).

[6] 42 U.S.C. § 4012a(b)(1).

[7] 42 U.S.C. § 4104a.

[8] 44 C.F.R. §§ 61.4(b), 61.13(d).

[9] "Pursuant to its authority under 42 U.S.C. § 4081(a), FEMA created the WYO [Write Your Own] Program, which allows private insurers . . . to issue and administer flood-risk policies under the NFIP." Jacobson v. Metro. Prop. & Cas. Ins. Co., 672 F.3d 171, 174-75 (2d Cir. 2012) ; see also 44 C.F.R. Pt. 62, App. A (private insurance companies participate as WYO Program carriers authorized to issue SFIPs). "After a WYO company depletes its net premium income, FEMA reimburses the company for the company's claims payments." Gibson, 289 F.3d at 947, quoting Van Holt, 163 F.3d at 166-67, citing 44 C.F.R. Pt. 62, App. A, Art. IV (A). "Thus, a lawsuit against a WYO company[,]" like defendant Allstate in this case, "is, in reality, a suit against FEMA." Id.

[10] Gowland v. Aetna, 143 F.3d 951, 955 (5th Cir. 1998).

Some courts have held that federal law pre-empts state law when there is litigation regarding losses under SFIP policies. The U.S. Courts of Appeals for the Third and Sixth Circuits have addressed the issue of preemption under the NFIA, holding that such state law claims are preempted.[11] District courts in the U.S. Court of Appeals for the Second Circuit have applied preemption to state law claims regarding administration of insurance claims under NFIA.

CONCLUSION

A strong federal policy exists in this area, because flood losses are essentially paid by the federal treasury. In the context of state law challenges to LPI rates filed with state insurance departments on properties in flood zones, the same federal policy concerns remain. Stated differently, the filed rate doctrine should bar challenges to LPI insurance rates in flood zones, even when the challenge is based on state law. Losses in flood zones are paid by the federal treasury. As litigation unfolds in this area, the relationship between state and federal law will become increasingly important.

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[11] C.E.R. 1988, Inc. v. The Aetna Casualty & Surety Co., 386 F.3d 263 (3d. Cir. 2004); Gibson v. American Bankers Ins. Co., 289 F.3d 943 (6th Cir. 2002).