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# NOT TO BE PUBLISHED OPINION

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RENDERED: SEPTEMBER 23, 2010
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

FINAL
DATE 10-14-10 Ella Grauitt DC

2010-SC-000244-MR

SOUTHERN FINANCIAL LIFE INSURANCE COMPANY — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2009-CA-002183
PIKE CIRCUIT COURT NO. 07-CI-00114

HONORABLE STEVEN D. COMBS
(PIKE CIRCUIT COURT); AND
ROGER MULLINS (ADMINISTRATOR
OF THE ESTATE OF VALERIE MULLINS) — APPELLEES

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

Southern Financial Life Insurance Company appeals from an order of the Court of Appeals denying its petition for a writ to compel the trial court to dismiss a complaint filed against it on the basis of the filed-rate doctrine.[1] Because we conclude that the Court of Appeals did not abuse its discretion[2] in denying the writ, we affirm.

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1 *See Commonwealth ex. rel. Chandler v. Anthem Ins. Companies, Inc.*, 8 S.W.3d 48, 51 (Ky.App. 1999) ("In general terms, the filed rate — or filed tariff — doctrine provides that tariffs duly adopted by a regulatory agency are not subject to collateral attack in court.").

2 *Saleba v. Schrand*, 300 S.W.3d 177, 180 (Ky. 2009) ("Whether to grant or deny a writ . . . is within the sound discretion of the court with which the petition is filed. Thus, an appellate court ultimately reviews that decision for an abuse of discretion.") (citations omitted).

## I. PROCEDURAL HISTORY AND FACTS.

Roger Mullins's late wife, Valerie Mullins, filed a purported class action in circuit court alleging problems with insurance she had purchased from Southern. After Valerie Mullins died, Roger Mullins, as Administrator of her Estate, "moved to file a second amended complaint naming himself as the party plaintiff." Southern "did not oppose this amendment, as the substance of the complaint did not change."[3]

Mullins then filed a Third Amended Complaint. Southern moved to dismiss the Third Amended Complaint under Kentucky Rules of Civil Procedure (CR) 12.02(f) for failure to state a claim. Southern asserted that the third amended complaint alleged for the first time in the litigation that Southern's premiums were excessive and illegal. Southern contended that any challenge to the lawfulness of its premiums was barred under the filed-rate doctrine because its premiums had been approved by the Kentucky Department of Insurance.[4]

Southern further stated in its motion that the alleged charging of excessive or unlawful premiums "is the only new claim in the third amended complaint" and that the remaining allegations in the third amended complaint had already been stated in the second amended complaint. So Southern

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[3] Other than the third amended complaint, which is directly at issue, none of the other complaints filed by the Mullinses are included in the limited record we are provided with in this writ case.

[4] In the alternative, Southern argued that, under the doctrine of primary jurisdiction, these new allegations of unlawful premiums should be referred to the Kentucky Department of Insurance and that the case should be stayed "in its entirety until resolution by the Department."

demanded dismissal of the third amended complaint and reinstatement of the second amended complaint.

In Mullins's response to the motion to dismiss, Mullins essentially argued that Southern had misunderstood the nature of the new allegations in the third amended complaint. Mullins asserted that he was not arguing that the rates themselves were excessive or unlawful but rather that Southern had improperly charged the statutory "credit health insurance" rates[5] without meeting the requirements for a "credit health insurance" under Kentucky law.[6] Accordingly, he asserted that the filed-rate doctrine was inapplicable because the Department of Insurance had not adopted the rates at issue; but, rather, the rates were statutorily adopted under Kentucky Revised Statutes (KRS) 304.19-080(4).

Southern contended in its reply brief that the insurance product that Mullins had bought from Southern was not a credit health insurance product regulated by Subtitle 19 of the Kentucky Insurance Code (KRS 304.19-010, *et. seq.*) but, rather, was a debtor group insurance product regulated by

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5 *See* Kentucky Revised Statutes (KRS) 304.19-080(4) (which provides that "[t]he following premium rates, or actuarially equivalent rates, shall be charged for the coverages set forth hereunder" for credit health insurance and then provides a chart of premium rates).

6 *See* KRS 304.19-010 ("All life insurance and all health insurance in connection with loans or other credit transactions shall be subject to the provisions of this subtitle, except health insurance in connection with a loan or other credit transaction of more than five (5) years' duration or life insurance in connection with a loan or other credit transaction of more than ten (10) years' duration; nor shall insurance be subject to the provisions of this subtitle, where the issuance of such insurance is an isolated transaction on the part of the insurer not related to an agreement or a plan for insuring debtors of the creditor."). We note that what is referred to as "credit health insurance" in Kentucky is elsewhere known as "credit disability insurance."

Subtitle 16 of the Kentucky Insurance Code (KRS 304.16-010, *et. seq.*). It asserted that the rates at issue were filed with the Department of Insurance as a Subtitle 16 Group Debtor Insurance product and approved by the Department, and that any claims of excessive or unlawful premiums were therefore barred under the filed-rate doctrine.

The trial court entered a written order denying the motion to dismiss, stating that it had reviewed the parties' pleadings and heard argument of counsel. But the written order did not explain the reasoning underlying its ruling.[7]

Southern then filed a petition for a writ in the Court of Appeals seeking to compel the trial court to dismiss the third amended complaint. Southern argued that the trial court should have dismissed the third amended complaint under the filed-rate doctrine and that a writ should issue to compel dismissal of the third amended complaint because "[i]n ignoring this [filed-rate] doctrine, the Pike Circuit Court is acting outside of its jurisdiction and attempting to adjudicate a matter lying squarely within the exclusive province of the [Kentucky Department of Insurance]."

The Court of Appeals denied the writ rejecting application of the filed-rate doctrine. But the Court of Appeals did take note of possible bases for the argument that the filed-rate doctrine should apply. The court noted that Mullins's allegation that a question common to the class she purported to

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[7] While it is possible that the trial court orally explained the reasons for its ruling to the parties at some point, any such oral explanation is not contained in the limited record provided to us.

represent was "[w]hether the premiums charged for the credit disability insurance exceeded the premiums allowable under Kentucky law." The court also noted other allegations in the complaint that Southern "failed or refused to notify [its customers] that the premiums charged and collected violated Kentucky law" and that "the policies and practices of Southern . . . violate Kentucky Revised Statute (KRS) 304.12-010 *et seq.* and 304.12-230 in that 'credit disability' insurance premiums were charged to and collected from [certain class members or customers] although the insurance product did not comply with Kentucky law." The Court of Appeals further noted Mullins's expert disclosure statement indicating that a proposed expert would testify about damages suffered by class members because of premiums charged in excess of the "statutorily mandated premium" as well as what would be an "actuarially appropriate premium" for class members sold "something other than a credit health product or a credit life product."

Despite the fact that some of these allegations and the subject matter of proposed expert testimony seem on their face to attack the legality of Southern's premium rates, the Court of Appeals accepted Mullins's argument that the third amended complaint did not actually attack the reasonableness of the rates, which it viewed as having been set by the legislature. It explained that the filed-rate doctrine was not applicable because Mullins did not attack "the rates established under Kentucky law, but rather the way in which [Southern) applied those statutory rates" and that the trial court therefore had jurisdiction to hear Mullins's claims:

> Petitioner [Southern] contends that the lower court is acting outside of its jurisdiction by entertaining claims that are within the sole province of the Kentucky Department of Insurance under the "filed rate" doctrine. The filed rate doctrine provides that rates approved by a regulatory agency are immune from challenge in court. *Com. ex rel. Chandler v. Anthem Ins. Co.*, 8 S.W.3d 48, 51 (Ky.App. 1999).
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> Here, the questions of law and fact presented by the third amended complaint will be settled through the interpretation of the certificates of insurance issued to Ms. Mullins and by the application of various Kentucky statutes to the facts. Both contract interpretation and statutory construction are questions of law to be decided by the trial court. *See Equitania Ins. Co. v. Slone & Garrett, P.S.C.*, 191 S.W.3d 552, 556 (Ky. 2006); *Osborne v. Commonwealth*, 185 S.W.3d 645, 649 (Ky. 2006).
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> In this case, the real party in interest argues in the third amended complaint that the product sold to Ms. Mullins did not qualify under Kentucky law as "credit health insurance," and thus, the use of the statutory "credit health insurance" rates violated Kentucky law. For example, the real party in interest argues that, pursuant to Kentucky law, the statutory rates for credit health insurance are to be used for loans not exceeding sixty months in duration. KRS 304.19-080(4). Because the disability product sold to Mrs. Mullins was issued for one loan with a period of seventy-three months and another loan with a period of one hundred eight months, [Mullins] claims that the product sold to Mrs. Mullins did not qualify under Kentucky law as "credit health insurance." The real party in interest's [Mullins's] claims that petitioner [Southern] charged premiums that violate Kentucky law is not an attack on the rates established under Kentucky law, but rather the way in which [Southern] applied those statutory rates. Therefore, the filed rate doctrine is not applicable and [Mullins's] claims fall within the trial court's subject matter jurisdiction.

Southern argues that a writ must issue because the trial court lacked subject matter jurisdiction to hear claims alleging excessive or unlawful premiums under the filed-rate doctrine.[8]

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[8] Southern does not argue that the trial court lacked subject matter jurisdiction under the "primary jurisdiction" doctrine. Southern states in its reply brief that "the primary jurisdiction doctrine and questions of deference to agency decisions

Southern contends that the Court of Appeals erred in concluding that "the allegations of the third amended complaint present only matters of contractual and statutory interpretation." It further argues that the Court of Appeals "erroneously held that, because Mr. Mullins claims that the products at issue violate Section 19 of the Insurance Code, KRS 304.19-010, *et seq.*, and he is not directly challenging the premium rates established by that Subtitle, the filed-rate doctrine does not apply in this case." It claims that the insurance product at issue was actually approved by the Kentucky Department of Insurance as a Subtitle 16[9] "debtor group product" rather than as a "Subtitle 19 credit disability product"[10] and that the Court of Appeals relied upon the wrong Subtitle of the Insurance Code and erroneously concluded that the filed-rate doctrine did not apply. Mullins responds that the trial court should sort out the facts and applicable law, including resolving whether Subtitle 16 or Subtitle 19 — or perhaps both — apply.

Upon our review of the limited record before us, we are not so firmly convinced that the trial court lacked jurisdiction to hear the third amended complaint or otherwise acted so erroneously that a writ should issue. We conclude that the Court of Appeals did not abuse its discretion in denying a

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are *irrelevant* to this appeal" and that "only the Circuit Court's failure to apply the filed rate doctrine presents a question of subject matter jurisdiction."

9 *See* KRS 304.16-010 ("This subtitle applies only to group life insurance and may be known and cited as the 'Group Life Insurance Law.'").

10 Subtitle 19 of the Kentucky Insurance Code (KRS 304.19-010 *et. seq.*) is nominated as governing "Credit Life Insurance and Credit Health Insurance."

writ, and we do not elect to exercise our discretion to issue a writ even if circumstances might otherwise permit issuance of a writ.

## II. ANALYSIS.

As this Court has frequently made clear, a writ is an extraordinary remedy which may only be *permitted* in very limited circumstances[11] and the granting of writs is disfavored.[12] Even where the petitioner is able to establish the prerequisites to make a writ available, "whether to grant the writ is in the sound discretion of the Court."[13]

Because writs are disfavored and the granting of writs is discretionary even where prerequisites for the availability of writs are met, we conclude that the Court of Appeals did not abuse its discretion in denying the petition for a writ to compel dismissal of the third amended complaint under the facts and circumstances of this case.

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11 *Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky. 2004) ("A writ of prohibition *may* be granted upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted.").

12 *Powell v. Graham*, 185 S.W.3d 624, 627 (Ky. 2006).

13 *Appalachian Regional Healthcare, Inc. v. Coleman*, 239 S.W.3d 49, 53 (Ky. 2007) ("This is not to say, however, that the appellant is automatically entitled to the requested writ. The appellant must still satisfy the *Hoskins* writ standard for the remedy even to be available. Even then, whether to grant the writ is in the sound discretion of the Court."). *See also id.* at 56. ("when the remedy of a writ is available, whether to grant it remains within the sound discretion of the court hearing the petition, or, as in this case, the court hearing the appeal of the writ action.").

Southern did not clearly attack the trial court's jurisdiction to hear the claims in its motion to dismiss because its motion to dismiss was not expressly premised on a lack of subject matter jurisdiction.[14] More precisely, the basis of its motion to dismiss was failure to state a claim,[15] citing the filed-rate doctrine.[16]

Although Southern did not clearly argue to the trial court that it lacked jurisdiction, we are aware that lack of subject matter jurisdiction may be raised at any time.[17] But from our review of the limited record before us, it does not appear so clear to us that a writ should issue on the basis of the trial court's lacking jurisdiction or acting erroneously in not dismissing the third amended complaint under the filed-rate doctrine. It appears to us more accurate to say that the parties have fundamentally different understandings of the facts and issues presented and that the trial court — not this Court — must necessarily resolve such fundamental factual controversies as (1) which particular insurance products are implicated in Mullins's claims of statutory violations and (2) whether any particular insurance product was sold as "credit health insurance" under Subtitle 19 of the Insurance Code.

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[14] *See* CR 12.02(a) (motion to dismiss for lack of subject matter jurisdiction).

[15] See CR 12.02(f) (motion to dismiss for failure to state a claim).

[16] Southern also stated an alternative basis for relief that the trial court "should" refer questions concerning the legality of premiums to the Department of Insurance under the doctrine of primary jurisdiction. We note that it appears that the doctrine of primary jurisdiction would not necessarily indicate that the trial court lacked subject matter jurisdiction. *See Black's Law Dictionary* (8th ed. 2004) (defining *primary-jurisdiction doctrine* as "[a] judicial doctrine whereby a court tends to favor allowing an agency an initial opportunity to decide an issue in a case in which *the court and the agency have concurrent jurisdiction.*")(emphasis added).

[17] *Kentucky Employers Mut. Ins. v. Coleman*, 236 S.W.3d 9, 15 (Ky. 2007).

According to Mullins, the primary claim asserted in the third amended complaint is that Southern violated Kentucky law by charging statutory rates for "credit health insurance" under KRS 304.19-080(4)[18] when the insurance sold did not qualify as "credit health insurance" under KRS 304.19-010 because it was issued in connection with a loan of more than five years' duration. Although this argument may appear to involve a challenge to a rate, we agree with the Court of Appeals majority that the gist of this claim appears to be violation of state law (KRS 304.19-010) by improperly selling "credit health" insurance policies that do not qualify as "credit health" insurance policies—not necessarily a challenge to the rates established for "credit health insurance" in KRS 304.19-080(4).

Southern contends that the rates at issue here were actually approved by the Kentucky Department of Insurance under Subtitle 16 of the Insurance Code, KRS 304.16-010 *et seq.*, which purports to govern life insurance contracts rather than under Subtitle 19 of the Insurance Code. Mullins contends that the trial court should resolve the question of whether Subtitle 16 or Subtitle 19 or both apply to the instant case.

We are inclined to agree with Mullins, especially on the limited record provided to us in this writ case, because we cannot discern for example, whether Southern was employing the statutory premium rates or actuarially

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[18] KRS 304.19-080 appears somewhat unusual in that the legislature actually determines certain rates to be offered itself instead of, for example, delegating authority to an administrative agency such as the Department of Insurance to approve rates sought by insurance companies. *See* KRS 304.19-080(7) ("The foregoing rates and procedures are deemed to be legislative prerogatives and shall not be subject to administrative or executive change or modification.").

equivalent rates provided in KRS 304.19-080(4) or whether the Department of Insurance approved some other schedule of rates filed by Southern for insurance policies governed by Subtitle 16 of the Insurance Code or some other provision of the Insurance Code.

Southern appended to its petition copies of correspondence in which its Compliance Manager requested approval of a "Debtor Group Gross/Net Program" and "Debtor Group Certificate[s,]" which appear to be stamped as "approved" by the Kentucky Department of Insurance. But even this correspondence does not directly refer to which Subtitles of the Insurance Code are applicable and does not specifically indicate the rates that were approved. Nor can we ascertain whether this correspondence actually refers to the products for which Mullins has asserted claims in the third amended complaint. And perhaps there is some confusion about what insurance products are actually at issue as evidenced by the following footnote in Southern's reply to Mullins's response to the motion to dismiss:

> This case has raised claims from the beginning concerning the scope of [Mullins's] credit disability benefits under Southern's Debtor Group certificates purchased by Mrs. Mullins. While [Mullins] seems to imply in his opposition that he is making credit life and other expanded product claims, Southern has inadequate notice from the pleadings of such an expansion of Plaintiff's claims to involve other Southern products.

In short, the parties seem to have fundamentally different understandings about what is at issue before the trial court, particularly any new claims raised in the third amended complaint. We believe that such

issues must be resolved by the trial court rather than prematurely addressed in a writ action.

If, in the course of further litigation, Mullins directly attacks the legality of a rate charged by Southern and Southern offers proof that such rate was approved by the Department of Insurance, perhaps Southern could obtain relief through means of a properly supported motion for partial summary judgment based upon the filed-rate doctrine. But on the limited record before us now, we will not issue a writ to require the trial court to dismiss the third amended complaint given the state of confusion concerning what types of insurance are at issue, whether the rates at issue were approved by the Department of Insurance, what allegations are made, and what relief is sought by Mullins.

## III. CONCLUSION.

For the foregoing reasons, we affirm the opinion of the Court of Appeals denying the petition for a writ.

All sitting. All concur.

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