Sedgwick LLP

California Court of Appeal Adopts Filed Rate Doctrine for Insurance Rate Filings

Insurance Law Flash

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In *MacKay v. Superior Court (21st Century Insurance Company)*, B220469 & B223772, the Second Appellate District of the California Court of Appeal, Division 3, held that the "filed rate" doctrine is applicable to California rate filings under Proposition 103. The doctrine precludes civil actions challenging rates and rating factors approved by the Department of Insurance. *MacKay* provides insurers doing business in California with much needed protection from civil actions challenging rates and rating plans. Such lawsuits typically are class actions seeking refunds of premiums alleged to be unlawful, notwithstanding regulatory approval.

The court's opinion in *MacKay* is based on statutory construction of the rate regulatory statutes applicable to property/casualty rates, so it applies directly only to Proposition 103 lines. The opinion, however, relies on authorities from other states that adopted the filed rate doctrine as a common law doctrine.

The *MacKay* decision expressly disagrees with a 2008 opinion by a different division of the same appellate district – *Fogel v. Farmers*, 160 Cal.App.4th 1403 – which held that the filed rate doctrine does not apply in California.

The *MacKay* opinion distinguishes several decisions frequently relied on by plaintiffs in challenges to rates and rating plans. The *Donabedian v. Mercury* opinion ((2004) 116 Cal.App.4th 968) recites - and appears to support - several arguments in favor of allowing civil actions challenging approved rates. The court in *MacKay* distinguished *Donabedian* on the grounds that, in the posture in which *Donabedian* was presented, it was not clear that the action challenged an approved rating factor, rather than the insurer's use of a different rating factor not approved by the insurance commissioner. The filed rate doctrine would not apply to a practice of using an unapproved rating factor. The *MacKay* court rejected the argument that the controlling statute (Insurance Code section 1860.1) has only a limited application to specific concerted activity allowed by the rate statutes. That is a proposition for which *Donabedian* is frequently cited.

The court in *MacKay* also distinguishes *Farmers v. Superior Court* (1992) 2 Cal. 4th 377, another case relied upon by plaintiffs in civil actions challenging approved rates and rating

plans. *Farmers* adopted the primary jurisdiction doctrine in an action brought by the attorney general alleging a failure by the insurer to comply with provisions of the California rate laws. Because primary jurisdiction implies concurrent jurisdiction in the regulator and the courts, plaintiffs have argued over the last 15 years that the *Farmers* opinion "held" that the regulator does not have exclusive original jurisdiction precluding a civil action challenging approved rates. The *MacKay* decision rejected this interpretation where the challenged rates have been approved by the regulator.

MacKay clearly enunciates that the only permissible way to challenge a rate or rating plan approved by the Department of Insurnace is to petition the commission to withdraw approval and, if the petition is denied, to appeal the regulator's determination to the California Superior Court.

MacKay leaves the door open to cases challenging the "application of the rate" rather than the approved rate itself. This could occur if, for example, an insurer misclassifies a risk, or applies a rating factor different from the approved rating factor. We anticipate that future actions will be framed by plaintiffs as challenges to the "application" of an approved rate or rating plan, not to the rate or rating plan filed with and approved by the regulator.

Sedgwick filed an amicus brief in *MacKay* behalf of several insurance trade associations.

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