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“A NUANCED APPROACH”: HOW WASHINGTON COURTS SHOULD APPLY THE FILED RATE DOCTRINE

Kaleigh Powell*

Abstract: As of 2015, the vast majority of the American public had some form of health insurance, mostly provided by private companies. While some customers might, at some point, contemplate suing their insurance provider—for breach of contract, consumer protection statute violation, or some other cause—these potential plaintiffs are not likely to get far in many cases. The reason is the little-known “filed rate doctrine,” a court-created rule that bars lawsuits against many agency-regulated entities. The filed rate doctrine is based on the fact that many states, including Washington, require health insurers to file their rates with a regulatory agency—and have those rates approved—before they can start charging customers. Because companies get their rates approved by these regulatory agencies, courts invoke the filed rate doctrine to prevent plaintiffs from bringing actions that seek to “challenge” these agency-approved rates. Some courts, however, have stretched the filed rate doctrine too far, relying on the doctrine to dismiss breach of contract and state consumer protection act claims that do not challenge the actual rate paid.

In a recent Washington case, the Washington State Supreme Court left open the question of whether it would broadly construe the filed rate doctrine and adopt a rule that applies the doctrine to cases that are only tangentially related to agency-approved rates. This Comment seeks to address this gap in the Washington case law and argues that Washington courts should not apply the filed rate doctrine to cases involving health insurers where the plaintiffs do not allege that their rates are too high. First, this Comment describes the current health insurance regulatory framework in Washington, Oregon, and California and the application of the filed rate doctrine in those states. It then argues why, in Washington in particular, courts should use—as the Washington Court of Appeals recently described it—a “nuanced approach” in their application of the filed rate doctrine, not using it to bar breach of contract or Washington Consumer Protection Act claims, but keeping it to its original purpose: to prevent lawsuits that seek to challenge the actual rate paid.

INTRODUCTION

In 2015, about ninety-one percent of the United States population had some form of health insurance.¹ While at some point many of these millions of customers might have a cause of action to sue their health

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1. *Health Insurance Coverage of the Total Population*, KAISER FAMILY FOUNDATION, <http://kff.org/other/state-indicator/total-population/?currentTimeframe=0> [<https://perma.cc/R6JD-RBN4>].

insurance provider, most are probably unaware of the court-made rule that will prevent many of their lawsuits: the “filed rate doctrine.” Where regulated entities—like insurance providers and utility companies—file their rates and get them approved by a regulating agency, courts invoke the filed rate doctrine to dismiss lawsuits that challenge the reasonableness of those rates.² The doctrine essentially holds that a “filed rate” is “per se reasonable and cannot be the subject of legal action against the private entity that filed it.”³

The United States Supreme Court first established the filed rate doctrine in *Keogh v. Chicago & Northwestern Railway Co.*⁴ It is now generally accepted that the “[t]he purposes of the ‘filed rate’ doctrine are twofold: (1) to preserve the agency’s primary jurisdiction to determine the reasonableness of rates, and (2) to insure that regulated entities charge only those rates approved by the agency.”⁵ That is, the purpose of the doctrine is to preserve the ability of the agency to carry out its legislatively-designed function of approving rates and to prevent discrimination among customers in the rates charged.⁶ These two purposes are often referred to as the “non-justiciability” strand and the “anti-discrimination” strand of the doctrine, respectively.⁷ In cases that would seek to undermine the ability of the agency to determine rates (what some courts call a typical “justiciability” case), “the court is asked to determine a lower rate by assessing how much defendants have inflated the rate through their alleged wrongdoing.”⁸ Courts refer to the doctrine as the “filed rate” and “filed tariff” doctrine interchangeably.⁹

The filed rate doctrine, of course, has its critics.¹⁰ Scholars have argued that the doctrine should be presumptively inapplicable unless the regulating entity can show that its approval of the filed rate was not

2. *Tenore v. AT&T Wireless*, 136 Wash. 2d 322, 332, 962 P.2d 104, 108 (1998).

3. *Id.* at 331, 962 P.2d at 108 (citing *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17 (2d Cir. 1994)).

4. 260 U.S. 156 (1922).

5. *McCarthy Fin., Inc. v. Premera*, 182 Wash. 2d 936, 942, 347 P.3d 872, 875 (2015) (quoting *Tenore*, 136 Wash. 2d at 331–32, 962 P.2d at 108).

6. *Id.*

7. *Wegoland Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112, 1115 (S.D.N.Y. 1992), *aff’d* 27 F.3d 17 (2d Cir. 1992).

8. *Id.* (citing *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986)).

9. *Vonda Mallicoat Laughlin, The Filed Rate Doctrine and the Insurance Arena*, 18 CONN. INS. L.J. 373, 375 (2012); *see also* *AT&T Co. v. Central Office Tel.*, 524 U.S. 214 (1998) (using the terms interchangeably throughout).

10. *In re Title Antitrust Cases*, 702 F. Supp. 2d 840, 847 (N.D. Ohio 2010).

arbitrary¹¹ or that the doctrine simply should not apply at all because it undermines the ability of regulators and courts to promote competition and deter market abuses.¹² But so far Washington courts, at least, have not taken up the call to eliminate or modify the filed rate doctrine pursuant to critical responses.

Though courts first applied the doctrine to suits sounding in antitrust,¹³ many courts now apply the filed rate doctrine to cases involving breach of contract and state consumer protection acts.¹⁴ Courts reason that permitting a plaintiff to recover damages from defendants who have their rates approved by regulatory agencies would, in effect, amount to a challenge to the rates themselves.¹⁵ This Comment argues that such an extension of the filed rate doctrine—specifically into breach of contract and state consumer protection act claims in the health insurance arena—is both contrary to the doctrine’s core justifications and an unjustifiable burden on citizens who should otherwise have the right to bring suit against these regulated entities.

This Comment proceeds in six Parts. Part I describes the emergence of the filed rate doctrine and its repeated validation in the federal context by the Supreme Court of the United States, explaining in detail the Court’s development of the non-discrimination and the non-justiciability strands of the doctrine. Part II focuses on the application of the federal filed rate doctrine in federal courts; it describes how, though courts purport to permit breach of contract claims involving a filed rate, courts around the country still use the doctrine to effectively bar these claims in practice by preventing any meaningful measure of damages. The filed rate doctrine, however, was created by a federal court to apply to claims related to federal regulation, so states are not required to apply the doctrine to cases where state regulators determine reasonable rates¹⁶—though many do.¹⁷ Part III addresses state application of state versions of the filed rate doctrine; specifically, Part III describes the health

11. Julia Gorodetsky, *Analogy by Necessity: The Filed Rate Doctrine and Judicial Review of Agency Inaction*, 23 TUL. ENVTL. L.J. 1, 2–3 (2009).

12. Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era*, 56 VAND. L. REV. 1591, 1597 (2003).

13. *Keogh v. Chicago & Nw. Ry. Co.*, 260 U.S. 156, 159–60 (1922).

14. See Part II, *infra*.

15. See, e.g., *Hoffmann v. N. States Power Co.*, 764 N.W.2d 34, 38 (Minn. 2009) (alleging breach of contract).

16. See *Wegoland Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112, 1115 (S.D.N.Y. 1992), *aff’d* 27 F.3d 17 (2d Cir. 1994).

17. See, e.g., *McCarthy Fin., Inc. v. Premera*, 182 Wash. 2d 936, 943–44, 347 P.3d 872, 876 (2015) (applying the filed rate doctrine to bar plaintiffs’ claims).

insurance regulatory framework and the application of the filed rate doctrine in Washington, Oregon, and California, drawing on federal precedent from Part II. This Comment focuses on these states in particular because of the way that—despite the proximity of each—they apply the doctrine very differently, if at all. Although this Comment focuses on the application of the filed rate doctrine in the health insurance arena in particular, each of these Parts relies on the application of the doctrine to regulated utilities as a way of explaining how the doctrine functions generally. Finally, Part IV concludes by laying out the reasons that Washington courts should not apply the filed rate doctrine to bar claims for breach of contract or violation of the Washington Consumer Protection Act (WCPA), but instead should apply a “nuanced approach” that determines whether the claims are only tangentially related to the rates paid.¹⁸

I. THE FILED RATE DOCTRINE EMERGES OUT OF CASES CHALLENGING THE RATES CUSTOMERS PAID

A. *Keogh v. Chicago & Northwestern Railway Co. Establishes the Filed Rate Doctrine*

Keogh is generally credited as the case that established the filed rate doctrine as a court-made rule, though the Supreme Court in that case never used the term “filed rate.”¹⁹ In that case, Keogh brought antitrust claims against eight railroad companies and twelve individuals, alleging that the defendants conspired to set freight rates and eliminate competition between their various companies.²⁰ The question before the Supreme Court was whether Keogh could sustain a private right of action under Section 7 of the Anti-Trust Act for the defendants’ alleged conduct.²¹

The defendants noted that they had filed their rates with the Interstate Commerce Commission (ICC),²² which had then, upon Keogh’s

18. See *McCarthy Fin., Inc. v. Premera*, 182 Wash. App. 1, 14, 328 P.3d 940, 947 (2014), *rev’d* 182 Wash. 2d 936, 944, 347 P.3d 872, 876 (2015).

19. Allan Kanner, *The Filed Rate Doctrine and Insurance Fraud Litigation*, 76 N.D. L. REV. 1, 2 n.2 (2000).

20. *Keogh v. Chicago & Nw. Ry. Co.*, 260 U.S. 156, 159–60 (1922).

21. *Id.* at 161.

22. The ICC was an agency created by Congress to “regulate construction, operation, and abandonment of railroad lines.” Greg H. Hirakawa, Comment, *Preserving Transportation Corridors for the Future: Another Look at Railroad Deeds in Washington State*, 25 SEATTLE U. L. REV. 481,

complaint, suspended the use of the increased rates until the ICC could conduct hearings.²³ Keogh himself participated in the hearings, but the ICC ultimately approved the rates over his objection.²⁴ Keogh then sued, claiming as damages the “difference in rates” between what he was paying under the prior rate schedule and what he was forced to pay as a result of the ICC approval.²⁵ He also claimed damages in the lost value of one of his factories as the result of lost profits from the increased freight rates.²⁶

The Supreme Court rejected Keogh’s claims for several reasons,²⁷ noting at the outset of its analysis that “[a]ll the rates fixed were reasonable and non-discriminatory. That was settled by the proceedings before the Commission.”²⁸

In rejecting Keogh’s claims, the Court first determined that neither Keogh nor any private plaintiff could, by definition, state a claim under Section 7 of the Anti-Trust Act because no plaintiff could meet the injury requirement under the statute.²⁹ The Court described the injury requirement as follows:

Section 7 of the Anti-Trust Act gives a right of action to one who has been “injured in his business or property.” Injury implies violation of a legal right. 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.³⁰

Because a plaintiff could not claim violation of any legal right, there was no way for Keogh or any other plaintiff to meet the statute’s injury requirement.

Perhaps more importantly for future filed rate cases, the Court reasoned that courts must apply this “stringent rule” “because otherwise the paramount purpose of Congress—prevention of unjust

486 (2001). The ICC was abolished in 1995 and replaced with the Surface Transportation Board. *Ass’n of Am. R.Rs. v. Surface Trans. Bd.*, 162 F.3d 101, 102 (D.C. Cir. 1998).

23. *Keogh*, 260 U.S. at 160.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 162.

28. *Id.* at 161.

29. *Id.* at 162.

30. *Id.* at 163.

discrimination—might be defeated.”³¹ In other words, if courts permitted a private plaintiff to recover for damages resulting from artificially high rates, then that plaintiff would, in effect, pay a different rate than that plaintiff’s non-suing counterpart.³² Keogh argued that a discriminatory rate would not *necessarily* ensue from permitting a cause of action under Section 7 because any person might bring suit and obtain the benefit of a reduced rate.³³ The Court rejected that argument, though, noting that “[u]niform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief.”³⁴

According to the Court, Keogh also had a causation problem: he, like other plaintiffs attempting to bring suit under Section 7, would not only have to prove that he would have paid a lower rate in the absence of a conspiracy, he would also have to prove that this “hypothetical lower rate” would have been lawful under the Act to Regulate Commerce and would have been approved by the ICC.³⁵ The Court refused to submit that question—whether Keogh’s hypothetical rates would be discriminatory under the Act—to the ICC. “[B]y no conceivable proceeding could the question whether a hypothetical lower rate would under conceivable conditions have been discriminatory, be submitted to the Commission for determination.”³⁶ That point, like the others already addressed by the Court, proved fatal to Keogh’s claim because that “hypothetical question [was] one with which plaintiff would necessarily be confronted at trial” and was one that the Court determined Keogh would be unable to prove there.³⁷

Finally, the Court determined that Keogh could not bring his antitrust action challenging the approved rates because the damages he alleged were “purely speculative.”³⁸ Specifically, the Court determined that no court or jury would be able to say that the benefit of lower rates would

31. *Id.*

32. *Id.* (“If a shipper could recover under § 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors.”).

33. *Id.*

34. *Id.*

35. *Id.* at 163–64.

36. *Id.* at 164.

37. *Id.*

38. *Id.*

flow directly to Keogh—“[t]he benefit might have gone to his customers, or conceivably, to the ultimate consumer.”³⁹

Thus, without using the term “filed rate doctrine,” the Court created a rule that would, as it was elaborated and expanded, eventually bar many suits against entities with agency-approved rates.

B. The Supreme Court Elaborates on the “Non-Justiciability” Strand of Filed Rate and Applies It to State Law Actions that Implicate Federally-Filed Rates

Several decades after *Keogh*, the Court continued protecting agency-approved rates from collateral attack in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*⁴⁰ and *Arkansas Louisiana Gas Co. v. Hall.*⁴¹ Together these cases illustrate what has come to be known as the “non-justiciability” strand of the filed rate doctrine: the idea that courts are not equipped to make a decision on what rates would be “reasonable” because Congress has delegated that decision to the agency.

In *Montana-Dakota*, the plaintiff, Montana-Dakota Utilities Company, alleged that it was being charged “unreasonably high prices” for the defendant’s electricity.⁴² Though the rates that the plaintiff paid were approved by the Federal Power Commission pursuant to the Federal Power Act, the plaintiff alleged that it had been unable to “protest to the Commission to have reasonable rates and charges established” because, at the time the rates were set, the plaintiff company and defendant company shared a board of directors—preventing the plaintiff company from challenging the rates set.⁴³ The Court ruled, however, that Congress had delegated the authority to determine reasonable rates to the agency, so courts had no place in determining what a “reasonable” rate might be:

Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high. To reduce the abstract concept

39. *Id.* at 165.

40. 341 U.S. 246 (1950).

41. 453 U.S. 571 (1981).

42. *Montana-Dakota*, 341 U.S. at 248.

43. *Id.*

of reasonableness to concrete expression in dollars and cents is the function of the Commission.⁴⁴

The plaintiff, therefore, could not state a cause of action under the Federal Power Act for unreasonable rates.⁴⁵ Rather, the only rate that the plaintiff had a right to was the rate set by the Commission—“the courts can assume no right to a different [rate] on the ground that, in its opinion, it is the only or the more reasonable one.”⁴⁶

This concept reappeared years later in *Arkansas Louisiana Gas*, where the Supreme Court was confronted with the question of whether the filed rate doctrine “forbids a *state* court to calculate damages in a breach-of-contract action based on an assumption that had a higher rate been filed, the Commission would have approved it.”⁴⁷ In *Arkansas Louisiana Gas*, the plaintiffs were producers of natural gas who entered into a contract with the defendant, Arkansas Louisiana Gas Company (Arkla) under which the plaintiffs would sell their gas to the defendant.⁴⁸ The contract had a fixed price, but it also included a “favored nations” clause that provided that the plaintiffs would be paid more for their sales to Arkla if Arkla purchased gas from another party at a rate higher than what it was paying the plaintiffs.⁴⁹ The plaintiffs filed both the contract and their rates with the Federal Power Commission and “obtained from the Commission a certificate authorizing the sale of gas at the rates specified in the contract.”⁵⁰

Years later, Arkla purchased leases from the United States and started producing gas on the leaseholds.⁵¹ The plaintiffs eventually filed a state court action complaining that the lease payments had triggered the favored nations provision and sought “as damages an amount equal to the difference between the price they actually were paid in the intervening years and the price they would have paid had the favored nations clause gone into effect.”⁵²

As it had in *Montana-Dakota*, the Court determined that the plaintiff’s requested relief—reasonable rates that the defendant would have paid another party—was a nonjusticiable issue; that is, under the

44. *Id.* at 251.

45. *Id.* at 251–52.

46. *Id.* at 252.

47. *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 573 (1981) (emphasis added).

48. *Id.*

49. *Id.*

50. *Id.* at 574.

51. *Id.*

52. *Id.*

Natural Gas Act, “the rates that a regulated gas company files with the Commission for the sale and transportation of natural gas are lawful only if they are ‘just and reasonable,’” and “[n]o court may substitute its own judgment on reasonableness for the judgment of the Commission.”⁵³ “The authority to decide whether the rates are reasonable is vested by § 4 of the Act solely in the Commission.”⁵⁴

In *Montana-Dakota* and *Arkansas Louisiana*, then, the Court emphasized that one of the key purposes of the filed rate doctrine is to prevent judicial interference in decisions delegated to regulating agencies, especially because a court is ill-equipped to make policy decisions about “reasonable” rates.

C. *The Supreme Court Reaffirms Keogh in Square D*

The Supreme Court was given the chance to overrule *Keogh*—and the filed rate doctrine as a whole—in *Square D Co. v. Niagara Frontier Tariff Bureau*.⁵⁵ In that case, various shipping companies brought a private action against defendant motor carriers for antitrust in violation of the Sherman Act. The question presented was whether the carriers could be subject to treble damages if the shipping companies proved the allegations in their complaint.⁵⁶ The Court conducted its analysis in three parts, considering: (1) the sufficiency of the allegations in the complaint; (2) the impact of *Keogh* on the case at hand; and (3) “the extent to which the rule of the *Keogh* case remains part of our law today.”⁵⁷ The discussion here focuses only on the last two parts, which relate to the filed rate doctrine.

The Court quickly handled the question of *Keogh*’s application, finding that the rates in *Square D*, like those in *Keogh*, were duly submitted to and deemed lawful by the ICC.⁵⁸ The question for the Court, then, was “whether [it] should continue to respect the rule of *Keogh*,”⁵⁹ especially in light of the fact that the petitioners and the Solicitor General were asking the Court to overrule *Keogh*.⁶⁰ The Court identified a number of historical changes that might undermine its ruling

53. *Id.* at 577.

54. *Id.*

55. 476 U.S. 409 (1986).

56. *Id.* at 410.

57. *Id.* at 411.

58. *Id.* at 417.

59. *Id.*

60. *Id.*

in *Keogh*, including: the development of class actions, which could address the concern of “discriminatory” rates that arise where one customer receives a damages award and another does not; “the emergence of precedents permitting treble-damages remedies even when there is a regulatory remedy available”; innovation in calculating damages, which might address the fear that damages calculations might otherwise be “speculative”; and, finally, the “development of procedures in which judicial proceedings can be stayed pending regulatory proceedings.”⁶¹

Ultimately, though, the Court rejected out of hand the argument that these “developments” should cause it to overrule *Keogh*, concluding that they were “insufficient to overcome the strong presumption of continued validity that adheres in the judicial interpretation of a statute.”⁶²

II. FILED RATE CASES INVOLVING BREACH OF CONTRACT ARE GENERALLY PERMITTED, BUT THE DOCTRINE STILL PREVENTS MOST MEASURES OF DAMAGES IN FEDERAL COURTS

Most federal courts permit a breach of contract claim even where a filed rate is involved. The Fifth Circuit, for example, has ruled that the Federal Power Act preempts breach of contract claims that challenge a filed rate, but not breach of contract claims based on another rationale.⁶³ One such rationale was adequately asserted, according to the Fifth Circuit, in *Gulf States Utilities Co. v. Alabama Power Co.*,⁶⁴ which “held that . . . there is no preemption if damages were sought because the breach [of contract] caused an increase in the *quantity* [of electricity] purchased at the filed rate,” rather than an increase in the filed rate itself.⁶⁵ Similarly, in *Euclid Insurance Agencies, Inc. v. Scottsdale Insurance Co.*,⁶⁶ the filed rate doctrine did not bar the plaintiff’s claim for breach of contract because, the court reasoned, the plaintiffs had challenged the defendant’s failure “to honor its contractual obligation to

61. *Id.* at 423.

62. *Id.* at 424. Notably, in dissent, Justice Marshall adopted the lower court opinion of the Second Circuit Court of Appeals, which, in his view, “cogently and comprehensively explained why the reasoning of [*Keogh*] has been rendered obsolete by subsequent developments in the law.” *Id.* at 424–25 (Marshall, J., dissenting).

63. *Mirant Corp. v. Potomac Elec. Power Co.*, 378 F.3d 511, 519 (5th Cir. 2006).

64. 824 F.2d 1465 (5th Cir. 1987).

65. *Mirant*, 378 F.3d at 519.

66. No. 95 C 3308, 1998 WL 60775, at *4 (N.D. Ill. Feb. 5, 1998).

adjust rates” rather than the reasonableness of the rates themselves.⁶⁷ Thus, federal courts have contemplated at least some scenarios where the filed rate doctrine does not bar lawsuits that do not challenge the reasonableness of the rates themselves. But while these claims are purportedly allowed, federal courts may still dismiss these claims if the plaintiffs’ proposed measure of damages would require a court to engage in the same sort of reasonable rate inquiry that the legislature delegated to the agency.

A. *Courts Dismiss Filed Rate Claims if Resolution of Those Claims Would Require a Court to Calculate a Reasonable Rate*

It appears that where plaintiffs challenge some part of a defendant’s conduct, and not the reasonableness of the rate the defendant charged the plaintiffs, courts still dismiss plaintiffs’ claims under the filed rate doctrine if the plaintiffs’ damages request would require some sort of rate calculation. As the Eighth Circuit ruled, “the underlying conduct does not control whether the filed rate doctrine applies. Rather, the focus for determining whether the filed rate doctrine applies is the impact the court’s decision will have on agency procedures and rate determinations.”⁶⁸ In other words, according to some courts, the “filed rate doctrine prohibits a party from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct at issue.”⁶⁹

The Ninth Circuit has expressly adopted the principle that the filed rate doctrine bars claims for damages that require reference to the filed rate.⁷⁰ In *NOS Communications*,⁷¹ the Ninth Circuit considered claims in a multidistrict litigation from various plaintiffs asserting, inter alia, fraud and consumer protection against defendant telecommunications carriers.⁷² The court, in affirming and reversing dismissal on the various

67. *Id.* (“Although the reasonableness of [defendant’s] insurance rates and the fact that the rates were governed by regulatory agencies may be factors in deciding this issue, they are not dispositive.”). See also *Randleman v. Fidelity Nat’l Title Ins. Co.*, 465 F. Supp. 2d 812, 823 (N.D. Ohio 2006) (“The filed rate doctrine is inapplicable in this action. Plaintiffs are not challenging the reasonableness of the filed rate, but instead attempt to enforce a contract incorporating a filed rate.”).

68. *H.J., Inc. v. Nw. Bell Tel. Co.*, 954 F.2d 485, 489 (8th Cir. 1992).

69. *Id.* at 488; see also *Wegoland Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112, 1121–22 (S.D.N.Y. 1992), *aff’d* 27 F.3d 17 (2d Cir. 1992).

70. See *In re NOS Comms.* 495 F.3d 1052, 1060 (9th Cir. 2007).

71. 495 F.3d 1052, 1060 (9th Cir. 2007).

72. *Id.* at 1057.

claims under the filed rate doctrine, held that in filed rate cases, “where the measure of damages requires comparing the rates charged under the filed-rate with the rate that allegedly should have been charged, . . . state claims are preempted.”⁷³ Plaintiffs’ claims, therefore, were only permissible “to the extent that [they] . . . assert claims that neither attack the rates *nor require reference to the filed-rate for a calculation of damages.*”⁷⁴

B. Federal Courts Dismiss Cases Under Filed Rate Even Where Plaintiffs Allege Nonperformance of Contractual Obligations

There is at least one federal case where plaintiffs alleged that the defendants failed to perform contractual obligations but the court ruled that the filed rate doctrine still barred their claims. In *Rios v. State Farm Fire & Casualty Co.*,⁷⁵ the plaintiff class alleged state law claims for fraudulent inducement/rescission, unjust enrichment, and breach of contract. They sought premium damages paid to State Farm Insurance for an Upfront Endorsement Policy that State Farm ceased to honor. State Farm moved for judgment on the pleadings, arguing that the filed rate doctrine barred plaintiffs from recovering premium damages.⁷⁶ Plaintiffs countered that “the return of the Upfront Endorsement premiums, as damages, do not implicate the filed rate doctrine because [the plaintiffs were] not ‘contesting the amount of premium set by state regulators, the reasonableness of any rate or premium approval by any state or federal regulatory agency or insurance department,’” and because, significantly, the plaintiffs did “not request anything that would require the court to re-calculate the premium rate approved by any state or federal regulatory agency or insurance department.”⁷⁷ Rather,

73. *Id.* at 1060.

74. *Id.* (emphasis added). A notable exception is *Ellsworth v. U.S. Bank*, 908 F. Supp. 2d 1063 (N.D. Cal. 2012), where the plaintiff brought a putative class action challenging the defendant U.S. Bank’s practice of force-placing flood insurance on his real property in return for a kickback from defendant insurance company. U.S. Bank argued that the plaintiff’s claim was barred by the filed rate doctrine. *Id.* at 1082. The court held that the doctrine did not apply, reasoning that “[j]ust because the damages are based on increased costs incurred as a result of the alleged kickback scheme does not transform a challenge to conduct and practices into a challenge to the premiums.” *Id.* at 1083. *See also* Gallo v. PHH Mortg. Corp., 916 F. Supp. 2d 537, 548 (D.N.J. 2012) (holding that plaintiff’s claim could proceed, despite filed rate doctrine, because plaintiff “clearly complain[ed] of Defendant PHH Mortgage’s conduct in allegedly improperly receiving various financial benefits through the forced-placed insurance process, and cannot be fairly read as a direct challenge to the reasonableness of the rates charged”).

75. 469 F. Supp. 2d 727 (S.D. Iowa 2007).

76. *Id.* at 733.

77. *Id.* at 737.

“[p]laintiffs argue that they are merely seeking to enforce the terms of the services State Farm filed with the Commissioner, which would not conflict with the filed rate doctrine.”⁷⁸

The court, relying on *H.J., Inc. v. Northwestern Bell Telephone Co.*,⁷⁹ disagreed and held that the plaintiffs’ claims were barred by the filed rate doctrine because “for all practical purposes, the damages sought can only be measured by comparing the difference between the premium rates the Commissioner originally approved with the premium rates the Commissioner should have approved.”⁸⁰ Specifically, the court found that to measure the damages in *Rios*, it would have to determine what portion of the plaintiffs’ premiums were being used for the Upfront Endorsement provision and then “second guess” what rate would have been approved for the policies without the Upfront Endorsement provision; it refused to do so because it determined that “[t]his type of rate making and damages concept falls squarely within the filed rate doctrine.”⁸¹

In *Rios*, then, the proposed measure of damages was a refund of the premium equal to the market rate for the contract provision at issue (the Upfront Provision), and the courts dismissed the damages claims.⁸² Thus, while breach of contract claims are not per se barred under the filed rate doctrine, damages calculations matter a great deal. Specifically, courts have evinced a willingness to dismiss claims for

78. *Id.*

79. 954 F.2d 485 (8th Cir. 1992).

80. *Id.* at 739.

81. *Id.* (emphasis original) (internal citations omitted).

82. State courts, too, have similarly barred claims for nonperformance of contractual obligations in some cases. *See, e.g., Hoffman v. Northern States Power Co.*, 764 N.W.2d 34 (Minn. 2009). In *Hoffman*, plaintiffs in a putative class action brought state law claims for breach of contract against their electricity provider, alleging that the provider failed to meet its contractual obligation to maintain the electrical wiring leading to plaintiffs’ homes. *Id.* at 38. The Court held that although the plaintiffs could pursue injunctive relief to enforce the terms of the contract, *id.* at 45–46, the filed rate doctrine precluded them from recovering compensatory damages in the amount of the market rate of the services not rendered, *id.* at 48. The Court reasoned that “appellants essentially claim an overcharge for services actually performed under the tariff, compared to the services appellants claim the tariff required to be performed. These damages are measured as the difference between what the appellants actually paid for the performance of the service not received and the presumably lesser amount they would have paid had the services not been required in the tariff.” *Id.* at 47. The Court found that the proposed damages calculation would require it to contravene the dual purposes of the filed rate doctrine. *Id.* Firstly, the plaintiff’s proposed damages calculation would violate the non-justiciability principle because “[t]he measure of damages in this case is . . . inextricably linked to the filed rate.” *Id.* Further, this damages calculation would violate the non-discrimination principle because such a damages award “would result in appellants paying less for the electrical services than non-class members.” *Id.* at 48. The filed rate doctrine, therefore, barred the claim. *Id.*

nonperformance of a contractual obligation under the filed rate doctrine where the plaintiffs seek a partial refund of their premium in damages.

III. STATES TAKE DIFFERENT APPROACHES TO WHETHER AND HOW TO APPLY STATE LAW VERSIONS OF THE FILED RATE DOCTRINE

Though state courts are not required to apply the filed rate doctrine where rates are not filed with federal government agencies, many states have adopted their own versions of the filed rate doctrine or at least considered adopting it.⁸³ Three of those states—Washington, Oregon, and California—are now considered in turn; these states each approach the filed rate doctrine differently despite their geographic proximity. Washington's application of the doctrine is uncertain—as very few cases have addressed the issue—but there seems to be an opening for lawsuits like breach of contract or state consumer protection act violations that do not challenge the reasonableness of rates filed.⁸⁴ Oregon courts have never applied the filed rate doctrine in that state—despite considering the doctrine on at least two occasions—but have evinced a willingness to engage in the kinds of activities the federal filed rate doctrine generally seems to bar: requiring a refund of rates paid and asking regulating agencies to reconsider approved rates.⁸⁵ Finally, California is unusual in that its filed rate doctrine (for most kinds of insurance) is embodied in statute, and its lower courts expressly disagree about whether and how the filed rate doctrine applies to regulated entities.⁸⁶

A. *Washington Has Adopted the Filed Rate Doctrine, but the Parameters of Its Application Are Uncertain*

Washington courts have had little opportunity to apply the filed rate doctrine, as to date it has only expressly been addressed in three published Washington cases.⁸⁷ These cases leave the parameters of the doctrine's application in Washington unclear.⁸⁸ This section will discuss the health insurance regulatory framework in Washington and filed rate

83. See Laughlin, *supra* note 9, at 392–95.

84. See section III.A.3, *infra*.

85. See sections III.B.2–3, *infra*.

86. See section III.C, *infra*.

87. Those three cases are *McCarthy Fin., Inc. v. Premera*, 182 Wash. 2d 936, 347 P.3d 872 (2015); *Tenore v. AT&T Wireless*, 136 Wash. 2d 322, 962 P.2d 104 (1998); and *Hardy v. Claircom Comms. Grp.*, 86 Wash. App. 488, 937 P.2d 1128 (1997).

88. See section III.A.3, *infra*.

precedent in the state. It will then conclude with an analysis of what the likely continued application of the doctrine in Washington will be.

1. *The Washington Health Insurance Regulatory Framework*

In Washington, the Office of the Insurance Commissioner (OIC) approves health insurance premiums.⁸⁹ “Among its powers, the OIC may disapprove (1) ambiguous or misleading contracts and deceptive solicitations and (2) contracts the benefits of which are ‘unreasonable in relation to the amount charged for the contract.’”⁹⁰ The requirements for individual and small group filings are contained in section 284-43-6100 of the Washington Administrative Code.⁹¹

The OIC reviews rate increase requests only from individual and small employer⁹² plans.⁹³ These plans make up just a small percentage of the overall Washington insurance market—in 2014, five percent of Washington residents with health insurance had individual plans, and four percent received their plans from small group employers.⁹⁴ Almost half of all Washington residents with health insurance get their insurance through large group insurance policies.⁹⁵

The OIC regulatory process for *large* group rates is very different.⁹⁶ Large insurers create and file “Large Group Rating Models” with the OIC.⁹⁷ The OIC reviews these models, requiring the insurer to respond

89. *McCarthy*, 182 Wash. 2d at 941, 347 P.3d at 875.

90. *Id.* (citing WASH. REV. CODE §§ 48.44.020(2)–(3), 48.44.110 (2014)).

91. WASH. ADMIN. CODE § 284-43-6100 (2016).

92. A small group employer is an employer with up to fifty employees. *See Frequently Asked Questions About Health Insurance Rates*, WASHINGTON STATE OFFICE OF THE INSURANCE COMM’R, <https://www.insurance.wa.gov/your-insurance/health-insurance/health-rates/frequently-asked-questions/> [<https://perma.cc/7WVP-DBVA>] [hereinafter *FAQ About Health Insurance Rates*] (under “How we review rates”).

93. *See id.*

94. MIKE KREIDLER, OFFICE OF THE INS. COMM’R, THE STATE OF WASHINGTON’S UNINSURED 2014–2015, 15 fig.4-2 (2016), <https://www.insurance.wa.gov/about-oic/reports/commissioner-reports/documents/2014-2015-state-of-uninsured.pdf> [<https://perma.cc/UPZ4-M3XG>] [hereinafter WASHINGTON’S UNINSURED].

95. *Id.* The rest of Washington’s health insurance (other than individual, small group employer, and large group employer providers) largely comes from Medicaid (twenty-five percent of Washington’s insured) and Medicare (seventeen percent). *Id.*

96. *See FAQ About Health Insurance Rates*, *supra* note 92 (under “How we review rates”) (“We also review the *policies* for large employer health plans (51+ employees), but most employers can negotiate the *rates* with their insurance company.” (emphasis added)).

97. *Premera, Premera Blue Cross, and Lifewise Health Plan of Washington’s Motion for Summary Judgment* at 1–2, *McCarthy Fin., Inc. v. Premera*, No. 122015708, 2013 WL 9008317 (Wash. Super. Jan. 4, 2013), 2012 WL 11386547.

to various “objections” the OIC might have.⁹⁸ The insurer then directly negotiates its actual rates with its large group insureds.⁹⁹ After the insurer and the large group insureds negotiate their rates, the insurer files its individual large group contracts with the OIC.¹⁰⁰ The OIC is empowered to disapprove these large group contracts on various grounds, including in situations where the OIC determines that “the benefits provided therein are unreasonable in relation to the amount charged for the contract.”¹⁰¹ No part of the statutory scheme, however, requires the OIC to review and affirmatively approve those rates, and indeed it appears that the OIC chooses not to do so.¹⁰²

2. *Washington Has Implicitly Adopted a State Version of the Filed Rate Doctrine That Bars Suits Alleging Artificially High Rates*

To date, there have been only three published Washington cases that consider the filed rate doctrine, resulting in two opinions by the Washington State Supreme Court and one by the Court of Appeals.¹⁰³ Though Washington courts have never explicitly stated that they are

98. *Id.*

99. *Id.* (“One important difference between large group and small group or individual rates is that the large group rates are customized for each group after individualized negotiations between Premera and each individual group.”).

100. *Id.*; WASH. REV. CODE § 48.44.040 (2016).

101. WASH. REV. CODE § 48.44.020(3) (2016). The OIC may also disapprove the contracts for any of the reasons listed in § 48.44.020(2), which empowers the OIC to reject any individual or group contract:

(a) If it contains or incorporates by reference any inconsistent, ambiguous or misleading clauses, or exceptions and conditions which unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the contract; or (b) If it has any title, heading, or other indication of its provisions which is misleading; or (c) If purchase of health care services thereunder is being solicited by deceptive advertising; or (d) If it contains unreasonable restrictions on the treatment of patients; or (e) If it violates any provision of this chapter; or (f) If it fails to conform to minimum provisions or standards required by regulation made by the commissioner pursuant to chapter 34.05 RCW; or (g) If any contract for health care services with any state agency, division, subdivision, board, or commission or with any political subdivision, municipal corporation, or quasi-municipal corporation fails to comply with state law.

102. *See How We Review Health Rates*, WASHINGTON STATE OFFICE OF THE INSURANCE COMM’R, <https://www.insurance.wa.gov/your-insurance/health-insurance/health-rates/how-we-review-rates/> [<https://perma.cc/RXC6-6XU2>] (“We review all rate requests for individual and small-group plans (employers with 1–50 employees) in Washington state.”); *Search Health Insurance Rate Increases*, WASHINGTON STATE OFFICE OF THE INSURANCE COMM’R, <https://www.insurance.wa.gov/health-rates/Search.aspx> [<https://perma.cc/NRB9-NWLM>] (database for rate increase requests for individuals and small groups only).

103. *See* *McCarthy Fin., Inc. v. Premera*, 182 Wash. App. 1, 11–12, 328 P.3d 940, 946 (2014) (noting that, prior to *McCarthy*, there were only two filed rate cases in Washington—one by the Washington State Supreme Court and one by the Washington Court of Appeals), *rev’d* 182 Wash. 2d 936, 944, 347 P.3d 872, 876 (2015).

adopting the filed rate doctrine, it appears that these cases implicitly adopted a Washington State version.¹⁰⁴

The Washington State Supreme Court first considered the filed rate doctrine in *Tenore v. AT&T Wireless*.¹⁰⁵ In that case, customers challenged AT&T’s nondisclosure of its practice of rounding up phone call durations to the next highest minute.¹⁰⁶ AT&T argued that, under the filed rate doctrine, it could not be subject to the lawsuit because calculating the plaintiffs’ damages—the amount that the plaintiffs had overpaid as a result of the billing practice—would require a court to calculate a reasonable rate for phone service.¹⁰⁷ As a preliminary matter, the Court decided that the federal filed rate doctrine did not apply because the defendants in that case were specifically exempted from filing tariffs with the FCC.¹⁰⁸

In dicta relevant to the filed rate doctrine, however, the Court then considered whether the claims were nonetheless barred on federal preemption grounds—specifically, the Court considered whether the Federal Communications Act completely preempted plaintiffs’ state law claims by barring “State or local government . . . authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service.”¹⁰⁹ The Court noted that “[t]he award of damages is not per se state regulation, and as the United States Supreme Court has observed, does not require a court to ‘substitute its judgment

104. See *id.* at 11, 328 P.3d at 946. As noted by the Washington Court of Appeals in *McCarthy*, prior to its consideration of that case, only two published Washington cases had considered the filed rate doctrine in Washington: *Tenore* and *Hardy*. *Id.* at 11–12, 328 P.3d at 946. Both of those cases, however, dealt with the *federal* version of the filed rate doctrine. See *Tenore v. AT&T Wireless*, 136 Wash. 2d 322, 334, 962 P.2d 104, 109–10 (1998) (noting that whether the filed rate doctrine applied to that case depended on whether the defendant telecommunications companies had filed their rates with the Federal Communications Commission); *Hardy v. Claircom Comms. Grp.*, 86 Wash. App. 488, 490–91, 937 P.2d 1128, 1130–32 (1997) (noting that “[t]he filed tariff doctrine arises under the Federal Communications Act,” which required the telecommunications company defendant to file its tariffs with the FCC). The Washington Court of Appeals indicated that the Washington courts had at least implicitly adopted the doctrine in Washington, however, when it stated that “[w]hether to extend the filed rate doctrine to a claim involving health insurance is a question of first impression.” *McCarthy*, 182 Wash. App. at 11, 328 P.3d at 946. The Washington State Supreme Court, on review, did not consider this “question of first impression,” further indicating that a state version of the doctrine has been implicitly adopted. See *McCarthy Fin., Inc. v. Premera*, 182 Wash. 2d 936, 347 P.3d 872 (2015).

105. 136 Wash. 2d 322, 962 P.2d 104 (1998).

106. *Id.* at 327, 962 P.2d at 106.

107. *Id.* at 328–29, 962 P.2d at 107.

108. *Id.* at 334, 962 P.2d at 109–10.

109. *Id.* at 328, 962 P.2d at 110.

for the agency's on the reasonableness of a rate.'"¹¹⁰ Accordingly, the plaintiffs' state law claims and the damages they sought were not preempted by the Federal Communications Act.¹¹¹

In *Hardy v. Claircom Communications Group*,¹¹² the Washington Court of Appeals determined that the filed rate doctrine barred customers' claims against the defendant for failing to disclose its billing practices. Specifically, plaintiffs alleged that the defendant breached its contract and violated the Washington Consumer Protection Act (WCPA) by failing to disclose that its billing practice was to round up charges from its air-to-ground telephones in commercial aircraft to the next highest minute, thereby increasing the cost of the plaintiffs' telephone use.¹¹³ The plaintiffs reasoned that the filed rate doctrine should not bar their claims because they were "specifically challenging the allegedly deceptive advertising practices of [the defendants], not the underlying rate."¹¹⁴

The court determined that, irrespective of the plaintiffs' claim that they were not challenging the reasonableness of the rates, the *damages* calculation that the court would be required to perform barred the plaintiffs' actions.¹¹⁵ The court reasoned that it would, in other words, have to determine what a reasonable rate *would have been* as a baseline for assessing damages.¹¹⁶ The court, moreover, invoked the non-discrimination strand of filed rate, finding that:

[A]ny court-imposed award of damages would by definition result in [the plaintiffs] paying something other than the filed rate Significantly, neither [plaintiff] alleges that they or any other customer has paid anything other than the filed rate. Both of their claims are thus barred by the filed tariff doctrine.¹¹⁷

In *McCarthy Finance, Inc. v. Premera*,¹¹⁸ the Washington State Supreme Court had an opportunity to consider the filed rate doctrine in the *state* regulatory context. In that case, the Court was asked to consider whether the filed rate doctrine barred the plaintiffs' WCPA claims

110. *Id.* at 345, 962 P.2d at 115 (quoting *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 299 (1976)).

111. *Id.*

112. 86 Wash. App. 488, 937 P.2d 1128 (1997).

113. *Id.* at 490, 937 P.2d at 1130.

114. *Id.* at 494, 937 P.2d at 1132.

115. *Id.*

116. *Id.*

117. *Id.* at 494–95, 937 P.2d at 1132.

118. 182 Wash. 2d 936, 347 P.3d 872 (2015).

against their insurance provider and the Washington Alliance for Healthcare Insurance Trust (WAHIT) for allegedly “collud[ing] and ma[king] false and misleading representations to the plaintiffs that induced the plaintiffs to purchase health insurance policies under false pretenses.”¹¹⁹ Specifically, the plaintiffs alleged that as a result of the defendants’ WCPA violations, the plaintiffs paid “excessive, unnecessary, unfair and deceptive overcharges for health insurance” even though their rates had been approved by the Washington OIC.¹²⁰

The Court noted at the outset that a claim for damages relating to the plaintiffs’ insurance premiums was not per se barred by the filed rate doctrine.¹²¹ Rather, it was up to courts to “determine whether the claims and damages are merely *incidental* to agency-approved rates and therefore may be considered by courts or would necessarily require courts to reevaluate agency-approved rates and therefore may not be considered by courts.”¹²² The Court stated that “[i]n most cases, courts must consider [WCPA] claims even when the requested damages are related to agency-approved rates.”¹²³ The Court, however, qualified this broad command, noting that such a WCPA claim would be able to proceed only “to the extent that claimants can prove damages without attacking agency-approved rates” because it was in those cases that the benefits of considering the plaintiffs’ WCPA claims would outweigh any value in dismissing those claims under filed rate.¹²⁴

For that reason, the plaintiffs in *McCarthy* might have been able to proceed on their WCPA claim—but those plaintiffs, “rather than requesting general damages or seeking any damages that [did] not directly attack agency-approved rates,” requested refunds of the overpayments they allegedly made in addition to the insurance company’s alleged surplus.¹²⁵ Specifically, the plaintiffs sought two forms of damages, both of which expressly asked for a refund of premiums paid: first, the plaintiffs requested “a refund[] of the gross and excessive overcharges in premium payments” that resulted from the defendant’s unfair business practices and excessive premiums; second,

119. *Id.* at 939, 347 P.3d at 873–74.

120. *Id.* at 940, 347 P.3d at 874.

121. *Id.* at 942–43, 347 P.3d at 875 (“The mere fact that a claim is related to an agency-approved rate is no bar.”).

122. *Id.* at 942, 347 P.3d at 875 (emphasis added) (citing *Tenore v. AT&T Wireless*, 136 Wash. 2d 322, 344, 962 P.2d 104, 115 (1998)).

123. *Id.* at 943, 347 P.3d at 875.

124. *Id.*

125. *Id.* at 943, 347 P.3d at 875–76.

the plaintiffs sought a refund of the excess surplus to the insureds who paid the “high premiums causing the excess.”¹²⁶ Because the plaintiffs sought damages that would necessarily require a court to calculate a reasonable rate for their insurance premiums, the plaintiffs’ claims were barred by the filed rate doctrine.¹²⁷ The Court reasoned that:

[A]warding either of the two specific damages requested by the Policyholders would run contrary to the purposes of the filed rate doctrine because *the court would need to determine what health insurance premiums would have been reasonable for the Policyholders to pay as a baseline* for calculating the amount of damages[,] and the OIC has already determined that the health insurance premiums paid by the Policyholders were reasonable.¹²⁸

3. *The Future Application of the Filed Rate Doctrine in Washington Is Unsettled*

It is unclear from these few cases how Washington would treat a claim involving a filed rate against a defendant for failure to perform services promised in a contract. The Washington Supreme Court seems willing to hear claims that tangentially involve filed rates but do not challenge the reasonableness of those rates—especially WCPA claims.¹²⁹ But the Washington State Supreme Court has also been careful to note that the damages calculations in those cases would need to be calculated “to the extent that claimants can prove damages *without attacking agency-approved rates*.”¹³⁰ In particular, the Court barred the claims by the *McCarthy* plaintiffs on the ground that it would be required to determine as a baseline a reasonable rate for insurance premiums, which violated the non-justiciability strand of the filed rate doctrine.¹³¹ But the Washington State Supreme Court’s decision in *McCarthy* provided little guidance on what might constitute a claim that did not “attack” an agency-approved rate—a gap that this Comment seeks to address by considering the purposes of the filed rate doctrine.¹³²

126. *Id.* at 940, 347 P.3d at 874.

127. *Id.* at 943–44, 347 P.3d at 876.

128. *Id.* at 943, 347 P.3d at 876 (emphasis added).

129. *Id.* at 943, 347 P.3d at 875 (“[T]he benefits gained from courts’ considering CPA claims outweigh any benefit that would be derived from applying the filed rate doctrine to bar the claims.”).

130. *Id.* (emphasis added).

131. *Id.* at 943, 347 P.3d at 876.

132. *See infra* Part IV.

It is unclear whether Washington courts would treat a claim alleging nonperformance of promised services differently than a claim for excessive premiums. But it seems, based on the decision of the court of appeals in *Hardy*, that it does not matter whether the court would be able to assign a reasonable value to the complained-of conduct—in that case, overcharging consumers by rounding up the call times—and subtract that from the price actually paid. That is, it seems plausible that the *Hardy* court could have calculated the damages to each individual caller—presuming that the defendants kept records of call times pre-rounding—and then subtracted that total from the rate paid. The court declined to do so, however, following the same reasoning in *McCarthy* and holding that the damages calculation in that case would impermissibly require the court to engage in ratemaking. *Hardy*, however, was a case involving federally-filed rates,¹³³ and need not dictate the outcome in future Washington State filed rate cases. Which Washington claims (and which measures of damages) might be dismissed under the filed rate doctrine, therefore, is uncertain.

B. Oregon Does Not Have a State Version of the Filed Rate Doctrine

Oregon courts, unlike Washington courts, have not applied the filed rate doctrine in their state.¹³⁴ But Oregon has given some more indication of what that doctrine might look like should Oregon courts decide to adopt filed rate—that is, that it will not adopt the doctrine nearly as rigidly as it is applied elsewhere.¹³⁵ This section begins by discussing the insurance regulatory scheme in Oregon before moving on to examining Oregon’s consideration of the filed rate doctrine. The section concludes by hypothesizing what the filed rate doctrine might look like in Oregon if the state decides to adopt it.

1. The Oregon Insurance Regulatory Framework

Insurers in Oregon are required to file their rates, rating plans, and rating systems with the Director of the Department of Consumer and Business Services (DCBS).¹³⁶ The Director determines whether the rates, rating plans, or rating systems comply with Oregon’s insurance

133. See *supra* note 104 and accompanying text.

134. *Dreyer v. Portland Gen. Elec. Co.*, 142 P.3d 1010, 1014 n.10 (Or. 2006).

135. See *infra* section III.B.3.

136. OR. REV. STAT. ANN. § 737.205 (West 2016).

regulations.¹³⁷ Insurance rates in Oregon “shall not be excessive, inadequate or unfairly discriminatory.”¹³⁸ Rates are excessive when they are “unreasonably high for the insurance provided[,] and . . . [a] reasonable degree of competition does not exist” in that particular insurance arena.¹³⁹

Health insurance rates are reviewed by the DCBS in much the same way that they are reviewed in Washington; that is, the DCBS reviews and approves rates only for individuals who do not get insurance through an employer and small employers with fifty or fewer employees.¹⁴⁰ The DCBS does not review rates for large groups (with more than fifty employees), as those “groups negotiate prices with the insurer.”¹⁴¹

2. *Oregon Has Refused to Adopt the Filed Rate Doctrine*

Oregon courts, though noting that the doctrine exists, have avoided the question of whether filed rate is applicable under Oregon law.¹⁴² But the reasoning of some related Oregon cases suggests that if Oregon courts were to adopt filed rate, they would not apply a strict version of the doctrine.

In *Dreyer v. Portland General Electric Co.*,¹⁴³ the Oregon Supreme Court avoided the question of whether the filed rate doctrine applied in Oregon to bar the plaintiffs’ claims.¹⁴⁴ In *Dreyer*, plaintiffs in consolidated class actions brought a claim against defendant Portland General Electric (PGE) alleging that PGE had wrongfully charged its customers for the undepreciated value of one of its former—and now closed—power plants.¹⁴⁵ Plaintiffs sought a refund “of all amounts that ratepayers unlawfully had to pay” during the period PGE charged for the

137. *Id.* § 737.045 (Westlaw).

138. *Id.* § 737.310(1) (Westlaw).

139. *Id.* § 737.310(2)(a) (Westlaw).

140. DEP’T OF CONSUMER & BUS. SERVS., CONSUMER GUIDE TO HEALTH INSURANCE RATE REVIEW IN OREGON 6 (2015), <http://dfr.oregon.gov/healthrates/Documents/4961.pdf> [<https://perma.cc/R9CQ-3NWX>] [hereinafter RATE REVIEW IN OREGON].

141. *Id.*; see also *id.* at 7 (for large group insurance plans (fifty or more employees), “[e]mployers negotiate rates directly with the insurance company; these plans’ rates are not subject to state regulation”).

142. See *Dreyer v. Portland Gen. Elec. Co.*, 142 P.3d 1010, 1014 n.10 (Or. 2006).

143. 142 P.3d 1010 (Or. 2006).

144. *Id.* at 1014 n.10; see also *Bates v. Bankers Life and Casualty Co.*, 993 F. Supp. 2d 1318, 1350 (D. Or. 2014) (noting that no Oregon court has ever decided whether the filed rate doctrine applies in Oregon).

145. *Dreyer*, 142 P.3d at 1011.

plant.¹⁴⁶ After a complicated procedural history involving multiple suits and the Oregon Public Utility Commission (PUC), PGE petitioned the Oregon Supreme Court for a writ of mandamus ordering the county circuit court to dismiss the plaintiffs’ actions and vacate the order granting class certification.¹⁴⁷

Though the Oregon Supreme Court said that it would not decide whether the filed rate doctrine applied in light of section 757.225 of the Oregon Revised Statutes (ORS) (requiring utilities to charge only their filed rates),¹⁴⁸ it did express some uncertainty as to whether the filed rate doctrine would bar plaintiffs’ claims for damages even if the doctrine were applicable in Oregon.¹⁴⁹ The Court noted that it “share[d] plaintiffs’ skepticism of the proposition that is at the heart of PGE’s argument—that ORS 757.225 manifests a legislative intent that PUC-approved rates be treated as conclusively lawful for all purposes ‘until they are changed as provided in ORS 757.210 to 757.220.’”¹⁵⁰ Rather, the Court reasoned, “The statute is not aimed, as PGE suggests, at conclusively and permanently binding the entire world to the rate decisions of the PUC.”¹⁵¹

In a related later case involving the same allegedly unlawful PGE rates, the Oregon Court of Appeals interpreted two statutes—one addressing the inclusion of undepreciated investments in rates¹⁵² and one addressing the exclusion of certain costs from rates¹⁵³—to determine whether PGE was permitted to charge its customers for the undepreciated value of its closed plant.¹⁵⁴ The court of appeals determined that the PUC had erred in permitting PGE to charge its customers for more than the principal amount of its “undepreciated investment” in the closed power plant.¹⁵⁵ The court reversed the consolidated cases and remanded with instructions for the PUC to reconsider its rates.¹⁵⁶

146. *Id.* at 1016.

147. *Id.* at 1011.

148. *Id.* at 1014 n.10.

149. *Id.* at 1018–19.

150. *Id.*

151. *Id.* at 1019.

152. OR. REV. STAT. ANN. § 757.140(2) (West 2016).

153. *Id.* § 757.355 (Westlaw).

154. *Citizens’ Util. Bd. v. PUC*, 962 P.2d 744, 746–47 (Or. App. 1998).

155. *Id.* at 750.

156. *Id.* at 752.

On reconsideration, the PUC “clarified its understanding of [the Oregon Supreme Court’s] decision in *Dreyer*, particularly noting that [the Oregon Supreme Court] had not determined the scope of the filed rate doctrine or its impact on the PUC’s remedial authority.”¹⁵⁷ Accordingly, the PUC “concluded that it had remedial authority [to order issue of a refund] The PUC [thus] ordered PGE to issue a refund to the post-2000 ratepayers” to compensate them for the difference between what they paid following a settlement in a related case and the rates they would have paid if PGE had filed rates without the unlawful inclusion of some of its power plant losses.¹⁵⁸

In *Gearhart v. Public Utility Commission of Oregon*,¹⁵⁹ customers in a class action and the Utility Reform Project challenged the PUC’s reexamination of previously authorized rates to determine whether PGE’s customers had suffered injury, arguing that the court should adopt “a rule against retroactive ratemaking.”¹⁶⁰ The Court declined to hold that the rule against retroactive ratemaking applied in Oregon under all circumstances, but decided that:

It is sufficient for present purposes to conclude, as we do, that the rule against retroactive ratemaking does not preclude the action that the PUC took on remand in this case. The PUC did not alter PGE’s rates retroactively, but rather used ratemaking principles to calculate the rates that it would have authorized PGE to charge had it not included a return on the investment in [the closed plant].¹⁶¹

In coming to that decision, the Court noted that it was important that it had not accepted the “extreme” version of the filed rate doctrine that PGE had urged in *Dreyer*.¹⁶² Rather, it emphasized that in *Dreyer*, “the [C]ourt rejected the notion that PGE was shielded from liability because it was required by ORS 757.225 to charge the rates that were later held

157. *Gearhart v. Public Util. Comm’n of Or.*, 339 P.3d 904, 911 (Or. 2014).

158. *Id.* at 913.

159. 339 P.3d 904 (Or. 2014).

160. *Id.* at 917. The rule against retroactive ratemaking is a related doctrine to filed rate, but has important differences. See Stefan H. Krieger, *The Ghost of Regulation Past: Current Applications of the Rule Against Retroactive Ratemaking in Public Utility Proceedings*, 1991 U. ILL. L. REV. 983, 986 n.8 (1991) (“Closely related to, but distinct from, the rule against retroactive ratemaking is the ‘filed rate doctrine.’ That doctrine forbids a utility from charging rates other than those properly filed with the commission. Although courts have relied on the filed rate doctrine as one of the bases for the retroactivity rule, this doctrine is in fact a limitation on the power of utilities, not commissions.” (citations omitted)).

161. *Gearhart*, 339 P.3d at 917.

162. *Id.* at 918.

to improperly include a return on the investment in” the closed plant.¹⁶³ Accordingly, the Court concluded in *Gearhart*:

Thus, unlike some courts, this [C]ourt has not read ORS 757.225 as a manifestation of legislative intent to allow retroactive relief only when a utility collects rates different from those approved by the PUC *Dreyer* instead suggests that a utility that collects rates approved by the PUC *may have to return a portion of those rates if they are later found to be invalid on judicial review*.¹⁶⁴

Courts in other Oregon cases have been similarly unwilling to apply the filed rate doctrine to bar a plaintiff’s claims.¹⁶⁵

3. *Oregon Has Implicitly Rejected a Traditional Application of the Filed Rate Doctrine*

Though Oregon courts have not adopted the filed rate doctrine in that state, Oregon has evinced a willingness to permit challenges to approved rates,¹⁶⁶ to allow courts to remand orders to the regulating agency where the approved rate included an unlawful charge,¹⁶⁷ and to permit the regulating agency to issue refunds for rates unlawfully charged.¹⁶⁸ Indeed, in its proclamation that the statute requiring utilities to charge the filed rate “is not aimed . . . at conclusively and permanently binding the entire world to the rate decisions of the PUC[,]”¹⁶⁹ the Oregon Supreme Court seems to suggest that—unlike courts that will permit no variation between the approved rate and the customer’s out-of-pocket payment to the company—approval by a regulating agency does not insulate the company’s rates from challenge or refund.

163. *Id.*

164. *Id.* (emphasis added). *See also* *Gearhart v. Public Util. Comm’n of Or.*, 299 P.3d 533, 545 (Or. App. 2013) (in interpreting the *Dreyer* decision, the court of appeals noted that the filed rate statute “in and of itself does not absolutely shield a utility from having to return any part of its rates that later is adjudged to be unlawful”).

165. *See, e.g.*, *Bates v. Bankers Life and Casualty Co.*, 993 F. Supp. 2d 1318, 1350 (D. Or. 2014) (“Assuming *arguendo* that Oregon has adopted or would adopt the filed-rate doctrine under appropriate circumstances, it is inapposite here. Plaintiffs state expressly that their claims are not premised on any challenge to Bankers’ authority to raise its premium rates *or to the validity of the rates that they have been charged . . .*” (emphasis added in final clause)); *Adamson v. WorldCom Comms., Inc.*, 78 P.3d 577, 582 (Or. App. 2003) (holding that where a tariff is filed, the terms of the tariff control except where the claim is unrelated to the tariff; “[i]n other words, merely because a tariff exists does not necessarily mean a claim is barred”).

166. *See Dreyer v. Portland Gen. Elec. Co.*, 142 P.3d 1010, 1018–19 (Or. 2006).

167. *See Citizens’ Util. Bd. v. PUC*, 962 P.2d 744, 752 (Or. App. 1998).

168. *See Gearhart*, 339 P.3d at 918–19.

169. *Dreyer*, 142 P.3d at 1019.

Accordingly, Oregon courts are unlikely to use the filed rate doctrine to bar at the outset a request for damages based on premiums paid to an insurance company whose rates are filed in Oregon. And, if the Oregon courts were to adopt the filed rate doctrine, that doctrine would almost certainly look very different than it appears elsewhere, as Oregon courts have already effectuated the kind of “rebates” that some courts applying filed rate appear to avoid.

C. *California Application of the Filed Rate Doctrine is Inconsistent*

California, unlike Washington and Oregon, has embodied its filed rate doctrine in the insurance arena in statute for most kinds of insurance.¹⁷⁰ California’s statutory filed rate doctrine, however, does not apply to health insurance.¹⁷¹ For that reason, California courts expressly disagree with each other about whether the common law filed rate doctrine applies to other California insurance—and, indeed, they disagree about whether it applies in other contexts as well.¹⁷² This section proceeds in four segments. It begins by discussing the health insurance regulatory framework in California. It then moves on to describing the insurance regulatory scheme in that state, noting how California’s version of the filed rate doctrine (for insurance other than health insurance) is embodied in statute. But despite the statutory nature of California’s filed rate doctrine for insurance other than health insurance, courts still disagree about whether that statutory scheme—like common law filed rate in some jurisdictions—bars suits related to agency-approved rates. The section then considers the filed rate doctrine in the utility context before concluding with an analysis of the likely future application of the filed rate doctrine in California.

1. *The California Health Insurance Regulatory Framework*

In California, health insurers are required to file rate information for individual and small group health insurance policies before implementing a rate change.¹⁷³ Health insurers are required to file rate change information for large group health insurance policies only when the change amounts to an “unreasonable rate” increase.¹⁷⁴

170. See CAL. INS. CODE § 1860.1 (West 2016).

171. *Id.* § 1851 (Westlaw).

172. See *infra* sections III.C.2–3.

173. CAL. INS. CODE. § 10181.3(a) (West 2017).

174. *Id.* § 10181.4(a) (Westlaw).

“‘Unreasonable rate increase’ has the same meaning as that term is defined in the [Patient Protection and Affordable Care Act].”¹⁷⁵ The rate filing must be accompanied by an actuarial certification of the rate’s reasonableness or unreasonableness.¹⁷⁶ If the rate is unreasonable, that rate must also include a justification for the increase.¹⁷⁷ All of the rate filing information submitted under these laws must be made publicly available by the California Department of Insurance with the exception of the contracted rates between health insurers and providers/large groups.¹⁷⁸

The Department of Insurance reviews the filings, posts the rate increase information on its websites and permits public comment on the postings, and reports to the Legislature on unreasonable rate filings.¹⁷⁹ Furthermore, if the Insurance Commissioner determines that a rate increase is unreasonable or unjustified, or that a rate filing contains inaccurate information, the Department posts that decision on its website,¹⁸⁰ and the health insurer is required to “provide notice of that determination to any individual or small group applicant.”¹⁸¹ However, “[w]hile the Commissioner can request that the insurer amend the rate change or make an official determination that the proposed rate change is unreasonable, the Commissioner does not have the authority to deny or approve proposed rate changes.”¹⁸²

Thus, unlike its counterparts in Washington and Oregon, the California Department of Insurance is not empowered to disapprove health insurance rates. For that reason, it seems unlikely that the filed rate doctrine would ever apply (at least under the current statutory scheme) to claims against health insurers in California. The following sections, however, attempt to discern what that doctrine might look like if it were to apply to health insurance by detailing how the doctrine has applied in other regulatory contexts in California.

175. *Id.* § 10181 (Westlaw).

176. *Id.* § 10181.6 (Westlaw).

177. *Id.* § 10181.6(b) (Westlaw).

178. *Id.* § 10181.7 (Westlaw).

179. *Id.* § 10181.11 (Westlaw).

180. *Id.* § 10181.11(f) (Westlaw).

181. *Id.* § 10181.3(g) (Westlaw).

182. *Rate Filings and Review*, CALIFORNIA DEP’T OF INSURANCE, <http://www.insurance.ca.gov/01-consumers/110-health/70-rates/> [<https://perma.cc/4CAP-39G4>]. Some courts have argued that the mere *review* of filed rates, rather than their application, is enough to trigger the filed rate doctrine. *See infra* Part IV.B. The Ninth Circuit, however, has rejected this argument. *See Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332, 337–38 (9th Cir. 1990).

2. *Application of the Filed Rate Doctrine to Insurance Other than Health Insurance Is Uneven Because It Requires Statutory Interpretation*

Unlike courts in Washington and Oregon, courts in California have determined that the filed rate doctrine in California is, at least for some insurance, embodied in statute.¹⁸³ Following a voter initiative passed in 1988, certain insurers¹⁸⁴ are required to file a rate application with the Insurance Commissioner and receive the Commissioner's approval before changing any insurance rates.¹⁸⁵ "Once the commissioner's decision is final, an insurer must charge only the approved rate A consumer, however, may petition the commissioner to review the continued use of any rate."¹⁸⁶ Accordingly, application of the filed rate doctrine to insurance cases (besides health insurance) in California often depends on an interpretation of the Insurance Code.¹⁸⁷ However, "California Courts of Appeal have disagreed over whether California recognizes [the filed rate] doctrine to preclude challenges to rates filed pursuant to the Insurance Code"¹⁸⁸—that is, California courts disagree about whether this statutory scheme acts (as the common law filed rate doctrine does in other jurisdictions) as a bar to lawsuits related to

183. CAL. INS. CODE § 1860.1 (West 2016); *see also* King v. Nat'l Gen. Ins. Co., 129 F. Supp. 3d 925, 933 n.5 (N.D. Cal. 2015) ("While Defendants' argument invokes the 'filed rate doctrine,' a judicially-created doctrine that prohibits lawsuits challenging rates approved by a regulatory agency, California's statutory scheme explicitly embodies an analogous prohibition in Section 1860.1 of the California Insurance Code. . . . The filed rate doctrine is relevant, if at all, because it supports courts' interpretations of the statutes.").

184. This provision does not apply to health insurance. Pursuant to section 1851 of the California Insurance Code, "[t]he provisions of this chapter shall apply to all insurance on risks or on operations in this state, except: . . . (e) [d]isability insurance." "Disability insurance" under this statutory scheme includes health insurance. "Disability insurance includes insurance appertaining to injury, disablement or death resulting to the insured from accidents, and appertaining to disablements resulting to the insured from sickness." CAL. INS. CODE § 106(a) (West 2016). "In statutes that become effective on or after January 1, 2002, the term 'health insurance' for purposes of this code shall mean an individual or group disability insurance policy that provides coverage for hospital, medical, or surgical benefits." *Id.* § 106(b) (Westlaw).

185. Fogel v. Farmers Grp., Inc., 74 Cal. Rptr. 3d 61, 66 (Cal. Ct. App. 2008).

186. Walker v. Allstate Indem. Co., 92 Cal. Rptr. 2d 132, 134 (Cal. Ct. App. 2000) (internal citation omitted).

187. *See, e.g.,* MacKay v. Superior Court, 115 Cal. Rptr. 3d 893, 905–06 (Cal. Ct. App. 2010) (interpreting how sections 1860.1, 1860.2, and 1861.03 work together to preclude claims that attempt to challenge insurance rates); Fogel, 74 Cal. Rptr. at 72–73 (whether plaintiffs' claims were barred depended on whether the action complained of fell within the scope of section 1860.1).

188. Leghorn v. Wells Fargo Bank, N.A., 950 F. Supp. 2d 1093, 1115 (N.D. Cal. 2013) (citing Fogel, 74 Cal. Rptr. 3d at 74–75; Walker, 92 Cal. Rptr. 2d at 137 n.4; MacKay, 115 Cal. Rptr. 3d at 910).

agency-approved rates that arise within the Insurance Code itself. Where California courts do use the filed rate doctrine in these cases, “the filed rate doctrine provides that rates duly adopted by a regulatory agency are not subject to collateral attack in court.”¹⁸⁹

The lower California courts expressly disagree with each other about whether filed rate applies to California insurance cases other than health insurance.¹⁹⁰ On one side of the divide, many California courts interpreting and applying the doctrine have determined that the statute applies to bar most claims; at least two cases have held that plaintiffs may not challenge an approved rate under a law that is outside the Insurance Code.¹⁹¹ In *MacKay v. Superior Court*,¹⁹² the plaintiffs had challenged the defendant insurance company’s method of determining whether an insured was a “Good Driver” for the purposes of California law permitting a rate reduction. The court held that the statute barred the plaintiffs’ claims.¹⁹³ And in *Walker v. Allstate Indemnity Co.*,¹⁹⁴ the court similarly ruled that the plaintiffs’ claim that they were charged too much for insurance and were entitled to a refund was barred by the statute.¹⁹⁵

On the other side of the divide, the court in *Fogel v. Farmers Group, Inc.*¹⁹⁶ determined that a “key distinction” between the filed rate doctrine and California’s “‘prior approval’ system governing insurance rates”—the ability of the insurer to issue a rebate—meant that the plaintiff was *not* barred from bringing his claim.¹⁹⁷ The distinction was simple: under the federal system, once rates are filed a carrier cannot give rebates to its customers and a customer is barred from bringing a lawsuit that would, if damages were awarded, have the effect of a rebate; the California statutory scheme, on the other hand, permits an insurer to rebate excessive premiums to its customers.¹⁹⁸ Thus, the court determined, “even if the filed rate doctrine applied in the context of a rate approved

189. *Leghorn*, 950 F. Supp. 2d at 1115 (quoting *MacKay*, 115 Cal. Rptr. 3d at 910) (internal quotation marks omitted).

190. *MacKay*, 115 Cal. Rptr. 3d at 910. (“We thus must disagree with *Fogel v. Farmers Grp., Inc.* to the extent that it rejected the application of the filed rate doctrine to California insurances rates.” (internal citation omitted)).

191. *Id.*; *Walker*, 92 Cal. Rptr. 2d at 136.

192. 115 Cal. Rptr. 3d 893 (Cal. Ct. App. 2010).

193. *Id.* at 896.

194. 92 Cal. Rptr. 2d 132 (Cal. Ct. App. 2000).

195. *Id.* at 136.

196. 74 Cal. Rptr. 3d 61 (Cal. Ct. App. 2008).

197. *Id.* at 74–75.

198. *Id.* at 74–75.

by a *state* regulatory agency (defendants have pointed to no cases in which it was), it nevertheless would have no application here.”¹⁹⁹

California federal courts applying California law have also been unwilling to find that plaintiffs’ claims against insurers are precluded under filed rate where the plaintiffs do not challenge the rates themselves.²⁰⁰ Those decisions appear to be split, however, on whether the measure of damages might implicate the filed rate doctrine. *Ellsworth v. U.S. Bank*,²⁰¹ for example, reasoned that “[j]ust because the damages are based on increased costs incurred as a result of [an] alleged kickback scheme does not transform a challenge to conduct and practices into a challenge to the premiums.”²⁰² The court in *Leghorn v. Wells Fargo Bank*,²⁰³ however, noted that although the filed rate doctrine did not preclude plaintiffs’ claims that their banks were improperly receiving kickbacks from an insurance company, the filed rate doctrine could have barred the plaintiffs’ claims if the “[c]omplaint [was] construed as setting forth the theory that Plaintiffs were harmed by payment of [the insurance company’s] premiums because those premiums were improperly inflated by the commissions it paid to [the bank].”²⁰⁴

3. *Application of the Filed Rate Doctrine to Utilities Is Similarly Contradictory*

Some California courts applying the filed rate doctrine in the telecommunications context have found that damages claims requesting a rebate of rates paid are barred by the doctrine.²⁰⁵ The courts—like most others applying filed rate—reason that permitting a refund of rates would, in effect, permit the plaintiff to receive services at a discounted rate in violation of the non-discrimination strand of filed rate.²⁰⁶

199. *Id.* at 75.

200. *Leghorn v. Wells Fargo Bank, N.A.*, 950 F. Supp. 2d 1093, 1115 (N.D. Cal. 2013); *Ellsworth v. U.S. Bank, N.A.*, 908 F. Supp. 2d 1063 (N.D. Cal. 2012).

201. 908 F. Supp. 2d 1063 (N.D. Cal. 2012).

202. *Id.* at 1083.

203. 950 F. Supp. 2d 1093 (N.D. Cal. 2013).

204. *Id.* at 1115.

205. *See, e.g., Gallivan v. AT&T Corp.*, 21 Cal. Rptr. 3d 898 (Cal. Ct. App. 2004); *Day v. AT&T Corp.*, 74 Cal. Rptr. 2d 55 (Cal. Ct. App. 1998).

206. *Gallivan*, 21 Cal. Rptr. 3d at 905; *Day*, 74 Cal. Rptr. 2d at 63 (“[Plaintiffs] may *not* seek to recover any money from respondents, whether they label their request one for disgorgement or otherwise. The net effect of imposing any monetary sanction on the respondents will be to effectuate a rebate, thereby resulting in discriminatory rates.”).

Not all California courts agree with this analysis, however. The court in *Cellular Plus, Inc. v. Superior Court*²⁰⁷ determined that the filed rate doctrine did not prevent the plaintiffs from bringing an antitrust claim against cellular providers charging the defendants with price fixing, even though the rates had been approved by the California Public Utilities Commission (PUC). In that case, the plaintiffs—individual consumers and corporate sales agents—brought suit against cellular phone service providers in San Diego County.²⁰⁸ The trial court had granted the defendants demurrer as to two of the plaintiffs’ causes of action alleging wholesale and retail price fixing of cell phone service rates in the County,²⁰⁹ reasoning that the plaintiffs’ antitrust claims were either precluded or that the plaintiffs needed to bring them to the PUC in the first instance because the cellular providers’ rates had been approved by the PUC.²¹⁰ The court of appeals disagreed, rejecting the argument that the Supreme Court’s reasoning in *Keogh* applied in California to antitrust cases.²¹¹ Rather, the court found that “[n]either the Cartwright Act nor the Public Utilities Code contains any provision exempting cellular telephone service providers from the prohibitions of the Cartwright Act.”²¹² The court found it significant that the filed rate doctrine, if used in this way, could actually incentivize illicit activity because removing the threat of treble damages under the Cartwright Act might encourage companies to engage in anticompetitive price fixing.²¹³

4. *The Future Application of the Filed Rate Doctrine in California Is Unsettled*

Because California health insurance rates are not “approved” by the Department of Insurance (in that health insurers are not required to get authorization of their rates prior to charging customers), it is unlikely that the filed rate doctrine would apply to health insurers required to file in California.²¹⁴ Indeed, one of the stated purposes for the filed rate doctrine—to preserve the agency’s primary jurisdiction to determine the

207. 18 Cal. Rptr. 2d 308 (Cal. Ct. App. 1993).

208. *Id.* at 310.

209. *Id.* at 311.

210. *Id.* at 310.

211. *Id.* at 318–19.

212. *Id.* at 319.

213. *Id.*

214. Some courts argue that the filed rate should apply in just these circumstances. *See infra* section IV.B.

reasonableness of rates—would make little sense in California, where the agency does not have primary jurisdiction to dictate reasonable rates.

However, health insurers in California are still permitted to charge only the rates they have on file with the Department of Insurance unless and until they file to change those rates. To the extent, then, that a court may invoke the filed rate doctrine to rates filed with—but not approved by—the state Department of Insurance, it seems likely that courts would draw on the filed rate doctrine as it is applied to utilities (currently analyzed under a common law version of the filed rate doctrine) and insurance other than health insurance (analyzed under the California Insurance Code’s statutory scheme). Unfortunately, California courts directly contradict each other on whether and how the filed rate doctrine applies in California under both of these versions of filed rate. Clarity on the filed rate doctrine in California would require either a California Supreme Court case on the topic or for the lower courts to begin overruling their prior (contradictory) cases.

IV. IN WASHINGTON, THE FILED RATE DOCTRINE SHOULD NOT APPLY TO CLAIMS OF WRONGFUL CONDUCT THAT ARE INDEPENDENT OF RATES

The filed rate doctrine should apply to claims that allege unreasonable rates, but it should not apply to other claims that, if successful, might result in a rebate of those rates. There is a difference between, on the one hand, claims that assert that the rates approved by a regulating agency are *artificially high* because of some wrongful conduct committed by the defendant and, on the other hand, claims that the defendant committed some wrongful conduct that entitles the plaintiffs to a return of some of the rate paid. The former alleges that the plaintiffs should have received the same services for lower rates; the latter alleges that the plaintiffs would have been satisfied to pay the rate approved by the OIC if they had received the services promised, but that the defendant either breached a contract or committed some other violation of the law (usually in the WCPA arena).²¹⁵ The former claim should be barred by the filed rate doctrine; the latter should not. What is needed, therefore, is

215. *See, e.g.*, *Beller v. William Penn Life Ins. Co.*, 778 N.Y.S.2d 82, 85 (N.Y. App. Div. 2004) (where plaintiff brought claims for breach of contract based on the defendant insurance company’s alleged failure to lower her premiums as required by their contract, the filed rate doctrine did not apply because the plaintiff did not “challenge the reasonableness of the maximum rates set forth in the policy, nor [did] she claim that she should have been treated differently from any other subscriber”).

a “nuanced approach” that seeks to “consider[] the specifics of the claim and the policy basis for the filed rate doctrine.”²¹⁶

A. *Application of the Filed Rate Doctrine to Cases Involving Breach of Contract or WCPA Claims Is Contrary to the Doctrine’s Purposes*

Where plaintiffs allege only that the agency-approved rates that they paid were artificially high because of some wrongful conduct by the defendant, it makes sense to apply the filed rate doctrine. A good illustration of a case asserting artificially high rates is the recent Washington case of *McCarthy Finance, Inc. v. Premera*. As noted in section III.A.2, the plaintiffs in *McCarthy* alleged that their insurance provider and the Washington Alliance for Healthcare Insurance Trust (WAHIT) had “colluded and made false and misleading representations to the plaintiffs that induced the plaintiffs to purchase health insurance policies under false pretenses” in violation of the WCPA.²¹⁷ As a result of the defendants’ alleged “violations of the [WCPA, the plaintiffs] experienced excessive, unnecessary, unfair and deceptive overcharges for health insurance, resulting in Premera obtaining profits of millions of dollars that helped enable Premera to amass a surplus of approximately \$1 billion.”²¹⁸ The plaintiffs sought to recover (1) a refund in their premiums in the amount that they allegedly overpaid, and (2) a refund of the surplus that the insurance company had allegedly amassed as a result of the wrongful rates.²¹⁹ The Washington State Supreme Court rejected the plaintiffs’ claims under the filed rate doctrine because the plaintiffs could not find some measure of damages that did not directly attack the amount prescribed by rates they had paid.²²⁰ In essence, the *McCarthy* plaintiffs were asserting that, for the services they received, their rates were too high. In a case like this, where the rates and the underlying services are evaluated by the OIC,²²¹ it makes sense for a court to refuse to reevaluate a decision left by the Legislature to the agency’s discretion.

A very different case is presented by a class of plaintiffs that is perfectly happy to pay the rate set by the OIC *provided that the*

216. *McCarthy Fin., Inc. v. Premera*, 182 Wash. App. 1, 14, 328 P.3d 940, 947 (2014), *rev’d* 182 Wash. 2d 936, 944, 347 P.3d 872, 876 (2015).

217. 182 Wash. 2d 936, 939, 347 P.3d 872, 873–74 (2015).

218. *Id.* at 940, 347 P.3d at 874 (internal quotation marks omitted).

219. *Id.*

220. *Id.* at 943, 347 P.3d at 875–76.

221. Provided that they are, in fact, evaluated—*see infra* section IV.B.

regulated entity lives up to its contractual and legal obligations under that rate schedule. In this type of case, plaintiffs do not allege that their rates are too high; rather, they allege that they either did not receive the services that they were promised (say, if their utility refused to maintain its equipment on their property, as it was obligated to under their contract²²²) or that their company committed some sort of consumer protection violation not involving the filed rate (say, if an insurance company failed to disclose a data breach, giving insureds less time to monitor and protect their personal information²²³). In those cases, the two reasons underlying the filed rate doctrine do not apply.

First, prevention of rate discrimination is inapplicable in cases involving a breach of contract or injury caused by an insurer's tort. As the Supreme Court noted in *Keogh*—the case establishing filed rate—the purpose behind non-discrimination is not to ensure that everyone pays the same amount for the sake of simplicity; rather, non-discrimination exists to prevent a private plaintiff from getting a “rebate” in damages that might “operate to give him a preference over his trade competitors.”²²⁴ But in cases involving breach of contract, the measure of damages is the amount of money it would take to give the plaintiff the benefit of the bargain he already struck with the service provider—not an amount that is intended to give him some advantage over trade competitors.²²⁵ This is particularly significant in cases where other customers have not experienced the same breach of contract. In such a case, a court refusing to award damages on the basis of filed rate effectuates discriminatory rates: it forces the breached plaintiff to bear the costs of the defendants' wrongful conduct while permitting other plaintiffs to enjoy the benefit of the same rates without the cost of breach. This reasoning applies with equal force to cases sounding in tort, where the plaintiff's measure of damages is not an amount of money that would give him an unfair advantage over his competitors, but an amount

222. See *Hoffman v. Northern States Power Co.*, 764 N.W.2d 34, 38 (Minn. 2009).

223. See *In re Anthem, Inc. Data Breach Litigation*, No. 15-MD-02617-LHK, 2016 WL 3029783, at *1–3 (N.D. Cal. May 27, 2016).

224. *Keogh v. Chicago & Nw. Ry. Co.*, 260 U.S. 156, 163 (1922) (emphasis added).

225. See RESTATEMENT (SECOND) OF CONTRACTS § 347 (West 2016) (the measure of damages “in general” in a contract action is “damages based on [the party's] expectation interest, as measured by (a) the loss in value to him of the other party's performance caused by its failure or deficiency, (b) any other loss, including incidental or consequential loss, caused by the breach, less (c) any other cost or other loss that he has avoided by not having to perform”).

that would make him whole for a defendant’s breach of duty.²²⁶ Refusing to make a plaintiff whole on the basis of the filed rate doctrine, therefore, discriminates in favor of other customers who have not experienced the same injury and who therefore pay the agency-approved rate without suffering the same costs.²²⁷

Second, the non-justiciability strand of the filed rate doctrine is chiefly intended to prevent judicial interference in “a function that Congress [or the legislature] has assigned to a . . . regulatory body.”²²⁸ But where the legislative body at issue has directly permitted the lawsuit that the insurer would seek to prevent under the filed rate doctrine, application of the doctrine no longer makes sense. In Washington, an insured is expressly permitted to bring a WCPA claim against an insurer—including a claim based on misrepresentations that are prohibited in the Insurance Code.²²⁹ As the court of appeals noted in *McCarthy*, “[t]he rigid filed rate standard Premera propose[d] would significantly undercut these provisions.”²³⁰ The Washington Supreme Court has further emphasized that “while a court must be cautious not to substitute its judgment on proper rate setting for that of the relevant agency, the legislature has directed that the [WCPA] be liberally construed.”²³¹ To say, then, that the application of the filed rate doctrine in WCPA cases serves the legislature’s purpose in delegating ratemaking decisions to the agency *ignores* the legislature’s purpose in *specifically permitting that very cause of action*. The Washington Supreme Court recognized as much in *McCarthy*, though the Court in that case was faced with an excessive premiums claim masquerading as a WCPA claim:

In most cases, courts must consider [WCPA] claims even when the requested damages are related to agency-approved rates

226. See RESTATEMENT (SECOND) OF TORTS § 903 (West 2016) (defining “compensatory damages” in tort as “the damages awarded to a person as compensation, indemnity or restitution for harm sustained by him”).

227. Class actions, moreover, have the potential to effect the same rebate for all customers—thereby eliminating the risk of discrimination among ratepayers. Although the United States Supreme Court considered this argument insufficient to nullify the filed rate doctrine in *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 423 (1986), there is no reason that state courts (including Washington) should not consider this argument in deciding how state versions of the doctrine might apply.

228. *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 582 (1981).

229. WASH. REV. CODE § 19.86.170 (2016); *McCarthy Fin., Inc. v. Premera*, 182 Wash. App. 1, 13, 328 P.3d 940, 946 (2014), *rev’d* 182 Wash. 2d 936, 944, 347 P.3d 872, 876 (2015).

230. *McCarthy*, 182 Wash. App. at 13, 328 P.3d at 946–47.

231. *McCarthy*, 182 Wash. 2d at 942, 347 P.3d at 875 (2015).

because, to the extent that claimants can prove damages without attacking agency-approved rates, the benefits gained from courts' considering [WCPA] claims outweigh any benefit that would be derived from applying the filed rate doctrine to bar the claims.²³²

Washington courts have spent many years now measuring damages in the WCPA context²³³—there is no reason to believe that they could not do so for claims against health insurers, at least where those claims do not allege that the premiums are artificially high.

B. The Potential Application of the Filed Rate Doctrine in Class Actions Further Demonstrates the Hazards of Applying the Doctrine to Cases Only Tangentially Involving Rates

Because of the potential for unnecessary and unfair disparate treatment, cases of particular concern are class actions involving the same allegedly wrongful conduct—say, a data breach exposing customers' private information to hackers—where some class plaintiffs are subject to the filed rate doctrine and others are not. In Washington, the OIC does not affirmatively approve health insurance *rates* for large group insurance policies (51 or more employees). Rather, the OIC collects only rating models from large group policies, allowing the insurance companies to directly negotiate rates with the large group insureds.²³⁴ The OIC affirmatively approves rates only for small group and individual policy filings.²³⁵

This distinction is significant. The Ninth Circuit has held that “failure to disapprove,” even where an agency is empowered to make such a disapproval, does not trigger application of the federal filed rate

232. *Id.* at 943, 347 P.3d at 875.

233. *See, e.g.,* Panag v. Farmers Ins. Co., 166 Wash. 2d 27, 62–63, 204 P.3d 885, 902 (2009) (collecting cases related to the different ways that Washington courts have measured damages for WCPA claims).

234. *FAQ About Health Insurance Rates, supra* note 92 (under “How we review rates”) (“We also review the policies for large employer health plans (51+ employees), but most employers can negotiate the rates with their insurance company.”); Premera, Premera Blue Cross, and Lifewise Health Plan of Washington’s Motion for Summary Judgment at 1–2, *McCarthy Fin., Inc. v. Premera*, No. 122015708, 2013 WL 9008317 (Wash. Super. Jan. 4, 2013), 2012 WL 11386547, at *1 (“One important difference between large group and small group or individual rates is that the large group rates are customized for each group after individualized negotiations between Premera and each individual group.”).

235. The plaintiffs in *McCarthy* for some reason chose not to argue the significance of this distinction in the Washington State Supreme Court, instead deciding “not [to] challenge that the OIC approved the health insurance premiums that the Policyholders paid.” *McCarthy*, 182 Wash. 2d at 942, 374 P.3d at 874.

doctrine.²³⁶ In *Wileman Bros. & Elliott, Inc. v. Giannini*,²³⁷ the Ninth Circuit considered whether the filed rate doctrine barred allegedly unfair marketing standards that the defendants had promulgated without authorization from the Secretary of Agriculture.²³⁸ The defendants argued that the Secretary’s failure to disapprove the standards, in light of statutory provisions that would have permitted such an action, prevented the plaintiff’s action under the filed rate doctrine;²³⁹ the court rejected that argument, reasoning that:

The mere failure to disapprove . . . does not legitimize otherwise anticompetitive conduct. First, nondisapproval requires neither publication and comment nor explicit findings. In fact, it does not guarantee any level of review whatsoever Second, non-disapproval is equally consistent with lack of knowledge or neglect as it is with assent.²⁴⁰

The Ninth Circuit upheld *Wileman* in *Brown v. Ticor Title Insurance Co.*²⁴¹ and took the argument a step further—in *Brown*, the defendant title insurance company actually filed its rates with *state* regulatory agencies,²⁴² and it was only permitted to charge the rates that it filed.²⁴³ The court rejected the defendant’s argument that its rates were lawful because they had not been disapproved by the relevant regulatory agencies, reasoning instead that if the defendant’s “rates were the product of unlawful activity prior to their being filed and were not subjected to meaningful review by the state, then the fact that they were filed does not render them immune from challenge.”²⁴⁴ In the absence of meaningful state review, the court went on, insurers are permitted “to

236. *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 393–94 (9th Cir. 1992); *Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332, 337–38 (9th Cir. 1990); cf. *Town of Norwood v. New England Power Co.*, 202 F.3d 408, 419 (1st Cir. 2000) (“It is the *filing* of the tariffs, and not any affirmative approval or scrutiny by the agency, that triggers the filed rate doctrine.”).

237. 909 F.2d 332 (9th Cir. 1990).

238. *Id.* at 333.

239. *Id.* at 337.

240. *Id.* at 337–38.

241. 982 F.2d 386 (9th Cir. 1992).

242. Though the Ninth Circuit in *Brown* dealt with rates filed with Arizona and Wisconsin regulatory agencies, it did not appear to consider or apply Arizona or Wisconsin state versions of the filed rate doctrine (if they exist, which is beyond the scope of this Comment). *Id.* at 393–94. Rather, the court continually referred to the filed rate doctrine as the “*Keogh* doctrine,” an apparent call out to federal filed rate under *Keogh v. Chicago & Nw. Ry.*, 260 U.S. 156 (1922). *Id.*

243. *Brown*, 982 F.2d at 393–94.

244. *Id.* at 394.

file any rates they want,” and so “the act of filing does not legitimize a rate arrived at by improper action.”²⁴⁵

If a Washington court were to rigidly apply the filed rate doctrine, then—applying it only to claims that are actually *approved* by the agency—the claims of class plaintiffs who were *not* part of a large group insurance policy would likely be barred, while the claims of their large group co-plaintiffs would likely not be. In such a case, the twin aims of the filed rate doctrine are undone.

First, rate discrimination would ensue: large group insureds would be permitted to receive a refund of premiums paid as a measure of damages, and would therefore in total paying less than their non-large group counterparts. This is a particularly troublesome possibility because where agencies do not approve rates for large groups, it is often because it is assumed that large-group policyholders are in a better position to bargain for lower rates.²⁴⁶ If a Washington court were to rigidly apply the filed rate doctrine in a mixed class case like this, it would, in effect, further ensure that small group and individual policy holders were put in worse bargaining positions and forced to pay higher premiums. This seems particularly harsh in light of the fact that the WCPA authorizes suits for “unfair competition and unfair, deceptive and fraudulent acts or practices *in order to protect the public and foster fair and honest competition.*”²⁴⁷ Where a court would deny individual and small group insureds a WCPA cause of action on the basis of filed rate (while permitting the claims of their large group counterparts), it would strike a double blow to those who are most likely hurt by the absence of “fair and honest competition.”

Second, and perhaps more importantly, the non-justiciability arm of the filed rate doctrine would no longer apply: the same court that would dismiss small group and individual policyholders on the basis of the filed rate doctrine (reasoning that it, as a court, was in no position to calculate reasonable rates) would necessarily have to decide reasonable rates as a measure of damages for the large group policyholders anyway. It makes little sense that a court could dismiss a swath of plaintiffs on the basis that it cannot calculate a measure of damages that it is poised to calculate for the rest of the class.

245. *Id.*

246. See RATE REVIEW IN OREGON, *supra* note 140, at 6 (“[I]ndividuals and small business buyers are considered the most vulnerable consumers because they lack the negotiating power of large groups.”).

247. WASH. REV. CODE § 19.26.920 (2016) (emphasis added).

CONCLUSION

Though Washington has left the door open for WCPA claims, even in the context of filed rates, it needs to do more to draw the line between cases that challenge the reasonableness of rates charged and cases that deal with rates only as a tangential matter. While it might make sense to prevent collateral attack of agency-approved rates when a claim is, essentially, that the rates are too high, the justifications for the doctrine—non-discrimination and non-justiciability—are not applicable to cases where plaintiffs allege a breach of contract or a WCPA violation. Courts, then, should take care to investigate the gravamen of a plaintiff’s claims before dismissing on the basis of filed rate, dismissing only where the plaintiff in essence challenges an agency’s approval of the rates it must pay. Certainly, this distinction might prove difficult to implement; California courts, as explained, seem to be struggling with whether and how to distinguish between cases that challenge rates and cases that allege some other wrong. But, as is more apparent in Oregon, there does not seem to be any irreparable harm in refunding rates to customers for wrongs done them by private companies with filed rates. Where consumers do not challenge the agency-approved rates themselves, then, there seems little reason to continue to apply the filed rate doctrine, especially where doing so would undermine the intent of the legislature in enacting the WCPA.