

No. 21-508

IN THE
Supreme Court of the United States

In re William J. French and Sandra M. French

ON PETITION FOR A WRIT OF MANDAMUS TO
THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WISCONSIN,
MILWAUKEE DIVISION

**SUPPLEMENTAL BRIEF TO
PETITION FOR A WRIT OF MANDAMUS**

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SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF MANDAMUS

Petitioners file this supplemental brief to their previously filed Petition for Writ of Mandamus to the District Court for the Eastern District of Wisconsin based on recent actions by that court that have not been brought to this Court's attention.

On July 16, 2020, Petitioners commenced this action ("Action") by filing in the United States District Court for the Eastern District of Wisconsin ("district court") a class action complaint ("Complaint"). The Complaint alleges subject matter jurisdiction based on the Class Action Fairness Act, 28 U.S.C. §§1332(d)m, 1453 and 1711-1715. In addition, federal courts have jurisdiction pursuant to 28 U.S.C. §§1331, which provides that the "District Courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." This action presents federal questions arising under provisions of the Internal Revenue Code of 1986, including 26 U.S.C. §§7702B, *et seq.* and 26 CFR §§801—3(e) and federal common law.

On October 1, 2021, Petitioners filed in this Court their Petition for issuance of a Writ of Mandamus to the district court for the Eastern District of Wisconsin ("Petition"), the Hon. Brett H. Ludwig, Presiding, ("Respondent").

On October 6, 2001, the Clerk of this Court ("Clerk") docketed this case as Case No. 21-508 and

mailed to Petitioners two forms, a Notice of Filing (“Notice”) and a Waiver (“Waiver”). The Notice notifies Respondent’s counsel that the Court had filed and docketed the case, while the Waiver is to be completed by Respondent’s counsel to advise the Court whether or not Respondent intends to “file a response to the writ of certiorari” [sic].

Petitioners received these forms on or about October 13, 2021. The Notice and Waiver, as provided by the Clerk, are captioned “Supreme Court of the United States, William J. French, et al. (Petitioners) v. (Respondent) No.21-508. The Notice states that “NOTICE IS HEREBY GIVEN that a petition for writ of mandamus in the above-entitled case was filed in the Supreme Court of the United States on October 1, 2021, and placed on the docket on October 6, 2021.” The Waiver, to be completed by Respondent’s counsel, is intended to identify those Respondent(s) counsel represents and to advise the Court if they intend to respond to the Petition.

Because the identity of Respondent’s counsel was unknown, Petitioners, on October 13, 2021, by overnight mail, sent to Respondent the forms provided by the Clerk, advised Respondent of the dates that the Petition was filed and docketed and of this Court’s direction that the forms be provided to Respondent’s counsel, and enclosed a copy of the Petition.

Without advising the Court whether or not he intended to respond to the Petition, on November 5,

2021, Respondent issued a “Decision and Order” on a pending motion for judgment on the pleadings that Northwestern Mutual Life Ins. Co. and Northwestern Long-Term Care Ins. Co. (“Defendants”), had previously filed with the district court. Based on the Defendants’ motion, the Decision and Order dismissed the Complaint based on the filed rate doctrine. The Decision and Order is set forth below as Appendix Item A.

The Decision and Order is a nullity because this Court acquired jurisdiction of the case on October 1, 2021, by the filing of the Petition which presents the issue whether Defendants’ QLTCI contracts are valid under federal law notwithstanding the filed rate doctrine.

It has long been the rule that a case is only in one court at a time. In *Marbury v. Madison*, 1 Cranch, 137, 175 (1803) the Court held that to warrant the issue of a writ of mandamus in cases where original jurisdiction is not conferred by the Constitution (citation omitted), it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable the court to exercise its appellate jurisdiction and that:

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This

is true, yet the jurisdiction must be appellate, not original.

Later, in *McClelland v. Carland*, 217 U.S. 268, 280 (1910), the Court defined the rule, applicable to both the Supreme Court and to the courts of appeals, that the power to issue the writ under R.S. § 716 is not limited to cases where its issue is required in aid of a jurisdiction already obtained, but that “where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below.”

The Petition is properly before this Court pursuant to 28 U.S.C. 1651(a), which provides that federal courts “may issue all writs necessary or appropriate in aid of their respective jurisdictions.” The statute recognizes the inherent power of federal courts to issue extraordinary writs in aid of their given jurisdiction. The power is a “legislatively approved source of procedural instruments designed to achieve ‘the rational ends of law.’” *Harris v. Nelson*, 394 U.S. 286, 299 (1969), quoting *Price v. Johnson*, 334 U.S. 266, 282 (1948), which quoted *Adams v. United States ex rel. McCann*, 317 U.S. 269, 2732 (1942). Federal courts may thus avail themselves of all auxiliary writs as aids in the performance of their duties, when their use is calculated in a court’s sound judgment to achieve the ends of justice entrusted to it.

In *Telecom. Res. and Action Cntr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984), the court confirmed these rules, as follows:

While [§1651] does not expand the jurisdiction of a court, (citation omitted) it is equally well settled that "the authority of the appellate court is not confined to the issuance of writs in aid of jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected." *Federal Trade Comm. v. Dean Foods Co.*, 384 U.S. 597, 603-604 (1966) (quoting *Roche v. Evaporated Milk Assoc.*, 319 U.S. 21, 25 (1943). This authority extends to support an ultimate power of review, even though it is not immediately and directly involved. *U.S. v. U.S. District Court*, 334 U.S. 258, 263 (1948). In other words, section 1651(a) empowers a federal court to issue writs of mandamus necessary to protect its prospective jurisdiction. *Dean Foods*, 384 U.S. at 6032-604; *U.S. v. U.S. District Court*, 334 U.S. at 263; (other citations omitted)... [See also] *McClellan v. Carland*, 217 U.S. 269, 280 (1910) ([w]e think it the true rule that where a case is within the appellate jurisdiction of a higher court

a writ ... may issue in aid of the appellate jurisdiction which might otherwise be defeated....) (footnote omitted).

Just as the filing of a notice of appeal initiates the process of an appeal, so the filing of a petition for a writ initiates the process by which the writ may be issued. Each filing is “an event of jurisdictional significance — confer[ing] jurisdiction on the court of appeal and divest[ing] the district court of its control over those aspects of the case” covered by the filing. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). In each case, the rule prevents simultaneous consideration of the same issues by a district court and a court of appeals. *Id.* at 59. While the “one-court-at-a-time” rule may permit a district court to subsequently issue ministerial orders, it precludes it from entering orders that would interfere with an appellate court’s jurisdiction to consider the matters presented by a petition. This is particularly so where a district court issues an order that attempts to moot matters presented by a petition before the appellate court has an opportunity to consider them. Accordingly, upon its filing with this Court on October 1, 2021, the Petition divested the district court of jurisdiction over the issues the Petition presents.

In addition, by basing the Decision and Order exclusively on the filed rate doctrine, the district court ignored the most fundamental issue that Petition presents: whether federal law requires that a valid QLTCI Contract exist before a valid rate can exist.

The district court erred when it held that “there is no federal cause of action for Plaintiffs’ common law breach of contract, breach of the implied duty of good faith, and common law fraud claims.” D&O at 4. In *Jackson Transit Authority v. Transit Union*, 457 U. S. 15, 21 (1982), the “precise question before us is whether the union’s contract actions are federal causes of action.” In answering that question, the Court stated as follows:

on several occasions [we had] determined that a plaintiff stated a federal claim when he sued to *vindicate contractual rights set forth by federal statutes*, [even though] the relevant statutes lacked express provisions creating federal causes of action.” *Id.*, at 22 (emphasis added, citing cases).

Summarizing prior decisions in which the Court held that contract created by Congress created a federal cause of action, the Court stated:

These decisions demonstrate that suits to enforce contracts contemplated by federal statutes may set forth federal claims and that private parties in appropriate cases may sue in federal court to enforce contractual rights created by federal statutes. But they do not dictate the result in this case.

Whenever we determine the scope of rights and remedies under a federal statute, the critical factor is the congressional intent behind the particular provision at issue.

Id. at 22.

The Court then held that if Congress intended that [the parties' agreements] be "creations of federal law," and that *the rights and duties contained in those contracts be federal in nature*, then the union's suit states federal claims. *Id.* at (emphasis added, citations omitted). *Id.*

The Petition confirms that Congress intended that QLTCI Contracts be "creations of federal law." The Contract is governed by the Internal Revenue Code ("Code"), which provides not only that "the Contract shall be treated as a guaranteed renewable contract subject to the rules of Code §816(e)" it also requires that a QLTCI Contract protect a policyowners' rights, and that insurers meet the duties imposed by, the Consumer Protection Provisions of Code §7702B(g)). 26 U.S.C. 7702(b)(1)(F).

The district court also ignored the rule that federal law controls the interpretation and construction of a contract written by Congress.

After applying the Wisconsin choice-of law rules, the district court stated that "NML argues that

Texas law applied to all of Plaintiffs' claims because Texas has the most significant relationship to Plaintiffs' insurance policies. The Court agrees."

Only by ignoring the Code's Consumer Protection Provisions, Code §7702B(g), 26 U.S.C. 7702(b)(1)(F), which impose requirements that must be met before a long-term care contract qualifies as a QLTCI Contract under the Code, could the court determine that Texas law applied to all of Plaintiffs' claims.

The district court also ignored the undisputed fact that, contrary to provisions of the Code and the Contract, NML materially altered the Contract in order to create the false impression that it had the right to create the numerous classes that it used to assess discriminatory rates on its policyowners. It did so by altering the term that Congress used in the Code, "on a class basis," to the term, "by class." NML's Memorandum of Law in Support of Motion by Defendants for Judgment on the Pleadings extolls that change by stating that "In fact, the language 'premiums may be changed by class' supports the obvious conclusion that more than one class may exist." But that statement proves too much. For if the term "by class" was consistent with the Code's term, "on a class basis," no change would have been necessary. And, as Justice Harlan stated in *United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332, 340 (1956) "That the so-called 'filed rate' procedure is applicable to changes in contracts ... proves only that

contracts may be changed, *not that they may be changed unilaterally.*"

NML unilateral, material alterations rendered its purported QLTCI Contracts illusory and void a matter of law, and prevented any meeting of the minds from possibly occurring. Nevertheless, the material changes that NML made to its purported QLTCI Contracts allowed it to assess premiums on contracts that are illusory, assessments that the Decision and Order permits NML to continue.

CONCLUSION

When preparing the Petition, Petitioners were concerned, but could not bring themselves to believe, that the district court would go to such extreme lengths to facilitate the continuation of NML's nationwide, fraudulent, health insurance scheme. Indeed, the Decision and Order, which protects NML's scheme from termination, is nothing short of extraordinary. Plaintiffs have not found a similar decision in which a federal court has taken patently unsupportable positions that permit such a massive fraudulent scheme to continue without serious scrutiny. Nothing could more conclusively confirm the necessity for decisive intervention by this Court to prevent NML's scheme from causing further injury to innocent, elderly, policyowners in the coming years.

Respectfully Submitted,

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APPENDIX

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF WISCONSIN

WILLIAM J FRENCH, SANDRA M FRENCH,

Plaintiffs,

v.

Case No. 20-cv-1090-bhl

**NORTHWESTERN MUTUAL LIFE INSURANCE
COMPANY, NORTHWESTERN LONG TERM CARE
INSURANCE CO,**

Defendants.

DECISION AND ORDER

If the phrase “tax-qualified, guaranteed renewable, comprehensive, long-term care insurance policy” were any more impenetrable, it might be mistaken for an excerpt from *Finnegan’s Wake*. But this Joycean jumble of surplus adjectives means a great deal to the millions of—predominantly elderly—Americans who rely on such policies for medical support. Take, for example, Plaintiffs William and Sandra French. In 2007, they purchased long-term care insurance policies from Defendant Northwestern Long-Term Care Insurance Company, a wholly owned subsidiary of Northwestern Mutual Life Insurance Company (collectively NML). Although neither

Plaintiff required daily assistance at that point, they anticipated long, happy lives, and wanted to lock in reasonable premiums early. They reveled in the belief that they had done so, until May 2018 when, after 11 years of punctual payments, NML increased their annual rates by over \$4,000.

According to Plaintiffs, this substantial rate increase represented the final step in a decades-long scheme whereby NML collected premiums from forethoughtful customers, with no intention of fulfilling its corresponding obligations. They contend that the rate increase was designed to drive policyholders off their plans and relieve NML of its duty to provide the benefits those policyholders had paid for over the years. Consequently, the Frenches hired counsel and filed this class action lawsuit. NML answered, denying Plaintiffs' claims and raising the Filed Rate Doctrine as an affirmative defense. It then moved for judgment on the pleadings based on this defense. After firing their lawyers, Plaintiffs responded to NML's motion *pro se*, and the motion is now fully briefed. Because the Court concludes that the Filed Rate Doctrine bars Plaintiffs' claims, NML's motion will be granted.

FACTUAL BACKGROUND¹

In August 2007, while living in Texas, Plaintiffs purchased tax-qualified, guaranteed renewable, comprehensive, long-term care insurance policies (QLTCI) from Defendant Northwestern Long-Term Care Insurance Company, a wholly owned subsidiary of Northwestern Mutual Life Insurance Company. (ECF No. 1 at 2.) Before selling a new QLTCI policy in Texas, an insurer must submit a Rate Filing to the Texas Department of Insurance (TDI). (*Id.* at 14.) The TDI reviews the submission, which includes an Actuarial Memorandum, Actuarial Certification, the policy form, and other relevant materials, to determine if the proposed policy and its design comply with governing law. (*Id.*) The QLTCI policies that Plaintiffs purchased were issued on policy form "RS-LTC.(1101)." (ECF No. 24 at 9.) NML filed that form and its associated premium rate schedules, and the TDI initially approved them for sale on March 28, 2002. (ECF No. 1 at 14.) The first page of the policy stated: "This long-term care policy is guaranteed renewable for life upon timely payments of premiums for the life of the Insured and can neither be cancelled nor have its terms, *other than premiums*, changed by

¹ These facts are drawn from Plaintiffs' complaint (ECF No. 1) and Defendants' memorandum in support of their motion for judgment on the pleadings (ECF No. 24) to the extent that the latter invokes documents incorporated into the pleadings by reference. See *United States v. Wood*, 925 F.2d 1580, 1582 (7th Cir. 1991); *Schilke v. Wachovia Mortg., FSB*, 820 F.Supp.2d 825, 835 n. 4 (N.D. Ill. 2011) (taking judicial notice of an insurer's state rate filings).

the Company. Premiums may be changed by class.” (ECF No. 24 at 9) (*italics* added.) The premium rates as approved by the TDI differentiated among policyholders based on age, benefit period, and other appropriate factors. (*Id.* at 10.)

In 2016, NML filed a request with the TDI for a premium rate increase on the RS- LTC.(1101) policy series. (*Id.*) The 2016 Rate Increase was approved by the TDI on February 9, 2018. (*Id.* at 11.) NML sought a substantial average rate increase of 86%, but the TDI, following its review of NML’s submissions, approved only a 62% average rate increase. (*Id.* at 11.) The TDI requested—and NML provided—an implementation plan and final rate schedules for the 2016 Rate Increase, which included the applicable percentage increases by benefit period and age. (*Id.* at 11.) On May 2, 2018, NML advised Plaintiffs that, effective August 8, 2018, each Plaintiff’s Annual Premium of \$6,679.30 would increase by \$4,285.70. (ECF No. 1 at 2.) This increase was in accordance with the 2016 Rate Increase approved by the TDI and as per the implementation plan NML provided to the TDI. (ECF No. 24 at 11.)

RULE 12(c) STANDARD

NML raises the Filed Rate Doctrine as an affirmative defense and has moved for judgment on the pleadings under Fed. R. Civ. P. 12(c) based on that defense. (ECF No. 24 at 2). This is procedurally correct. The Seventh Circuit has confirmed that Rule 12(c) is “the appropriate vehicle for resolving an

affirmative defense.” *Gunn v. Continental Casualty Co.*, 968F.3d 802, 806 (7th Cir. 2020).

In resolving a Rule 12(c) motion, the Court applies the same standard as the more-typical Rule 12(b)(6) motion to dismiss. “The only difference between a motion for judgment on the pleadings and a motion to dismiss is timing; the standard is the same.” *Federated Mut. Ins. Co. v. Coyle Mech. Supply Inc.*, 983 F.3d 307, 313 (7th Cir. 2020). “When a [party] moves for judgment on the pleadings, the motion should not be granted unless it appears beyond doubt that the nonmovant cannot prove facts sufficient to support its position[.]” *Scottsdale Ins. Co. v. Columbia Ins. Grp., Inc.*, 972 F.3d 915, 919 (7th Cir. 2020). Therefore, the Court must “view the facts in the complaint in the light most favorable to the nonmoving party,” but it “need not ignore facts set forth in the complaint that undermine the plaintiff’s claim or give weight to unsupported conclusions of law.” *Buchanan-Moore v. Cnty. of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009).

ANALYSIS

Plaintiffs bring four claims. The first three are common law claims for: breach of contract, breach of the covenant of good faith and fair dealing, and common law fraud. Plaintiffs’ fourth claim is for alleged violations of the Texas Deceptive, Unfair, and Prohibited Practice in the Business of Insurance Act. Plaintiffs seek to certify national classes on the first three claims and a Texas subclass on the fourth. NML

argues the Texas Filed Rate Doctrine precludes all four claims.

I. Texas Law Governs the Court's Analysis of Plaintiffs' Claims.

Plaintiffs filed this case in federal court pursuant to the Court's diversity jurisdiction and 28 U.S.C. §1332(d), the Class Action Fairness Act. (ECF No. 1 at 4.) In support of their motion, Defendants argue that Texas law applies to Plaintiffs' claims. (ECF No. 24 at 9-10.) The Frenches, proceeding without the benefit of counsel, call Defendants' invocation of state law "remarkable" and suggest federal law, in the form of the Internal Revenue Code, applies. (ECF No. 32 at 2.) Contrary to Plaintiffs' suggestion, all four of the claims raised in the complaint are state-law claims. Plaintiffs' Texas Deceptive, Unfair, and Prohibited Practice in the Business of Insurance Act is obviously a Texas statutory claim. And there is no federal cause of action for Plaintiffs' common law breach of contract, breach of the implied duty of good faith, or common law fraud claims.

As a federal court exercising its diversity jurisdiction, the Court must apply Wisconsin's choice of law rules to determine which state's laws apply to Plaintiffs' common law claims. *See Auto-Owners Ins. Co. v. Websolv Computing, Inc.*, 580 F.3d 543, 547 (7th Cir. 2009) ("When a federal court hears a case in diversity . . . it applies the choice-of-law rules of the forum state to determine which state's substantive law applies."). Under Wisconsin law, "the 'first rule' in

the choice-of-law analysis is ‘that the law of the forum should presumptively apply unless it becomes clear that nonforum contacts are of the greater significance.’” *In re Jafari*, 569 F.3d 644, 649 (7th Cir. 2009) (quoting *Drinkwater v. Am. Fam. Mut. Ins. Co.*, 2006 WI 56, ¶40, 290 Wis. 2d 642, 714 N.W.2d 568 (2006)). In the insurance context, when a policy does not include a choice-of-law provision, Wisconsin applies the “grouping-of-contacts” approach, which “provides that insurance coverage is ‘determined by the law of the jurisdiction with which the contract has its most significant relationship.’” *Wis. Pharmacal Co., LLC v. Neb. Cultures of Cal., Inc.*, 2016 WI 14, ¶14, 367 Wis. 2d 221, 876 N.W.2d 72 (Wis. 2016) (quoting *State Farm Mut. Auto. Ins. Co. v. Gillette*, 2002 WI 31, ¶26, 251 Wis. 2d 561, 641 N.W.2d 662 (Wis. 2002)).

Following this approach, NML argues that Texas law applies to all of Plaintiffs’ claims because Texas has the most significant relationship to Plaintiffs’ insurance policies. (ECF No. 24 at 9-10.) The Court agrees. The QLTCI policies were issued and delivered in Texas, where Plaintiffs resided at the time. (ECF No. 1 at 2.) Plaintiffs received them on a Texas policy form that had been filed with and approved by the Texas Department of Insurance (TDI). (*Id.* at 14.) And the increased premium rates that prompted this suit only existed because of TDI assent. (*Id.* at 19.) Therefore, under Wisconsin choice-of-law principles, the Court must apply Texas law.

II. Under Texas Law, Rates that Are Filed and Approved by a State Agency May Not Be Challenged in Court.

NML argues that the Filed Rate Doctrine, as adopted under Texas law, bars all four of Plaintiffs' claims. Under Texas law, "[t]he filed rate doctrine bars "judicial recourse against a regulated entity based upon allegations that the entity's 'filed rate' is too high, unfair or unlawful." *Texas Comm'l Energy v. TXU Energy, Inc.*, 413 F.3d 503, 507 (5th Cir. 2005) (citing *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986)). The Texas Supreme Court has explained that the doctrine applies "when state law creates a state agency and a statutory scheme under which the agency determines reasonable rates for the service provided." *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 216 (Tex. 2002); *see also Alexander v. Glob. Tel Link Corp.*, 816 F.App'x 939, 943 (5th Cir. 2020) ("the rationales underlying the filed rate doctrine apply equally strongly to regulation by state agencies").

The doctrine serves two purposes. First, it "prevents regulated companies from engaging in price discrimination between customers ('nondiscrimination')[.]" *Winn v. Alamo Title Ins. Co.*, 2009 WL 7099484, at *4 (W.D. Tex. 2009), *aff'd*, 372 F. App'x 461 (5th Cir. 2010). Second, it "preserves the exclusive role of regulatory agencies in approving rates" and keeps "courts, which are far less competent to perform this function, out of the rate-making process ('nonjusticiability')." *Id.* The first principle

deputizes the regulator to protect the consumer from the regulated company; the second protects the regulator from the courts. Courts have recognized that the Filed Rate Doctrine applies to bar challenges to insurance rates. *Korte v. Allstate Ins. Co.*, 48 F.Supp.2d 647, 651 (E.D. Tex. 1999) (doctrine is “equally applicable to the insurance industry as to other industries where a state agency determines reasonable rates pursuant to a statutory scheme”); *see also Winn*, 7099484 at *5 (listing numerous instances of federal district courts applying the Filed Rate Doctrine to actions against insurers subject to comprehensive regulations).

A. Plaintiffs’ Claims Fall Directly Within the Ambit of the Filed Rate Doctrine.

Under Texas law, the TDI has exclusive jurisdiction over long-term care insurance rate schedule increases on policies issued in Texas. *See e.g.*, Tex. Ins. Code Ann. §1651.056(a), (b) (“The commissioner may disapprove a long-term care premium rate that is not actuarially justified or does not comply with standards established under this chapter or adopted by rule by the commissioner.”). Thus, it is the TDI’s job to determine whether rate increases are actuarially justified, adequate, and reasonable in relation to the benefits provided to policyholders. *See Tex. Ins. Code Ann.* §1651.055(a)(1)(B) (enabling statute); 28 Tex. Admin. Code §3.3831(c) (establishing standards applicable to premium rate increases for any long-term care policy or certificate delivered or issued for delivery in Texas

on or after July 1, 2002). And Texas' comprehensive regulatory scheme requires insurers to obtain TDI's approval for any long-term care insurance premium rate increases prior to notifying policyholders. 28 Tex. Admin. Code §3.3832(c)(2)(A) (requiring insurers to file with the TDI prior to notifying policyholders, outlining detailed requirements surrounding the actuarial submissions that must be provided to the TDI in connection with rate increase filings, and providing for the TDI's continued oversight of the implementation of any such rate increases).

NML filed a request for a premium rate increase on the RS-LTC.(1101) policy series with the TDI in 2016, and, two years later, the TDI approved an average rate increase of 62%. (ECF No. 24 at 10-11.) Following approval, NML submitted an implementation plan and final rate schedules. (*Id.*) Then, effective late 2018, NML raised Plaintiffs' premiums in exact accordance with the TDI-approved rate increase and filed implementation plan. (*Id.*) This is precisely the type of process the relevant regulatory statutes contemplate.

B. Plaintiffs' Arguments Against Application of the Filed Rate Doctrine Are Unavailing.

Notwithstanding well-established Texas law embracing the Filed Rate Doctrine, Plaintiffs insist that the Texas insurance regulator's rating decision should be afforded no weight and does not bar their claims. Plaintiffs offer four arguments against application of the Filed Rate Doctrine. They contend

the doctrine does not bar their claims because: (1) NML misled the Department; (2) the IRS Code forbade the Department from granting NML's request; (3) the *Sierra-Mobile* Doctrine prevents Defendants from invoking the Filed Rate Doctrine in this case; and (4) Plaintiffs are not directly challenging NML's rates. None of these arguments carries the day for Plaintiffs.

1. Plaintiffs Cannot Evasive the Filed Rate Doctrine by Alleging One or More Misrepresentations.

Plaintiffs' first argument attempts to bootstrap a policy critique into a legal standard. They contend that because NML lied to regulators, the Filed Rate Doctrine should not apply. This argument has long been rejected as an exception to the doctrine.

The United States Supreme Court first recognized the Filed Rate Doctrine in *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922). In doing so, it explained the balancing of interests inherent in the doctrine, including the weighing of the risks of deceit, conspiracy, and regulatory error against the benefits of unlimited judicial intervention. Based on this balancing, the Court concluded that agency deference was the preferable approach. See, e.g., *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 402 (7th Cir. 2000) (applying the Filed Rate Doctrine even where reviewing agencies "rarely exercise their muscle and thus give no meaningful review to the rate structure"); *Coll v. First American Title Ins. Co.*, 642 F.3d 876, 886 (10th Cir. 2011) (applying the Filed Rate

Doctrine in a case where the insurer allegedly bribed the insurance commission to set the rates); *In re Penn Title Litig.*, 648 F.Supp.2d 663, 674-75 (E.D. Pa. 2009) (“as long as the regulatory scheme requires the filing of rates with a governmental agency that has legal authority to review those rates, the filed rate doctrine applies regardless of the actual degree of agency review of those filed rates”).

Defendants insist there is no reliable evidence indicating that NML concealed policy characteristics to mislead the TDI as Plaintiffs allege. (ECF No. 24 at 18.) But the Court need not resolve that factual dispute. Even if plaintiffs were correct on the facts, those facts would not justify abandoning the Filed Rate Doctrine. Texas courts have made clear that the doctrine is not subject to equitable considerations. *See Peacock v. AARP, Inc.*, 181 F.Supp.3d 430, 439-40 (S.D.Tex. 2016) (applying the Filed Rate Doctrine to claims that the approved insurance fee was unlawful); *Zamber v. Am. Airlines, Inc.*, No. 4:20-CV-00114-O, 2020 WL 3163037 at *10 (N.D. Tex. 2020) (barring claims that premiums were artificially inflated by kickback schemes). Plaintiffs may find this objectionable, but they have chosen the wrong venue to air their grievances. If a disgruntled baseball player finds the infield fly rule unreasonable, he does not petition the plate umpire for redress; he takes his complaints to the MLB Playing Rules Committee. Similarly, if a Texas insurance policyholder disagrees with Texas’ application of the Filed Rate Doctrine or the power it affords the TDI, their recourse sits in the Texas Capitol in Austin, not a federal courthouse in

Milwaukee.

2. The IRS Code Did Not Forbid the TDI from Approving NML's Rate Increase.

Plaintiffs next argue that the Internal Revenue Code prohibits the TDI from approving NML's requested rate increase because the Code permits rate changes only on the basis of a single, national class. This argument fails because it is premised on a misreading of applicable law.

By the policy's terms, NML could only alter QLTCI premiums "by class." (ECF No. 24 at 9.) This is consistent with 26 U.S.C. §7702B(g)(2)(A)(i)(I), which incorporates the National Association of Insurance Commissioners' (NAIC) Long-Term Care Insurance Model Regulation §6. A. (2), providing:

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.

NAIC Long-Term Care Ins. Model Reg. §6.A.(2). Accordingly, a policy premium revision cannot

discriminate; whatever its effect, a change must have that effect on the entire class of policyholders.

Plaintiffs contend that, as a matter of law, NML is entitled to just one, national QLTCI class. (ECF No. 1 at 9.) Based on this premise, they insist that NML breached its contracts when it petitioned the TDI for a premium rate increase on only the RS-LTC. (1101) policies, and the class of plaintiffs who owned those policies is therefore entitled to equitable relief and statutory damages.

To justify their novel “one class” theory, Plaintiffs meet the lawyer in his domain—linguistic and statutory interpretation. (ECF No. 35 at 10-14.) They ultimately conclude that the use of the singular term “class” rather than plural “classes” in the adopted NAIC Model Regulation means that only a single premium QLTCI class may exist under federal law. (ECF No. 1 at 8.) Of course, the phrase “on a class basis” implies, not a hard limit, but rather a bare minimum of one. If just one of four classes has their premiums adjusted, that adjustment is nevertheless done “on a class basis.” And a plural formulation, “on a classes basis,” creates syntactic absurdity. The TDI’s approval of the rate increase is thus consistent with federal law.

Further, the Court is not inclined to substitute its judgment for that of the state regulator. The McCarran-Ferguson Act provides that:

Congress hereby declares that the

continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. §1011. Additionally:

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business or insurance, or which imposes a fee or tax upon such business, unless such Act specifically relatesto the business of insurance[.]

Id. at §1012(b).

Congress was silent as to the definition of a QLTCI class in 26 U.S.C. §7702B. Yet Plaintiffs propose a novel reading of that statute over the interpretation adopted by the TDI pursuant to its duties under Texas law. The McCarran-Ferguson Act is fatal to such an attack on state law. If, in 1996, the national legislature had meant to uproot the settled role of the states and state regulators in construing and regulating insurance policies in 51 jurisdictions, it would not have transmitted that intention via cipher. If the elephant in the U.S. Capitol building represented a fundamental restructuring of national insurance regulation, Congress would not have

jammed that elephant into a mousehole. *See Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001) (“Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, ‘hide elephants in mouseholes.’”). Simply put, there is no good reason to accept Plaintiffs’ reading of §7702B over that of the TDI, and this Court will not do so.

3. Plaintiffs’ Attempt to Trump the Filed Rate Doctrine with the *Sierra-Mobile* Doctrine Is Unavailing.

Plaintiffs next argue that the *Sierra-Mobile* Doctrine prevents application of the Filed Rate Doctrine to the present case. The *Sierra-Mobile* Doctrine arises from two 1956 Supreme Court decisions: *United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332 (1956), and *Federal Power Comm’n v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). In broad strokes, it stands for the proposition that a regulated entity may not unilaterally modify a privately negotiated contract by filing a new tariff with the regulator but must instead obtain the buyer’s consent. *See Richmond Power & Light v. FPC*, 481 F.2d 490, 493 (D.C. Cir. 1973). More specifically, the *Richmond Power & Light* Court found that, where a privately negotiated utility contract provided that a customer’s rate would be changeable only in a specific manner, the *Sierra-Mobile* Doctrine worked to preserve the integrity of that private agreement, and a unilateral filing with the state regulator would not suffice. *Id.*

Here, NML does not directly negotiate rates with its customers. It submits proposals to the TDI, which approves or denies the rates. Moreover, the contracts Plaintiffs signed explicitly contemplated unilateral premium changes by class. (ECF No. 24 at 9.) In essence, preserving the integrity of Plaintiffs' contracts means *permitting* NML to unilaterally petition the TDI for premium rate increases. NML is not running an "end around" to avoid the terms of its contracts as the defendants in *Mobile Gas Corp.* and *Sierra Pacific* did; it is effectuating the very terms Plaintiffs agreed to. Therefore, the *Sierra-Mobile* Doctrine has no applicability to this case.

4. Even if Plaintiffs are Not Directly Challenging NML's Premium Rates, the Filed Rate Doctrine Bars Their Claims.

Finally, Plaintiffs argue that the Filed Rate Doctrine is inapposite because their claims challenge, not the rates themselves, but the illicit behavior that precipitated those rates. As with the prior three challenges, this one also fails to justify an exception to the Filed Rate Doctrine.

The Filed Rate Doctrine "bars not only claims that 'directly attack a filed rate' but also claims that 'effectively implicate the validity of the rates,' including claims purportedly 'seeking to recover for substantially illegal overcharges'" *Zamber*, 2020 WL 3163037 at *10 (quoting *Winn*, WL 7099484 at *9). When claims "clearly rest on the amount paid by Plaintiffs for . . . insurance, effectively implicating the

validity of the rates,” it is no defense to assert that Plaintiffs are not attacking the filed rates directly. *Peacock*, 181 F.Supp.3d at 441 (quoting *Winn*, WL 7099484 at *9); *see also Hill v. BellSouth Telecomm., Inc.*, 364 F.3d 1308, 1317 (11th Cir. 2004)(awards of damages that would result in judicial determine of reasonableness of a rate is prohibited under the Filed Rate Doctrine); *Roussin v. AARP, Inc.*, 664 F.Supp.2d 412, 416 (S.D.N.Y. 2009) (“Although the claims are styled as claims of breach of fiduciary duties and gross negligence, Roussin essentially seeks relief for an injury allegedly caused by her payment of her AARP healthcare premiums.”).

Plaintiffs request rescission, disgorgement, restitution, and the creation of a constructive trust to remedy NML’s “unjust enrichment.” (ECF No. 1 at 45.) To the extent that these remedies do not directly challenge the filed rate, they nevertheless prohibit NML from charging the TDI’s approved rate, and they require the Court to find the approved rate invalid. This indirect attempt to overturn the regulator’s decision is equally unacceptable under the Filed Rate Doctrine.

CONCLUSION

Lawyers and judges, perhaps more so than any other classes of professionals, possess the unique ability to persuade themselves of their expertise on matters in which they have scarcely meddled. The Filed Rate Doctrine is a self-imposed check on a court’s instinct to usurp the role of the regulator. This

case presents the perfect opportunity for such judicial modesty. The Court will not accept Plaintiffs' invitation to second-guess the TDI. Accordingly, Plaintiffs' attempt to clothe their filed rate challenges in other garb is ineffective. Having reviewed the record and considered the law, the Court finds that Defendants are entitled to judgment on the pleadings.

Accordingly,

IT IS HEREBY ORDERED that Defendant's Motion for Judgment on the Pleadings under Fed. R. Civ. P. 12(c) (ECF No. 23) is **GRANTED**, and the case is **DISMISSED**. The Clerk of Court is directed to enter judgment accordingly.

Dated at Milwaukee, Wisconsin on November 5, 2021.

s/ Brett H. Ludwig
BRETT H. LUDWIG
United States District Judge