

# Young Moore

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March 8, 2010

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Re: State of North Carolina, ex rel. Commissioner of Insurance and North Carolina Rate Bureau v. Dare County, et al.; No. COA 09-1171 (NC Court of Appeals)  
and  
Dare County, et al. v. NC Department of Insurance, et al.  
No. COA 09-1172 (NC Court of Appeals)

Dear Counsel:

Enclosed for service please find a copy of *Appellee the North Carolina Rate Bureau's Motion to Strike Appellants' Rule 28(h)(2) Reply Brief* in the above-referenced matters. We will be filing this pleading with the Court of Appeals tomorrow. If you have any questions or concerns, please do not hesitate to call.

Sincerely,

YOUNG MOORE AND HENDERSON, P.A.

By:   
Shawn Carpenter,  
Assistant to Glenn C. Raynor

/slc  
Enclosure  
875490/070044-009

NO. COA 09-1171

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA ex  
rel. COMMISSIONER OF  
INSURANCE and NORTH  
CAROLINA RATE BUREAU

Appellees,

v.

DARE COUNTY, WASHINGTON  
COUNTY, CURRITUCK COUNTY,  
HYDE COUNTY, CARTERET  
COUNTY, NEW HANOVER  
COUNTY, BRUNSWICK COUNTY,  
CHOWAN COUNTY, PERQUIMANS  
COUNTY, TYRRELL COUNTY,  
PAMLICO COUNTY, PASQUOTANK  
COUNTY, TOWN OF NAGS HEAD,  
TOWN OF DUCK, TOWN OF  
SOUTHERN SHORES, TOWN OF  
INDIAN BEACH, TOWN OF PINE  
KNOLL SHORES, TOWN OF  
EMERALD ISLE, TOWN OF KILL  
DEVIL HILLS, TOWN OF KURE  
BEACH, TOWN OF CEDAR POINT,  
TOWN OF HERTFORD, STARCO  
REALTY & CONSTRUCTION, INC.  
and JOSEPH M. GERAGHTY

Appellants.

From Wake County  
09 CVS 7841

North Carolina  
Commissioner of Insurance  
Docket No. 1434  
Docket No. 1435

NO. COA 09-1172

NORTH CAROLINA COURT OF APPEALS

\*\*\*\*\*

DARE COUNTY, TOWN OF NAGS  
HEAD, TOWN OF SOUTHERN  
SHORES, STARCO REALTY &  
CONSTRUCTION, INC., JOSEPH M.  
GERAGHTY, WASHINGTON  
COUNTY, CURRITUCK COUNTY,  
HYDE COUNTY, THE TOWN OF  
DUCK, THE TOWN OF SOUTHERN  
SHORES, CARTERET COUNTY,  
THE TOWN OF PINE KNOLL  
SHORES, THE TOWN OF INDIAN  
BEACH, and THE TOWN OF KILL  
DEVIL HILLS

Petitioner-Appellants,

v.

THE NORTH CAROLINA  
DEPARTMENT OF INSURANCE,  
COMMISSIONER OF INSURANCE  
WAYNE GOODWIN and NORTH  
CAROLINA RATE BUREAU,

Respondent-Appellees.

From Wake County  
09 CVS 1073

North Carolina  
Commissioner of Insurance  
**Docket No. 1434**  
**Docket No. 1435**

\*\*\*\*\*

APPELLEE THE NORTH CAROLINA RATE BUREAU'S MOTION TO  
STRIKE APPELLANTS' RULE 28(h)(2) REPLY BRIEF

\*\*\*\*\*

NOW COMES respondent-appellee, the North Carolina Rate Bureau (“Rate Bureau”), by and through its undersigned counsel and pursuant to Rules 28 and 37 of the North Carolina Rules of Appellate Procedure, and does hereby move that this Court enter an order striking the Reply Brief filed by appellants in this Court on March 1, 2010. In support of this Motion, appellee Rate Bureau shows unto the Court as follows:

1. Appellate Rule 28(h) prohibits an appellant from filing a reply brief in response to an appellee’s merits brief except under limited circumstances expressly defined by Rule 28(h).

2. Appellants’ reply brief states that it was filed pursuant to Rule 28(h)(2). That rule allows an appellee to file a reply brief (without leave of court) only for the purpose of responding to any new or additional questions raised for the first time by an appellee’s merits brief. None of the arguments presented in appellants’ Reply Brief address new questions first raised in this action by either of appellees’ merits briefs.

3. Appellants’ reply brief addresses the following four issues, in the order presented within that brief:

- I. The application of the filed rate doctrine to this appeal;
- II. The application of G.S. § 58-2-53 to this appeal;

- III. The significance of the General Assembly's enactment of H.B. 1305 on August 6, 2009 on the issues raised by this appeal; and
- IV. The alleged right of appellants to seek retrospective modification of insurance rates approved by the Commissioner of Insurance ("Commissioner").

4. This appeal arises out of an order of the Wake County Superior Court granting motions to dismiss filed by the Rate Bureau, the Department of Insurance ("Department") and the Commissioner. The filed rate doctrine and its underlying principles, G.S. § 58-2-53, and the impropriety of making retrospective changes to the Commissioner's approved rates (the issues addressed in arguments I, II and IV of the appellants' reply brief, respectively) are each issues that were expressly raised within appellees' motions to dismiss filed with the trial court, which are the subject of this appeal (Record pp. 98-106, and attached hereto as Exhibit A with emphasis added).

5. Argument III of appellants' reply brief relating to H.B. 1305 was not expressly raised within the appellees' motions to dismiss filed in the trial court, because the bill was not enacted until August 6, 2009, or approximately four months after the motions to dismiss were filed and heard in the trial court. However, the arguments presented by the Rate Bureau on pages 39-40 of its merits brief relating to H.B. 1305 address the question of whether appellants have now or ever have had any right to seek judicial review of a rate order by the Commissioner following a rate proceeding to which the appellants were not parties. That issue

was briefed extensively by appellants in their merits brief, and appellee Rate Bureau's argument that H.B. 1305 supports the Rate Bureau's arguments on that issue does not in itself constitute the presentation of a new issue which would allow appellants to file a reply brief.

6. Each of the issues addressed within appellants' reply brief has existed and has been known to the parties in this case since the respondent-appellees filed their motions to dismiss in the superior court in April, 2009.

7. The fact that appellants chose not to address each of the existing issues raised by this appeal through their merits brief does not entitle appellants to now contend that the Rate Bureau's arguments relating to those existing issues present "new issues" allowing appellants the right to file a reply brief.

8. Through an order dated November 17, 2009 consolidating the appeals in Docket Nos. COA 09-1171 and COA 09-1172 for briefing, this Court enlarged the page and word count limit for the parties' briefs (forty (40) pages or ten thousand (10,000) words, depending upon the format). The issues presented on this appeal are complex, involving many technical issues relating to the ratemaking framework established by the legislature and administered by the Commissioner. Each of the parties thus had to make tactical decisions regarding the issues to be addressed within their respective briefs, in order to comply with the page limitations established by this Court.

9. Appellants tactically chose not to address issues relating to the filed rate doctrine, the application of G.S. § 58-2-53 and the alleged availability of retrospective relief from rates approved by the Commissioner within their merits brief, notwithstanding the fact that those issues were expressly raised through the motions to dismiss in the trial court that are central to this appeal.

10. In now attempting to address those issues through a reply brief, appellants are effectively seeking to grant themselves a further enlargement of the page and word count limit imposed by this Court's November 17, 2009 order, and to thus gain a tactical advantage over the appellees on this appeal.

11. For these reasons the appellee Rate Bureau respectfully submits that appellants' reply brief is not properly before this Court pursuant to Rule 28(h)(2) and should not be considered by this Court.

WHEREFORE, appellee Rate Bureau hereby respectfully prays unto the Court that it enter an order striking the reply brief of appellants filed in this Court on March 1, 2010 and granting this appellee such other and further relief as the Court deems just and proper.

This the 8<sup>th</sup> day of March, 2010.

YOUNG MOORE AND HENDERSON, P.A.

BY:

  
\_\_\_\_\_  
GLENN C. RAYNOR

N.C. Bar No. 18384

*Attorneys for Appellee*

*North Carolina Rate Bureau*

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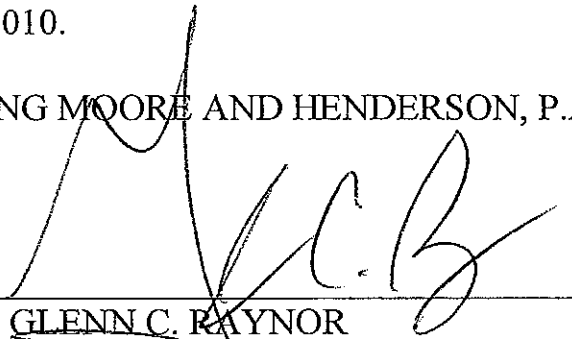
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served the foregoing Motion to Strike Appellants' Rule 28(h)(2) Reply Brief upon the attorneys and parties shown below by depositing a copy of the same in the United States mail, postage prepaid, addressed to said attorneys.

This the 5th day of March, 2010.

YOUNG MOORE AND HENDERSON, P.A.

BY:



GLENN C. RAYNOR

N.C. Bar No. 18384

*Attorneys for Appellee*

*North Carolina Rate Bureau*

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*NCDOI and Commissioner*

NORTH CAROLINA  
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO. 09 CVS 7841

DARE COUNTY, WASHINGTON )  
COUNTY, CURRIFUCK COUNTY; )  
HYDE COUNTY, CARTERET )  
COUNTY, NEW HANOVER COUNTY, )  
BRUNSWICK COUNTY, CHOWAN )  
COUNTY, PERQUIMANS COUNTY, )  
ET AL., )

Petitioners, )

vs. )

NORTH CAROLINA DEPARTMENT )  
OF INSURANCE, THE )  
COMMISSIONER OF INSURANCE )  
OF THE STATE OF NORTH )  
CAROLINA, and NORTH CAROLINA )  
RATE BUREAU, )

Respondents. )

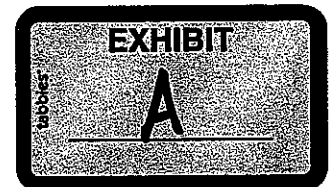
MOTION TO DISMISS  
BY THE NORTH CAROLINA  
DEPARTMENT OF INSURANCE  
AND THE COMMISSIONER  
OF INSURANCE

[AOC Cover Sheet Code: MDLA]

COME NOW the North Carolina Department of Insurance (NCDOI) and the Commissioner of Insurance (the Commissioner), and hereby move the Court to dismiss this action against them, pursuant to the North Carolina Rules of Civil Procedure set out herein.

In support of said motion, NCDOI and the Commissioner show unto the Court the following:

1. By this purported Petition for Judicial Review, Petitioners seek to overturn certain homeowners insurance rates set by the Commissioner of Insurance.
2. The purported Petition of the Petitioners demonstrates that Petitioners were not parties to the rate-making filing and decision which they seek to overturn.



**FIRST MOTION TO DISMISS**

[Rule 12(b)(1)]

This purported Petition should be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure based upon the filed rate doctrine that prohibits collateral attacks on rates after they have been set by a regulator. See, N.C. Steel, Inc. v. National Council on Compensation Ins., 347 N.C. 627, 496 S.E.2d 369 (1998). See also, Lupton v. Blue Cross & Blue Shield of N.C., 139 N.C. App. 421, 533 S.E.2d 270 (2000).

**SECOND MOTION TO DISMISS**

[Rule 12(b)(1)]

This purported Petition should be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure based on N. C. Gen. Stat. §58-2-53 that eliminates Petitioners from the categories of persons who may seek judicial review of rate-making decisions of the Commissioner of Insurance.

**THIRD MOTION TO DISMISS**

[Rule 12(b)(1)]

This purported Petition should be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure to the extent a claimed basis for jurisdiction in this Court is either Article 40 or Article 41 of Chapter 58 of the North Carolina General Statutes. Said Articles 40 and 41 are inapplicable to homeowners insurance rate making. See N. C. Gen. Stat. §58-36-1(3), §58-40-15(11) and §58-41-10.

**FOURTH MOTION TO DISMISS**

[Rule 12(b)(1)]

This purported Petition should be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure since Petitioners have failed to show that they have legal standing to institute this action to review the rate making decision of the Commissioner of Insurance.

**FIFTH MOTION TO DISMISS**

[Rule 12(b)(1)]

Petitioners' purported claims for declaratory relief or injunctive relief are a disguised request for a writ of mandamus to compel a public official to comply with Petitioners' desires. Petitioners' attempt to obtain a writ of mandamus through its purported claims for declaratory relief and injunctive relief should be dismissed pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure for lack of subject matter jurisdiction because a writ of mandamus or mandatory injunction may not be issued to compel or review the acts of a public official regarding discretionary matters.

**SIXTH MOTION TO DISMISS**

[Rule 12(b)(6)]

This purported Petition should be dismissed for failure of the purported Petition to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure based upon the filed rate doctrine that prohibits collateral attacks on rates after they have been set by a regulator. See, N.C. Steel, Inc. v. National Council on Compensation Ins., 347 N.C. 627, 496 S.E.2d 369 (1998). See also, Lupton v. Blue Cross & Blue Shield of N.C., 139 N.C. App. 421, 533 S.E.2d 270 (2000).

**SEVENTH MOTION TO DISMISS**

[Rule 12(b)(6)]

This purported Petition should be dismissed for failure of the purported Petition to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure based on N. C. Gen. Stat. §58-2-53 that eliminates Petitioners from the categories of persons who may seek judicial review of rate-making decisions of the Commissioner of Insurance.

**EIGHTH MOTION TO DISMISS**

[Rule 12(b)(6)]

This purported Petition should be dismissed for failure of the purported Petition to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure to the extent the Petition relies upon either Article 40 or Article 41 of Chapter 58 of the North Carolina General Statutes. Said Articles 40 and 41 are inapplicable to homeowners insurance rate making. See N. C. Gen. Stat. §58-36-1(3), §58-40-15(11) and §58-41-10.

**NINTH MOTION TO DISMISS**


[Rule 12(b)(6)]

Petitioners' purported claims for declaratory relief or injunctive relief are a disguised request for a writ of mandamus to compel a public official to comply with Petitioners' desires. Petitioners' attempt to obtain a writ of mandamus through its purported claims for declaratory relief and injunctive relief should be dismissed pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief may be granted because a writ of mandamus or mandatory injunction may not be issued to compel or review the acts of a public official regarding discretionary matters.

WHEREFORE, the North Carolina Department of Insurance and the Commissioner of Insurance of the State of North Carolina, respectfully pray the Court to dismiss this action against them pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure.

This 22nd day of April, 2009.

**ROY COOPER  
ATTORNEY GENERAL**



**Daniel S. Johnson  
Special Deputy Attorney General  
Attorney for NCDOI and  
the Commissioner of Insurance**



**David W. Boone  
Assistant Attorney General  
Attorney for NCDOI and  
the Commissioner of Insurance**

**N. C. Department of Justice  
P.O. Box 629  
Raleigh, N.C. 27602-0629  
(919) 716-6610**

**CERTIFICATE OF SERVICE**

I, the undersigned attorney, do hereby certify that a copy of the foregoing pleading or paper was served on:

M. Keith Kapp  
Attorney for Petitioners  
Williams, Mullen, Clark & Dobbins, P.C.  
Post Office Box 19764  
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[Facsimile number 981-4300]

R. Michael Strickland  
Attorney for N. C. Rate Bureau  
Young Moore and Henderson, PA  
PO Box 31627  
Raleigh, NC 27622-1627  
[Facsimile number 782-6753]

in the following manner:

(XX) by facsimile transmission to the facsimile number set out above, as provided by Rule 5(b) of the North Carolina Rules of Civil Procedure, or

( ) by depositing a copy thereof in the United States mail, first class postage prepaid, as provided by Rule 5 of the North Carolina Rules of Civil Procedure.

This 22nd day of April, 2009.

**ROY COOPER  
ATTORNEY GENERAL**

By: *Daniel S. Johnson*

**Daniel S. Johnson  
Special Deputy Attorney General  
Attorney for NCDOI and Commissioner  
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NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

WAKE COUNTY

09 CVS 7841

DARE COUNTY, WASHINGTON  
COUNTY, CURRITUCK COUNTY, HYDE  
COUNTY, CARTERET COUNTY, NEW  
HANOVER COUNTY, BRUNSWICK  
COUNTY, CHOWAN COUNTY,  
PERQUIMANS COUNTY, TYRREL  
COUNTY, PAMLICO COUNTY,  
PASQUOTANK COUNTY, TOWN OF  
NAGS HEAD, TOWN OF DUCK, TOWN  
OF SOUTHERN SHORES, TOWN OF  
INDIAN BEACH, TOWN OF PINE KNOLL  
SHORES, TOWN OF EMERALD ISLE,  
TOWN OF KILL DEVIL HILLS, TOWN OF  
KILL DEVIL HILLS, TOWN OF KURE  
BEACH, TOWN OF CEDAR POINT, TOWN  
OF HERTFORD, STARCO REALTY &  
CONSTRUCTION, INC., JOSEPH M.  
GERAGHTY,

Petitioners,

v.

THE NORTH CAROLINA DEPARTMENT  
OF INSURANCE, COMMISSIONER OF  
INSURANCE WAYNE GOODWIN and  
NORTH CAROLINA RATE BUREAU,

Respondents.

MOTION TO DISMISS  
OF RESPONDENT  
NORTH CAROLINA RATE BUREAU

Respondent, The North Carolina Rate Bureau ("Rate Bureau"), moves the Court pursuant to N.C.G.S. §1A-1, Rules 12(b)(1) and (6), for a dismissal of the Petitioners' verified petition for judicial review, motion for stay and request for declaratory judgment and writ in its entirety. The grounds for this Motion are that this Court is without subject matter jurisdiction to hear this matter as it constitutes a request to review rulings by the Commissioner of Insurance on rate

filings and that N.C.G.S. §58-2-75(a) and §58-2-80 establish that the Superior Court does not have jurisdiction to review insurance rate decisions. Jurisdiction for review of a rate decision lies exclusively with the North Carolina Court of Appeals by appeal of a party to the rate proceeding. The Petitioners were not parties to the rate proceeding and have no right to seek judicial review of the decision of the Commissioner of Insurance in any court. Petitioners are further barred from challenging the decisions of the Commissioner by the filed rate doctrine as applied at common law and by N.C.G.S. § 58-2-53, which limits the right to seek judicial review of the Commissioner's approval of a rate or territory classification filing under Chapter 150B, solely to the parties making such a filing, and any party who intervened in the filing. To the extent that Petitioners seek to have this Court compel the Commissioner to reconsider the rate and territory classification filings retrospectively, said relief is further barred by the provisions of N.C.G.S. § 58-36-20. Finally, the Petitioners otherwise lack sufficient standing to seek review of the orders approving the rate and territory filings by the Commissioner of Insurance that are at issue in this proceeding.

This the 22<sup>nd</sup> day of April, 2009.

YOUNG MOORE AND HENDERSON, P.A.

BY: 

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WILLIAM M. TROTT  
GLENN C. RAYNOR

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served the foregoing document upon the attorney(s) shown below by e-mail and by depositing a copy of same in the United States mail, postage prepaid, addressed to said attorney(s).

This the 22<sup>nd</sup> day of April, 2009.

YOUNG MOORE AND HENDERSON, P.A.

BY:

  
 GLENN C. RAYNOR

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