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The Filed-rate Doctrine: Leaving Regulation to the Regulators

Kevin M. Decker

THE FILED-RATE DOCTRINE: LEAVING REGULATION TO THE REGULATORS

Kevin M. Decker[†]

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I. INTRODUCTION

> [I]f a court were to entertain a private claim that a regulated rate was unreasonable or unlawful, it would necessarily have to second-guess the decisions of the agency to whom the legislature has delegated the

[†] Mr. Decker is a business litigator at Briggs and Morgan, P.A. in Minneapolis, Minnesota, with an emphasis in railroad and energy law. He was among a team that represented the electric utility in *Hoffman v. Northern States Power Co.*, 743 N.W.2d 751 (Minn. Ct. App. 2008), *rev. granted* (Minn. Apr. 15, 2008), discussed *infra* Part III.B.

> responsibility to approve rates, and a court generally would not have the technical expertise to do so nor the capacity to consider the entire rate structure or to balance all competing interests.[1]

With that recognition, the Minnesota Supreme Court formally adopted the "filed-rate doctrine." The doctrine protects uniform regulatory oversight by curbing lawsuits that implicate a company's "filed rate" (i.e., a mandatory tariff filed with a government agency that establishes exclusive charges and services). Businesses immediately affected by the doctrine include railroad, telecommunications, gas, electric, and insurance companies that must have their tariffs administratively approved. The upshot for such regulated industries is clear: the centralized, uniform regulation that compels such entities to offer services on government-approved terms will be insulated from the regulatory effects of litigation.

The impact on Minnesota state court litigation will be profound. When applicable, the doctrine signals the end of the judicial line for otherwise cognizable claims. Look no further than *Schermer*, which dismissed a certified class action involving potentially thousands of discrimination claimants.[2] And just recently, the state's intermediate appellate court rejected a putative class action on behalf of allegedly aggrieved electric utility ratepayers across Minnesota and the Dakotas.[3] In both cases, the courts followed the United States Supreme Court's lead in protecting regulatory uniformity by directing the plaintiffs to find available relief in the governing agency realm.[4]

In the years ahead, regulated defendants will seek to realize the doctrine's ample protections, while plaintiffs will endeavor to define its limitations. With decades of federal precedent as a guide, however, history teaches that in Minnesota the doctrine will continue to serve its principle purpose: keeping regulation to the regulators.

1. Schermer v. State Farm Fire & Cas. Co., 721 N.W.2d 307, 314 (Minn. 2006).
2. *Id.* at 311.
3. Hoffman v. N. States Power Co., 743 N.W.2d 751, 755–57 (Minn. Ct. App. 2008), *rev. granted* (Minn. Apr. 15, 2008).
4. *See id.*; *Schermer*, 721 N.W.2d at 311.

II. BACKGROUND

Federal and state laws subject certain industries to regulatory oversight.[5] The means for such oversight are tariffs that are filed with, and then approved and administered by, government agencies or commissions. The tariffs specify the allowable "rates," which by definition include the charges and, often times, the services provided by the regulated companies.[6]

The United States Supreme Court has dealt with the legal ramifications of filed rates for almost a century. The filed-rate doctrine first emerged in the railroad context and then spread to other industries subject to regulation by filed tariffs.[7] From the beginning, the high court has zealously protected the regulatory uniformity afforded by tariff schemes by prohibiting private lawsuit encroachment.

Now, the doctrine has taken root in Minnesota. But what has been planted? What form shall it take? Only time will tell, but as Justice Holmes so aptly observed: "In order to know what [the law] is, we must know what it has been and what it tends to become."[8] When considered in the proper historical context, the looming effect of the filed-rate doctrine in Minnesota is evident.

A. Chicago & Alton Railroad Co. v. Kirby

The Minnesota Supreme Court traces the doctrine's origins back to 1922,[9] but the rationale began percolating in even earlier precedents. *Chicago & Alton Railroad Co. v. Kirby*[10] arose out of a railroad-shipper dispute over the transportation of high-grade

5. *See, e.g.*, 15 U.S.C. § 717c (2006) (natural gas); 47 U.S.C. § 203 (2006) (telecommunications); MINN. STAT. § 70A.06 (2006) (insurance); MINN. STAT. § 216B.05 (2006) (gas and electric services).

6. *See, e.g.*, 47 U.S.C. § 203(a) (2006) (requiring filing of "charges" and all "classifications, practices, and regulations affecting such charges"); MINN. STAT. § 216B.02, subdiv. 5 (2006) (defining "rate" as "every compensation, charge, fare, toll, tariff, rental, and classification, or any of them, demanded, observed, charged, or collected by any public utility for any service and any rules, practices, or contracts affecting" prices or services).

7. *See infra* Part II.A.

8. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

9. Schermer v. State Farm Fire and Cas. Co., 721 N.W.2d 307, 311 (Minn. 2006) (citing Keogh v. Chicago & Nw. Ry. Co., 260 U.S. 156 (1922)).

10. 225 U.S. 155 (1912). Given the prevalence of railroad litigants in filed-rate jurisprudence, such cases will be referenced by the non-railroad party (e.g., *Kirby*).

horses.[11] Pursuant to the then-prevailing incarnation of the Interstate Commerce Act,[12] the railroad's shipping rates (i.e., its services and associated charges) had been published in a tariff that was on file with the Interstate Commerce Commission.[13] The commerce act prohibited the railroad from deviating from the tariff terms.[14]

Standard tariff services were not sufficient for the shipper; timeliness concerns demanded that the horses be shipped via a fast stock train.[15] To accommodate those needs the railroad agreed to expedite delivery.[16] The railroad ultimately breached the contract by getting the horses to their destination after the promised time.[17] A lawsuit to recover damages followed.[18]

The Supreme Court rejected the lawsuit, finding that the regulatory scheme prohibited the railroad from having to render services outside of those required in the published rates.[19] The demand for expedited service amounted to a prohibited "preference or advantage" because no other shipper was privy to the extra-tariff service:

> An advantage accorded by special agreement which affects the value of the service to the shipper and its cost to the carrier should be published in the tariffs; and for a breach of such a contract, relief will be denied, because its allowance without such publication is a violation of the act. It is also illegal because it is an undue advantage, in that it is not one open to all others in the same situation.[20]

Thus, even before the phrase "filed-rate doctrine" entered the lexicon of regulated commerce, *Kirby* recognized that a tariff

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11. *Id.* at 162–63.
12. *See generally* Rene Sacasas, *The Filed Tariff Doctrine: Casualty or Survivor of Deregulation?*, 29 DUQ. L. REV. 1 (1990) (discussing the Interstate Commerce Act and surveying the three major phases of federal regulation under the Act).
13. *Kirby*, 225 U.S. at 163. The Interstate Commerce Commission, which was disbanded and absorbed by the Department of Transportation in 1995, was established by the Interstate Commerce Act in 1887 and regulated surface transportation between the states through certification of carriers and pipelines and through monitoring quality and pricing. BLACK'S LAW DICTIONARY 839 (8th ed. 2004).
14. *Kirby*, 225 U.S. at 163–64.
15. *Id.* at 162.
16. *Id.*
17. *Id.* at 162–63.
18. *Id.*
19. *Id.* at 164–66.
20. *Id.* at 165.

scheme precludes deviation from regulatorily-approved terms.[21] Notably, the damaged party's ignorance of the published terms was of no import:

> That the defendant in error did not see and did not know that the published rates and schedules made no provision for the service he contracted for, is no defense. For the purposes of the present question he is presumed to have known. The rates were published and accessible, and, however difficult to understand, he must be taken to have contracted for an advantage not open to others.[22]

The rationale's broad sweep may be startling, but *Kirby* would not be the last time that a tariff would preclude civil litigation from compromising the regulatory scheme.

B. Louisville & Nashville Railroad Co. v. Maxwell

The next chapter in the filed-rate saga was *Louisville & Nashville Railroad Co. v. Maxwell*,[23] a challenge to tariff-based charges.[24] The operative facts are straightforward: the tariff specified rates for carriage; Maxwell was promised and charged a cheaper rate; the railroad sued to recover the undercharge.[25] Maxwell prevailed until the high court weighed in.[26]

The Court did not hesitate to enforce the tariff because "[u]nder the interstate commerce act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext."[27] The decision echoed *Kirby*'s strict application in favor of uniform regulation: "Shippers and travelers are charged with notice, of [the tariff], and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable."[28]

The seemingly unfair impact to Maxwell was acknowledged, but not relevant: "This rule is undeniably strict, and it obviously

21. *Id.* at 166 ("To guarantee a particular connection and transportation by a particular train was to give an advantage or preference not open to all, and not provided for in the published tariffs.").
22. *Id.* at 166 (citing Tex. & P. R.R. Co. v. Mugg & Dryden, 202 U.S. 242 (1906)).
23. 237 U.S. 94 (1915).
24. *Id.* at 95–96.
25. *Id.*
26. *See id.*
27. *Id.* at 97.
28. *Id.*

may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."[29] Thus *Maxwell* establishes that tariff-based charges will always prevail, and in this sense, the precedent represents the filed-rate doctrine at its most basic.

C. Keogh v. Chicago & Northwestern Railway Co.

Ten years after *Kirby* first roped-off the regulatory regime from judicial action, the Supreme Court made it clear that the developing doctrine barred litigation arising out of tariff-related matters no matter what form such claims may take. *Keogh v. Chicago & Northwestern Railway Co.* was an anti-trust action brought by an excelsior and flax tow shipper.[30] Keogh sued eight railroad companies and a dozen individuals whose conspiracy to restrain trade had caused damage.[31]

Liability on the merits was not a close call: a committee formed by the various railroads secured an agreement among competitors to fix interstate transportation rates.[32] This scheme thereby eliminated competition and "interstate commerce was restrained."[33] The damages suffered by Keogh were not simply theoretical: "[t]he uniform rates so established were arbitrary and unreasonable; they were higher than those theretofore charged; and they were higher than the rates that would have been, if competition had not been thus eliminated."[34]

The railroad's only defense was the filed-rate doctrine. The complained-of rates had been filed with the Interstate Commerce Commission, and despite an administrative investigation prompted by Keogh's complaints, the Commission had blessed the pricing structure.[35] The Supreme Court was called upon to answer whether Keogh could seek damages when the "instrument by which Keogh is alleged to have been damaged are rates approved by the Commission."[36]

29. *Id.*
30. Keogh v. Chicago & Nw. Ry. Co., 260 U.S. 156, 159 (1922).
31. *Id.*
32. *Id.* at 159–60.
33. *Id.* at 160.
34. *Id.*
35. *Id.*
36. *Id.* at 161.

The tariff scheme trumped Keogh's anti-trust protections. Writing for the court, Justice Brandeis found that "[a] rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the Anti-Trust Act."[37] Rather, the act only affords a "right of action to one who has been injured in his business or property" and, importantly, "injury implies violation of a legal right."[38] Therein lay the undoing of Keogh's claims:

> 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.[39]

In other words, an anti-trust injury could not be pursued if Keogh had no legal right to the "competitive" rate upon which the claim would be based.

The Court observed that the net effect of affording Keogh recourse would be to grant a rate different from that provided by the tariff, thereby giving Keogh an extra-tariff preference over other ratepayers.[40] The ability of similarly-damaged persons to redress like damages made no difference: "[i]t is no answer to say that each of these might bring a similar action under [the Anti-trust Act]. Uniform 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."[41] Because Keogh lacked a right to a rate beyond that provided in the tariff—even though the tariff was the product of anti-competitive conduct—the anti-trust damages lawsuit could not proceed.[42]

D. Davis v. Cornwell

Justice Brandeis solidified the high court's tariff jurisprudence

37. *Id.* at 162.
38. *Id.* at 163 (citation omitted).
39. *Id.* (citations omitted).
40. *Id.*
41. *Id.* (citing Tex. & Pac. R.R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 440 (1907)).
42. *Id.* The Court did not rule out governmental criminal or injunctive redress against the railroads. *Id.* at 162 (stating that "[t]he fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the government").

in *Davis v. Cornwell*.[43] *Davis* involved a railroad's promise to provide freight cars on a date certain—a term not contemplated by the governing tariff.[44] When the railroad failed to perform, the shipper successfully sued until the case reached the high court.[45]

In setting aside the damage award, the Supreme Court succinctly summed up the dispositive situation: "The obligation of the common carrier implied in the tariff is to use diligence to provide, upon reasonable notice, cars for loading at the time desired. A contract to furnish cars on a day certain imposes a greater obligation than that implied in the tariff."[46]

The cause of action could not be sustained because the lawsuit attempted to impose extra-tariff duties.[47] Even though the underlying conduct—i.e., the timing of car delivery—was merely ancillary to the transportation services that were the true object of the tariff, the Court refused to countenance the imposition of extra-tariff duties outside of the regulatory scheme:

> [T]hat the thing contracted for in this case was a service preliminary to the loading is not a difference of legal significance. The contract to supply cars for loading on a day named provides for a special advantage to the particular shipper, as much as a contract to expedite the cars when loaded. It was not necessary to prove that a preference resulted in fact. The assumption by the carrier of the additional obligation was necessarily a preference.[48]

E. Chicago & Northwest Transportation Co. v. Kalo Brick & Tile Co.

Many years and justices passed through the Supreme Court between *Davis* and *Chicago & Northwest Transportation Co. v. Kalo Brick & Tile Co.*[49] Although technically not a filed-rate doctrine precedent, *Kalo Brick* offers insight into the Court's continuing focus on preserving the uniformity and centrality of regulatory oversight through administrative filings.

43. 264 U.S. 560 (1924).
44. *Id.* at 561.
45. *Id.*
46. *Id.*
47. *Id.* at 562 ("[*Kirby*] settled that a special contract to transport a car by a particular train, or on a particular day, is illegal, when not provided for in the tariff.").
48. *Id.*
49. 450 U.S. 311 (1981).

Kalo Brick challenged a railroad's branch line abandonment.[50] The railroad served only one shipper on the line, and the abandonment put the shipper out of business.[51] Over the shipper's objection, the Interstate Commerce Commission granted the railroad's request to cast off the line due to conditions (a mud slide) beyond the railroad's control.[52]

The shipper did not appeal the Commission's administrative decision, but rather sued in state court on various statutory and common law grounds, including negligent failure to maintain the roadbed and tortious interference with the shipper's contractual relations.[53] The state trial court dismissed on preemption grounds, but the intermediate appellate court reversed on a theory that the federal and state schemes provided "complementary" relief for injured persons.[54] The state's high court denied review.[55]

Writing for a unanimous Supreme Court, Justice Marshall reversed on federal-preemption grounds in an opinion rife with filed-rate doctrine implications.[56] For instance, the Court characterized the state appellate court decision as amounting "to a holding that a state can impose sanctions upon a regulated carrier for doing that which only the Commission, acting pursuant to the will of Congress, has the power to declare unlawful or unreasonable."[57] Indeed, "it is difficult to escape the conclusion that the instant litigation represents little more than an attempt by a disappointed shipper to gain from the Iowa courts the relief it was denied by the Commission."[58]

The high court admonished the complaint as essentially charging the railroad with acting "unreasonably" despite the administrative approval:

> Respondent in essence seeks to use state law to compel petitioner to furnish cars in spite of the congressional decision to leave regulation of car service to the Commission. But "the duty to provide cars is not absolute," and the law "exacts only what is reasonable of

50. *Id.* at 314.
51. *Id.*
52. *Id.* at 314–15.
53. *Id.*
54. *Id.* at 316.
55. *Id.*
56. *Id.* at 317–24.
57. *Id.* at 324 (citing Chicago v. Atchison, Topeka & Santa Fe R.R. Co., 357 U.S. 77, 87 (1958)).
58. *Id.*

> the railroads under the existing circumstances."[59] *The judgment as to what constitutes reasonableness belongs exclusively to the Commission.* It would vitiate the overarching congressional intent of creating "an efficient and nationally integrated railroad system," to permit the State of Iowa to use the threat of damages to require a carrier to do exactly what the Commission is empowered to excuse. A system under which each State could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress in enacting the Interstate Commerce Act.[60]

In the field of regulated commerce, therefore, "reasonableness" determinations are for administrative assessment and an agency blesses the reasonableness of a "rate" by approving the railroad's filing. As a result, a post-hoc attack by means of a negligence action could not be sustained:

> [T]he questions respondent seeks to raise in the state—whether roadbed maintenance was negligent or reasonable and whether petitioner abandoned its line with some tortious motive—are precisely the sort of concerns that Congress intended the Commission to address in weighing abandonment requests from the carriers subject to its regulation.[61]

F. Arkansas Louisiana Gas Co. v. Hall

A tariff's terminal effect on litigation was confirmed in *Arkansas Louisiana Gas Co. v. Hall*, in which the doctrine was officially extended beyond the confines of earlier Interstate Commerce Act precedents.[62] Arkansas Louisiana Gas Co. (Arkla) purchased natural gas from Frank Hall et al., pursuant to a 1952 contract that included a fixed price schedule and a "favored nations clause."[63] Pursuant to this clause, if Arkla purchased natural gas from the same gas field from which Hall was producing,

59. *Id.* at 325 (quoting Milmine Grain Co. v. Norfolk & W. R.R. Co., 352 I.C.C. 575, 585 (1976) (citing Elgin Coal Co. v. Louisville & Nashville R.R. Co., 277 F. Supp. 247, 250 (E.D. Tenn. 1967))). *See also* Midland Valley R.R. Co. v. Barkley, 276 U.S. 482, 484 (1928).

60. *Id.* at 325–26 (citations omitted) (emphasis added).

61. *Id.* at 326–27.

62. 453 U.S. 571, 578–79 (1981).

63. *Id.* at 573.

but at a higher rate than Arkla was paying to Hall, then Hall would be entitled to a higher price.[64] In 1954, Hall filed—and the Federal Power Commission (FEP) approved—the Arkla gas purchase agreement.[65]

Several years later, Arkla purchased certain leaseholds from the United States and began producing its own gas from the field Hall was using.[66] Believing that this transaction invoked the price-adjustment clause, Hall filed a lawsuit seeking damages equal to the difference between the amounts that Arkla had paid and those it should have paid assuming the favored nations clause had been triggered.[67] The district court found that the deal with the United States did, in fact, trigger the favored nations clause.[68] Nonetheless, the filed-rate doctrine precluded an award of damages for completed sales.[69]

The Supreme Court of Louisiana reversed, finding that Hall was entitled to damages between 1961 and 1972 regardless of the filed-rate doctrine.[70] Shortly after this state supreme court ruling, however, the FEP entered the fray by concluding that the allowance of damages by the state supreme court violated the filed-rate doctrine.[71]

Settling the dispute, the United States Supreme Court recounted how the filed-rate doctrine had developed through Interstate Commerce Act cases, but noted that the rule "has been extended across the spectrum of regulated utilities. 'The considerations underlying the doctrine . . . are preservation of the agency's primary jurisdiction over reasonableness of rates and the need to ensure that regulated companies charge only those rates of which the agency has been made cognizant.'"[72] Protecting agency primacy against litigation attacks on regulatory-tariff matters was deemed equally applicable in analogous industries like natural gas production and sales.[73]

64. *Id.*
65. *Id.* at 574.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 574–75.
70. *Id.* at 575.
71. *Id.* at 576.
72. *Id.* at 577–78 (quoting City of Cleveland v. FPC, 525 F.2d 845, 854 (D.C. Cir. 1976)); *see also* City of Piqua v. FERC, 610 F.2d 950, 955 (D.C. Cir. 1979).
73. *Id.*

The requested damages could not be allowed because "[n]ot only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively."[74] Consequently:

> It would undermine the congressional scheme of uniform rate regulation to allow a state court to award as damages a rate never filed with the Commission and thus never found to be reasonable within the meaning of the Act. Following that course would permit state courts to grant regulated sellers greater relief than they could obtain from the Commission itself.[75]

In short, "[i]t would surely be inconsistent with this congressional purpose to permit a state court to do through a breach of contract action what the Commission itself may not do."[76]

The seemingly-unfair impact of the Court's ruling was emphasized in Justice Powell's dissent: "Despite the fact that Arkla breached its contract, and despite the fact that no federal policy is threatened by allowing the Louisiana courts to redress that breach, the Court today denies respondents the benefit of their lawful bargain."[77] Nonetheless, the filed-rate doctrine prevailed.

G. AT&T v. Central Office Telephone, Inc.

As much as *Arkansas Louisiana Gas Co.* represents the "rate" aspect of the filed-rate doctrine, *AT&T v. Central Office Telephone Inc.*[78] addresses the "services" called for by filed rates. When the filed-rate doctrine is brought to bear, the result for litigation is the same.

AT&T arose out of a dispute between the provider (AT&T) and a reseller (Central Office) of long-distance telecommunications services.[79] Central Office complained that contracted-for order fillings and account billings were late and that other agreed-upon service options had not been delivered.[80] The tariff covered provisioning and billing duties by committing those service-related responsibilities to AT&T's discretion:

74. *Id.* at 578.
75. *Id.* at 579.
76. *Id.* at 580.
77. *Id.* at 586 (Powell, J., dissenting).
78. 524 U.S. 214 (1998).
79. *Id.* at 216–20.
80. *Id.* at 220.

> [W]hereas [Central Office] asks to enforce a guarantee that orders would be provisioned within 30 to 90 days, the tariff leaves it up to [AT&T] to "establis[h] and confir[m]" a due date for provisioning, requires that petitioner merely make "every reasonable effort" to meet that due date, and if it fails gives the customer no recourse except to "cancel the order without penalty or payment of nonrecurring charges."[81]

Although AT&T's obligations were established by the tariff, the district court allowed Central Office's lawsuit to proceed.[82] Enforcing what was deemed to be an AT&T contractual commitment, the jury awarded $13 million in lost profits (later sliced to $1.154 million).[83]

On appeal, the Ninth Circuit upheld the lost profits award without regard to the published tariff, believing that "this case does not involve rates or rate-setting, but rather involves the provisioning of services and billing."[84] Moreover, the circuit court sent the case back to the district court for a punitive damages assessment.[85]

The Supreme Court rejected the Ninth Circuit's rates-versus-services dichotomy:

> Rates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa. "If 'discrimination in charges' does not include non-price features, then the carrier could defeat the broad purpose of the statute by the simple expedient of providing an additional benefit at no additional charge . . . . An unreasonable 'discrimination in charges,' that is, can come in the form of a lower price for an equivalent service or in the form of an enhanced service for an equivalent price."[86]

Invoking the earliest tariff-related precedents, Justice Scalia reminded that challenges to tariff-provided services offend the filed-rate doctrine just as much as attacks on tariff-approved pricing:

81. *Id.* at 225.
82. *Id.* at 221.
83. *Id.*
84. Cent. Office Tel., Inc. v. AT&T, 108 F.3d 981, 990 (9th Cir. 1997).
85. *Id.*
86. *AT&T*, 524 U.S. at 223 (quoting Competitive Telecomms. Ass'n v. FCC, 998 F.2d 1058, 1062 (D.C. Cir. 1993)).

> In *Chicago & Alton R. Co. v. Kirby*, 225 U.S. 155, 32 S. Ct. 648, 56 L. Ed. 1033 (1912), we rejected a shipper's breach-of-contract claim against a railroad for failure to ship a carload of race horses by a particularly fast train. We held that the contract was invalid as a matter of law because the carrier's tariffs "did not provide for an expedited service, nor for transportation by any particular train," and therefore the shipper received "an undue advantage . . . that is not one open to others in the same situation." Similarly, in *Davis v. Cornwell*, 264 U.S. 560 (1924), we invalidated the carrier's agreement to provide the shipper with a number of railroad cars on a specified day; such a special advantage, we said, "is illegal, when not provided for in the tariff."[87]

AT&T left no doubt that ratepayers cannot elude the filed-rate bar by pleading "services" claims; challenges to rates and claims against services are two sides of the same coin for filed-rate purposes. In both cases, respect for agency jurisdiction requires that courts dismiss tariff-related complaints.

III. MINNESOTA EMBRACES THE FILED-RATE DOCTRINE

With the trail blazed by the likes of *Kirby*, *Keogh*, and *AT&T*, the Minnesota courts were not faced with a daunting jurisprudential leap. Nonetheless, the impact of the *Schermer* court formally adopting the filed-rate doctrine cannot be overstated: the precedent definitively reset the balance between regulated entities and their would-be litigation adversaries.

A. Schermer v. State Farm Fire & Casualty Co.

1. Background

Schermer v. State Farm Fire & Casualty Co. arose out of an insurance dispute.[88] Insurance rates, like railroad, gas, and telecommunications rates, are subject to tariff filings.[89] The Minnesota Department of Commerce (DOC) exclusively decides whether an insurer's proposed rates are "excessive, inadequate or

87. *Id.* at 224 (citations omitted).

88. Schermer v. State Farm Fire & Casualty Co., 721 N.W.2d 307, 307 (Minn. 2006).

89. MINN. STAT. § 70A.06, subdiv. 1 (2006).

unfairly discriminatory."[90] One statute in particular—subdivision 13(b) to section 72A.20 of the Minnesota Statutes—prohibits rate discrimination on the basis of the age of the structure to be insured.

State Farm Fire & Casualty Company (State Farm) filed an insurance rate plan with the DOC on May 8, 1997.[91] That plan gave some homeowners a discount and imposed a surcharge on others based upon the age of the home's electrical wiring.[92] Homes with electrical systems eight years old and newer received varying discounts; homes with electrical systems between nine and thirty-nine years old received no discount or surcharge; and homes with systems thirty-nine years and older paid a six percent surcharge.[93]

Tying the discount/surcharge to the age of the electrical system was no accident: State Farm sought to satisfy an exception to section 72A.20, which provides that while insurance rates may not be based solely on the age of the primary structure, the age of the electrical system may be considered to the extent that factor reflects a risk of loss.[94] In fact, however, the actuarial data that State Farm relied upon to show that older electrical systems increase risk encompassed all non-catastrophic losses rather than those directly related to older electrical systems.[95] Despite this apparent illogic, the rate plan was approved on July 23, 1997.[96]

Years after the DOC approval, a State Farm policyholder received a premium increase notice based upon the age of the electrical system.[97] The policyholder complained to the DOC, and State Farm was required to produce supporting actuarial data.[98] State Farm eventually conceded that it lacked "electrical system cause-of-loss data to support" the rate surcharge.[99] The DOC subsequently found State Farm's rate to be based upon structure age and, therefore, violative of section 72A.20, subdivision 13(b). A consent decree followed, in which State Farm denied the allegations but agreed to cease and desist.[100]

90. *Id.* § 70A.04, subdiv. 1.
91. *Schermer*, 721 N.W.2d at 310.
92. *Id.*
93. *Id.*
94. MINN. STAT. § 72A.20, subdiv. 13(b) (2006).
95. *Schermer*, 721 N.W.2d at 310.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*

2. The Doctrine is Brought to Bear

Within days of the consent decree, a putative class action was filed.[101] The *Schermer* class was certified to include all insurance policyholders who had paid surcharges based upon the now-rejected rate plan.[102] The class alleged "that [a] surcharge that was imposed by [the insurer] on homes whose electrical systems were more than 39 years old was racially discriminatory."[103] The lawsuit sought a refund of all impermissible surcharges.[104]

The insurer moved for summary judgment on filed-rate doctrine grounds.[105] The district court obliged, finding that "the filed-rate doctrine prevents a court from retroactively changing a rate that has been filed with and approved by a state regulatory agency."[106] The intermediate appellate court affirmed.[107]

Before the Minnesota Supreme Court, the class declared the filed-rate doctrine to be inapplicable "because their challenge is not to the reasonableness of the [tariff that had been filed with the responsible agency], but to its legality, which is a matter within the peculiar expertise of courts."[108] Also, damages were said to be "judicially ascertainable."[109] Both contentions came up short.

The *Schermer* court began by noting that the United States Supreme Court had not committed to one filed-rate doctrine rationale.[110] The doctrine sounded in "separation of powers" when turning upon a legislative body conferring upon an administrative agency exclusive authority to determine the reasonableness of a particular rate.[111] Simultaneously, justiciability concerns are piqued because "a court is not well suited to determine, if the rate approved by the commission were found to be unlawful, what other rate the commission would find to be reasonable and non-discriminatory to take its place."[112] In that vein, *Schermer* endorsed an observation from the Second Circuit Court of Appeals:

101. *Id.* at 311.
102. *Id.*
103. *Id.* at 309.
104. *Id.* at 311.
105. *Id.* at 309.
106. *Id.*
107. *Id.*
108. *Id.* at 314.
109. *Id.*
110. *Id.* at 311–12.
111. *Id.* at 312.
112. *Id.* (citing Keogh v. Chicago & Nw. Ry. Co., 260 U.S. 156, 164–65 (1922)).

> [R]egulatory agencies have special expertise, investigative capacities, and experience and familiarity with the regulated industry that enable them to "consider the whole picture regarding the reasonableness of a proposed rate," whereas the courts are ill-suited to second-guess the decisions of regulatory agencies.[113]

The *Schermer* court reasoned that "the filed-rate doctrine should reflect separation of powers and comity considerations [which] the Class's argument overlooks."[114] With regard to separation of powers, the court recognized that "ratemaking is a legislative function."[115] Succinctly put:

> [I]f a court were to entertain a private claim that a regulated rate was unreasonable or unlawful, it would necessarily have to second-guess the decisions of the agency to whom the legislature has delegated the responsibility to approve rates, and a court generally would not have the technical expertise to do so nor the capacity to consider the entire rate structure or to balance all competing interests.[116]

The *Schermer* court likewise adopted the justiciability rationale, finding that "courts are ill-equipped to retroactively reallocate rates among ratepayers, by modifying the rates for some ratepayers but not for others."[117] Further, "the regulation of rates is an 'intricate ongoing process' and interference by a court 'may set in motion an ever-widening set of consequences and adjustments' which courts are powerless to address."[118] Thus consistent with the foundational filed-rate jurisprudence, the *Schermer* court recognized and defended the uniformity and centrality of regulation intended by tariff mechanisms.[119]

113. *Id.* (*accord* Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 20, 21 (2d Cir. 1994)). Although filed-rate jurisprudence was born in the federal courts, the *Schermer* court recognized that the doctrine applies equally to rates filed with state agencies. *Id.* Indeed, the court noted that in such cases the doctrine is a matter of state law (albeit the *Schermer* court heavily relied upon United States Supreme Court precedents). *Id.* at 312–13.

114. *Id.* at 314.

115. *Id.* (citing Nw. Bell Tel. Co. v. State, 299 Minn. 1, 28, 216 N.W.2d 841, 857 (1974) (citation omitted)).

116. *Id.*

117. *Id.* at 315 (citing Peoples Natural Gas Co. v. Minn. Pub. Utils. Comm'n, 369 N.W.2d 530, 535 (Minn. 1985)).

118. *Id.* (quoting *Peoples Natural Gas*, 369 N.W.2d at 535).

119. *Id.*

3. No Exceptions

Faced with legal peril, the class urged that the filed-rate doctrine cannot trump the lawsuit because the Minnesota Constitution guarantees "a certain remedy in the laws for all injuries or wrongs."[120] Unpersuaded, the *Schermer* court concluded that the comprehensive regulatory scheme protected the class members and all ratepayers.[121]

The Minnesota State Constitution only preserves "remedies for which the legislature has not provided a reasonable substitute."[122] The court found such a reasonable substitute in the pervasive administrative oversight:

> The statutes that regulate insurance companies in general and rates in particular—including the rate filing requirements, the DOC review requirements, the DOC investigative responsibilities, and the DOC and district court enforcement capabilities—provide remedies that ensure protection of the interests of ratepayers. In fact, the collective requirements of those statutes relieve individual ratepayers of the burden of reviewing, monitoring, or challenging rates and, instead, charge the DOC with the responsibility to assure ratepayers that rates will not be excessive. This regulatory scheme is a reasonable substitute for the common law claim that the Class will be prevented from asserting.[123]

The *Schermer* court countenanced no exceptions to the doctrine despite acknowledging that other courts have found no filed-rate bar when:

- A rate filed with a state regulatory agency violates a federal anti-discrimination statute;[124]

- The regulatory agency's review was minimal;[125] or

120. *Id.* at 316 (quoting MINN. CONST. art. I, § 8).
121. *Id.* at 316–17.
122. *Id.* at 316 (quoting Hickman v. Group Health Plan, Inc., 396 N.W.2d 10, 14 (Minn. 1986)).
123. *Id.* at 316–17.
124. *Id.* at 317 (citing Saunders v. Farmers Ins. Exch., 440 F.3d 940, 944–45 (8th Cir. 2006)).
125. *Id.* (citing Brown v. Ticor Title Ins. Co., 982 F.2d 386, 393–94 (9th Cir. 1992)).

- Fiduciary duty breaches are present.[126]

Taking a cue from the Ninth Circuit, the *Schermer* class contended that an exception for filed rates should apply because agency review of insurance rates is "passive."[127] The court disagreed, finding that insurance pricing in Minnesota is subject to "meaningful review" because the insurance commissioner is charged with enforcing the laws, insurers must file all rates with the commissioner, and the rates cannot be "excessive, inadequate, or unfairly discriminatory."[128] The DOC is also responsible for "examin[ing] the affairs and conditions of every insurer licensed in the state not less frequently than once every five years."[129] Although "the insurance regulatory scheme is less stringent than, for example, the scheme for electrical, gas, and telephone utilities . . . this difference in degree of regulation is one that the legislature has chosen and it does not materially impact the rationale for the filed rate doctrine."[130] Therefore, the case had to be dismissed.

B. Hoffman v. Northern States Power Co.

1. Background

With *Schermer*'s broad and dispositive holding in place, the question remained as to how Minnesota courts would give effect to the principle. The first appellate application—*Hoffman v. Northern States Power Co.*—embraced an expansive approach.[131]

Hoffman is an electricity case.[132] Like their counterparts in railroad, gas, telecommunications, and insurance businesses, electric utilities must file tariffs setting forth the "rates" and "all rules that, in the judgment of the [Minnesota Public Utilities

126. *Id.* (citing Am. Bankers Ins. Co. v. Alexander, 818 So. 2d 1073, 1085 (Miss. 2001), *overruled on other grounds by* Capital City Ins. Co. v. G.B. "Boots" Smith Corp., 889 So. 2d 505 (Miss. 2004)). The *Schermer* court expressly refused to address whether a claim under the Minnesota Human Rights Act might vitiate the filed-rate doctrine. *Id.* at 317 n.6. *See also* MINN. STAT. § 363A.33 (2006).
127. *Schermer*, 721 N.W.2d at 317.
128. *Id.* at 318 (quotations and citations omitted).
129. *Id.* (quoting MINN. STAT. § 60A.031, subdiv. 1 (2006)).
130. *Id.*
131. *See generally* Hoffman v. N. States Power Co., 743 N.W.2d 751 (Minn. Ct. App. 2008), *rev. granted* (Minn. Apr. 15, 2008). The Minnesota Supreme Court has not yet set the case for argument.
132. *Id.*

Commission (MPUC)], in any manner affect the service or product."[133] The MPUC is statutorily vested with exclusive authority to assess the "reasonableness" of the tariff.[134] Once in effect, electric utilities cannot sell or distribute electricity except as provided for in the tariff.[135]

The *Hoffman* complaint stemmed from a dispute over the "point of connection" between Northern States Power Company's (NSP) wires and the customers' homes.

> According to respondents, NSP initially connects a customer to its system by affixing wires to lugs within the customer's meter box. After securing this connection, NSP installs a seal on the meter box to prevent access by the customer, a measure provided for in the tariffs. Respondents contend that over time these connections can become corroded, loose, or both, causing a fire hazard. They argue that NSP is obligated under the tariffs to inspect and maintain its electrical wiring up through and including this connection point.[136]

The lawsuit was filed as a putative class action on behalf of all residential NSP electric customers in Minnesota, North Dakota, and South Dakota.[137]

2. Schermer *is Enforced*

NSP invoked the filed-rate doctrine, but had to go to the appeals court to realize its protections.[138] In short, the Minnesota Court of Appeals concluded that the regulatory implications of allowing the litigation to proceed triggered the filed-rate doctrine as adopted in *Schermer*.[139]

The appeals court surveyed *Schermer*'s boundaries with the jurisprudence upon which the precedent had been based:

> The filed-rate doctrine, as applied by the United States Supreme Court for more than a century, forbids a regulated entity from charging its customers a rate other than the one duly filed with the appropriate regulatory

133. MINN. STAT. § 216B.05, subdiv. 2 (2006).
134. *Id.* § 216A.05, subdiv. 2(2).
135. *Id.* §§ 216B.06, 216B.07.
136. *Hoffman*, 743 N.W.2d at 753. *Hoffman* was decided on the pleadings, so those allegations had to be regarded as true. *See id.*
137. *Id.* at 752.
138. *See id.* at 757.
139. *Id.*

> authority . . . . This preclusion against suit extends to claims challenging the services provided in exchange for a filed rate.[140]

The appellate court found no filed-rate reason to distinguish the insurance industry from the electric utility industry.[141] Nor did the court find an important distinction in that the *Hoffman* plaintiffs "do not seek a refund of the rate paid, but rather contract damages for the value of services promised but not provided."[142] Further, the appeals court affirmed the filed-rate doctrine understanding that the *form* of a claim or relief does not control the analysis:

> We reject this latter distinction as no more than semantic. In determining the application of the filed-rate doctrine, our focus is on "the impact the court's decision will have on agency procedures and rate determinations." And, here, as in *Schermer*, respondents underestimate the extent to which a judicial decision in their favor would interfere with rate-making. Whether properly characterized as a request for additional services or enforcement of the tariff "as it stands," respondents' claims will inevitably impact the rate-making process between NSP and the MPUC. Public-utility rate setting is a complex process, involving the agency's review and careful balancing of multiple factors affecting the regulated entity's appropriate rate of return. A judgment from the court in this matter—whether or not it merely construes the tariff—will interfere with the rate-making process.[143]

Consistent with the emphasis on the *effect* that prosecuting a civil remedy could have on the filed-rate structure, the appellate court also rejected the suggestion that a claim that merely seeks to enforce the terms of a tariff should not be barred by the filed-rate doctrine.[144] The court acknowledged "a split among federal

140. *Id.* at 755 (citing H.J. Inc. v. Nw. Bell Tel. Co., 954 F.2d 485, 488 (8th Cir. 1992); AT&T v. Cent. Office Tel. Inc., 524 U.S. 214, 223 (1998) (citations omitted)). The appellate court made it clear that the doctrine was not merely statutory: "the supreme court emphasized the separation-of-powers purposes underlying the filed-rate doctrine, noting that 'ratemaking is a legislative function.'" *Id.* (quoting *Schermer*, 721 N.W.2d at 314) (citation omitted)).

141. *Id.* at 756.

142. *Id.*

143. *Id.* (citations omitted).

144. *Id.* The claimants were relying on at least two other cases decided on federal-law grounds. *See* Brown v. MCI Worldcom Network Servs, Inc., 277 F.3d

authorities as to whether the doctrine precludes claims that are seeking no more than interpretation and enforcement of the terms of a tariff."[145] But the *Brown*-line of thinking was rebuffed because such decisions do not explain "how such a claim is any less invasive upon the administrative rate-making process. Nor do they address the separation-of-powers principles that the supreme court found crucial in *Schermer*."[146]

The MPUC, not the courts, have the exclusive say:

> As the agency charged by statute with approving rates, MPUC is in the best position to determine whether the point of connection must be maintained and, if so, by whom. If respondents petitioned MPUC to hold that NSP must maintain the points of connection, and MPUC concluded in respondents' favor, it is also the entity with the power to consider the costs of such a burden, adjust the rate accordingly, and enforce that rate.[147]

IV. THE ROAD AHEAD

The filed-rate doctrine may be new to Minnesota, but it arrives battle tested. No less an authority than the United States Supreme Court has poked and prodded the theory from *Kirby* through *AT&T*. If a law may be understood by "know[ing] what it has been and what it tends to become,"[148] there is little doubt that *Schermer* forecasts rough seas for litigation efforts that intrude upon the administrative oversight of regulated commerce.

Consider the genealogy:

- *Kirby*: company cannot be held liable to provide services beyond the tariff despite agreement to do more.[149]

1166, 1166 (9th Cir. 2002); Lipton v. MCI Worldcom, Inc., 135 F. Supp. 2d 182, 182 (D.D.C. 2001).

145. *Id.* at 754 (comparing *H.J.*, 954 F.2d at 488 with *Brown*, 277 F.3d at 1166). The appellate court noted that federal authorities do not control the analysis because the filed-rate doctrine is a matter of state law. *Id.* at 756.

146. *Id.*

147. *Id.*

148. HOLMES, *supra* note 8.

149. Chicago & Alton R.R. Co. v. Kirby, 225 U.S. 155, 163–66 (1912). *See supra* Part II.A.

- *Maxwell*: tariff trumps contractual duty.[150]

- *Keogh*: anti-trust duties cannot be enforced once complained-of conduct has been covered by regulatorily-approved tariffs.[151] Specifically, "[t]he rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier."[152]

- *Davis*: duty to provide railroad cars on a date certain unenforceable (despite agreement to do so) because such services were not tariff-required.[153]

- *Kalo Brick*: courts may neither impose a roadbed maintenance duty nor probe for tortious motivations when railroad proceeded pursuant to regulatorily-approved plan.[154]

- *Arkansas Louisiana Gas Co.*: lawsuit precluded because assumption that the regulatory agency would find damages to be "reasonable" is wholly speculative.[155]

- *AT&T*: no damages for breach of contract or tortious interference because regulated utility's service obligations are limited to the filed tariff regardless of contrary promises.[156]

Once the Minnesota Supreme Court accepted the prevailing rationale, the result in *Schermer* was a foregone conclusion. After all, the *Schermer* plaintiffs sought damages equal to the amount of a

150. Louisville & Nashville R.R. Co. v. Maxwell, 237 U.S. 94, 96–97 (1915). *See supra* Part II.B.
151. Keogh v. Chicago & Nw. Ry. Co., 260 U.S. 156, 162–64 (1922). *See supra* Part II.C.
152. *Keogh*, 260 U.S. at 163 (citations omitted).
153. Davis v. Cornwell, 264 U.S. 560, 561–62 (1924). *See supra* Part II.D.
154. Chicago and Nw. Transp. Co. v. Kalo Brick & Tile, Co., 450 U.S. 311, 324–27 (1981). *See also supra* Part II.E.
155. Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577–82 (1981). *See supra* Part II.F.
156. AT&T v. Cent. Office Tel. Inc., 524 U.S. 214, 223–25 (1998). *See supra* Part II.G.

discriminatory surcharge.[157] If such damages were awarded, the *Schermer* plaintiffs effectively would have paid a rate for insurance services lower than that set forth in the regulatory tariff. The result is a quintessential filed-rate doctrine transgression.[158]

The same goes for the *Hoffman* litigants. Those plaintiffs sought to enforce the tariff as they saw it, and felt that the courts could simply calculate the value of the services to which they believed they were entitled, but had been denied.[159] Again, the court refused to meddle in MPUC tariff affairs because of the regulatory disformity that would be wrought.[160] The tariff scheme could not be unsettled by a damages award.

Importantly, the filed-rate doctrine does not only apply when damages are analogous to some form of a rebate as in *Schermer* and *Hoffman*. The horseman in *Kirby* sought compensation for the damages he sustained when he did not receive the services for which he had bargained.[161] So, too, did the telecommunications reseller in *AT&T* seek compensation for lost profits.[162] What mattered in those cases was not that the plaintiffs sought a refund of rates paid, but rather that they sought to hold the regulated entity liable for failing to fulfill a duty not provided for in the tariff. Litigation that effectively demands extra-tariff efforts is thus equally repelled by the historical doctrine.

Undoubtedly, the filed-rate doctrine will get much play in the Minnesota courts in the coming years. While it remains to be seen whether the courts will keep the doctrine whole or begin embracing exceptions, it is clear that the balance in tariff-related litigation has shifted toward regulatory uniformity and away from regulation-by-litigation.

157. Schermer v. State Farm Fire & Cas. Co., 721 N.W.2d 307, 311 (Minn. 2006).

158. *See, e.g.*, *Ark. La. Gas Co.*, 453 U.S. at 579 ("It would undermine the congressional scheme of uniform rate regulation to allow a state court to award as damages a rate never filed with the Commission and thus never found to be reasonable within the meaning of the Act."); Keogh v. Chicago & Nw. Ry. Co., 260 U.S. 156, 163 (1922) (stating that "[i]f a shipper could recover . . . 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").

159. Hoffman v. N. States Power Co., 743 N.W.2d 751, 752 (Minn. Ct. App. 2008).

160. *Id.* at 755.

161. Chicago & Alton R.R. Co. v. Kirby, 225 U.S. 155, 162–63 (1912).

162. American Tel. and Tel. Co. v. Cent. Office Tel. Inc., 524 U.S. 214, 220–21 (1998).