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Is There a Reason to Think the Court Will Reign In the Filed-Rate Abomination? Oh Please, Oh Please, Oh Please!

Christopher Sagers (Cleveland-Marshall College of Law) · Tuesday, December 18th, 2012

Keep an eye out for the Court's decision on certiorari in *McCray v. Fidelity Nat'l Ins. Co*., 682 F.3d 229 (3rd Cir. 2012). I have my fingers crossed that it may be the case in which the Court finally does the right thing with the accursed "filed rate doctrine." I filed a brief in support of certiorari in the case on behalf of myself, eighteen leading antitrust scholars, and the American Antitrust Institute.

Pretty much everybody who is not a regulated industry is in agreement about the FRD, an old rule now commonly associated with Louis Brandeis's famous opinion in *Keogh v. Chicago & Nw. Ry. Co.*, 260 U.S. 156 (1922). Specifically, they all pretty much agree that the FRD is bad and should be discarded. It didn't make a lot of sense theoretically even in the days of *Keogh* (for the reasons why, one nice explanation is in Henry Friendly's careful opinion in *Square D v. Niagara Frontier Tariff Bur*., 760 F.2d 1347 (2d Cir. 1985)), it really doesn't make sense in an age of substantial deregulation, and it works differently from the other judge-made antitrust immunities, for no apparent reason. But efforts to get rid of it were dealt a near-death blow by the Court's 1986 decision in *Square D Co. v. Niagara Frontier Tariff Bur.*, 476 U.S. 409 (1986), a decision made most bizarre by the person of its author. Justice Stevens, ordinarily an antitrust true believer, wrote an opinion for a near unanimous Court resoundingly reaffirming the FRD, even though the case involved a partially deregulated environment, and even though no less than President Reagan's Solicitor General wrote in support of the private plaintiffs, urging outright rejection of the FRD. Justice Stevens rested primarily on stare decisis, the value of which he strongly defended in many other contexts. Personally, I think the real explanation for his view was his opposition to the radical deregulatory moves then underway within the Reagan administration. I think he saw the case as really not about antitrust at all, but rather just how far the Court should allow a President to implement his free-market ideology without congressional acquiescence. But in any case, the FRD is now pretty much like the baseball immunity—a theoretically decrepit anachronism that has been preserved by the courts for literally no reason except stare decisis, and preserved by Congress mainly for its inability to accomplish much of anything at all.

Well, a big spate of circuit court decisions during the past year or so have rendered filed rate decisions, and I believe one or more of them might be nicely primed for the Court to take on certiorari. Most importantly, a series of parallel antitrust class actions worked their way through the courts this year that challenged price fixing in the title insurance industry. Every court of appeals to consider the issue dismissed the actions under either or both of McCarran-Ferguson immunity and the FRD. (Only the 6th Circuit has so far refused to reach the FRD issue.) I think the title insurance cases are the most important for two reasons: (1) they extend filed rate protection to rates filed with a *state* agency, a question that remains of first impression before the Supreme Court, and (2) they do so on facts substantially identical to those on which the Supreme Court *denied* immunity under a similar doctrine called state action immunity, in *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992). Importantly, *Ticor* stressed the requirement that the state in question "actively supervises" the challenged private conduct before it can enjoy state action immunity.

Here's why I'm optimistic about the case. If the Third Circuit's view in the case holds—that rates filed with a state agency enjoy FRD protection even though under *Ticor* they could not enjoy state action immunity—then there is really a pretty serious theoretical tension between the FRD and the state action doctrine. Why should "active supervision" be so important in the one context and literally irrelevant in the other (since most courts now say that the FRD requires no actual review or supervision of the rates filed)? Why is the mere formality of a tariff-filing requirement, even in cases in which the tariff receives literally no government review at all (those were the facts in *Ticor*) so significant that it would completely preclude private damages remedies, even though private remedies would not be precluded in a state with an otherwise identical regulatory system that merely lacks the pro forma filing requirement?

My fingers are cautiously optimistically crossed.

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