CHAPTER 61

The Filed Rate, or *Keogh*, Doctrine

SYNOPSIS

§ 61.01 The Filed Rate Doctrine Precludes Antitrust Damage Claims

While technically neither an antitrust exemption nor an immunity,[1] the filed rate, or *Keogh*, doctrine precludes an award of damages under the antitrust laws when a plaintiff seeks a recovery measured by payments made according to rates approved by a regulatory agency. The doctrine derives its name from the Supreme Court's decision in *Keogh v. Chicago Northwestern Railway Co.*,[2] which involved rates approved by the Interstate Commerce Commission ("ICC"). The term "*Keogh* doctrine" is most often used in cases involving rates filed with the ICC. The principle, however, is not limited to such cases. It applies in cases involving rates filed with other federal and state regulatory bodies and is more commonly referred to as the "filed rate" doctrine.[3] Thus, the two terms often are usedinter-

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[1] Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 422, 106 S. Ct. 1922, 90 L. Ed. 2d 413 (1986) ("We disagree . . . with petitioners' view that the issue in *Keogh* and in this case is properly characterized as an 'immunity' question."). *See also* Texas Commercial Energy v. TXU Energy, Inc. 413 F.3d 503, 508 (5th Cir. 2005) (rejecting the noting that the filed rate doctrine creates an antitrust immunity).

[2] 260 U.S. 156, 43 S. Ct. 47, 67 L. Ed. 183 (1922).

[3] *See* Cost Mgmt. Servs., Inc. v. Washington Natural Gas Co., 99 F.3d 937, 943 n.7 (9th Cir.

(Text continued on page 61-3)

1996) ("The phrase 'Keogh doctrine' is usually applied in cases involving rates filed with the [ICC], whereas the 'filed rate doctrine' applies more broadly to cases involving rates filed with any regulatory body."); *see also* Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp. of Del., 805 F. Supp. 1277, 1294 n.32 (D.S.C. 1992), *aff'd without opinion,* 998 F.2d 1009 (4th Cir.)*, cert. denied,* 510 U.S. 993, 114 S. Ct. 553, 126 L. Ed. 2d 454 (1993).

changeably.[4]

The filed rate doctrine is based on the concept of the "legal rate."[5] The doctrine recognizes that where a legislature has established a scheme for rate-making, the rights of rate-payers in regard to the rate they pay are defined by that scheme.[6]

The doctrine is not confined to antitrust cases but applies in a wide variety of

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[4] *E.g.,* Cost Mgmt. Servs., 99 F.3d at 943 n.7, *above*; Brown v. Ticor Title Ins. Co., 982 F.2d 386, 393–94 (9th Cir. 1992), *cert. granted,* 510 U.S. 810, 114 S. Ct. 56, 126 L. Ed. 2d 26 (1993), *cert. dismissed as improvidently granted,* 511 U.S. 117, 114 S. Ct. 1359, 128 L. Ed. 2d 33 (1994).

[5] *See, e.g.,* Town of Norwood, Mass. v. New England Power Co., 202 F.3d 392, 400 (1st Cir. 2000), *cert. denied,* 531 U.S. 818, 121 S. Ct. 57, 148 L. Ed. 2d 24 (2000) ("Formally, the filed rate doctrine states that the only lawful rate is that reflected in the tariff on file when the service is performed . . . "); Groton v. Connecticut Light & Power Co., 662 F.2d 921, 929 (2d Cir. 1981) ("The rationale is that the regulatory agency determines the legal rate and the utility must collect it while it is in effect."); *see also* cases cited in N. 6 *below.*

[6] *E.g.,* Taffet v. S. Co., 967 F.2d 1483, 1490 (11th Cir.), *cert. denied,* 506 U.S. 1021, 113 S. Ct. 657, 121 L. Ed. 2d 583 (1992).

See also:

Supreme Court:

Keogh v. Chicago & N.W. Ry., 260 U.S. 156, 163, 43 S. Ct. 47, 67 L. Ed. 183 (1922) ("the legal rights of [ratepayer] 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 the carrier and [ratepayer]").

First Circuit:

Town of Norwood, , 202 F.3d at 406, *above* ("the filed rate doctrine protects the agency's authority over tariffed rates and prefers a prevailing tariff (unless set aside by the agency) over any separate contractual arrangements").

Fifth Circuit:

Texas Commercial Energy v. TXU Energy, Inc., 2004-2 Trade Cas. (CCH) ¶ 74,497 (S.D. Tex. 2004) , *aff'd*, 413 F.23d 503 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1033 (U.S. 2006) (noting illegal rates theory underlies the filed rate doctrine).

Seventh Circuit:

Minsky v. Auto Driveaway, 757 F.2d 718, 720 (7th Cir. 1984) (a "tariff that is filed with [a regulatory agency] and which becomes effective is the legal rate and established the legal rights of the parties until it is determined by [the regulator] to be unreasonable or discriminatory").

Tenth Circuit:

In re Universal Serv. Fund Tele. Billing Practices Litig., 300 F. Supp. 2d 1107, 1142–43 (D. Kan. 2003) ("the filed-rate doctrine, . . . holds that 'the rate of the carrier duly filed is the only lawful charge' and that 'deviation from it is not permitted upon any pretext.' . . . The filed-rate doctrine bars precisely this type of claim because the rates, terms, and conditions set forth in the tariff are deemed to be the only lawful rates, terms, and conditions. Plaintiffs and defendants are both bound by the tariff and may not deviate from it.").

contexts.[7] In the antitrust arena, federal courts apply the doctrine when the rates are set by either federal or state regulatory agencies.[8] The states also recognize the doctrine, in both antitrust and other contexts. Indeed, the doctrine has its origins in state court decisions.[9]

§ 61.02 Origins, Rationale, and Continued Vitality of the Filed Rate Doctrine

The first case in which the Supreme Court dismissed an antitrust claim because of the regulatory context was *Keogh v. Chicago & Northwestern Railway*

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[7] The Supreme Court has applied the doctrine in a variety of contexts. *E.g.,* AT&T v. Central Office Tel., Inc., 524 U.S. 214, 118 S. Ct. 1956, 141 L. Ed. 2d 222, *reh'g denied,* 524 U.S. 972, 119 S. Ct. 20, 141 L. Ed. 2d 781 (1998) (filed rate doctrine preempted breach of contract and tortious interference claims concerning the price at which services were offered); Security Servs., Inc. v. K Mart Corp., 511 U.S. 431, 114 S. Ct. 1702, 128 L. Ed. 2d 433 (1994) (action in bankruptcy to recover undercharges); Maislin Industries, U.S. v. Primary Steel, 497 U.S. 116, 110 S. Ct. 2759, 111 L. Ed. 2d 94 (1990 (same); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986) (challenge to regulatory tariffs); Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 101 S. Ct. 2925, 69 L. Ed. 2d 856, 70 O.&G.R. 119 (1981) (breach of contract action by customer).

See also Public Util. Dist. No 1 v. IDACORP Inc., 379 F.3d 641 (9th Cir. 2004) (contract and unjust enrichment claims); Transmission Agency of No. Cal. v. Sierra Pac. Power Co., 295 F.3d 918, 929-30 (9th Cir. 2002), *cert. denied*, 539 U.S. 914, 123 S. Ct. 2272, 156 L. Ed. 2d 129 (2003) (breach of contract claims); Town of Norwood, 202 F.3d at 416, *above* (breach of contract claims, as well as antitrust claims); T&E Pastorino Nursery v. Duke Energy Trading & Mktg., L.L.C., MDL No. 1405, 2003 U.S. Dist. LEXIS 16352 (S.D. Cal. Aug. 25, 2003), *aff'd,* 123 Fed Appx. 813 (9th Cir. 2005) (state unfair competition law claims); *In re* EVIC Class Action Litig., MDL No. 1339, 2002 U.S. Dist. LEXIS 1404T&E 9, at *25–30 (S.D.N.Y. July 30, 2002) (RICO claims).

But see Saunders v. Farmers Ins. Exch., 440 F.3d 940 (8th Cir. 2006) (doctrine did not bar claim for race discrimination pricing under the Fair Housing Act and Civil Rights Act).

[8] *See* § 61.03[1] *below.*

[9] In 1989, the Alabama Supreme Court became one of the first state courts to invalidate a contract because the contract rate was less than the rate filed with and approved by the state regulator. S. Ry. Co. v. Harrison, 119 Ala. 539, 24 So. 552 (1898). *Harrison* was a seminal case that influenced the development of the *Keogh* doctrine. In one of the earliest federal filed rate cases, Texas & P. Ry. Co. v. Mugg & Dryden, 202 U.S. 242, 244–45, 26 S. Ct. 628, 50 L. Ed. 1011 (1906), the U.S. Supreme Court wrote that the doctrine was "so aptly reviewed and declared" by the Alabama Supreme Court's opinion in *Harrison* that the U.S. Supreme Court adopted that opinion as its own.Texas & P. Ry. Co. v. Mugg & Dryden, 202 U.S. 242, 244. When the Supreme Court subsequently applied the filed rate doctrine to antitrust claims in the *Keogh* case, the Court relied on the *Mugg & Dryden* decision. Keogh v. Chicago & N.W. Ry., 260 U.S. 156, 163, 43 S. Ct. 47, 67 L. Ed. 183 (1922).

Co.,decided in 1922.[1] In that case, the plaintiff, who shipped goods over the defendant railroads, brought a treble damage action to recover damages caused by the defendants' exaction of arbitrary rates allegedly set pursuant to a price-fixing conspiracy. The shipper alleged that because of the conspiracy, the rates, even though approved by the Interstate Commerce Commission ("ICC"), were "higher than the rates would have been, if competition had not been thus eliminated."[2] The shipper claimed as damages the difference between the rates established under the price-fixing arrangement and those previously in effect.[3] The defendants argued that the ICC's approval of the rates conclusively established that they were "reasonable and nondiscriminatory."[4] The Supreme Court agreed, while noting that ICC approval did not foreclose the possibility that, but for the conspiracy, the ICC might have approved as reasonable "somewhat lower" rates.[5] The Court stated that the government could bring criminal proceedings, civil injunctive proceedings, or a forfeiture action against the railroads for conspiring to fix rates.[6] The Court, however, added:

> The fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the government. It does not, however, follow that Keogh, a private shipper, may recover damages under [the antitrust laws] because he lost the benefit of rates still lower, which but for the conspiracy he would have enjoyed.[7]

In support of its ruling, the Supreme Court offered three principal arguments. First, the Court held, "[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. What rates are legal is determined by the Act to Regulate Commerce."[8] The shipper had a remedy under the Act; the ICC, if it had disapproved defendants' rates, could have awarded the shipper actual damages. Thus, plaintiff was not injured as a result of

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[1] 260 U.S. 156, 43 S. Ct. 47, 67 L. Ed. 183 (1922). It should be noted that at the time, the Interstate Commerce Act did not expressly provide that carriers were immune from antitrust liability if the ICC formally approved their rates. Therefore, the Court could not invoke the doctrine of exclusive jurisdiction on the grounds of express statutory immunity. Immunity would have to be found by implication.

[2] 260 U.S. at 160.

[3] 260 U.S. at 160

[4] 260 U.S. at 160.

[5] 260 U.S. at 161.

[6] 260 U.S. 160–61, 260 U.S. 156, 160-161, 43 S. Ct. 47, 67 L. Ed. 183.

[7] 260 U.S. at 162.

[8] 260 U.S. at 162.

defendants' actions because he was charged a legal rate.[9] Additionally, the Court doubted that Congress intended to provide a duplicative remedy in the Sherman Act.[10]

Second, the Court explained that if a single shipper were allowed to recover in a private antitrust suit "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."[11] This, the Court said, might defeat "the paramount purpose of Congress—prevention of unjust discrimination."[12] Protection of this purpose required application of a stringent rule that the filed rate was the only legal rate.

Third, the Court held that the plaintiff's damages were purely speculative. Under the antitrust laws, "damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture."[13] The Court felt that for two reasons such proof was "impossible in the case before us."[14] The plaintiff would have been required to prove the hypothetical lower rate that the ICC would have adopted. Whether the agency would have approved such a lower rate was a question best left to the agency itself, not the courts.[15] And since, by virtue of the antidiscrimination requirement, all competi-

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[9] The Supreme Court explained:

> Section 7 of the Anti-Trust Act gives a right of action to one who has been "injured in his business or property." Injury implies violation of a legal right. The legal rights of shipper 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.

260 U.S. at 163.

[10] 260 U.S. at 162.

[11] 260 U.S. at 163.

[12] 260 U.S. at 163. *See also* Arsberry v. Illinois, 244 F.3d 558, 562 (7th Cir. 2001), *cert. denied,* 534 U.S. 1062, 122 S. Ct. 661, 151 L. Ed. 2d 576 (2001) (finding doctrine inapplicable); Goldwasser v. Ameritech Corp., 222 F.3d 390, 402 (7th Cir. 2000) (claim under 1996 Telecommunications Act barred); Daleure v. Kentucky, 119 F. Supp. 2d 683, 688 (W.D. Ky. 2000), *appeal dismissed*, 269 F.3d 540 (6th Cir. 2001) (antitrust claims partially barred).

Several courts have rejected the claim that class actions prevent unjust discrimination and so should not be subject to the filed rate doctrine. Marcus v. AT&T Corp., 138 F.3d 46, 61 (2d Cir. 1998); Wegoland Ltd v. NYNEX Corp., 27 F.3d 17, 21-22 (2d Cir. 1994); Daleure v. Kentucky, 119 F. Supp. 2d 683, 688-90 (W.D. Ky. 2000), *appeal dismissed*, 269 F.3d 540 (6th Cir. 2001).

[13] 260 U.S. at 165.

[14] 260 U.S. at 165.

[15] 260 U.S. at 163–64. This rationale for the *Keogh* doctrine is related to insuring a

tors would have been charged the same rate, a jury could not have found that Keogh would have enjoyed the benefit of those rates. Competition might have forced him to pass on the lower rates to his customers.[16]

Subsequent developments and Supreme Court decisions undermined the validity of the rationales offered in *Keogh*.[17] For example, "the fear that recovery of antitrust damages would operate 'like a rebate' to produce discrimination

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regulator'sprimary jurisdiction. *E.g.,* Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577–78, 101 S. Ct. 2925, 69 L. Ed. 2d 856, 70 O.&G.R. 119 (1981) ("The considerations underlying the doctrine . . . are preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant."). *Keogh* itself is often cited as a seminal case in the creation of the doctrine of primary jurisdiction.

In more recent decisions, courts have relied heavily on this justification in applying the filed rate doctrine. *See, e.g.*, Arsberry v. Illinois, 244 F.3d at 562 *above,* (finding request for injunction banning exclusive dealing would not be barred by the filed rate doctrine); Miranda v. Michigan, 168 F. Supp. 2d 685 (E.D. Mich. 2001) (dismissing claim under Federal Telecommunications Act); Daleure v. Kentucky, 119 F. Supp. 2d 683, *above* (damages claim—but not injunctive relief claim—barred by doctrine); Paladin Assocs. Inc. v. Montana Power Co., 97 F. Supp. 2d 1013, 1025 n.14, 146 O.&G.R. 439 (D. Mt. 2000), *aff'd,* 328 F.3d 1145 (9th Cir. 2003) (holding doctrine inapplicable).

[16] The Court said in full:

> To make proof of such facts would be impossible in the case before us. It is not like those cases where a shipper recovers from the carrier the amount by which its exaction exceeded the legal rate . . . . Here the instrument by which the damage is alleged to have been inflicted is the legal rate, which while in effect, had to be collected from all shippers. Exaction of this higher legal rate may not have injured Keogh at all; for a lower rate might not have benefited him. Every competitor was entitled to be put—and we must presume would have been put—on a parity with him. And for every article competing with excelsior and tow, like adjustment of the rate must have been made. Under these circumstances no court or jury could say that, if the rate had been lower, Keogh would have enjoyed the difference between the rates or that any other advantage would have accrued to him. The benefit might have gone to his customers, or conceivably, to the ultimate consumer.

Keogh, 260 U.S. at 165, *above*.

[17] In the Second Circuit's opinion in the *Square D* case, Judge Friendly noted that "[a]lthough the *Keogh* opinion has the 'relentless quality' characteristic of Justice Brandeis, many of his arguments do not seem so compelling today as they did in 1922." Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 760 F.2d 1347, 1352 (2d Cir. 1985), *aff'd,* 476 U.S. 409, 106 S. Ct. 1922, 90 L. Ed. 2d 413 (1986) (footnote omitted). The Second Circuit nonetheless upheld the *Keogh* doctrine stating that "if there is to be any overruling, that task is for the Supreme Court." 760 F.2d at 1349.

The Second Circuit's criticisms were repeated by the Ninth Circuit in Cost Management Services, Inc. v. Washington Natural Gas Co., 99 F.3d 937, 944–45 (9th Cir. 1996). There, the court noted that in its review of the Second Circuit's decision in *Square D* the Supreme Court "did not directly challenge the validity of [Judge Friendly's] observations. Instead, the Court 'assumed that petitioners are correct in arguing that the *Keogh* decision was unwise as a matter of policy . . . but nonetheless affirmed on grounds of *stare decisis*." 99 F.3d at 945.

among shippers ignores the difference between a carrier's passing money under the table to a favored shipper and a court's deciding that a shipper had suffered antitrust injury."[18] This concern also would seem to have been mitigated by the Supreme Court's ruling in *ICC v. American Trucking Association*, where it allowed parties to recover both actual damages and whatever additional amounts the antitrust laws permitted whenever the ICC found an effective tariff illegal.[19] Additionally, the class action device, not available in 1922, helped eliminate the concern that only some shippers would receive the benefit of an antitrust recovery.[20]

The argument that any damage award would be based on speculation was also eroded by subsequent decisions referring to the ICC such questions as whether another rate would have been approved as reasonable and nondiscriminatory.[21] It should be noted, though, that this rationale continues to apply when courts cannot refer the question of the reasonableness of another rate to regulators; this might be the case where a federal court is asked to award damages based on rates approved by state agencies.[22]

Another basis for the *Keogh* holding, that damages were speculative because the lower rates might have been passed on to the shipper's customers, has been countered by the holding in *Hanover Shoe*[23] and other cases eliminating the "pass on" defense to prevent recovery of antitrust damages in price-fixing cases.[24]

Some have questioned the first basis for the *Keogh* ruling. The Second

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See also Areeda & Hovenkamp, Antitrust Law ¶ 247a, at 108–09 (1997) (modern legal developments have undermined the rationales for the *Keogh* doctrine); Hovenkamp, Federal Antitrust Policy: The Law of Competition and its Practice § 19.6, at 660 (1994) ("none of these arguments has much to be said for them at the time they were originally made, and they are even less sensible today").

[18] Square D, 760 F.2d at 1352, *above*.

[19] 467 U.S. 354, 104 S. Ct. 2458, 81 L. Ed. 2d 282, *reh'g denied,* 468 U.S. 1224, 105 S. Ct. 20, 82 L. Ed. 2d 915 (1984). *See* Square D, 760 F.2d at 1352, *above* ("argument that antitrust damages create discrimination contrary to the goals of the ICA is also inconsistent with [*American Trucking*]").

[20] 760 F.2d at 1352.

[21] 760 F.2d at 1353 (*citing* United States v. Western Pac. R.R., 352 U.S. 59, 62–70, 77 S. Ct. 161, 1 L. Ed. 2d 126 (1956)).

[22] In such situations, the filed rate doctrine is consistent with the *Parker* or state action doctrine. This doctrine is discussed in ch. 49, *above*.

[23] Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 487–94, 88 S. Ct. 2224, 20 L. Ed. 2d 1231, *reh'g denied,* 393 U.S. 901, 89 S. Ct. 65, 21 L. Ed. 2d 188 (1968).

[24] Square D, 760 F.2d at 1353, *above*.

Circuithas wondered why a rate filing that resulted from a price-fixing conspiracy should be legal simply because a regulatory agency has approved it as reasonable. In the view of these observers, the agency might have approved as reasonable a lower rate, thus causing damages.[25] However, these criticisms fail to consider the impact of other defenses, such as the *Noerr-Pennington* and state action doctrines, that immunize concerted activity seeking governmental approval of a rate.

Notwithstanding these criticisms of *Keogh*, the filed rate doctrine continued to enjoy Supreme Court approval in a number of contexts outside the antitrust arena.[26] In 1986, the Supreme Court expressly declined to overrule the doctrine in an antitrust case. In *Square D Company v. Niagara Frontier Tariff Bureau, Inc.*,[27] the Court reaffirmed the *Keogh* doctrine on grounds of *stare decisis* and lack of congressional action to overrule the defense. Acknowledging the criticisms of the doctrine,[28] the *Square D* Court noted that the "Petitioners, supported by the Solicitor General of the United States, ask us to overrule *Keogh*"[29] on the grounds that *Keogh* was implicitly rejected in subsequent legislation,[30] that *Keogh* in effect created an implied immunity from the antitrust laws, that its reasoning was

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[25] 760 F.2d at 1353–54 ("Even the first reason expressed for the result in *Keogh* no longer seems so self-evident as Justice Brandeis thought. . . . The case for reaching a conclusion today contrary to that reached by Justice Brandeis is particularly strong in the light of recent statutes which rely increasingly on competition rather than regulation to insure the reasonableness of rail and motor carrier rates.").

[26] 760 F.2d at 1355 ("Appellants acknowledge, as they must, that the Supreme Court has not expressly overruled *Keogh*; indeed, *Keogh* was reaffirmed and applied to damages claims concerning rates that had been filed with but had not been approved (or disapproved) by the ICC in Georgia v. Pennsylvania R.R., 324 U.S. 439, 453, 65 S. Ct. 716, 89 L. Ed. 1051 (1945). Little over a year ago it was applied in Minsky v. Auto Driveway Company, 734 F.2d 18 (7th Cir. 1984), *cert. denied,* 469 U.S. 1019, 105 S. Ct. 435, 83 L. Ed. 2d 361 (1984).").

See also Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 260, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972) (*citing Keogh* to explain holding in Georgia v. Pennsylvania R.R.); Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 299–300, 93 S. Ct. 573, 34 L. Ed. 2d 525 & n.12, 409 U.S. 289, 93 S. Ct. 573, 34 L. Ed. 2d 525 (1973) (*citing Keogh* as an example of the "recurring problem" of conduct seemingly within the reach of both antitrust laws and other regulatory statutes); McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 243, 100 S. Ct. 502, 62 L. Ed. 2d 441 (1980) (court may have jurisdiction over antitrust action even though remedies are limited to injunctive relief).

[27] 476 U.S. 409, 106 S. Ct. 1922, 90 L. Ed. 2d 413 (1986).

[28] 476 U.S. at 420 (adding "we may assume that petitioners are correct in arguing that the *Keogh* decision was unwise as a matter of policy").

[29] 476 U.S. at 417.

[30] This legislation included the Reed-Bulwinkle Act and in the Motor Carrier Act of 1980.

"inconsistent with later cases," and that "the rationales of the *Keogh* decision are no longer valid."[31] The Court rejected each of these arguments.

First, the Reed-Bulwinkle Act had "created an absolute immunity from the antitrust laws for approved collective ratemaking activities."[32] The Court added:

> Nothing in the Act or in its legislative history, however, indicates that Congress intended to change or supplant the *Keogh* rule that other tariff-related claims, while subject to governmental and injunctive antitrust actions, did not give rise to treble-damages antitrust actions. On the contrary, the House Report expressly stated that, except for creating the new exemption, the bill left the antitrust laws applicable to carriers unchanged "so far as they are now applicable." . . . Particularly because the legislative history reveals clear congressional awareness of *Keogh*, far from supporting petitioners' position, the fact that Congress specifically addressed this area and left *Keogh* undisturbed lends powerful support to *Keogh*'s continued viability.[33]

Similarly, the Court noted that in enacting the Motor Carrier Act of 1980, which introduced competition into the transportation industry, "Congress must be presumed to have been fully cognizant of this interpretation of the statutory scheme."[34] The Court found persuasive the fact that "Congress did not see fit to change it when Congress carefully reexamined this area of the law in 1980,"[35] and on that basis refused to find a specific congressional intention to overturn the *Keogh* rule.[36]

The *Square D* Court further refused to overrule *Keogh* on the grounds that it created by implication an antitrust immunity, which would have been strongly disfavored. The Court denied that the doctrine created an immunity and observed that it had a limited scope, precluding private treble damage actions, while permitting criminal sanctions and equitable relief.[37] While noting various devel-

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[31] 476 U.S. at 418.

[32] 476 U.S. at 419.

[33] 476 U.S. at 419 (footnotes omitted).

[34] 476 U.S. at 420.

[35] 476 U.S. at 420.

[36] 476 U.S. at 420.

[37] The Supreme Court said in full:

> We disagree, however, with petitioners' view that the issue in *Keogh* and in this case is properly characterized as an "immunity" question. The alleged collective activities of the defendants in both cases were subject to scrutiny under the antitrust laws by the Government and to possible criminal sanctions or equitable relief. *Keogh* simply held that an award of treble damages is not an available remedy for a private shipper claiming that the rate submitted to, and approved by, the ICC was the product of an antitrustviolation.

opments[38] "that seem to undermine some of the reasoning in Justice Brandeis's *Keogh* opinion,"[39] the Court stated:

> Even if it is true that these developments cast Justice Brandeis' reasons in a different light, however, it is also true that the *Keogh* rule has been an established guidepost at the intersection of the antitrust and interstate commerce statutory regimes for some six decades. The emergence of subsequent procedural and judicial developments does not minimize *Keogh*'s role as an essential element of the settled legal context in which Congress has repeatedly acted in this area. . . .
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> . . . We conclude, however, that the developments in the six decades since *Keogh* was decided are insufficient to overcome the strong presumption of continued validity that adheres in the judicial interpretation of a statute . . . . We are especially reluctant to reject this presumption in an area that has seen careful, intense, and sustained congressional attention. If there is to be an overruling of the *Keogh* rule, it must come from Congress, rather than from this Court.[40]

In *Square D,* the Supreme Court specifically held that the *Keogh* doctrine is not limited to situations in which the ICC had approved a rate. Instead, the Court applied the doctrine in a case where the rates were filed with the ICC and took effect upon filing, even though they were not approved before they became effective and were subject to a formal ICC hearing only after they became effective.[41]

> Such a holding is far different from the creation of an antitrust immunity, and makes the challenge to *Keogh*'s role in the settled law of this area still more doubtful.

476 U.S. at 422 (footnotes omitted).

[38] The Court pointed to the following developments:

> [T]he development of class actions, which might alleviate the expressed concern about unfair rebates; the emergence of precedents permitting treble-damages remedies even when there is a regulatory remedy available; the greater sophistication in evaluating damages, which might mitigate the expressed fears about the speculative nature of such damages; and the development of procedures in which judicial proceedings can be stayed pending regulatory proceedings.

476 U.S. at 423.

[39] 476 U.S. at 423.

[40] 476 U.S. at 423–24.

[41] 476 U.S. at 417 n.19. The Court rejected the petitioner's argument that this provided grounds to distinguish and narrow the filed rate doctrine. The Court said:

> In their brief, petitioners argue that, even under *Keogh* their treble-damages action should not have been dismissed because there was no ICC hearing in this case and because *Keogh* did not involve allegations of the type of covert legal violations at issue here . . . . The Court of Appeals, however, properly concluded that *Keogh* was not susceptible to such a narrow reading: "Rather than limiting its holding to cases where, as in *Keogh,* rates had been investigated and approved by the ICC, the Court said broadly that shippers could

Since the *Square D* decision, courts have continued to apply the doctrine. In subsequent decisions involving the filed rate doctrine outside the antitrust arena, courts have pointed out that two companion principles lie at the core of the doctrine: first, that legislative bodies design agencies for the specific purpose of setting uniform rates, and second, that courts are not institutionally well suited to engage in retroactive rate setting.[42]

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not recover treble-damages for overcharges whenever tariffs have been filed."

476 U.S. at 417 n.19.

[42] Public Util. Dist. No 1 v. IDACORP Inc., 379 F.3d 641, 651-52 (9th Cir. 2004) (filed rate doctrine rests on exclusive jurisdiction of agencies); Transmission Agency of N. Cal. v. Sierra Pac. Power Co., 295 F.3d 918, 929 (9th Cir. 2002), *cert. denied*, 539 U.S. 914, 123 S. Ct. 2272, 156 L. Ed. 2d 129 (2003) ("At its most basic, the filed rate doctrine provides that state law, and some federal law (e.g. antitrust law), may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question."); Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 19 (2d Cir. 1994) (quoting the lower court's opinion, 806 F. Supp. 1112, 1115 (S.D.N.Y. 1992)); Stand Energy Corp. v. Columbia Gas Transmission Corp., 373 F. Supp. 2d 631, 635 (S.D. W.Va. 2005). Texas Commercial Energy v. TXU Energy, Inc., 2004-2 Trade Cas. (CCH) ¶ 74,497 (S.D. Tex. 2004), *aff'd*, 413 F.3d 503 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1033 (U.S. 2006) (filed rate doctrine reflects "two corresponding interests: (1) potential discrimination in rates as between ratepayers, . . . and (2) the justiceability of determining reasonable rates") (internal quotation marks and citations omitted); Ice Cream Liquidation, Inc. v. Land O'Lakes, Inc., 253 F. Supp. 2d 262, 275 (D. Conn. 2003) ("doctrine reflects the dual concerns that rates set by a regulatory agency should be stringently applied to prevent unjust discrimination and that the courts should avoid impermissible judicial rate-making."); Pub. Util. Dist. No. 1 v. Dynegy Power Mktg., Inc. (*In re* Cal. Wholesale Elec. Antitrust Litig.), 244 F. Supp. 2d 1072, 1077 (S.D. Cal. 2003), *aff'd sub nom.* Public Utility Dist. No. 1 of Snohomish County v. Dynegy Power Mktg., Inc., 384 F.3d 756 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 2957 (2005) ("The filed rate doctrine, in the electricity context, results from FERC's responsibility for setting and ensuring compliance with just and reasonable rates of wholesale electricity and transmission. . . . The filed rate doctrine arises from the sum of these concepts, and holds that electricity generators who file their rates with FERC, as they are required to do by law, are insulated from suits challenging those rates and from court orders having the effect of imposing a rate other than that filed with FERC." (citations omitted)); California *ex rel.* Lockyer v. Mirant Corp, 266 F. Supp. 2d 1046, 1061 (N.D. Cal. 2003), *aff'd*, 375 F.3d 831, *opinion amended*, *reh'g denied*, 387 F.3d 966 (9th Cir. 2004), *cert. denied*, 544 U.S. 974 (2005) (under filed rate doctrine, "[c]ourts may not effectively substitute their judgments for those of FERC concerning wholesale rate setting"); Farina v. UPS (*In re* EVIC Class Action Litig.), MDL No. 1339, 2002 U.S. Dist. LEXIS 14049, at * 2627 (S.D.N.Y. July 30, 2002) (doctrine rests on two "companion principles ": "first, that legislative bodies design agencies for the specific purpose of setting uniform rates, and second, that courts are not institutionally well suited to engage in retroactive rate setting."); Miranda v. Michigan, 168 F. Supp. 2d 685, 692 *and* 141 F. Supp. 2d 747, 757 (E.D. Mich. 2001) (filed rate doctrine holds that a rate approved by a regulatory agency is *per se* reasonable and emanates from two principles: file rate doctrine prevents discrimination between rate payers and exclusive role of agencies in approving rates); CTC Commun. Corp. v. Bell Atlantic Corp., 77 F. Supp. 2d 124, 136 (D. Me. 1999) ("At the heart of the doctrine is a policy