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The Filed Rate Doctrine and Insurance Fraud Litigation

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I. INTRODUCTION

Insurance is not a typical business.[1] Unlike most businesses, it affects the public interest, in large part because people purchase it to protect their families and themselves at their moments of greatest vulnerability. Thus, the quality of the insurance product and the way in which it is sold has been, and continues to be, regulated at common law.

Increasingly, courts are being asked to void these historic consumer protections by applying the "filed rate doctrine"[2] to bar damage claims in insurance cases. Essentially, the filed rate doctrine prevents recourse by those alleging unfair pricing on the basis of properly established and filed rates.[3] Some have attempted to import this doctrine into the insurance context, thus cutting off claims based on properly filed insurance rates. As more and more insurance companies attempt to escape liability in tort or contract by invoking the filed rate doctrine,[4] the need for careful analysis of the appropriate forms and limits of this doctrine grows.

Generally, efforts to use the filed rate doctrine in the insurance context have been unsuccessful, since its doctrinal foundations make little sense in the insurance context. Therefore, the overwhelming majority of federal and state courts, including North Dakota's, have never applied the filed rate doctrine to insurance.[5]

Initially, the filed rate doctrine was created to preserve the ratemaking procedures of the Interstate Commerce Commission and to prevent interstate carriers from engaging in price discrimination.[6] Later, the doctrine was applied to telecommunications[7] and utilities[8] to prevent

1. *See, e.g.*, German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 411 (1914); Bekken v. Equitable Life Assurance Soc'y of the United States, 293 N.W. 200, 210 (N.D. 1940).

2. The filed rate doctrine, also known as the "Keogh doctrine," is a judicially created concept which originated in *Keogh v. Chicago & Northwest Railway*, 260 U.S. 156 (1922).

3. *Id.*

4. *See, e.g.*, Hanson v. Acceleration Life Ins. Co., No. A3-97-152 (D.N.D. Mar. 16, 1999) (Webb, C.J.), *available at* <http://www.ndd.uscourts.gov/dndopinions/html/A3_97_152_118. htm>.

5. The only North Dakota case on the filed rate doctrine is *E.W. Wylie Corp. v. Menard*, 523 N.W.2d 395 (N.D. 1994), in which the North Dakota Supreme Court refused to apply the filed rate doctrine to permit a shipper to collect freight charges against a consignor who had already paid a consignee for the shipping charges.

6. When it became effective on January 1, 1996, the ICC Termination Act of 1995 abolished the ICC; however, the Act also transferred most of the Commission's functions to a new agency, within the Department of Transportation, called the Surface Transportation Board. *See* ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 932, 932-43 (1995). The Act has also removed most of the previous filing requirements and unreasonable discrimination prohibitions with respect to motor carriers, but it has left them in place for rail and pipeline carriers. *See id.*

7. *See generally* American Tel. & Tel. Co. v. Central Office Tel. Inc., 524 U.S. 214 (1998).

8. *See generally* Arkansas La. Gas Co. v. Hall, 453 U.S. 571 (1981). However, the filed rate doctrine has not been applied in two recent electric utility rate cases. *See, e.g.*, Columbia Steel Casting Co. v. Portland Gen. Elec. Co., 103 F.3d 1446 (9th Cir. 1996), *as amended, on denial of rehearing*, 111 F.3d 1427 (9th Cir. 1997); Florida Mun. Power Agency v. Florida Power & Light Co., 64 F.3d 614 (11th

regulated entities from charging rates for services other than the filed rates.[9] However, not all regulated industries automatically warrant application of the filed rate doctrine. Courts that have reviewed the applicability of the filed rate doctrine to new fields have focused on one or more of the following factors:

(1) The impact the court's decision will have on agency procedures and rate determinations;[10]
(2) Whether there is an administrative agency to review the claim and provide a remedy;[11]
(3) Whether there is meaningful review of rate increases;[12] and
(4) Whether the damages are based upon the difference between the filed rate and the rate that would have been charged absent some alleged wrongdoing.[13]

Until recently, there had been no North Dakota jurisprudence indicating whether the filed rate doctrine would apply to bar fraud-based claims in the field of insurance. In *Hanson v. Acceleration Life Insurance Co.* (hereinafter "*Hanson*"),[14] Chief Judge for the Federal District of North Dakota Rodney Webb determined that, under applicable state law,[15] the filed rate doctrine does not apply to the business of long-term

Cir. 1995). Based on the expansion of energy deregulation, the filed rated doctrine will likely be limited in future utility cases.

9. The Second Circuit recently stated that the filed rate doctrine is "plainly a creature of a different time" that should not be strictly applied in an era of deregulation and competing carriers. *See* Fax Telecomm. Inc. v. AT&T, 138 F.3d 479 (2d Cir. 1998). The cases which apply the filed rate doctrine to various regulated industries support the analysis here, since all of those regulatory schemes are both more comprehensive than North Dakota's insurance scheme and provide administrative remedies to aggrieved parties.

10. *See generally* H.J. Inc. v. Northwestern Bell Tel. Co. Inc., 954 F.2d 485 (8th Cir. 1992), *cert. denied*, 504 U.S. 957 (1992).

11. *See generally* Calico Trailer Mfg. Co., Inc. v. Insurance Co. of N. Am., 155 F.3d 976 (8th Cir. 1998).

12. *See generally* Brown v. Ticor Title Ins. Co., Inc., 982 F.2d 386 (9th Cir. 1992).

13. *See H. J. Inc.*, 954 F.2d at 488.

14. No. A3-97-152 (D.N.D. Mar. 16, 1999); *available at* <http://www.ndd.uscourts.gov/dndopinions/html/A3_97_152_118.htm>.

15. Under *Erie Railroad Co. v. Tompkins*, "the law to be applied in any [diversity] case is the law of the state." Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1939). The Eighth Circuit, discussing applicable law, stated as follows:

> The substantive issues in this case are governed by law of the State of Nebraska, the state in which the district court sits, because jurisdiction is based on diversity of citizenship. In determining the law of the State of Nebraska, we are bound by the decisions of the Nebraska Supreme Court. If the Nebraska Supreme Court has not addressed the issue, we must determine what that court would probably hold were it to decide the issue. In making this determination, we may consider relevant state precedent, analogous decisions, considered dicta, scholarly works and any other reliable data.

Farr v. Farm Bureau Ins. Co. of Neb., 61 F.3d 677, 679 (8th Cir. 1995) (citations omitted). It is not the role of a federal court to expand the existing scope of state law. *See generally* Burris Chem., Inc. v. USX Corp., 10 F.3d 243 (4th Cir. 1993) (explaining that, under *Erie*, federal courts sitting in diversity rule upon state law as it exists and do not surmise or suggest its expansion). Nor is it the role of the court to choose a rule of law that it believes is better or that it would adopt for itself. *Id.* The sole function of a federal court sitting in diversity is to determine the issue under state law as the state's

care insurance in North Dakota.[16] The decision properly weighed each of the above-mentioned issues against the facts of the case and the specific regulatory regime applicable to long-term care insurance in North Dakota.[17] According to the *Hanson* court, North Dakota's statutory scheme contains no requirement that the filed rate doctrine be applied, and the court found North Dakota's statutory language to be inconsistent with the doctrine's application.[18]

This Article will examine the inherent conflict in the application of the filed rate doctrine to fraud-based insurance claims in North Dakota in light of North Dakota's insurance regulations. Throughout, the analysis will use the recent *Hanson* case as a case study.[19]

II. FACTUAL BACKGROUND OF *HANSON*

The *Hanson* class action arose because over 2000 of North Dakota's senior citizens purchased long-term care or nursing care ("LTC") insurance policies from Acceleration Life Insurance Company ("Acceleration") and its licensed agents (collectively referred to as "defendants") between 1984 and 1990.[20] LTC is only one of a number of "over-age" insurance products, which also include medical supplement, major medical, and hospital indemnification policies, that were sold, generally in tandem, by defendants to the plaintiff class and renewed annually thereafter by plaintiffs.[21]

Under the terms of the subject LTC policies (Forms 520, 521 and 522), as long as the insureds paid the premium, the policy was guaranteed renewable each year.[22] According to section 45-06-05-04(1)(b) of the North Dakota Administrative Code:

> The term "guaranteed renewable" may be used only when the insured has the right to continue the long-term care insurance in force by the timely payment of premiums and when the insurer has no unilateral right to make any change in any provision of the policy or rider while the insurance is in force, and cannot decline to renew, except that rates may be revised by the insurer on a class basis.[23]

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highest court would determine it. *Id.*

16. Hanson v. Accelerated Life Ins. Co., No. A3-97-152, at *3 (D.N.D. Mar. 16, 1999), *available at* <http://www.ndd.uscourts.gov/dndopinions.html/A3_97_152_118.htm>.

17. *Id.*

18. *Id.*

19. *See generally id.*

20. *Id.* at *1, *6. Allan Kanner served as lead counsel for the plaintiffs in *Hanson v. Acceleration Life Insurance Co.*, No. A3-97-152 (D.N.D. Mar. 16, 1999).

21. *Id.* at **1-2.

22. *Id.* at *1.

23. N.D. ADMIN. CODE § 45-06-05-04(1)(b) (1994).

Defendants admitted in the actuarial memorandum underlying these policies that the policies were supposed to be "level premium" policies; that is, the premium would remain constant for every year that the policy was renewed.[24] However, the policies contained a provision which read as follows:

> PREMIUM RATES-CHANGES
> We may change the premium rates. A change will apply to all contracts with the same form number as your's which are in force in the state you live in. A change will apply on the next due date after we give you at least a 30-day written notice at your last known address.[25]

The plaintiffs charged that the *Hanson* defendants used this language, especially the phrase "We may change the premium rates," to justify the exorbitant rate increases that led to the lawsuit.[26] As discussed below, the LTC policies at issue in *Hanson* operated in fact as rising premium policies, caused in part by an escalating "death spiral."[27] The Hanson plaintiffs contended that such a policy was indisputably inappropriate for elderly people on fixed incomes, because LTC insurance is worthless unless the insured can afford to keep it until it is needed.[28]

A core element of the *Hanson* plaintiffs' complaint was that the LTC policies were sold as coverage that customers could realistically maintain for the rest of their lives or until needed.[29] This required the policies to have essentially level premiums.[30] The *Hanson* plaintiffs also claimed that the defendants knew at the time of sale and renewal that the policy premiums would increase dramatically to unaffordable levels and that the defendants not only intentionally withheld this information from new customers and renewal customers but affirmatively and falsely told customers in form renewal letters that these policies were "competitive" and "one of the best policies available in your state."[31] Likewise, the

24. *Hanson*, No. A3-97-152, at *2. Level premiums are actuarily possible because, unlike many true health policies, the benefits under such policies are capped. In a properly designed level premium policy, the policies are rated such that the premiums paid in the first years of the policy are in excess of what is needed to pay the commissions, administrative costs, and claims, so that there will be remaining funds to invest. As the pool grows older and claims increase, the premiums paid are less than the yearly cost of running the block. However, the pool is supported by the current premiums as well as the accumulated earnings from the premiums paid in the first years. *See generally* Plaintiff's Memorandum in Support of Motion of Partial Summary Judgment at 3 n.5, Hanson v. Acceleration Life Ins. Co., No. A3-97-152 (D.N.D. Mar. 16, 1999) [hereinafter Plaintiff's Memorandum].

25. *See* Plaintiff's Memorandum, *supra* note 24, at 4 (policy on file with author).

26. *See Plaintiff's Memorandum, supra* note 24, at 4 (policy on file with author).

27. *See* Plaintiff's Memorandum, *supra* note 24, at 3-5 (policy on file with author).

28. Plaintiff's Memorandum, *supra* note 24, at 3 n.7.

29. Plaintiff's Memorandum, *supra* note 24, at 4.

30. Plaintiff's Memorandum, *supra* note 24, at 4.

31. Plaintiff's Memorandum, *supra* note 24, at 4.

risk of rate increases and future unaffordability of the policies was not addressed in the brochure given to the plaintiffs at the time of application or when the insureds wrote their first premium check.[32] Instead, when the policy arrived, it stated that premiums "may" increase, omitting the fact that rate increases were planned and inevitable.[33] The policies also stated that they were "guaranteed renewable for life," suggesting falsely that they would be affordable for life.[34]

Due to the fact that premiums rose over 700% between 1989 and 1996, less than 200 North Dakota citizens were paying the annual premium on these policies at the time of the *Hanson* litigation.[35] Such an increase is without precedent.[36] According to the North Dakota Department of Insurance ("NDI"), this was the worst LTC policy sold in North Dakota.[37] Those who were still paying the premiums did so because they were trapped and were too old to switch coverage.[38]

Essentially, the *Hanson* plaintiffs claimed the LTC policies purchased by North Dakota citizens were defective products.[39] In addition, they claimed that the facts underlying these defects were fraudulently withheld from the plaintiff class to enable defendants to continue to sell, and annually renew, these policies.[40] In response to these allegations, the *Hanson* defendants argued plaintiffs' claims were barred by the filed rate doctrine.

The facts and circumstances revealed during discovery and discussed immediately below explain why this occurred. These facts and circumstances emphasize the ease with which insurance companies doing business in less regulated environments can manipulate insurance regulations and underscore the importance of Judge Webb's ruling that the filed rate doctrine should not apply under North Dakota's current insurance regulatory scheme.

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32. Plaintiff's Memorandum, *supra* note 24, at 4.
33. Plaintiff's Memorandum, *supra* note 24, at 4.
34. Plaintiff's Memorandum, *supra* note 24, at 4.
35. Plaintiff's Memorandum, *supra* note 24, at 5.
36. Plaintiff's Memorandum, *supra* note 24, at 5.
37. Plaintiff's Memorandum, *supra* note 24, at 5 n.12.
38. Plaintiff's Memorandum, *supra* note 24, at 5 n.12. In 1995, the average age of the class was 83. By now, many class members are over the age of 85 and are unable to obtain an LTC policy. Plaintiff's Memorandum, *supra* note 24, at 5 n.12.
39. Plaintiff's Memorandum, *supra* note 24, at 5 n.12. In order for a level premium policy to meet its intended purpose, it must be priced in a manner which accounts for the age of the policy holders, it must be underwritten in a way to avoid high risks or excessive, early claims, and the premiums paid by the customers must be reserved and managed properly in order to pay claims throughout the years. If the policy is priced correctly and the premiums remain level, both healthy risks and unhealthy risks will remain in the pool, thus providing continuing premiums to help support the block as a whole and keep the loss-ratio to a minimum. Plaintiff's Memorandum, *supra* note 24, at 5 n.14.
40. Plaintiff's Memorandum, *supra* note 24, at 6.

III. ANALYSIS

With the *Hanson* case providing a factual background, the following sections examine the filed rate doctrine in light of North Dakota's insurance regulatory scheme.

A. APPLICATION OF THE FOUR FACTORS FOR CONSIDERATION

In determining whether to apply the filed rate doctrine in new areas, such as the insurance field, courts examine four factors to guide their analysis.[41]

1. *Impact on Regulating Agency*

The Eighth Circuit in *H.J. Inc. v. Northwestern Bell Telephone Co.*[42] ruled that "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."[43] In *H.J. Inc.*, the court held that class members' RICO claims, alleging that Northwestern Bell bribed members of the Minnesota Public Utilities Commission in connection with proposed increases of telephone rates, were barred by the filed rate doctrine.[44] The court recognized that the purpose of the filed rate doctrine was to "preserve the regulating agency's authority to determine the reasonableness of rates" and that "the relief sought would disturb uniform rates and the Commission's rate-making decisions."[45] The Eighth Circuit went on to explain that granting the relief requested by the class would challenge the previous action of the Minnesota Public Utilities Commission, which had implemented a rate decrease during the appeal.[46]

The North Dakota Department of Insurance ("NDI") is not vested with great regulatory authority concerning rate setting and rate increases. Under North Dakota's insurance regulatory scheme, benefits under long-term care insurance policies are deemed to be reasonable in relation to premiums provided the expected loss ratio is at least sixty percent.[47] Although section 26.1-30-19 of the North Dakota Century Code requires all insurance policies or rate schedules issued in the state

41. *See, e.g.*, Calico Trailer Mfg. Co. v. Insurance Co. of N. Am., 155 F.3d 976 (8th Cir. 1998); Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992); H.J. Inc. v. Northwestern Bell Tel. Co., 954 F.2d 485 (8th Cir.), *cert. denied*, 504 U.S. 957 (1992).

42. 954 F.2d 485 (8th Cir. 1992).

43. H.J. Inc. v. Northwestern Bell Tel. Co., 954 F.2d 485, 489 (8th Cir.), *cert. denied*, 504 U.S. 957 (1992).

44. *Id.* at 486.

45. *Id.* at 488, 493.

46. *Id.* at 493.

47. N.D. ADMIN. CODE § 45-06-05-08 (1994).

to be filed and approved by the commissioner, section 26.1-30-21 of the North Dakota Century Code provides the commissioner with little enforcement authority following disapproval.[48] Moreover, North Dakota's insurance regulations do not contain provisions for consumers to air their complaints regarding rate increases. Instead, the regulations only provide hearings for insurance companies when their requested rate increases are denied.[49]

A comparison of the North Dakota Public Service Commission's ("PSC") authority with the NDI's authority underscores this point.[50] The ratemaking authority of the PSC is set forth at sections 49-02-03 and 49-02-02(5) of the North Dakota Century Code.[51] These statutes specifically grant the PSC the power, after notice and hearing, to "originate, establish, modify, adjust, promulgate, and enforce tariffs, rates, joint rates and charges of all public utilities."[52] This broad power in setting utilities rates is tempered, however, by the requirement that notice be provided and a hearing be held prior to the approval of any rate or rate increase.[53] In *Aggie Investments v. Public Service Commission*,[54] the North Dakota Supreme Court specifically held that section 49-02-02(5) required that a hearing be held before the PSC could enter into a settlement establishing a rate with a utility.[55] The *Aggie II* court noted that "[t]he powers and duties of the PSC must be exercised in accordance with the statutory provisions granting these powers," and it held that the PSC settlement of a rate increase without a hearing violated the hearing requirement in section 49-02-02(5) of the North Dakota Century Code.[56]

A complete description of the various steps in the PSC's procedure for handling rate increase applications can be found in a PSC publication entitled *Procedure in Major Rate Cases Before the Public Service Commission*.[57] The procedure mandated for the PSC by statute and administrative rule provides several opportunities for consumers to be involved in the PSC's determination of rate increases.

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48. N.D. CENT. CODE §§ 26.1-30-19, 26.1-30-21 (1995).
49. N.D. CENT. CODE § 26.1-30-21.
50. Typically, the filed rate doctrine is applied only to regulated entities, such as utilities. However, the North Dakota Supreme Court has chosen not to apply the doctrine under all such circumstances. *See* O'Connor v. Northern States Power Co., 308 N.W.2d 365 (N.D. 1981); *see also* discussion *infra* Part III.D.
51. N.D. CENT. CODE §§ 49-02-02(5), 49-02-03 (1999).
52. N.D. CENT. CODE § 49-02-03.
53. N.D. CENT. CODE § 49-02-02(5).
54. Aggie Investments v. Public Serv. Comm'n ("*Aggie II*"), 470 N.W.2d 805 (N.D. 1991).
55. *Aggie II*, 470 N.W.2d at 809 (citing N.D. CENT. CODE § 49-02-02(5)).
56. *Id. at 811 (citing N.D. CENT. CODE § 49-02-02(5)).*
57. NORTH DAKOTA PUBLIC SERVICE COMMISSION, PROCEDURE IN MAJOR RATE CASES BEFORE THE PUBLIC SERVICE COMMISSION (on file with author).

First, the utility's application for a rate increase must contain a section detailing the impact of the proposed rate increase on consumers. Second, public notice is given of the utility's request for rate increases.[58] Third, public input sessions are held throughout the state for consumers to voice their concerns and opposition to rate increases.[59] Fourth, section 69-02-02-05 of the North Dakota Administrative Code allows a consumer to intervene and become a party to the proceeding if the consumer has "a legal interest which may be substantially affected by the proceeding; and the intervention would not unduly broaden the issues or delay the proceedings."[60] Fifth, consumers are allowed to testify at the technical hearing as well. Finally, an intervenor who disagrees with the PSC's decision may appeal it to the district court and the North Dakota Supreme Court, as was the case in the *Aggie* decisions.[61]

In stark contrast, the NDI's authority and procedures, as mandated by statute and regulation for approving a LTC insurance premium rate or premium rate increases, are much less comprehensive. They do not allow NDI to initiate rates and provide for no involvement by consumers. The *Hanson* court recognized this lack of authority as follows: "[T]he statutory scheme provides no mechanism for meaningful review of rates filed with the Insurance Commissioner or for public input in a rate determination, hearings or otherwise. Simply put, the North Dakota Insurance Commissioner does not have the authority to establish long term care insurance policy rates."[62] While the statutes and regulations require the PSC to give public notice, hold several hearings for public input by consumers, allow for intervention by interested third parties including consumers, and provide for appeal by those third parties, no such protections exist in the context of the NDI determination of LTC premium rates.

NDI likewise has little authority over rate increases. Vance Magnuson, Senior Life and Health Rate and Forms Analyst for NDI, testified during his *Hanson* deposition that while NDI has the right to approve or disapprove a rate filing, if there is actuarial justification for a rate increase, *i.e.*, a sixty percent loss ratio, the insurance company will ultimately get its rate increase.[63] Insurance Commissioner Glenn Pomeroy has

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58. *Aggie I*, 451 N.W.2d at 141.

59. *Aggie II*, 470 N.W.2d at 807.

60. N.D. ADMIN. CODE § 69-02-02-05 (1992).

61. *Aggie II*, 470 N.W.2d at 805; *Aggie I*, 451 N.W.2d at 141.

62. Hanson v. Acceleration Life Ins. Co., No. A3-97-152, at *3 (D.N.D. Mar. 16, 1999), *available at* <http://www.ndd.uscourts.gov/dndopinions/html/A3_97_152_118.htm>.

63. Deposition of Vance Magnuson, at 128 (Sept. 22, 1998).

> A: I'll respond to the question, but I guess with a qualified—qualified yes, in that you know, the Department has the right to approve or disapprove a rate filing or request the

echoed this sentiment, saying that "[p]resent law doesn't allow the Department any alternative other than to approve these increases."[64]

Insurance companies, aware of North Dakota's lax insurance regulations, often take advantage of the situation. For example, the policies at issue in *Hanson* were priced to sell and were designed by a salesman who had little actuarial knowledge.[65] Even one of the *Hanson* defendants' own consultants, Mark Litow of Milliman & Robertson, acknowledged that these policies were initially priced too low.[66] The *Hanson* plaintiffs alleged that policies should have been priced to pay the benefits promised without the need for further rate increases, *i.e.*, level premiums, which was how the NDI understood they would work.[67] Unfortunately, they were not properly priced, a fact customers were not told.[68] Instead, the *Hanson* defendants began instituting a series of rate increases to cover the initial underpricing. Under North Dakota's statutory scheme, as long as the insurance company could satisfy the sixty percent loss ratio requirement, the NDI was obligated to approve the rate increases.

Additionally, the *Hanson* plaintiffs asserted the defendants engaged in bad underwriting, which also resulted in rate increases that the NDI did not have the authority to prohibit. It was plaintiffs' position that the *Hanson* defendants sold the policies to anyone who could sign a check, including people with Alzheimer's disease. This is bad underwriting, *i.e.*, the actuarial assumptions for the policy dictated that people with certain risks or preexisting conditions should not be sold the policy.[69] A

> company accept and refile something lower. If there is actuarial justification for a rate increase, the Department, no matter whether we disapprove that filing, or not, will probably ultimately end up in a hearing where the company would substantiate that a rate increase is necessary.
>
> Q: Okay.
>
> A: So the Department, I guess, has the option of either knowing that they're not going to prevail in a hearing and let a previous disapproval go because it is substantiated.

Id.

64. *Senate Industry, Business and Labor Committee on Senate Bill No. 2161*, 54th Legis. 3 (North Dakota 1995) (statement of Glenn Pomeroy, Insurance Commissioner). Commissioner Pomeroy further testified that:

> State law requires the Insurance Department to approve premium increases that are shown to be necessary to pay claims by the company . . . few companies, however, sold this type of insurance eight or ten years ago and are now requiring astronomical rate increase in order to pay the claims of those policyholders receiving nursing home care.

Id.

65. Johnny Smith, owner of Interstate Services Insurance Agency ("ISI"), developed the insurance products along with a consulting actuary Paul Barnhart. *See generally* Deposition of Johnny Smith (on file with author). Smith admitted in his *Hanson* deposition that he is "not an actuary, but I know enough about it to be dangerous." *Id.* at 92.

66. Plaintiff's Memorandum, *supra* note 24, at 6.

67. Plaintiff's Memorandum, *supra* note 24, at 7.

68. Plaintiff's Memorandum, *supra* note 24, at 7.

69. Plaintiff's Memorandum, *supra* note 24, at 10. This point can be illustrated by considering the contrast between insurance companies and public utilities. Utilities sell a product without discrimi

policy that has competent underwriting from the outset will incur fewer claims early on, which allows reserves to build up to cover later claims.[70] In *Hanson*, the exorbitant commissions of sixty percent the first year (plus twenty percent for each of the next ten years), plus the fact that many people claimed benefits almost immediately, prevented adequate reserves from accumulating. Therefore, it was necessary to use current premiums to pay current claims.[71] Thus, the poor initial pricing and poor underwriting led the *Hanson* defendants to seek regular premium increases. Since the NDI is effectively powerless to prevent such rate increases, any decision by a court allowing fraud or misrepresentation actions, or both, related to the sale and renewal of insurance policies, such as in *Hanson*, will not interfere with NDI's regulating authority.[72]

2. *Administrative Review and Remedies*

In virtually all cases applying the filed rate doctrine, the plaintiff has had other methods to recover damages under the regulatory scheme in lieu of civil damages.[73] For example, consumers in *H.J. Inc.* received refunds and decreases in telephone rates while the case was pending.[74]

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nation among buyers, and they do so at a fixed price. The utility product is for sale, and the aim is for as many people as possible to buy it. This is not so with LTC insurance, which is not sold indiscriminately. Rather, underwriters decide whether to accept a buyer's payment for insurance or to refuse the potential buyer. This is a way of controlling risk. In addition, different classes of consumers may be charged different rates. Plaintiff's Memorandum, *supra* note 24, at 10 n.23.

70. Plaintiff's Memorandum, *supra* note 24, at 10 n.24.

71. Plaintiff's Memorandum, *supra* note 24, at 10-11 nn.25-26. In 1996 and 1997, the NDI, writing to *Hanson* defendants' LTC policy holders who had filed complaints based on premium increases, noted that NDI shares "your frustration regarding this premium increase, but we find that our hands are tied as well[,] . . ." because "[u]nfortunately, North Dakota Insurance laws and regulations do not allow us to disapprove this rate increase."

72. In an analogous case, *Humana Inc. v. Forsyth*, the Supreme Court allowed a fraud action under RICO to proceed despite the defendant insurance company's claim that the McCarran-Ferguson Act precluded a RICO case in the face of state law "enacted for the purpose of regulating the business of insurance because it would invalidate, impair or supersede" the Nevada insurance laws. Humana Inc. v. Forsyth, 525 U.S. 299, 307, 314 (1999). The key issue before the Court was whether RICO's application would "impair" Nevada's law. *Id.* at 307. The court found that Nevada had a comprehensive administrative scheme prohibiting various forms of insurance fraud and misrepresentation and giving the Nevada Insurance Commissioner the authority to issue charges if there was reason to believe the Act had been violated, to issue cease and desist orders, and to administer fees. *Id.* at 311-12. The court also found that Nevada allowed private actions for violations of insurance practices, including misrepresentations of pertinent facts and tort actions for breach of the common law duty to deal with insureds in good faith. *Id.* at 312. However, despite the comprehensive scheme and other remedies available, the court found that allowing a RICO fraud action would not frustrate the Nevada policy at issue but would rather complement Nevada's statutory and common law claims for relief. *Id.* at 311-14.

73. *See, e.g.*, Georgia v. Pennsylvania R.R. Co., 324 U.S. 439 (1945); United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474 (1932); Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156 (1922); H.J. Inc. v. Northwestern Bell Tel. Co, 954 F.2d 485 (8th Cir.), *cert. denied*, 504 U.S. 957 (1992); N.C. Steel, Inc. v. National Council on Compensation Ins., 496 S.E.2d 369 (1998).

74. *H.J. Inc.*, 954 F.2d at 488; *see also N.C. Steel, Inc.*, 496 S.E.2d at 373 (finding that a "comprehensive regulatory scheme of administrative restitution" constitutes "a remedy for injured ratepayers").

Even the plaintiffs in the first filed rate doctrine case had a damage remedy under the Interstate Commerce Act.[75] In his seminal *Judicial Control of Administrative Action*, Professor Louis L. Jaffee describes the *Keogh v. Chicago & Northwestern Railway Co.*[76] case: "The usual private antitrust remedy is damages and when the damages alleged closely parallel the reparations which an agency can award for injuries growing out of the regulatory statute, the reasoning of [*United States Navigation Co. v. Cunard Steamship Co.*][77] is potentially applicable to block the antitrust suit."[78]

In *Cunard*, cited by Jaffee above, the Court held that the remedies of the Shipping Act superseded those of the antitrust laws.[79] The key point was that at least one remedy must be available before a second remedy is effectively nullified.[80] This point is made eloquently in *Georgia v. Pennsylvania Railroad Co.*,[81] in which the Court allowed Georgia to sue on behalf of itself and as *parens patriae* under antitrust law, stating "repeals by implication are not favored. Only a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to the extent of the repugnancy."[82]

Unlike the situation in the above cases, most state insurance departments do not have the power to award damages. Recently, the Eighth Circuit in *Calico Trailer Manufacturing Co. v. Insurance Co. of North America*[83] underscored the significance of this fact by ruling that the court would not consider the applicability of the filed rate doctrine to a diversity case challenging increases in workers' compensation rates because the appellant had refused to exhaust the administrative remedies available to worker's compensation insureds under Arkansas law.[84]

As discussed earlier, the NDI does not have a formal administrative procedure for the review of a requested LTC insurance premium increase to allow public hearings, or an administrative vehicle for the award

75. Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156, 162 (1922).

76. 260 U.S. 156 (1922).

77. 284 U.S. 474 (1932).

78. LOUIS L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 143 (Abridged Student ed. 1965).

79. United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474, 485 (1932).

80. *See id.*

81. 324 U.S. 439 (1945).

82. Georgia v. Pennsylvania R.R. Co., 324 U.S. 439, 456-57 (1945).

83. 155 F.3d 976 (8th Cir. 1998).

84. Calico Trailer Mfg. Co. v. Insurance Co. of N. Am., 155 F.3d 976, 978 (8th Cir. 1998) (quoting Reiter v. Cooper, 507 U.S. 258, 269 (1993) ("Where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts")); *see also* Provident Indem. Life Ins. Co. v. James, 506 S.E.2d 892 (Ga. App. 1998), *cert. denied*, (Jan. 15, 1999); Howard R. Rubin, Reiter v. Cooper *and Unreasonable Rates: Are Reports of the Filed Rate Doctrine's Death Greatly Exaggerated*, 42 DUKE L.J. 905, 927-30 (1993) (discussing primary jurisdiction concerns and the role of the judiciary and administrative agencies).

of compensatory damages. Yet, the insurance company can appeal the decision to the state district court for administrative review.[85] Some courts have held that deference to administrative agencies with respect to initial decisions on matters within the expertise of the agency are within the sound discretion of the trial court.[86] The North Dakota Supreme Court has held that the decision of an administrative agency is to be accorded "great deference," and the court will not make independent findings of fact or substitute its own judgment for that of the agency.[87] Instead, the court's role is to determine whether a reasonable mind could have reasonably concluded the facts or conclusions were supported by the weight of the evidence.[88] However, under the circumstances of this case, the only decision NDI is authorized to make is whether or not the insurance company has met the requisite sixty percent loss ratio necessary to justify a rate increase.

Moreover, to the extent North Dakota's insurance regime provides NDI with authority, that authority is not used, because the efforts would be futile. The NDI has not had a hearing or ruling on the denial of a LTC rate increase. Moreover, NDI testimony in *Hanson* indicates that even if it challenged the requested rate increase in an administrative hearing, the insurance company would prevail.[89]

It is true that some other states, particularly New York, have applied the filed rate doctrine to non-fraud rate claims in the insurance arena.[90] *Golomb v. Equitable Life Assurance Society of the United States* makes it clear that New Yorkers have an alternative remedy:

> However, this court held that the "filed rate" doctrine did not prevent plaintiffs from asserting a claim, albeit not as a class action, under Law §4226(a)(4), which prohibits misrepresentations of the financial condition of the insurer, since this statute specifically provides for a penalty in the amount of the premi-

85. *See, e.g.*, Insurance Servs. Office v. Knutson, 283 N.W.2d 395 (N.D. 1979); Allstate Ins. Co. v. Knutson, 278 N.W.2d 383, 391 (N.D. 1979) ("Allstate and the Commissioner apparently agreed that the Insurance Commissioner's authority in reviewing a filing is limited, and that he, unlike other rate-making authorities, cannot accept the filing in part and reject it in part"); Nationwide Mut. Ins. Co. v. Williams, 188 So. 2d 368, 369 (Fla. Dist. Ct. App. 1976) ("We observe a legislative deficiency upon the subject of regulating insurance rates by not allowing some flexibility on the part of the Insurance Commissioner to review filings").

86. *See, e.g.*, Magnolia Coal Terminal v. Phillips Oil Co., 576 So. 2d 475, 489 (La. 1991) (Marcus, J., dissenting).

87. Seela v. Moore, 603 N.W.2d 480 (N.D. 1999).

88. *Id.*

89. *See supra* note 64.

90. Golomb v. Equitable Life Assurance Soc'y of the United States, No. 101510/95, slip op at 8 (N.Y. Sup. Ct. Mar. 27, 1996).

> ums paid. Thus, there was no need to recalculate the approved rates. However, no such claims are asserted herein.[91]

Further, the insurance laws of New York are significantly different from North Dakota's insurance laws.

Insurance in New York is highly regulated by the Department of Insurance, which is armed with much greater authority regarding rate making decisions than the NDI. For example, the New York Insurance Code sets standards for rates and instructs the superintendent to examine certain criteria, including whether premiums are "excessive."[92] To the extent an insurer tries to plead losses on a single product, the superintendent may look at the profitability of the company as a whole.[93]

The Code also provides for a consumers advisory council, as well as a business advisory council to assist the superintendent's rate making decisions.[94] The Code has a provision allowing an aggrieved person access to information from the insurer (*i.e.*, discovery) and a means of being heard by the insurer.[95] If the insurer refuses or rejects the person's request, that person may file a request with the superintendent who must hold a hearing.[96] The Code provides that if the superintendent finds any rate filing in violation of these regulations or any rate filing that is excessive, inadequate, or discriminatory, the superintendent may order the filing withdrawn or suspended.[97] The insurer may then request a hearing at which the insurer bears the burden of justifying the rate.[98] Following the hearing, if the superintendent finds the rate discriminatory, he or she may order the insurer to remedy the rate.[99] If the superintendent finds the violation to be willful, he or she may, in addition to any

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91. *Id.* at 7.
92. N.Y. INS. LAW § 2303 (Supp. 1999-2000).
93. *Id.* The Code states:

> Rates shall not be excessive, inadequate, unfairly discriminatory, destructive of competition or detrimental to the solvency of insurers. In determining whether rates comply with the foregoing standards, the superintendent shall include all income earned by such insurer and any insurer controlling or controlled by such insurer or under common control by or with such insurer on all its investments of any kind and wherever located. The superintendent shall further determine whether any component of such rates represent an effort on the part of the insurer to recover losses incurred in another state due to any referendum, law or regulation which requires a general reduction in rates for the kinds of insurance described in section two thousand three hundred two of this article. Such a finding shall be deemed unfairly discriminatory for the purposes of this article.

Id.

94. N.Y. INS. LAW § 2341 (Supp. 1999-2000).
95. N.Y. INS. LAW § 2319 (Supp. 1999-2000).
96. *Id.*
97. N.Y. INS. LAW § 2321 (Supp. 1999-2000).
98. *Id.*
99. *Id.*

other penalty provided by law, assess a penalty on the insurer on behalf of the people of New York.[100] After a final determination against an insurer, any person so entitled may demand that the amount of overcharges received during the pendency of the hearing, together with interest, be refunded.[101]

Finally, the Code contains a "default" penalty provision for instances in which the Code is willfully violated but for which no other section of the chapter imposes a penalty.[102] This section also states that the superintendent may maintain a civil action in the name of the people to recover a judgment for a monetary penalty imposed by the Code. In other words, there is an alternative compensatory remedy in New York.

This brief overview of the Insurance Code of New York shows that the New York legislature designed an insurance agency with regulatory and enforcement authority and safeguards for consumer protection. Thus, New York courts are justified in applying the filed rate doctrine and deferring to the Insurance Department.[103] As discussed above, the same is not true for NDI.

The North Dakota Legislature has deliberately chosen not to enact a comprehensive regulatory scheme like that of New York. The NDI has no teeth in its regulations, and it cannot provide compensation to victims of insurance fraud. Rather, if a citizen of North Dakota has a dispute with an insurance company, he or she must handle the dispute individually in a court of law as envisioned by article I, section 9 of the North Dakota Constitution[104] and section 26.1-04-18 of the North Dakota Century Code.[105] Significantly, the differences between the relatively weaker North Dakota insurance laws and the relatively stricter New York laws were identified in *Hanson* discovery as a reason why the defendants chose to market these experimental policies in North Dakota, but not in New York.[106]

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100. *Id.*

101. NY INS. LAW § 2322 (Supp. 1999-2000).

102. NY INS. LAW § 109 (Supp. 1999-2000).

103. While New York does apply the filed rate doctrine to rate cases, it construes the doctrine narrowly, allowing for state law fraud actions against insurers. *See* Dornberger v. Metropolitan Life Ins. Co., 961 F. Supp. 506 (S.D.N.Y. 1997) (holding that the entitlement of an insured to seek rescission of an insurance policy based on fraud is well established).

104. N.D. CONST. art I, § 9. Article I, section 9 of the North Dakota Constitution provides as follows: "All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct." *Id.*

105. N.D. CENT. CODE § 26.1-04-18 (1995) ("An order of the commissioner under this chapter or order of a court affirming the commissioner's order does not relieve or absolve any person affected by the order from any liability under any other law of this state"); *see also* discussion *infra* Part III.C.

106. Deposition of Paul Barnhart, Vol. 1, at 147-48 (November 19, 1988)

A: I think it would depend. Some states are very loose on this. They'll look at it and

NDI's lack of review and enforcement abilities is not unique to North Dakota. The Supreme Court of Alabama in *Life Insurance Co. of Georgia v. Johnson*,[107] a case involving an elderly woman who had been sold worthless Medicare supplement insurance, explained that "Alabama citizens who become the victims of fraud have little recourse other than through litigation. The record in this case is replete with expert testimony to the effect that the State Insurance Department has little power to regulate agents and we judicially know that litigation is often the only weapon defrauded citizens have."[108] Other courts have recognized that their respective state insurance departments likewise have no authority to award damages.[109] This factor, when present, counsels against application of the filed rate doctrine.

3. *Meaningful Review*

The Ninth Circuit in *Brown v. Ticor Title Insurance Co.*[110] held that the filed rate doctrine would not bar a class action suit brought by Arizona and Wisconsin consumers against title insurance companies for antitrust violations.[111] The Ninth Circuit held that the fact that the title insurance companies had filed rates did not prevent litigation:

> The absence of meaningful state review allows the insurers to file any rates they want. Therefore, the act of filing does not legitimize a rate arrived at by improper action. The regulations of Arizona and Wisconsin require only "non-disapproval of the rates and do not require compliance with strict guidelines such as those set forth under the ICC regulations."[112]

> file it. And other states will really dig into. An example, like New York, if you are filing something in New York, it's going to be looked over pretty darn carefully. That's the case with the larger states. Some of the states with low population like North Dakota and some of those, they are not as–
>
> Q: Strict?
>
> A: They're not as strict, really. And partly, I think, because they might not have enough manpower, you know, with them to handle it in a small state, small population state.

Id.

107. 684 So. 2d 685 (Ala. 1996).

108. Life Ins. Co. of Ga. v. Johnson, 684 So. 2d 685, 693 (Ala. 1996).

109. *See* Shernoff v. Superior Court, 119 Cal. Rptr. 680, 682 (Cal. Ct. App. 1975) (finding that the California Insurance Commissioner had no implied power to award money judgments in favor of victims of insurance deceptive trade practices when statute limited his or her authority to injunctive relief); Sheeran v. Progressive Life Ins. Co., 440 A.2d 469, 475 (N.J. Super. Ct. App. Div. 1981) (finding that the New Jersey Commissioner had no implied power to award restitution to victims of unfair settlement claim practices); *see also* Great Bay Hotel & Casino v. Tose, 34 F.3d 1227, 1234 (3d Cir. 1994) (holding that the New Jersey Supreme Court would adopt the analysis in *Sheeran*).

110. 982 F.2d 386 (9th Cir. 1992).

111. Brown v. Ticor Title Ins. Co., 982 F.2d 386, 393 (9th Cir. 1992).

112. *Id.* at 394.

NDI's "review" of requests for increases in premiums for long term care policies is theoretical only, and it pales in comparison to the review proscribed by statute in statutory schemes such as that of New York.[113]

North Dakota's loss ratio scheme for premiums and rate increases can be manipulated or can mask defendants' own fault. In *Hanson*, there were ways to avoid or minimize the rate increases incurred by the North Dakota policyholders, but the *Hanson* defendants did not implement them with respect to the policy forms at issue.[114] Specifically, the defendants almost concurrently developed different LTC policies, the Form 532 and 1000 series, which were priced higher but were not marketed or sold in North Dakota.[115] These LTC policies never suffered a rate increase.[116] Moreover, the defendants' consulting actuary proposed in 1991 that the existing 520, 521, and 522 policies be rewritten as 532 policies to avoid rate increases.[117] In addition, at that point, Acceleration, which after the assumption by Commonwealth Life Insurance Company ("Commonwealth") retained only the Ohio business, pooled its Ohio policies with other LTC policies to stabilize the block and avoid rate increases.[118] Commonwealth, which has other North Dakota LTC policies to offer via its corporate parent Aegon, has not sought to pool this block of business.[119] Commonwealth also declined other available options such as converting the policies or rewriting the policies.[120] Instead, it elected to continue administering the defective Forms 520, 521 and 522 policies, increasing rates annually.[121] Thus, the filed rate doctrine's application under these circumstances is not warranted.

Further, in determining whether the filed rate doctrine applies to insurance cases in North Dakota, courts should give deference to NDI's interpretation of its authority.[122] Statements from Commissioner of

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113. *See, e.g.*, Byan v. Prudential Ins. Co., 662 N.Y.S.2d 44 (N.Y. App. Div. 1997); Minihane v. Weissman , 640 N.Y.S.2d 102 (N.Y. App. Div. 1996); *see also* Asby Brokerage, Inc. v. Allstate Ins. Co., 637 F. Supp. 382 (S.D.N.Y. 1986) (recognizing the primary jurisdiction of the NYAIP and the Insurance Commissioner).

114. *See generally* Plaintiff's Memorandum, *supra* note 24, at 7-8.

115. Plaintiff's Memorandum, *supra* note 24, at 7.

116. Plaintiff's Memorandum, *supra* note 24, at 7 n.17.

117. Plaintiff's Memorandum, *supra* note 24, at 7-8.

118. Plaintiff's Memorandum, *supra* note 24, at 8.

119. Plaintiff's Memorandum, *supra* note 24, at 8.

120. Plaintiff's Memorandum, *supra* note 24, at 8.

121. Plaintiff's Memorandum, *supra* note 24, at 8.

122. The United States Supreme Court has long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. *See* Chevron v. Natural Resources Defense, 467 U.S. 837 (1984). Further, the Court has consistently followed the principal of deference to administrative interpretations whenever a decision as to the meaning or reach of a statue has involved reconciling conflicting policies and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary

Insurance Glenn Pomeroy and Senior Life and Health Rate Forms Analyst Vance Magnuson indicate the Department of Insurance is virtually powerless to prohibit increases in premiums.[123] For example, Commissioner Pomeroy testified before a North Dakota Senate Committee as follows:

> Nothing is more frustrating to an insurance regulator as having no choice other than to approve a large premium increase . . . . State law requires the Insurance Department to approve premium increases that are shown to be necessary to pay claims by the companies . . . . Present law doesn't allow the Department any alternative other than to approve these increases.[124]

The Commissioner further addressed the regulation problem in a letter dated January 27, 1997, sent to the North Dakota House of Representatives in support of HB 1419, which sought to stabilize rates of LTC insurance.[125] The letter stated in part as follows:

> Currently, state law allows long term care insurance companies selling in North Dakota to increase the rates charged to their policy holders whenever they can demonstrate they need more in premiums to pay the claims they are incurring. State law does not establish any ground rules up front when the company first files the product, and so the company knows that regardless of where they price the product originally, they will be able to jack up the rates charged to their existing policy holders at any time during the life of the policy.[126]

A prime example of that to which Commissioner Pomeroy referred in the above statement is found in *Hanson*. By 1987, the *Hanson* defendants and their consulting actuary saw the need for premium rate increases and recomputed the actuarial assumptions underlying these policies.[127] Specifically, immediately before the big sales push in North Dakota, during which consumers were told their premiums would be X,[128] the defendants knew that the premiums would be raised to at least

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knowledge respecting matters subject to agency regulation. *Id.; see also* Delorme v. North Dakota Dep't of Human Servs., 492 N.W.2d 585, 587 (N.D. 1992).

123. *See generally Senate Industry, Business and Labor Committee on Senate Bill No. 2161*, 54th Legis. (North Dakota 1995) (statement of Glenn Pomeroy, Insurance Commissioner); Deposition of Vance Magnuson (Sept. 22, 1998).

124. *Senate Industry, Business and Labor Committee on Senate Bill No. 2161*, 54th Legis. 3 (North Dakota 1995) (statement of Glenn Pomeroy, Insurance Commissioner).

125. Letter from Glenn Pomeroy, North Dakota Insurance Commissioner, to North Dakota House of Representatives (Jan. 27, 1997) (on file with author).

126. *Id.*

127. Plaintiff's Memorandum, *supra* note 24, at 9.

128. Plaintiff's Memorandum, *supra* note 24, at 9. The average policy price was about $1000,

X + 20% in the first year, with more increases to follow.[129] Due to the initial low price of the policies and the poor underwriting, discussed above, the *Hanson* defendants knew they could easily meet the sixty percent loss-ratio requirement justifying these rate increases.[130]

To prevent this sort of fraudulent scheme from leading to price increases in the future, the NDI actuary, Tom Foley, who assists Pomeroy's legislative efforts, believes that the fixed loss ratio concept used in North Dakota for determining initial and renewal premiums (the 60% figure) must be legislatively eliminated. The testimony of Commissioner Pomeroy also supports a decision not to apply the filed rate doctrine to LTC insurance matters in North Dakota because of the lack of the Insurance Department's authority to reject rate increases. The indisputable evidence is that NDI has not interpreted its authority, and cannot do so, to give it the power of the New York Department of Insurance, or even the power of a ratemaking agency like the North Dakota PSC. Rather, the NDI acknowledges that it must accept and approve rates that meet certain statutory requirements related to a sixty percent loss-ratio, *i.e.*, sixty percent of premium dollars must go to pay benefits over the projected life of a policy. The filed rate doctrine has never been applied where the relevant agency has denied having the power to stop rate increases.

4. *Damages Not Based Upon Difference Between the Filed Rate and the Rate That Should Have Been Charged*

The Eighth Circuit in *H.J. Inc.* explained that "[t]he filed rate doctrine prohibits a party from recovering damages measured by comparing the filed rate doctrine and the rate that might have been approved absent the conduct in issue."[131] Because the responsible agency had reviewed the rate, found that it was "tainted," and ordered a prospective rate decrease and refund, the Court ruled that the filed rate doctrine barred the RICO action.[132] Other courts have also recognized that the filed rate doctrine prohibits a court from calculating damages based upon a reasonable rate absent fraud.[133]

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subject to one of six variations of coverage that altered the price slightly. Specifically, all policies were either 0-day elimination (coverage begins with claim) or 100 day elimination (insured not paid for first 100 days). Under either type, an insured could select one of three levels of maximum coverage, i.e., $40, $60 or $80 per day. Plaintiff's Memorandum, *supra* note 24, at 9.

129. Plaintiff's Memorandum, *supra* note 24, at 9.

130. Plaintiff's Memorandum, *supra* note 24, at 9.

131. H.J. Inc. v. Northwestern Bell Tel. Co., 954 F.2d 485, 488 (8th Cir.), *cert. denied*, 504 U.S. 957 (1992).

132. *Id.* at 495-96.

133. *See, e.g.*, Marcus v. AT&T Co., 138 F.3d 46 (2d Cir. 1998); Wegoland Ltd. v. NYNEX Corp. 27 F.3d 17 (2d Cir. 1994); Taffet v. Southern Co., 967 F.2d 1483, 1494 (11th Cir. 1993) (*en banc*).

However, courts have distinguished cases involving non-rate related issues, such as suitability, poor marketing practices, and fraudulent inducement.[134] This "rate v. non-rate" distinction is seen in numerous insurance fraud cases, such as the use of misleading projections in "vanishing premium" insurance litigation, which do not apply the filed rate doctrine.[135]

In *Florida Municipal Power Agency v. Florida Power & Light Co.*,[136] the Eleventh Circuit explained that a factual issue remained as to whether the filed rate covered the network service that the plaintiff sought to buy and remanded to the lower court with instructions that if the court concluded that the services were distinct, it could estimate the rate that would have been in effect but for the violation.[137] The court also noted that the United States filed an amicus brief which suggested that "[d]epending on the circumstances, the court also could have considered a primary jurisdiction referral to the Federal Energy Regulatory Commission in connection with this issue."[138] Clearly, the NDI has no such primary jurisdiction to decide a reasonable rate.

The *Hanson* plaintiffs sought the return of premiums they paid defendants for long-term care insurance policies they purchased based upon reasonable expectations of a reliable, affordable insurance product that would provide financial protection to them in their old age in the event they needed nursing home care, *i.e.*, fraud damages. The *Hanson* defendants never communicated to plaintiffs, either at the time of purchase or annually upon renewal, that there were problems with the policies that the plaintiffs purchased which impacted the value of the policies.[139] Such suitability issues are wholly distinguishable from rate issues and should not implicate the filed rate doctrine.[140]

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134. *See H.J. Inc.*, 954 F.2d at 490 (citing *Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465, 1471-72 (5th Cir. 1987), for the premise that setting aside contracts because of fraud in the inducement would not interfere with agency rate-making authority); *see also* Nordlicht v. New York Tel. Co., 617 F. Supp. 220, 227-28 (S.D.N.Y. 1985) (noting that the filed rate doctrine "is of no help to a defendant which fraudulently induces a plaintiff to pay a filed rate . . . by fraud").

135. *See, e.g., In re* Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. 450, 525 (D.N.J. 1997) (discussing the vanishing premium, improper replacement ("churning"), and deceptive investment scheme claims); *see also In re* Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d 283 (3d Cir. 1998); Dickerson v. Central Life Ins. Co., 932 F. Supp. 1471 (M.D. Ga. 1996); Duhamine v. John Hancock Mut. Life Ins. Co., Civ. A. No. 96-10706-GAO (D. Mass. Dec. 31, 1997). As these cases illustrate, insurers are often sued for fraud and bad faith.

136. 64 F.3d 614 (11th Cir. 1995).

137. Florida Mun. Power Agency v. Florida Power & Light Co., 64 F.3d 614, 615 (11th Cir. 1995).

138. *Id.* at 616.

139. *See generally* Plaintiff's Memorandum, *supra* note 24, at 9-10.

140. Fraud claims related to suitability can be divided into two broad categories, general suitability and specific suitability. In general suitability cases, the product is alleged to be a bad product, unsuitable for any customer or any customer within a class. *See, e.g.*, Hanson v. Acceleration Life Ins. Co., No. A3-97-152 (D.N.D. Mar. 16, 1999). In specific suitability cases, the product is alleged to be unsuitable only because of the objectives means and needs of the particular customer. *See, e.g.*,

In fact, Thomas Smith, the *Hanson* defendants' own expert and author of an amicus curiae brief in *Hanson* concerning the applicability of the filed rate doctrine, confirmed this.[141] Smith, a North Dakota attorney, was hired by the *Hanson* defendants to provide expert testimony primarily concerning North Dakota's regulation of LTC insurance. During his deposition, Smith testified that North Dakota law allows a consumer policyholder to sue an insurance company for fraud and fraudulent inducement to enter into a contract.[142] *Hanson* class counsel then posed a series of hypothetical situations to Smith, asking him to opine whether the filed rate doctrine would bar the hypothetical claims. Portions of Smith's deposition testimony follow:

> Q. (By Mr. Kanner). Let me ask you a hypothetical question. If somebody bought an insurance policy, and let's assume for purposes of my hypothetical that there was a fraudulent inducement, they thought it would provide some benefit that, in fact, it didn't, and that person had that unfortunate event occur and he or she sued for, say, the medical costs that weren't covered under the policy, sort of like some of those women that—older people that you protected, they thought they were getting some type of coverage and, in fact, they weren't getting it under the policy, could that person sue

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Young v. Ray Brandt Dodge, Inc., 176 F.R.D. 230 (E.D. La. 1997).

141. Smith authored an amicus brief for the American Council of Life Insurance on behalf of the *Hanson* defendants. *See generally* Amicus Brief of American Council of Life Insurance Regarding the Application of the Filed Rate Doctrine, Hanson v. Accelerated Life Ins. Co., No. A3-97-152 (D.N.D. Mar. 16, 1999). In its brief, the amicus cited *Allstate Insurance Co. v. Knutson*, for support of defendants' contention that the North Dakota Supreme Court would recognize and apply the filed rate doctrine. *See id.* at 15 (citing Allstate Insurance Co. v. Knutson, 278 N.W.2d 383 (N.D. 1979).

> The North Dakota Supreme Court, in reviewing the conduct of the insurance commissioner in a rate approval case, observed that, in reviewing findings of any administrative agency, the court must exercise restraint, and should not substitute its judgment for the judgment of the administrative agency, because of the constitutional prohibition involved in the doctrine of the separation of powers against a delegation of nonjudicial functions to the judiciary.

Id. That case involved an appeal by the Insurance Commissioner regarding a rate decision. Allstate had applied for a rate increase, which the Commissioner denied. The district court reversed the Commissioner's decision and remanded to the Commissioner for him to enter an order approving the rate. The North Dakota Supreme Court affirmed the district court's decision. Thus, despite the general rule that courts should defer to administrative agencies, the court in this case reversed the Commissioner's decision.

142. Deposition of Thomas Smith, at 17-18 (Aug. 4, 1999).

> Q. You agree that under North Dakota's Century Code, you can sue an insurance—a consumer policyholder can sue an insurance company for fraud, correct?
> A. Yes.
> Q. And they can sue an insurance company for fraudulent inducement to enter into a contract, correct?
> A. Yes.

Id.

for damages the amount of the medical bills and the coverage that they needed to pay?
A. Could they sue for the damages that were for medical care that was represented to them that was covered and it was not, is that what your question is? It's an element of damage, yes.
Q. Yes, they could?
A. Yes, sure.[143]

* * *

Q. All right. And let's assume that somebody claims they bought the policy, and then when they figured out this wasn't the suitable policy for them, they lapsed and then they had to go into a nursing home, and let's say their coverage was 120,000. Would that person be entitled to not the money back, but the $120,000 in the nursing home that they thought they were buying?
THE WITNESS: And they let it lapse for what reason?
Q. They determined that they had been fraudulently induced, they thought that it would be affordable until they needed it, turned out not to be affordable, they let it lapse, they figured it out, whatever reason?
A. I think it's a potential element of damages that can be recovered, yes, based upon that misrepresentation.[144]

* * *

Q. Okay. Now, people in North Dakota who let a contract of insurance lapse because they have let it lapse, they couldn't sue for rescission, correct, or not?
THE WITNESS: If they let it lapse, if there's fraud and material misrepresentation at the time that they entered into the contract?
Q. Yes.
A. And the contract didn't turn out to be, yeah, I think they could still possibly sue even after they let it lapse.
Q. For rescission?
A. Yeah, for return of the premiums, yeah.
Q. Okay. So if somebody sued for rescission arguing fraudulent inducement, they could sue and part of the remedy would properly be a return of the premiums under North Dakota law?

143. *Id.* at 63-64 (objections and clarifications omitted).
144. *Id.* at 65-66 (objections and clarifications omitted).

THE WITNESS: Well, I think that's a possibility, depending upon the facts, yeah.[145]

* * *

Q. (By Mr. Kanner) Okay. Assuming a jury returns a verdict on fraudulent inducement, would you agree that the Filed Rate Doctrine does not prohibit recovery of nursing home costs, correct?
A. I think that's a possibility, yes.
Q. Okay. What if somebody had to switch—What if instead of going into a nursing home, that person was able to buy new coverage at a much higher premium, and they felt that because they had aged, you know, during the years of coverage and they were in a higher risk group, would that person have a cause of action, at least for the difference that they're paying to their new insurance carrier, assuming that they were able to find one?
A. If there was a fraudulent misrepresentation at the time that the contract was entered into, I think that's a possibility.
Q. Yes, okay. In each of my questions I've asked if there was fraudulent inducement at the time of the initial sale of the contract. I want to ask the same questions, but with respect to the renewal of the contract. I want you to assume there wasn't fraudulent inducement at the time the contract was originally sold, okay?
A. Okay.
Q. Under this hypo there was no fraudulent inducement in 1984 when a contract of insurance was sold, okay, but let's assume that in the renewal process, say 1986, the company learned something material that under North Dakota law they needed to disclose to the customer and they failed to do it, and a jury returned a verdict that said "We find that the renewal from that year forward was based on fraudulent inducement caused by this material omission of fact," would you agree that if that person then ended up in a nursing home or then ended up having to buy a different insurance policy, that that person could sue for those damages without running afoul of your definition of the Filed Rate Doctrine?

* * *

Q. Right. I'm asking you to assume for purposes of the hypothetical that the jury renders that decision, again, I'm not

145. *Id.* at 66-67 (objections and clarifications omitted).

asking you to agree that it's a just or appropriate decision, okay, but would your analysis then be the same whether it was fraud in the inducement at the time of sale or fraud in the inducement at the time of the renewal with respect to your analysis of damages?
A. You could use the same ground, yeah, using those assumptions.[146]

* * *

Q. And you'd agree with me that a certain percentage of North Dakotans are going to buy long-term care and want to keep it for the rest of their lives, correct?
A. I think that's a fair statement.
Q. Okay. And that's an assumption these companies make when they start marketing these products, they don't know whether it's Tom Smith or John Smith that's going to buy it, but they know statistically a certain number of people are concerned about the risks of growing old in America and perhaps ending up in a nursing home, correct?
A. Okay.
Q. Now, for purposes of my hypothetical, I just want you to assume that we're talking about people who, all other things being equal, would choose to keep nursing care coverage for the rest of their lives, all right?
A. Okay.
Q. With respect to that subgroup of the overall American population, or North Dakota population, would you agree that they should only buy a policy that would be affordable for the rest of their lives?
THE WITNESS: Well, I think they'd want to buy a policy that's only affordable for the rest of their lives, yeah.
Q. Okay. And so isn't the assumption made by both the insurance company and the consumer that even if rates may go up, they won't go up to the point of being unaffordable?
THE WITNESS: Well, I would think that would be everybody's, you know, best effort as far as that type of a contract, yeah.
Q. Let's assume you have an insurance company, it's licensed, and the owner decides that he's going to sell a new product, a long-term care product, and without telling anyone else, he prices it wrong, okay, knows that it can never function

146. *Id.* at 69-72 (objections and clarifications omitted).

as a long-term care policy, takes people's money and flees before any claims are made, okay, would you agree that those people under North Dakota law could sue for fraud and get their money back?
Q. Okay. And even though they want their money back, you would not bar that suit under the Filed Rate Doctrine, that particular suit, correct?
A. Well, if he committed fraud at the inception, no.
Q. Okay. And that would be true even if he had filed the policy specimen with the Department and with the rate and the rate was approved, it was stamped filed and approved, and a copy of that was sitting in the Insurance Department file, correct?
A. That's correct.
Q. Okay. Now, let's assume that we have the same hypothetical with one exception, okay, fellow gets a long-term care policy, gets the specimen, files it, stamped filed and approved by the Department of North Dakota, he then begins through agents to sell the product, okay? He knows and plans and anticipates that he's going to shift the risk of any loss back to the customers and he knows he's going to need a bunch of rate increases, he's not going to go in for, you know, 100 percent, 200 percent at once, but he's planning on increasing the premiums at the time he's selling it, okay? Now, you would agree that that's fraudulent? Let's say this is a company that he figures he's just going to sell, and he figures the best way to sell is just to underprice the competitors and give big commissions to agents, okay, well-thought-out scheme, and he sells this stuff and he's planning on going in for future rate increases. Now, my question is: Before he goes in for future rate increases, would you agree that people could sue for fraud and either assume the contract, get back their premiums and/or whatever damages they had?
A. You could establish the fraud at the time whenever the fraud occurred, yeah.
Q. And that that wouldn't be barred by the Filed Rate Doctrine, correct?
A. Well, if there's fraud—You know he has a fraudulent scheme of some type from day one, I mean, you know, and there is concealment and that's relied upon by the policyholder, you know.
Q. Then yes, you could sue for fraud?

A. Yeah. There's always that possibility that you could rescind the contract.
Q. That particular fraud would not be barred by the Filed Rate Doctrine, correct?
A. Yeah, he could rescind the contract.
Q. Okay. Now, let's take that exact same hypothetical again and they begin raising rates, okay, he has priced the policy very, very low, okay, and he raises rates and he knows more rate increases are going to occur and people, while old who have bought the policy may still have a chance to go get a decent policy, but he sends them letters that contain false representations about the quality of his insurance product. Would those people under that fact scenario be able to sue, get their premiums back and any possible damages?
A. If there's fraud permeating the whole situation, yeah.
Q. Okay. And they could sue and there would be no Filed Rate Doctrine issue, as you understand it, correct?
A. Right.
Q. I want to vary that hypothetical. Let's assume at the inception of the contract the fellow who's selling the insurance decides he wants to underprice the market. He has no idea how this thing is going to perform, okay, but he certainly knows that if his pricing assumptions are wrong it could be very disastrous, okay, so he doesn't have a specific intent to defraud, but he certainly is knowingly underpricing the product for the sole purpose of maximizing sales and short-term returns, okay? Subsequently, he finds out that he's going to need massive rate increases to stabilize the block of business, right? At that time of renewal, and perhaps the first rate increase he sends a letter to people and makes material misrepresentations about the quality of the insurance product. Under that hypothetical, would you be allowed to maintain an action for fraud without the Filed Rate Doctrine as a bar under your theory?

* * *

Q. That could be fraud not barred by the Filed Rate Doctrine?
THE WITNESS: Possible, yes.[147]

147. *Id.* at 84-95 (objections and clarifications omitted).

Thus, even according to the *Hanson* defendants' own expert, the filed rate doctrine is inapplicable in most, if not all, insurance cases in North Dakota.[148]

B. THE FILED RATE DOCTRINE DOES NOT BELONG IN LONG TERM CARE INSURANCE CASES

The filed rate doctrine most often applies to entities which operate as a monopoly, as is the case with most public utilities, because in the absence of competition, the rate payer has no legal right to pay any other rate.[149]

The filed rate doctrine has only been applied to insurance when the insurance product at issue is not a specific insurance policy challenged by policyholders, as in *Hanson*. For example, a federal district judge in *Morales v. Attorneys' Title Insurance Fund*[150] applied the filed rate doctrine to bar federal Real Estate Settlement Procedures Act (RESPA) claims because all title insurance companies in Florida were legally required to charge a fixed rate.[151] North Dakota does not mandate a single rate for LTC insurance. Additionally, the *Morales* court refused to apply the filed rate doctrine to the state claims for fraudulent misrepresentation, negligent misrepresentation and violations of the Florida Deceptive and Unfair Trade Practice Act.[152]

A state-created workers' compensation insurance monopoly was challenged in *N.C. Steel, Inc. v. National Council on Compensation Insurance*.[153] Several employers alleged antitrust violations by the pool of workers' compensation carriers, which they alleged resulted in higher premiums.[154] The Supreme Court of North Carolina held that the filed rate doctrine precluded the suit and explained that the North Carolina General Statutes contained a comprehensive regulatory scheme which punished violators and provided for appeals from the Insurance Commissioner's decisions.[155]

However, there is no such approved insurance monopoly or oligopoly in North Dakota. Anyone who qualifies can be involved in the insurance business in North Dakota, as North Dakota has no quote or

148. *Id.* at 63-95.

149. *See* Keogh v. Chicago & N.W. Ry., 260 U.S. 156, 163 (1922) (stating that an "injury implies violation of a legal right").

150. 983 F. Supp. 1418 (S.D. Fla. 1997).

151. Morales v. Attorneys' Title Ins. Fund, 983 F. Supp. 1418, 1429 (S. D. Fla. 1997).

152. *Id.* at 1430.

153. 496 S.E.2d 369 (1998).

154. N.C. Steel, Inc. v. National Council on Compensation Ins., 496 S.E.2d 369, 371-72 (1998).

155. *Id.* at 372.

restrictions. This makes the filed rate doctrine inappropriate for insurance in North Dakota.

C. THE FILED RATE DOCTRINE HAS NEVER BEEN APPLIED IN THE FACE OF AN EXPRESS SAVINGS CLAUSE

Since the filed rate doctrine applied to the ICC, it obviously applies in the federal regulatory context. A consequence of applying the filed rate doctrine is the loss of an individual's ability to obtain redress in a court of law. As pointed out in *Keogh*, there was an administrative remedy available in absence of a civil remedy.[156] However, since the federal constitution does not provide for an express right to sue in federal court, discussion of an administrative remedy was arguably unnecessary, and there was likewise no need to consider whether the administrative remedy provided an adequate alternative to such a litigation right. However, a different analysis governs the application of the filed rate doctrine under state law.

When the filed rate doctrine is invoked in a case involving state law, state constitutional problems may arise when the citizens of a state have a constitutionally protected right to a remedy under the law. Each state court must consider a given legislatively created administrative scheme against its own constitutional backdrop.

Article I, section 9 of the North Dakota Constitution provides:

> All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct.[157]

Thus, the people of the state of North Dakota constitutionally reserved to themselves a remedy under the law for any wrong done to any person.[158] Furthermore, the North Dakota Supreme Court has stated that article I, section 9 of the North Dakota Constitution "plainly guarantees" an "important substantive right."[159]

The remedy contemplated by article I, section 9 is usually in the context of a citizen's right to bring a civil action against a tortfeasor.

156. Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156, 162 (1922).
157. N.D. CONST. art. I, § 9.
158. *See id.*
159. Bulman v. Hulstrand Const. Co. Inc., 521 N.W.2d 632, 637 (N.D. 1994) (interpreting article I, section 9, of the North Dakota Constitution).

Occasionally, however, the legislature makes exceptions. For example, in the workers' compensation arena, the North Dakota Legislature enacted section 65-01-01 of the North Dakota Century Code, which provides:

> The state of North Dakota, exercising its police and sovereign powers, declares that the prosperity of the state depends in a large measure upon the well-being of its wage workers, and, hence, for workers injured in hazardous employments, and for their families and dependents, *sure and certain relief is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding, or compensation,* except as otherwise provided in this title, and to that end, all civil actions and civil claims for relief for those personal injuries and all jurisdiction of the courts of the state over those causes are abolished except as is otherwise provided in this title. A civil action or civil claim arising under this title, which is subject to judicial review, must be reviewed solely on the merits of the action or claim. This title may not be construed liberally on behalf of any party to the action or claim.[160]

Thus, while the North Dakota Supreme Court has also classified the right to sue as an important substantive right,[161] in the context of workers' compensation, the court found that injured workers give up the right to sue in exchange for sure and certain administrative relief (*i.e.*, compensatory damages), regardless of questions of fault.[162] Consequently, although the employee no longer has the right to sue, his constitutional right to a remedy under the law, guaranteed by article I, section 9 of the North Dakota Constitution, is maintained. Additionally, even in the worker's compensation context where the legislature has taken away the right to sue in exchange for the promise of "sure and certain" relief, the law allows individuals to bring a private law suit against their employer for intentional acts.[163]

Numerous state courts have held that their respective "open courts" provisions protect a citizen's constitutional right to sue.[164] For example,

160. N.D. CENT. CODE § 65-01-01 (emphasis added).

161. Haney v. North Dakota Workers' Compensation Bureau, 518 N.W.2d 195, 200 (N.D. 1994).

162. *Id.* at 200.

163. Zimmerman v. Valdak Corp., 570 N.W.2d 204, 207 (N.D. 1997) (holding that the defense of "exclusive remedy" under the state workers' compensation system is not a defense when an employee's lawsuit against his or her employer alleges an intentional tort).

164. *See, e.g.*, Martin v. Richey, 711 N.E.2d 1273, 1284 (Ind. 1999); Naugle v. Theard, 917 S.W.2d 287, 292 (Tex. Ct. App. 1995); Wrolstad v. Industrial Comm'n of Utah, 786 P.2d 243 (Utah Ct. App. 1990).

a Utah court has stated that "to satisfy the open courts provision, the Legislature cannot effectively preclude all compensation without providing an equivalent alternative remedy."[165] A Texas court struck down a statute of limitations provision as violating the open courts provision finding that "[t]he open courts provision of our Constitution protects a citizen, such as [plaintiff], from legislative acts that abridge his right to sue before he has a reasonable opportunity to discover the wrong and bring suit."[166] An Indiana court has also acknowledged the right of access to the courts, stating:

> [T]he legislature cannot unreasonably deny citizens the right to exercise this right [of access, and] [s]imilarly, we have reasoned that the legislature cannot deprive a person of a complete tort remedy arbitrarily and unreasonably, consistent with the protections Section 12 affords, and that legislation which restricts such a right must be a rational means to achieve a legitimate legislative goal.[167]

Moreover, it is clear that the North Dakota legislature expressly intended to preserve the right to sue in the context of the state's insurance regulations:

> 26.1-04-18. Order does not relieve from other liability.
> An order of the commissioner under this chapter or order of a court affirming the commissioner's order does not relieve or absolve any person affected by the order from any liability under any other law of this state.[168]

This express reservation of rights reveals that the legislature understood that constitutional rights to sue could not easily be usurped without an alternative mechanism in place to award damages.

There is no remotely comparable legislative scheme providing for a trade-off of benefits between the insurer and the insureds in North Dakota. While the legislature provided for an administrative regime of admittedly limited regulations for insurance companies, it did not provide for 'sure and certain relief' for insureds injured by the fraudulent practices of the insurers in exchange for giving up the right to sue. In fact, the legislature specifically included the aforementioned express provision in the insurance regulations reserving an individual's right to sue.

165. *Wrolstad*, 786 P.2d at 245.
166. *Naugle*, 917 S.W.2d at 292 (citations omitted).
167. *Martin*, 711 N.E.2d at 1284.
168. N.D. CENT. CODE § 26.1-04-18 (1995).

Consequently, an insured's right to a remedy under the law, guaranteed in article I, section 9, of the North Dakota Constitution is protected.[169]

D. THERE IS NO PRECEDENTIAL BASIS FOR APPLICATION OF THE FILED RATE DOCTRINE IN NORTH DAKOTA

In *O'Connor v. Northern States Power Co.*,[170] the North Dakota Supreme Court had an opportunity to apply the filed rate doctrine, but it chose not to do so.[171] The court was faced with a lawsuit filed by consumers alleging the Northern States Power Company ("NSP") was charging impermissibly high rates.[172] In a prior administrative proceeding of the PSC, NSP had filed an application for a rate increase.[173] The PSC eventually issued an order allowing for a rate increase less than that which NSP had requested.[174] In response, NSP filed a new application for an even greater rate increase, which the PSC allowed to become effective.[175] The rate payers then filed a procedurally unrelated suit in state court seeking damages for the higher rates now being charged by NSP.[176]

Given these facts, the court could have pretermitted all issues raised by the plaintiffs by applying the filed rate doctrine to the PSC's ruling. Instead, the court did not discuss the filed rate doctrine, but entered into a lengthy discussion of the PSC statutory scheme and ruled on the merits of the case concluding that NSP lawfully charged the higher rate under the statutory scheme and was therefore not liable for damages.[177]

In *E.W. Wylie v. Menard, Inc.*,[178] the North Dakota Supreme Court recognized the existence of the filed rate doctrine under federal law in the context of ICC regulation of common carriers.[179] This is a requirement of federalism and, in light of *O'Connor*, is no indication of what the

169. This is also the view of other states. *See, e.g.*, *In re* Prudential Ins. Co. of Am. Sales Practice Litig., 148 F.3d 283 (3d Cir. 1998) (illustrating that private litigation is the primary watchdog that wakes up state regulators). The *Prudential* court observed that Prudential's illegal activities first came to light through private lawsuits filed in early 1994, which triggered a front-page news article. *See* Lastly Schism, *Fine Print Victims: Some Agents 'Churn' Life Insurance Policies, Hurt Their Customers*, WALL ST. J., Jan. 3, 1995, at 1. In April 1995, more than a year after the first private suit, the Multi-State Life Insurance Task Force was formed. *Id.* *Prudential* shows that private claims for relief are absolutely crucial to ensure that victims of insurance fraud receive restitution. *Id.*

170. 308 N.W.2d 365 (N.D. 1981).

171. *See generally* O'Connor v. Northern States Power Co., 308 N.W.2d 365 (N.D. 1981).

172. *Id.* at 367.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 368-71.

178. 523 N.W.2d 395 (N.D. 1994).

179. *See generally* E.W Wylie Corp. v. Menard, Inc., 523 N.W.2d 395 (N.D. 1994).

court would do in an insurance case. As previously noted, the filed rate doctrine was established by the United States Supreme Court to preserve the rate making authority of the ICC and to prevent interstate carriers from engaging in price discrimination. Consequently, *E.W. Wylie* has no bearing on this case. In fact, the court determined the carrier at issue was a motor contract carrier, bound by contract, as opposed to a motor common carrier, and found the filed rate doctrine had no application.[180]

The *O'Connor* case, in particular, presents a significant indication that the North Dakota Supreme Court would not apply the filed rate doctrine to a LTC insurance case if it refused to apply the doctrine to rates set by the powerful PSC in the highly regulated utility industry. Nor is there a legislative expression indicating an intent that North Dakota should apply the filed rate doctrine to LTC insurance rates, or to any insurance matter. Finally, there is no North Dakota Supreme Court case or lower court case applying the filed rate doctrine to LTC insurance cases.

IV. CONCLUSION

As can be seen from the above discussion, the filed rate doctrine does not belong in fraud-based insurance cases, such as *Hanson*. This is particularly true in light of the current insurance regulatory scheme in North Dakota. Society imposes on all its members certain norms of behavior so that others will not be injured. If those norms are violated, society shifts the losses from the injured party to the party at fault. Injured consumers should be permitted to seek redress for the damages incurred from tortious and/or illegal acts of insurance companies, without being met with the technical defense of the filed rate doctrine.

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180. *Id.* at 403.