gave short shrift to the title insurers' argument that they should be allowed to fix jointly the rate for escrow services because in the course of performing these services the companies do some evaluation of title defects, and thus the escrow process may have the effect of reducing the risk to them as title insurers. In answer to this argument, the Ninth Circuit, again relying on *Royal Drug,* drew a distinction between risk reduction and risk spreading, and concluded that even if it can be shown that the settlement process, which includes an updated search and examination of title, helps to identify title defects and thereby reduces the risks of a title insurer, it is nevertheless not within the McCarran Act exemption because risk reduction is not synonymous with spreading risks more widely, and spreading risk, not risk reduction, is at the core of the cooperative risk allocation rationale of the McCarran Act.[284] In other words, *TIRBA* teaches that the McCarran Act should not be read broadly as exempting all rate making by insurers because such an approach not only begs the question as to whether the collective rate making relates to the "business of insurance", but it also ignores the clear admonition in *Royal Drug* that the risk spreading purpose of the exemption must be kept in the forefront in defining the "business of insurance". Certainly once this restricted purpose **[83]** of the McCarran exemption is accepted, it necessarily follows (consistent with the basic tenet of narrowly applying antitrust exemptions) that the act cannot be interpreted so as to cover insurance company joint rate making that is unrelated to a pooling of risk experience.

Risk spreading and its central importance in defining the "business of insurance" was next taken up by the Supreme Court in *Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119 (1982), which involved still another antitrust challenge to an insurer's attempt to reduce claims by a restrictive arrangement. There the insurer refused to pay substantial claims for chiropractic services unless the case had been reviewed and approved by a peer review committee. Pireno, a chiropractor, challenged the peer review requirement as a conspiracy and attempt to boycott. The Court confirmed the three-prong test suggested by *Royal Drug* in holding that the arrangement between the insurance company and the chiropractors was not part of the

[284] As in *TIRBA,* respondents have argued here that during closing insurer-related closers verify that on-record liens have been removed and exercise special diligence in spotting off-record risks such as forgery. The *TIRBA* court did not consider these functions as constituting risk spreading or the business of insurance; moreover, there is nothing in this record to indicate that the zeal with which these non-insurance ministerial functions is carried out somehow depends on whether the closer is employed by a title insurer, bank, lawyer, independent closing company, or real estate broker. See Findings 180-184.

business of insurance since this practice, like the San Antonio prescription plan in *Royal Drug,* was aimed at reducing the cost of satisfying claims rather than risk spreading. *Pireno* added a gloss to the *Royal Drug* emphasis on risk spreading by saying that the practice must be "logically and temporally" connected to the spreading of risk, 458 U.S. at 130, but the result was the same as in *Royal Drug*—the review by the chiropractor peer committee was stricken because it was simply an aid in the claims payment process, and did not actually involve the spreading of risk.

Given the emphasis in *Royal Drug* and *Pireno* on risk spreading, respondents' insistence that *Equifax Inc.*, 96 FTC 844 (1980) is dispositive is off the mark. The Commission held in *Equifax* that the McCarran Act exempts the deceptive gathering of medical histories because presumably the material was to be used in the process of spreading risk. The Commission's decision, however, has no bearing here since the record shows, as I will indicate later, that neither search and examination in general, nor the joint setting and examination fees in particular, have anything to do with spreading risk **[84]** amongst an actuarially determined class of insureds. Equally misplaced is respondents' heavy reliance on *Commander Leasing Co. v Transamerica Title Ins. Co.*, 477 F.2d 77 (10th Cir. 1973); *McIlhenny v. American Title Ins. Co.*, 418 F.Supp. 364 (E.D. Pa. 1976), and *Schwartz v. Commonwealth Land Title Insurance Co.*, 374 F.Supp. 564 (E.D. Pa. 1974) for the proposition that search and examination cannot be separated from the risk portion of title insurance. These cases, all decided before *Royal Drug,* have been distinguished as not having applied properly the crucial risk spreading test to discrete services offered by title insurers. *TIRBA,* 517 F. Supp. 1053, 1057, n. 2, *aff'd,* 700 F.2d 1247, 1251, n. 1.[285].

In focusing on risk spreading, I also necessarily reject respondents' argument that collusion by title insurers is exempt if not undertaken for the purpose of risk spreading, but rather to preserve their status as reliable insurers. The Court in *Royal Drug* specifically considered and dismissed the "reliable insurer" standard as too broad since every

[285] Post-*Royal* and *Pireno* cases which have allowed the exemption have turned on a factual determination that the questioned activity relates to risk spreading. *See Feinstein v. Nettleship Co. of Los Angeles,* 714 F.2d 928, 932 (9th Cir.), *cert. denied,* 104 S. Ct. 2346 (1984) (exemption allowed because "[t]he effect is to spread risk across a wide area, and this is precisely what the Supreme Court described when it formulated the risk spreading criterion"); *Klamath-Lake Pharm. v. Klamath Med. Serv. Bureau,* 701 F.2d 1276, 1286 (9th Cir.), *cert. denied* 464 U.S. 822 (1983) (exemption allowed because "[i]t is the actuarial uncertainty inherent in projecting risks and the insurance industry's corresponding need for cooperation that makes its exemption from antitrust laws appropriate").

business decision made by a insurance company arguably has some impact on its status as a reliable insurer. 440 U.S. at 216-17. As for the legislative history, all that it will allow on this point is that a secondary purpose behind the McCarran Act was to permit the collective sharing of risk experience in order to preserve the solvency of insurers. But this limited objective cannot be transformed into a blanket approval of all rate fixing by insurers irrespective of the connection to risk allocation.

Finally, respondents argue that even apart from any consideration of risk spreading, there should be an exception here because the states treat search and **[85]** examination and settlement as part of the "business of insurance". But what constitutes the "business of insurance" under the McCarran Act is a federal not a state question, and all cases from *Variable Annuity* to *Royal Drug* and *TIRBA* have not resolved that question on the basis of the state's definition of insurance. *See, e.g., TIRBA,* 700 F.2d 1249-50.

Turning then to the crucial risk spreading issue raised by *Royal Drug,* and putting aside for the moment the question of escrow or settlement services which was largely disposed of in *TIRBA,* I look to what the record tells us about search and examination.

To begin with, the record shows that historically search and examination were offered, and are still offered, apart from any concept of insurance or insurance risk spreading, and while the services have been engrafted onto an insurance framework as part of an overall marketing stratagem designed to win the business of assuring good title away from abstractors and conveyancers, this does not logically transform the basic nature of the services, which are still largely ministerial functions irrespective of the particular evidence of good title that is the ultimate objective of the search and examination. But having largely succeeded in winning this competitive struggle for the search and examination business, respondents would then crown their triumph with an antitrust exemption although in the past their competitors were turned down in a comparable attempt at consolidation of market power. Thus in Virginia, where examination for title insurance may only legally be performed by lawyers, the bar sought to protect its monopoly against price competition by use of a minimum fee schedule which was defended on the grounds that the services were being performed by a learned profession. After paying due deference to the practice of law as a scholarly pursuit, the lawyers who sit on the Supreme Court had no difficulty in recognizing search and examination as integral parts of the real estate business and held, "[w]hatever else it may be, the examination of a land title is a service." *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 787 (1975). This easily identifiable service does not undergo a sea change, as respondents argue, when independent attorneys, for example, who were the subject of **[86]** *Goldfarb,* don attorney-agent or approved attorney hats, and along with their other wares—abstracts, certifications, and opinions—now offer search and examination in an insurance package.

Second, the record shows that search and examination are regarded by respondents themselves as discrete services which are usually billed at a price that is entirely removed from any consideration of whatever risk element may be involved in title insurance. That is, even assuming that there is some small risk involved in title insurance (a point which will be taken up later) the risk has been isolated and assigned a dollar value for rate making purposes which is entirely apart from the non-risk part of the premium represented by the cost of conducting the search and examination. While this separation of search and examination from the risk element of a title insurance premium is most clearly shown by the existence of separate "risk" rates, it is also seen in the promulgation of inclusive rates that simply combine separate risk and search elements. The existence of this risk component—which is not challenged by complaint counsel (except in Ohio where it is alleged that the risk rate is inflated to include search and examination as well as settlement services)—is convincing evidence of a clear distinction between the search and examination function and whatever risk is assumed in the title insurance policy.

As for the joint setting of search and examination rates—the precise subject of this proceeding—this has no logical connection whatever to risk spreading since there is no evidence that joint rate making is undertaken by title insurers for the purpose of sharing their collective risk experience. To the contrary, the record evidence is overwhelming that both joint and individual rates for title insurance (*i.e.,* apart from the "risk" rate) are set by looking to the cost of performing the search and examination service rather than the claims experience of insurers. This cost is not only easily ascertainable by each insurer, but is also within the control of the individual insurer, and therefore the basic rationale of the McCarran Act—that is, the presumed need for **[87]** insurers to combine for the purpose of sharing their experience relating to an uncontrollable element (future claims) which is then spread among a large universe of insureds—is not present.

As it happens, the connection between any aspect of title insurance and the notion of risk spreading is tenuous in the extreme. Few risks are assumed by title insurers since the very purpose of the entire title insurance process—from search and examination to binder to issuance of a final policy—is to eliminate risks by making certain that any serious defects in title are identified for the very purpose of seeing to it that they are not insured. To the limited extent that some risks are assumed by the title insurer, this, too, has nothing to do with the concept of risk spreading by a group of insurers. Disclosed risks are covered on the basis of individual company's legal analysis of the seriousness of the recorded title defect as balanced against competitive pressure to insure over the risk or lose the business to another title insurer. Again, this is contrary to the very purpose of the McCarran Act since risks are not underwritten on the basis of a collective pooling of risk experience.

As for hidden risks, this modest extension of title insurance beyond the scope of the abstract and the attorney's opinion has nothing to do with either search and examination or risk spreading since by definition the service at issue here—search and examination of public records—cannot allocate amongst a universe of insureds what it could not uncover in the first place. In any event, there is not a whit of evidence that these hidden risks are somehow spread among policyholders during the rate making process on the basis of the shared risk experience of the insurer members of rating bureaus.

In sum, since the central purpose of the McCarran Act is to allow for cooperation in the setting of rates so that insurers may take advantage of their collective experience in spreading risk, there clearly should be no exemption here because search and examination rates are not only unresponsive to collective risk experience, but do not **[88]** even reflect the risk experience of the individual insurer. Moreover, even apart from rates, the services themselves are not logically connected to risk assumption since the standard practice in the title insurance business is to exclude all elements of uncovered risk from the policy.[286]

[286] There is no basis on this record for concluding that respondents' joint rate fixing practices should be condemned under the remaining two *Royal Drug—Pireno* criteria, i.e., the practice must not relate to entities outside of the insurance industry, and must be part of the insurer-insured relationship. There is no allegation in this complaint that respondents have extended their price-fixing activities to approved attorneys, independent attorneys, abstractors, surveyors, or anyone else besides their own agents and employees. And while search and examination in general and joint rate making in particular have nothing to do with risk spreading, there

The State Action Defense

While I have concluded that the search and examination and closing services (see discussion herein under *Settlement Services*) are not the business of insurance under the McCarran Act, respondents' joint rate making activities through rating bureaus would still be exempt from the federal antitrust laws if they met the requirements of the *Parker* doctrine as refined by *Midcal* and *Southern Motor Carriers.*

In *Parker v. Brown,* 317 U.S. 341 (1943), the Supreme Court held that Congress did not intend to apply the antitrust laws to state action regulating economic activity within its own borders, and while some state action may be invalid, say, blanket authorization by a state that businesses may violate the federal antitrust laws without regard to state supervision, the practices involved in *Parker* (a state-sponsored but grower-administered program for limiting raisin production) were held to be a proper exercise of state discretion. In its opinion, the Court indicated that the exemption was derived from the policy favoring a spirit of accommodation within our federal system in order to avoid unnecessary conflict between the mandates of national law governing interstate commerce and state regulation of intrastate activity that may have interstate [89] implications. According to the Court, the exemption was also derived from the Tenth Amendment reservation of state sovereignty, as well as the belief that the states performed the useful function of serving as economic laboratories where diverse forms of regulation may be tested without interference from the federal government.

The *Parker* doctrine lay largely dormant for some 40 years until there appeared a spate of cases, both private and public, challenging under the federal antitrust laws alleged anticompetitive actions by states and municipalities as well as the practices of private persons acting under the color of state law. In response to this wave of state action cases, there eventually evolved a restatement of *Parker* which provided that before any restrictive practice departing from the competitive norm can qualify for the state action exemption, first, it must be demonstrated that the state's intention to grant federal antitrust immunity is clearly articulated and affirmatively expressed as a matter of policy, and second, that the state actively supervises the process chosen to replace the competitive market. *California Liquor*

can be no question that these services (and the charges for these services) are part of the relationship between insurer and insured in the sense that the search and examination determines what is excluded from the policy, and the joint rate making determines how much the insured pays for the coverage received.

Dealers v. Midcal Aluminum, 445 U.S. 97 (1980). As it happens, the second prong of *Midcal* could not be met in *Midcal* itself since there was no state involvement beyond a statute requiring liquor wholesalers to charge prices posted by producers. Despite the outcome in *Midcal*, prior to 1985, enforcement actions involving the claim of a state action exemption largely concentrated on the first *Midcal* test since it was assumed that the more complex issue of state supervision presumably did not have to be faced unless the state compelled the anticompetitive conduct as proof of a clearly articulated and affirmatively expressed state policy to suspend the federal antitrust law. *See, e.g., Mass. Furniture and Piano Movers Ass'n.* ("*Mass. Movers*"), 102 FTC 1176, *rev'd and remanded*, 773 F.2d 391 (1st Cir. 1985). The *Parker* doctrine underwent a further revision, however, on the basis of the Supreme Court's opinion in *Southern Motor Carriers Rate Conference v. United States*, 105 S.Ct. 1721 (1985) in which the Court rejected the notion that the first prong of the *Midcal* test requires compulsion, and held, instead (in a case involving joint rates filed by motor carrier rating bureaus) **[90]** that a state policy to suspend competition may be made manifest by the mere authorization of joint activity to the point that even a statutory reference to just and reasonable rates may be taken as an adequate indication that the state intended that rates were not to be set by the competitive market.

Because of the dramatic impact of *Southern Motor Carriers*, even before the first witness was heard in this case, complaint counsel conceded that it would not contest certain key aspects of respondents' state action defense. Thus complaint counsel acknowledged in its pretrial brief that respondents' alleged price fixing activities in Arizona, Connecticut, Idaho, Montana, Ohio, and Wisconsin "are undertaken pursuant to a clearly articulated and affirmatively expressed state policy and satisfy the first prong of the *Midcal* test." Complaint Counsel's Trial Brief (Legal Analysis) at p. 24 (Sept. 16, 1985). As for these six states, the only aspect of the state action defense which complaint counsel challenge is whether there is active state supervision. Respecting New Jersey and Pennsylvania, complaint counsel stipulated that there was active state supervision. Stipulation dated 11-25-85. Complaint counsel also conceded that it did not intend to challenge under any theory "price fixing in New Jersey or Pennsylvania on charges for search and examination and settlement services that do not involve attorney-agents." Complaint Counsel's Trial Brief (Legal Analysis) at p. 24, n.58 (Sept. 16, 1985). Finally, with respect to the five other states cited in the complaint (Louisiana, New Mexico, New York, Oregon, and Wyoming), these were dropped entirely from complaint counsel's case because "the quantum of proof necessary to resolve the question whether a state action defense is available appears to be greater than we originally anticipated" (Complaint Counsel's Trial Brief at p. 2 Sept. 16, 1985), an obvious concession to *Southern Motor Carriers*.

As a result of complaint counsel's stipulations and concessions, the *Midcal* issues remaining under the state action point are first, whether there had been state authorization for joint fixing of charges paid to attorney-agents in New Jersey and **[91]** Pennsylvania, and second, whether in Connecticut, Wisconsin, Arizona, Idaho, and Montana the rating bureau activities came under active state supervision. Ohio presents a special problem of determining whether search and examination rates were fixed at all.

The "authorization" issue in New Jersey and Pennsylvania is a question of statutory interpretation. Both states have authorized the joint filing of rates by the respective bureaus, and the only remaining issue is whether these states intend to include in the jointly fixed rates charges for search and examination and settlement when these services are performed by attorney-agents. While the statutes are ambiguous, New Jersey and Pennsylvania insurance regulators have clearly interpreted them to mean that the fees charged by all agents, including attorney-agents, should be regulated by the state insurance departments and may properly be fixed by the joint activity of the rating bureaus. The contrary view urged by complaint counsel may have been more creditable had it been shored up with testimony, documentary evidence, or citation to legislative history indicative of special circumstances (say, a successful campaign by the legal lobby in support of the parochial view that everything an attorney does should only be regulated by the bar or the judiciary), which might have justified an interpretation of the statute representing an extreme departure from the basic policy of these two states, *i.e.*, to regulate (and concededly to supervise actively) all aspects of the title insurance business.

The other prong of the *Midcal* test—"active supervision"—is an emerging concept that the Supreme Court has yet to flesh out. In *Midcal* itself, the only Court case to address the point directly, California required liquor wholesalers to post retail prices, which in turn had to be charged retailers. The Court observed that, "The State neither establishes prices nor reviews the reasonableness of the price schedule; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program." 445 U.S. at 105-06. All that the state did in *Midcal* was simply to issue a directive that wholesalers must either file [92] fair trade contracts or if they did not have fair trade contracts, they must post a resale price schedule which the retailers had to charge. From these facts the Court concluded that California exercised only a "gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Id.* at 106.

Southern Motor Carriers did not add significantly to *Midcal.* It only contained a passing reference to the active supervision concept since the case was disposed of on the "authorization" basis. At several points in the decision, however, the Court touched on the issue. The Court noted, "Here the Court of Appeals found, and the Government concedes, that the State Public Service Commissioners actively supervise the collective ratemaking activities of the rate bureaus", 105 S. Ct. at 1730, and in n. 23, *id.* at 1729, the Court said—

> Contrary to the Government's arguments, our holding here does not suggest that a State may "give immunity to those who violate the Sherman Act by authorizing them to violate it." *Parker v. Brown* 317 U.S. at 351, 63. S.Ct., at 313-314; see *Schwegmann Bros. v. Calvert Distillers Corp.* 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951). A clearly articulated *permissive* policy will satisfy the first prong of the *Midcal* test. The second prong, however, prevents States from "casting...a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Midcal,* 445 U.S., at 106, 100 S.Ct. at 943. This active supervision requirement ensures that a state's actions will immunize the anticompetitive conduct of private parties only when the "state has demonstrated its commitment to a program through its exercise of regulatory oversight." See I P. Areeda & D. Turner, *Antitrust Law* ¶ 213a, p. 73 (1978).

From the fragments in *Midcal* and *Southern Motor Carriers,* and from the Supreme Court's favorable citation to Areeda and Turner, complaint counsel urge the adoption of a strict procedural test for active supervision, which they claim finds support in the following discussion in that authoritative treatise—

> ...[state] agency inaction fails to satisfy the requirement of this Paragraph that there be adequate public supervision. Such inaction evades statutory approval procedures designed (1) to accord opponents the opportunity to present facts and arguments against the challenged act, (2) to assure conscious consideration by those particular state officials charged with the power and responsibility for approval, and (3) to allow

[93] judicial review of the agency record. Therefore, the general view is correct that official inaction does not constitute sufficient "state action" to justify an antitrust exemption. I P. Areeda & D. Turner, *Antitrust Law* ¶ 213f, pp. 78-79 (1978).

These comments by Areeda and Turner cannot be fairly transformed, as complaint counsel argue, into a hard and fast rule that for each rate change there must be a notice, opportunity for comment (preferably through a hearing), and a written decision appealable to the courts. I believe that what Areeda and Turner were suggesting instead is that state inaction obviously does not show conscious review as would be evidenced, for example, by a hearing, argument, and a record. This does not mean that these procedures are the only ways of showing state review or are even the preferred way. For one thing, it could be argued that the adoption of such strict procedural requirements, which complaint counsel acknowledge are modeled on the federal Administrative Procedure Act, may be inconsistent with the *Parker* doctrine's underlying rationale of allowing the states to experiment with alternative means of regulation. Moreover, by making procedural fastidiousness the focus of the active state supervision inquiry, this may have the adverse effect of diverting public attention away from the diligence of state insurance commissioners, which in the real world may be the only effective protection for consumers whenever non-competitive pricing norms are adopted. Besides, insistence on strict procedural conformity can quickly degenerate into meaningless exercises in bureaucratic rubber-stamping of boiler-plate rulings. In some instances, of course, the diligent regulator may choose one of the procedures advocated by complaint counsel, i.e., a public hearing, as the appropriate response to a particular regulatory problem. To take one example, in *Southern Motor Carriers*, the Fifth Circuit was obviously impressed by just such a showing ("the record evidence that the commissions routinely suspend the effectiveness of proposed tariffs and conduct hearings satisfies us that the second prong of the *Midcal* test has been met." 672 F.2d at 474, n.5) but the **[94]** conscientious insurance commissioner might have chosen just as readily some alternative way of determining the reasonableness of rates.

That *Parker* put the state's choice of procedure beyond the scope of federal review does not translate, as respondents argue, into a requirement that there be a docile acceptance of any regime that the states may set up as long as there exists an impressive array of latent supervisory power. Rather, what *Midcal* says is that in the context of an application for a federal antitrust exemption, the proper function of a court or administrative agency is to look at the state's regulatory machinery and make a determination as to whether there was, in fact, a review, monitoring, and an examination of critical aspects of the rate-making process. At trial what this comes down to is that since the "state action" exemption is a matter of affirmative defense, the initial burden rests with respondents to come forward with evidence showing that the state has a regulatory system that is capable, at least on its face, of examining critical aspects of the rate making process. Once this capability is demonstrated, I believe that the burden then shifts to the government which has to prove that in actual practice the regulators did not make such an examination with respect to some crucial aspect of rate making. This allocation of proof is grounded on the assumption of official regularity and the concomitant notion that respondents should have no burden of proving that state officials do what they are supposed to do under their own statutes. Or to put it somewhat differently, if the claim is made that a facially plausible supervisory regime is demonstrably inadequate then the burden to prove this should be on the party—complaint counsel here—challenging state supervision. Such a challenge, however, should not be allowed to lapse over into a qualitative evaluation of the performance of state officials—for example, whether they put enough time or effort into reviewing a particular rate submission—since an inquiry along these lines would not only be contrary to the public policy expressed in *Parker* of due deference to state sovereignty, but from a practical standpoint "[t]here simply is no way to tell if the state has 'looked' hard enough at the **[95]** data." I P. Areeda & D. Turner, *Antitrust Law,* ¶ 213c, p. 75 (1978).[287] On the other hand, *Midcal* would have no meaning at all if the exemption were granted when the regulatory machinery is patently inadequate on its face, or when the evidence is incontrovertible, say, an acknowledgment by the state itself that its latent powers are simply not being used (or cannot be used) to review, monitor, and examine crucial aspects of rate making.[288]

[287] See also *Ferguson v. Skrupa,* 372 U.S. 726 (1963) for requirement of similar federal restraint before invoking the Due Process Clause to second-guess the economic programs adopted by state legislatures.

[288] Post-*Midcal* cases have allowed the exemption when the regulatory agency had broad regulatory powers and there was evidence the powers were used. The exemption has been denied notwithstanding the presence of latent regulatory power when the record revealed that the powers were not used. *Compare Capital Telephone Co. v. N.Y. Telephone Co.,* 750 F.2d 1154 (2d Cir.), *cert. denied,* 105 S. Ct. 2325 (1985) (active supervision found where Public Service Commission not only had broad latent powers to supervise telephone companies through hearings and examination of books, but also actually used the powers to investigate rates) *with State of N.C. Ex Rel. Edmisten v. P.I.A. Ashville,* 740 F.2d 274 (4th Cir.), *cert. denied,* 105 S. Ct. 1865 (1985)

(footnote cont'd)

Applying the standard outlined above to the six states in question, the record shows that in Idaho, there is a specific requirement for prior approval of rates which at least creates a presumption that there had been a scrutiny of bureau filings. I would not second-guess the intensity of that scrutiny when there is no evidence that any aspect of rate making, including insurer expenses, was excluded from that review. **[96]**

In Arizona, where no major increase in search and examination rates was even proposed during the entire life of the Arizona Rating Bureau, again I do not believe there are adequate grounds for questioning state supervision, notwithstanding Arizona's apparent willingness to accept with little or no justification (under its "deemer" statute) prevailing rates that were simply adopted by the rating bureau. The record shows that the state was involved in what it considered to be a more immediate problem—the rating bureau's attempt to raise and then engraft jointly set escrow fees onto the existing rate structure—and it is unseemly for a federal agency to second-guess Arizona's supervision priorities when the federal government's own investigation of title insurance in Arizona in 1980 zeroed in on escrow rates.

Ohio, of course, is a special problem: complaint counsel simply failed to prove that the rate schedule filed by the Ohio Rating Bureau resulted in uniform charges for search and examination and settlement, as alleged in the complaint.

In Montana, Connecticut, and Wisconsin the states have adopted "file and use" or "use and file" statutes that reflect a basic policy of diminishing the role of state regulators in favor of reliance on competition as the market regulator. At the same time, these three states have authorized rating bureaus on the assumption that contrary to their basic policy of relying on the market to discipline sellers, the rating bureaus, as a medium for non-competitive, collective action by the insurers, will be closely scrutinized. The issue in these states then

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(finding of no active supervision on a record showing that although the state's grant of a certificate of need for a hospital acquisition was based on extensive review of the application, and the certificate could be revoked for failure to satisfy the conditions on which it was granted, the state did not monitor post-acquisition prices). *Marrese v. Interqual, Inc.*, 748 F.2d 373 (7th Cir.), *cert. denied*, 105 S. Ct. 3501 (1985), and *Patrick v. Burget*, 5 Trade Reg. Rep. (CCH) ¶ 67,299 (9th Cir. Sept. 30, 1986) represent the deference (grounded on concern for the quality of medical care) extended to state authorized peer review of doctors. This special treatment for the professions, which was suggested in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-89, n. 17 ("[t]he public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently"), has no application to fixing the price for a commonplace commercial service such as the search and examination of real estate title. *Id.* at 787.

is whether there was a critical examination of the crucial aspects of joint rate making, a scrutiny which is inherent not only in the states' own regulatory policies, but also in the "active supervision" standard of *Midcal.*

In Montana, where there has been a history of state involvement in the controlled business and agent commission problems (culminating in specific legislation giving the insurance commissioner authority to review and reject excessive commissions), there is inadequate basis on this record for questioning state supervision during the brief existence of the rating bureau. **[97]**

As for Connecticut and Wisconsin, there is no need to dwell on the likelihood that because of complaint counsel's obsession with notice, hearing, and a written decision, their attention may have been diverted away from showing during their own case-in-chief that the regulatory scheme was an empty shell. Respondents' defense witnesses—the state insurance officials—readily identified aspects of joint rate making that they themselves considered crucial but which clearly were not being supervised at all. Thus the record shows that in Connecticut jointly fixed rate increases were filed with generalized justifications relating mainly to the profits of the insurers. The rates were "deemed" effective after a brief period because the state had taken no action. At most, during the "deemer" period, the state merely reviewed for accuracy what the rating bureau gave it in the way of insurance company profitability. There was no critical examination whatever of what lay behind those profit figures. Most significantly, there was no showing that Connecticut even had the wherewithal to probe into the critical area of insurer expenses, especially the impact on the level of rates of the so-called agent retention or "commission" expense and the cozy relationship between insurers and attorney-agents that fuels this expense. In other words, even though the Connecticut Insurance Department was convinced of the overriding contribution of the agent commission factor in increasing the cost of title insurance to consumers, it believed that it was statutorily barred from doing anything about it, and indeed that it would take new legislation for it even to acquire the power to look behind the reported insurer expenses. Thus by the state's own account (and irrespective of the broad array of latent powers it possessed in the insurance field or the elaborate supervisory regime it had established), it cannot and did not, review, monitor, or examine in any meaningful sense the very factor that its insurance regulators had identified as crucial in rate making.

Similarly, Wisconsin followed a hands-off policy in dealing with title insurers. And again, it was a state official called by respondents who readily acknowledged that **[98]** insurer expenses were simply not examined although the state recognized how critical these expenses were in rate making.

It must be emphasized that to require that these two states put into place and use a means for examining crucial aspects of joint rate making does not impose an onerous burden on them. Basic rates are not changed that often in the title insurance business, and I am not suggesting that a state may not adopt a sampling approach whereby only across-the-board rate increases rather than adjustments or special endorsements are closely examined. But when the states themselves have identified a critical area, such as the agent retention expense, there must be a showing that the problem was addressed either before rates were increased or at least sometime during the period between major rate increases. And while I would also allow the states practically unlimited flexibility in how they chose to approach the problem, the point is that there is no proof in this record that these two states have taken any steps to deal with the agent-insurer relationship, or for that matter any other expense element factor impacting on title insurance rates.

Of course if the two states choose not to supervise actively by establishing and using a mechanism for scrutinizing the rate making process and especially the crucial expense component of that process, there is no federal requirement that they do so. But then insurers in those states should not be asking for a federal antitrust exemption, and instead the market should be allowed to accomplish what the states are either unwilling to do or are only willing to cover over with the "gauzy cloak" of supervision that *Midcal* says is not acceptable.

Settlement Services

The record fully supports the conclusion reached by the United States District Court For The District of Arizona and the Ninth Circuit in *TIRBA* that settlement or escrow services are clearly not the "business of insurance." However, in the only states where respondents, through title insurance rating bureaus, were allegedly fixing **[99]** settlement or escrow rates, and the issue is properly before the Commission,[289] the complaint allegations cannot be sustained. In

[289] As indicated in Finding 186, the issue of settlement services in Arizona is not properly before the Federal Trade Commission.

Pennsylvania and New Jersey, where the rating bureau activity concededly was actively supervised by the states, the *Parker* exemption applies to search and examination as well as settlement services since the states authorized the alleged illegal joint activity relating to attorney-agents. In Ohio and Connecticut, there was a failure of proof that either the "risk" rates or the inclusive rates set in those states by the rating bureaus resulted in uniform settlement fees.

Noerr-Pennington

In addition to a claim of immunized state action, respondents have argued that their joint rate making consists of nothing more than "petitioning" of a state agency which is protected by the *Noerr-Pennington* doctrine. In *Eastern R. Conf. v. Noerr Motors,* 365 U.S. 127 (1961), *Mine Workers v. Pennington,* 381 U.S. 657 (1965), and *California Transport v. Trucking Unlimited,* 404 U.S. 508 (1972) the Supreme Court held that political advocacy—broadly interpreted as attempts to influence the legislature, the executive, or an administrative agency in the making of policy—was protected under the First Amendment right to petition as well as the public policy of encouraging the free flow of ideas to policy makers. To argue, as respondents do, that the joint fixing of rates by competitors somehow interferes with their right of political advocacy, is analogous to saying that contractors should be allowed to conspire to rig bids on government projects so long as the results of the conspiracy are wrapped in the trappings of a "petition" or proposal which may be said to convey policy information to official decision-makers. Nothing said before or after *Noerr, Pennington,* or *California Transport* allows for such a distortion of the concept of political advocacy, and the Supreme Court, the lower courts, and the Commission have emphatically rejected similar attempts at such a misuse of the doctrine. *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 601-02, (1976); *United States v.* **[100]** *Southern Motor Carriers Rate Conference, Inc.,* 672 F.2d 409, 476-77 (5th Cir.), *rev'd on other grounds,* 105 S.Ct. 1721 (1985); *TIRBA,* 517 F. Supp. 1053, 1059-60 (D. Ariz.), *aff'd,* 700 F.2d 1247 (9th Cir.), *cert. denied,* 104 S. Ct. 3509 (1984); *Mass. Movers,* 102 FTC 1176, 1222-24, *rev'd and remanded on other grounds,* 773 F.2d 391 (1st Cir. 1985).

Rule of Reason

The Commission held in *Mass. Movers,* 102 FTC at 1224, that if there were no state action exemption, the collective rate making activities of a rating bureau are not governed by the rule of reason because "it is clear beyond cavil that agreements among competitors to set price levels or price ranges are *per se* illegal under the antitrust laws. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940); *see also Arizona v. Maricopa County Med. Soc.*, 457 U.S. 332, 102 S.Ct. 2466, 73 L.Ed. 2d 48 1982); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (*per curiam*)."

Commerce

The search and examination and settlement services offered by respondents are part and parcel of the interstate sale and financing of real estate. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

Mootness

There can be no mootness defense in this case since respondents insist that search and examination services, as part of the "business of insurance," are beyond the jurisdictional reach of the Commission, and they reserve the right to rejoin rating bureaus whenever they desire to fix collectively the rates for these services. In short, none of the conditions for preventing any future violation would be eliminated unless an order is issued. On this basis alone, this case is diametrically opposite to these instances (*see, e.g., United States v. W.T. Grant*, 345 U.S. 629 (1953); *Borg-Warner Corp. v. FTC*, 746 F.2d 108 (2d Cir. 1984)) in which the abandonment or mootness defenses were given limited recognition. **[101]**

Scope of The Order

Complaint counsel insist that they are entitled to an "all-states" order although it is obvious that is takes a state-by-state analysis to determine where the *Parker* defense applies. Complaint counsel's argument that they are entitled to a broad order is unpersuasive considering the fact that the complaint cites respondents' activities in only 13 states and complaint counsel's post-complaint investigation apparently revealed that the state action defense would probably prevail in at least seven of those states. As complaint counsel would now have it, an order should be entered, which not only would retrieve the seven states they themselves dropped from the case, but also would add 37 more that were never in the case to begin with. Not only is an "all-states" order unsupportable, but on a record in which there is not a hint of any collusive rate making activity outside of the rating bureaus, a broad order covering all other possible forms of illegal combination cannot be justified. **[102]**

IV. Conclusions

1. The Federal Trade Commission has jurisdiction in this matter because respondents are engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

2. Providing search and examination services and settlement services is not the "business of insurance" as that term is used in the McCarran-Ferguson Act.

3. Respondents combined to fix the rate for search and examination services in the states of Connecticut, Wisconsin, Arizona, Idaho, and Montana.

4. The joint fixing of the rates for search and examination services described in Paragraph 3 above, while authorized by the aforementioned states, was not actively supervised in Connecticut and Wisconsin.

5. Respondents joint rate making activity respecting search and examination services and settlement or escrow services performed by attorney-agents in Pennsylvania and New Jersey was authorized by the states.

6. There was a failure of proof that respondents have fixed uniform search and examination and settlement or escrow charges in Ohio.

7. There was failure of proof that respondents have fixed uniform settlement or escrow charges in Connecticut.

8. The issue of joint rate making activity by respondents respecting settlement or escrow charges in Arizona is not properly before the Commission.

Accordingly, the following order should be issued:

Order

I.

For the purposes of this order, *"Search and examination services"* neans all activities which are designed to identify and describe the wnership of a particular **[103]** parcel of real property as well as any ther actual or potential rights to, encumbrances on, or interests in ıe property.

II.

It is ordered, That respondents, their successors and assigns, and their officers, representatives, and employees, directly or indirectly, through any corporation, subsidiary, division or other device shall cease and desist in Connecticut and Wisconsin from discussing, proposing, setting, or filing any rates for title search and examination services through a rating bureau.

III.

It is further ordered, That respondents shall within thirty days after service of this order deliver a copy of this order to all their present officers, directors, and personnel having any responsibility in determining rates as well as to the state insurance departments in Connecticut and Wisconsin.

IV.

It is further ordered, That respondents notify the Commission at least thirty days prior to any change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of successor corporations, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of this order.

V.

It is further ordered, That respondents shall, within ninety days after the order becomes final, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Opinion of the Commission

By Strenio, *Commissioner:*[1]

[1] The abbreviations used in this opinion are as follows:

ALJ: Administrative Law Judge

CC: Complaint Counsel

CCAB: Complaint Counsel's Answering Brief

CCRB: Complaint Counsel's Rebuttal Brief

F.: ALJ's Findings

ID: Initial Decision

RAB: Respondents' Appeal Brief

RRB: Respondents' Reply Brief

I. Statement of the Case

On January 7, 1985, the Federal Trade Commission (Commission) issued a complaint charging respondent title insurers with a violation of Section 5 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45. More specifically, the Commission charged that the respondents, operating through rating bureaus, had restrained competition in setting rates for title search and examination services and settlement services.

The gravamen of the complaint appears in paragraph 11:

> Respondents have agreed on the price to be charged for title search and examination services or settlement services through rating bureaus in various states. Examples of states in which one or more of the [2] respondents have fixed prices with other respondents or other competitors for all or part of their search and examination services or settlement services are Arizona, Connecticut, Idaho, Louisiana, Montana, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Wisconsin and Wyoming.

Respondents, in turn, challenged the Commission's subject matter jurisdiction on the grounds that their activity was part of the business of insurance and therefore exempt from the FTC Act by reason of the McCarran-Ferguson Act. Respondents' answers also assert that the alleged anticompetitive practices are immune from antitrust prosecution by reason of the "state action" doctrine. Additional defenses raised on appeal are described below.

On December 26, 1986, Administrative Law Judge (ALJ) Needelman issued his initial decision, finding a law violation for activity in Connecticut and Wisconsin. The ALJ further found that search and examination by title insurers in connection with the issuance of a title insurance policy was not the "business of insurance."

This matter is now before the Commission on respondents' appeal brief, to which complaint counsel has filed an answering brief. Additionally, respondents have filed a reply brief and [3] complaint counsel has filed a rebuttal brief.[2] In their appeal brief, respondents argue that the ALJ erred in finding that Connecticut and Wisconsin did not "actively supervise" rating bureau filings. Further, respondents argued that the ALJ erred in ruling that respondents' rating bureau activities are not the "business of insurance." Additionally,

[2] Complaint counsel requested leave to file a brief discussing the impact on this case of the Supreme Court's decision in *Patrick v. Burget*, 108 S. Ct. 1658 (1988). Respondents did not oppose this motion and requested leave to file a supplementary brief. The Commission granted the parties' requests and said briefs were filed.

respondents argued that the ALJ erred in failing to apply the *Noerr-Pennington* doctrine to respondents' collective petitioning of state regulators; that respondents' rating bureau activities should be evaluated under a "rule-of-reason" analysis; and that the terms of the relief ordered by the decision were improper.

Complaint counsel disagreed with the ALJ to the extent that he found "active supervision" existed in several states. Complaint counsel also argued that respondents failed to meet the first prong of the *Midcal* test (that there be a clearly articulated and affirmatively expressed state policy to displace competition) as to Pennsylvania and New Jersey. Complaint counsel also would have fashioned differently the scope of the order proposed by the ALJ. **[4]**

For the reasons set forth below, we affirm the ALJ in part and reverse in part.

In brief, we find that respondents' activities in New Jersey, Pennsylvania, Connecticut, Wisconsin, Arizona,[3] and Montana are not beyond the purview of the federal antitrust laws.

Respondents' attempt to invoke the state action defense fails as to New Jersey and Pennsylvania because the statutes do not clearly articulate a state policy permitting a displacement of competition for charges to and retained by an attorney. Indeed, attorneys are specifically exempted from the statutory provisions invoked by respondents.

The attempt fails as to Connecticut, Wisconsin, Arizona, and Montana because respondents' private conduct was not actively supervised by the state. The active supervision prong of the state action defense requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy rather than merely the party's individual interests. We dismiss the complaint, however, as it **[5]** relates to settlement or escrow services, because the record as to those services was not developed.

Further, we find that respondents' search and examination services are not the "business of insurance" and therefore are not exempt from antitrust challenge. These services, commonly provided by non-insurance entities, do not have the indispensable element of risk

[3] We also find that the doctrine of *res judicata* does not bar Commission action as to Arizona.

spreading or transfer necessary to qualify as the business of insurance.

Moreover, we hold that respondents' activities are not protected from antitrust challenge under the *Noerr-Pennington* doctrine. Rather, because of the "context and nature" of this activity, we conclude that it is commercial activity of the type that traditionally has had its validity determined by the antitrust laws. This is merely private activity to set rates collectively—the equivalent of horizontal price-fixing—not a collective attempt to persuade the state to require such ratemaking. We also find this activity inherently suspect and an appropriate candidate for *per se* analysis, under the reasoning we employed previously in *Massachusetts Board of Registration in Optometry, infra.* **[6]**

II. Description of Respondents' Activities

Respondent insurers are engaged in the business of insuring the ownership of real estate for buyers and those lenders (mortgagees) who rely on real estate as security for their loans. As part of the package of services they offer, respondents provide search and examination and settlement or escrow services.[4] We adopt the ALJ's factual description of these activities. *See* ID at 12-45 and further discussion *infra.*

III. State Action Defense

One critical issue on appeal is whether the ratemaking activities here are beyond the purview of the federal antitrust laws by virtue of the state action doctrine.[5] As we stated in our decision in *New England Motor Rate Bureau, Inc.*, 112 FTC 200, Docket No. 9170, slip op. at 10-11 (Aug. 18, 1989) ("*New England*"), the state action doctrine attempts to resolve any conflicts that arise between the national economic policy in favor of competition, as embodied in the federal antitrust laws, **[7]** and the principle of federalism. Under this doctrine, restraints on competition are protected from antitrust attack if they constitute "state action or official action directed by a state." *Parker v. Brown*, 317 U.S. 341, 351 (1943).

The Supreme Court has stated that a "gauzy cloak of state

[4] We agree with the assessment of the ALJ that the complaint allegation respecting settlement or escrow services was an ancillary issue, barely addressed in this proceeding. The complaint is dismissed as to those services. *See* discussion *infra.* Our opinion therefore focuses on the search and examination issue.

[5] The state action doctrine is available in Section 5 cases applying Sherman Act standards. *E.g., Asheville Tobacco Board of Trade, Inc., v. FTC,* 263 F.2d 502 (4th Cir. 1959).

involvement" in private anticompetitive conduct is not sufficient to confer antitrust immunity. *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980). In *Midcal*, the Supreme Court spelled out criteria that anticompetitive conduct undertaken by private entities must satisfy in order to qualify as exempt "state action": (i) the challenged conduct must be undertaken pursuant to a "clearly articulated and affirmatively expressed state policy" to displace competition with regulation; and (ii) the conduct must be "actively supervised" by the state itself. *Id.* at 105-06; *see also Patrick v. Burget*, 108 S. Ct. 1658 (1988); *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985).

A. *Clear Articulation* (The First *Midcal* Prong)

The only issue for determination as to respondents' conduct in New Jersey and Pennsylvania is whether the state statutes give state action protection under the "clear articulation" prong of *Midcal* to collectively fixed rates charged for search and **[8]** examination services when performed by attorney-agents.[6] Complaint counsel argues that the statutes in Pennsylvania specifically exclude from the statutory definition of "fees" that are to be filed with the state insurance departments any charges that are paid to and retained by an attorney at law, whether such attorney is acting as an agent of a title insurance company or as an approved attorney of a title insurance company. Complaint counsel asserts that in both states respondents have fixed prices for charges paid to and retained by their attorney agents.

Respondents argue, in turn, that special deference should be given to a state administrative agency's interpretation of its own regulatory statute, citing *Midcal* and other cases. RRB at 68, n.55. They thus rely on an amicus brief filed by the Pennsylvania insurance department and testimony by the New Jersey insurance department favoring their interpretation of the statute—that attorney agent fees are not excluded from the statutory definitions of fees. Respondents criticize complaint counsel's argument that the statute is "perfectly clear on its face." RRB at 70. They admit that the statutes "are susceptible to multiple interpretations." RRB at 70. But respondents further argue that the meaning of the statutes cannot be discerned "without resort to the larger purpose and structure of the state statutes." RRB **[9]** at

[6] The parties have stipulated, for the purposes of this litigation, that there has been active supervision in Pennsylvania and New Jersey sufficient to satisfy the second prong of the *Midcal* test for a state action defense.

71. In both states, there is comprehensive regulation of the title insurance industry. RRB at 71-72. The "fee" definition which gives rise to complaint counsel's argument is said to be merely "an accommodation to members of the state bar who were concerned that legislation governing title insurance might be construed as regulating the legal fees of real estate attorneys." RRB at 72.

The ALJ found that the statutes were "ambiguous," ID at 91, but rested his holding that the first *Midcal* prong protected the activities of respondents in these two states on the interpretation given the relevant statutes by state officials. He stated that complaint counsel's contrary assertion may have been more credible had it been supported by other evidence.

Crucial to complaint counsel's argument as to New Jersey and Pennsylvania are the following statutes. In New Jersey, the statute in controversy, *N.J. Stat. Ann.* 17:46B-1(f), reads in relevant part:

> *"Fee"* for title insurance means and includes the premium for the assumption of the insurance risk, charges for abstracting or searching, examination, determining insurability, and every other charge, whether denominated premium or otherwise, made by any of them, but the term "fee" *shall not include any* **[10]** *charges paid to and retained by an attorney at law whether or not he is acting as an agent of a title insurance company or an approved attorney.* (emphasis supplied)

In Pennsylvania, Section 701(5) of the Pennsylvania Insurance Company Law broadly provides that fees for title insurance are subject to regulation but contains the following proviso:

> *"Fee"* for title insurance means and includes the premium, the examination and settlement or closing fees, and every other charge, whether denominated premium or otherwise, made by a title insurance company, agent of a title insurance company or an approved attorney of a title insurance company, or any of them, to an insured or to an applicant for insurance, for any policy or contract for the issuance of, or an application for any class or kind of, title insurance; but the term "fee" *shall not include any charges paid by an insured or by an applicant for insurance, for any policy or contract, to an attorney at law acting as an independent contractor and retained by such attorney at law, whether or not he is acting as an agent of or an approved attorney of a title insurance company,* or any charges made for special **[11]** services not constituting title insurance, even though performed in connection with a title insurance policy or contract. (emphasis supplied)

We find that the statutes in New Jersey and Pennsylvania do not clearly articulate a state policy permitting a displacement of competition regarding these charges. Indeed, the statutes appear to do the opposite—attorney agents are singled out of the statutory scheme. Both statutes unambiguously exclude from their definition of "fees" that are regulated "any charges" paid to and retained by an attorney. Despite this, in both states respondents have fixed prices for charges paid to and retained by their attorney agents. Since the statutes are clear on their face, the "plain meaning" rule of statutory construction must prevail. (We note in passing that no evidence of contrary legislative intent has been entered into the record.)

Further, deference to an agency's interpretation comes into play only when the statute is ambiguous, *SEC v. Sloan,* 436 U.S. 103, 117-19. Deference is not appropriate merely because an interpretation is long standing, since an agency "may not bootstrap itself into an area in which it has no jurisdiction by **[12]** repeatedly violating its statutory mandate."[7] *Sloan,* 436 U.S. at 117-19 (1978).

B. *Active Supervision* (The Second *Midcal* Prong)

To qualify for state action immunity, private conduct also must have been actively supervised by the state. *Midcal,* 445 U.S. at 105. The Supreme Court in *Town of Hallie v. City of Eau Claire,* 471 U.S. 34, 46 (1986), stated that the active supervision requirement "serves essentially an evidentiary function; it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy . . . . Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interest of the State."

The Supreme Court recently elaborated on the requirement of active state supervision in *Patrick v. Burget,* 108 S. Ct. at 1658. There, a physician in Oregon alleged that competing physicians conspired to terminate his surgical privileges at the one hospital in a community. Plaintiff alleged that the defendants had initiated and participated in proceedings before **[13]** the hospital's peer-review committee that culminated in a recommendation to terminate the plaintiff's staff privileges. These proceedings allegedly were undertaken for the sole purpose of reducing competition from plaintiff. The Court held that the state action doctrine did not apply to the challenged conduct because Oregon did not actively supervise the decisions of hospital peer review committees.

[7] We note further that the Pennsylvania insurance agency's interpretation is relatively recent. In Pennsylvania between 1921 and 1975, rates filed by the rating bureau did not include attorney-agent charges. "Prior to 1975, the Pennsylvania insurance department obviously did not believe that charges made by attorney agents . . . . were within the department's regulatory control." CCAB at 133.

> [T]he active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct.... The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests. * * * The mere presence of some state involvement or monitoring does not suffice.

108 S. Ct. at 1663.

To establish active state supervision, it is not enough merely to show, as respondents contend, that the state statute [14] governing the anticompetitive activity provides some mechanism for regulatory oversight. There must be a showing that the state actually exercised its authority. *Patrick v. Burget,* 108 S. Ct. at 1663. It is only through such an affirmative exercise that the state's intent can be discerned. Moreover, there must be a "program of supervision." *Id.* "The mere presence of some state involvement or monitoring does not suffice." *Id.* We understand this to mean that isolated instances of review—such as reviewing rate proposals submitted in 1990 and 1995 but not reviewing those submitted in the intervening years—will not suffice. Otherwise, a single instance of review illogically could shield anticompetitive behavior from antitrust challenge in perpetuity.

Thus, it is necessary to look at the entire program of supervision. We recognize that it would not be incumbent upon a respondent to show that every single piece of data filed with a rate commission was reviewed. Certainly, the use of sound sampling techniques would be permissible. It is reasonable to require, however, that the review activity be continuous. Consequently, our assessment of the regulatory activity in each state below will look at the review activity as a whole and seek to determine whether there was a general "program of supervision"—not whether each and every rate was reviewed. [15]

On the other hand, isolated instances of review will not suffice—otherwise there could be no "program of supervision." The state's involvement in the challenged activity must be more than peripheral to qualify as active supervision. In *Midcal,* for example, the Supreme Court emphasized that the state had not established prices, reviewed the reasonableness of price schedules, regulated the terms of fair trade contracts, monitored market conditions, or engaged in a "pointed reexamination" of the program. 445 U.S. at 105-106. Rather, the state's enforcement activities merely had cast a "cloak of state involvement over what [was] essentially a private price-fixing arrangement."[8] *Id.* at 106.

These decisions demonstrate that a state official or agency must engage in an affirmative, substantive review of the challenged conduct before active supervision can be found. Such review ensures that the state agency has consciously considered the anticompetitive consequences of the activity for which private parties seek approval. As we stated in **[16]** *New England,* 112 F.T.C. at 200, slip op. at 15, "[n]o clear inference of conscious state approval of the product of private collective ratemaking can be drawn from a state agency's passive acceptance of nonsubstantive review of rate filings." Thus, we hold that the active supervision requirement is satisfied only where the state agency has acted affirmatively to review and approve the proposed tariff or rate. Moreover, there must be a program of supervision, not merely isolated instances of review.

This case also raises the question of who has the burden of proving active supervision. Complaint counsel argues that although the ALJ recognized that the state action doctrine is a matter of affirmative defense, he impermissibly shifted the burden of proof to the government once respondents demonstrated that "the state has a regulatory system that is capable, at least on its face, of examining critical aspects of the rate making process." CCAB at 78, quoting ID at 94. Complaint counsel complains that this standard forces it to prove a negative, a difficult task given the dearth of documentation that intrinsically exists in states that do not actively supervise.

The Supreme Court's decision in *Patrick v. Burget* holds that the proponent of the state action defense has the burden of demonstrating the actual exercise of regulatory authority by state officials. 108 S. Ct. at 1663 ("respondents . . . have [not] succeeded in showing that any of these actors reviews—or **[17]** even could review—private decisions regarding hospital privileges"; "respondents have not shown that the [Board of Medical Examiners] in practice reviews privilege decisions"). We therefore conclude that the ALJ's evidentiary ruling was in error, and that respondents, as the proponents of the state

[8] Similarly, in *Patrick v. Burget,* the Court, observing that "[t]he mere presence of some state involvement or monitoring does not suffice," held that state action immunity could not be predicated upon a showing that Oregon health officials had licensing authority over the defendant physicians and that Oregon courts had some authority to review private peer group decisions on procedural grounds. 108 S. Ct. at 1663. Rather, a peer group decision would have been "actively supervised" by the state only if a state official or state court had, *and had exercised,* authority to review the merits of the peer group decision at issue. *Id.* (emphasis supplied). Of course, this reasoning is consistent with the earlier cited language that there must be a "program of supervision."

action defense, failed to meet the burden of demonstrating that state officials engaged in an affirmative, substantive review of their rate proposals. We think that respondents' defense was not prejudiced by the ALJ's erroneous ruling. Both parties' introduction of evidence and examination of the witnesses at the administrative trial elicited more than adequate testimony upon which to base our decision.

We now turn to an examination of the individual states' supervision of the activity at issue.

C. *Individual States and Active Supervision*

1. Connecticut

The ALJ found no active supervision in Connecticut. He based his decision on a finding that the state officials had readily identified aspects of collective ratemaking that they themselves considered crucial but which were not being supervised at all. The ALJ found that collectively-filed rate increases were submitted with general justifications that related merely to **[18]** insurer profits. There was no critical examination of what lay behind those profit figures. "Most significantly, there was no showing that Connecticut even had the wherewithal to probe into the critical area of insurer expenses, especially the impact on the level of rates of the so-called agent retention or 'commission expense' and the cozy relationship between insurers and attorney-agents that fuels this expense." ID at 97. In fact, the state insurance commission believed it was statutorily barred from doing anything about this. Thus, the state regulators "cannot and did not, review, monitor, or examine in any meaningful sense the very factor that its insurance regulators had identified as crucial in ratemaking." ID at 97.

Respondents argue that the ALJ's "critical aspects" standard impermissibly and inappropriately second-guesses the qualities of supervision. RAB at 7. (The same argument is made as to Wisconsin, discussed *infra.*) Respondents state that a central goal of the state action doctrine "is to preserve for the states maximum flexibility in economic regulation." RAB at 8. Respondents admit, however, that "a state cannot simply authorize private parties to violate the federal antitrust laws . . ." RAB at 8. But respondents argue that *Southern Motor Carriers* cited with approval the Areeda-Turner treatise which pointed out, in part, that "[t]he federalism concerns at the heart of *Parker* cannot be reconciled with federal court probing of the 'true' motives of state legislatures and agencies." RAB at 9. "There **[19]** simply is no way to tell if the state has 'looked' hard enough at the data . . ." RAB at 10.

Respondents assert that the record demonstrates that there was an appropriate regulatory mechanism in place in Connecticut. RAB at 16. Even if any federal scrutiny of state supervision beyond ascertaining the existence of a regulatory mechanism is permissible, "that scrutiny should be limited to a 'quick look' by the federal agency or court . . .". RAB at 19. A "quick look" in Connecticut assertedly demonstrates active involvement. Respondents then recite various facts that they believe show active supervision under the "quick look" test. RAB at 19-30.

Complaint counsel argues, on the other hand, that when the rating bureau filed its first rate manual in 1966, it did not file statistical data to support the collectively-set rates.[9] CCAB at 109. Requests for clarification by the state regulators were not fulfilled. Nonetheless, this rate filing was effective until 1981.

Complaint counsel asserts that the 1981 rate filing did not contain information from which the department could assess the reasonableness of insurer expenses. A 1983 filing was approved **[20]** immediately, despite the fact that it lacked the supporting data required by statute.

Moreover, numerous endorsements and amendments were filed without supporting cost justifications. CCAB at 110. Although agreeing with the ultimate finding of liability by the ALJ, complaint counsel disagrees with his finding that minimal review was sufficient for "ancillary" filings such as these. F. 130 n.192. Complaint counsel contends that the department did not consider these endorsement filings to be minor or ancillary. CCAB at 111 n.137. Charges of over $100 per endorsement were not uncommon. Respondents even allegedly characterized one of the endorsement filings as "significant." RAB at 22. A minimal review standard is insufficient, according to complaint counsel. Finally, complaint counsel argues that the state did not have the "wherewithal" to examine insurer expenses, citing DiSanto Testimony 2739-40 and 2793.

In reply, respondents argue that the 1966 rate filing was examined and the rating bureau responded to all inquiries. RRB at 39. RX 104 through 110. Respondents also contend that the other filings similarly were examined and proper justifications were filed.

[9] We preface our examination of complaint counsel's argument by rejecting complaint counsel's proposed method for analysis as to all states insofar as it relies on its standard loosely based upon the Administrative Procedure Act. *See* our discussion in *New England,* 112 FTC at 200, slip op. at 15-16 n. 14.

The Commission finds that Connecticut did not meaningfully examine the rates submitted because it did not have the **[21]** "wherewithal" to examine the critical area of insurer expenses. ID at 97, ID at 53-55. We adopt the ALJ's findings that the state insurance department suffered from a dearth of information that would have enabled it to assess the appropriateness of the filed rates. F. 130, 132-33. For example, the ALJ found "no evidence that the department's request for justification relating to [the 1966 rate filing] was ever answered satisfactorily." F. 130. Further, the ALJ found that the state insurance official conceded that the department lacked the authority to control insurer expenses they knew were excessive. ID at 53-55.

The fact that the state regulators could not meaningfully regulate a critical component of the ratemaking process is fatal in and of itself to respondents' state action defense. As the Supreme Court stated in *Patrick v. Burget*, the "mere presence of some state involvement or monitoring does not suffice." 108 S. Ct. at 1663. The Court's concurrent citation of *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345, n.7, is instructive. In *Duffy*, the Court held that certain forms of state scrutiny of a restraint established by a private party did not constitute active state supervision because they did not "exer[t] any significant control over" the terms of the restraint. *Id.* Accordingly, when the state regulator responsible for implementing the statutory scheme admits a lack of significant control over the restraint in question, the rates are the product of private action and the state action defense is inapplicable. **[22]**

However, we disagree with the ALJ that so-called "ancillary" filings receive some sort of exemption or lower standard under the *Midcal* test. Since there is no *de minimis* exception to the antitrust laws for price-fixing, the ALJ's minimal review standard for endorsements and amendments is contrary to the law. These were separate filings that should have been accorded state review. Although the use of scientifically sound sampling techniques to examine a rate filing might be reasonable, simply ignoring some filings because they do not involve generalized rate increases is impermissible. There must be a "program of supervision," not hit-and-miss review.

In sum, we conclude that the state of Connecticut did not actively supervise the rate filings at issue, and the state action defense does not apply. Respondents' arguments that in order to find a state action defense we should take merely a "quick look" at the state's regulatory supervision or be satisfied merely that any regulatory mechanism is in place, are put to rest by *Patrick v. Burget.* As discussed generally above, we must determine whether the state actually exercised its authority. The state did not do so here. **[23]**

2. Wisconsin

The ALJ found no active supervision in Wisconsin. He stated that there "is little evidence that these [latent powers possessed by the insurance commissioner] were used to influence bureau rate making." ID at 55. "To illustrate, while the insurance commissioner was required to examine the Wisconsin Rating Bureau at regular intervals, no examination was ever made." ID at 55. Further, "no hearing has ever been held in Wisconsin on any insurance rate filing, and no rate suspension order has ever been issued." ID at 55. Essentially, "Wisconsin followed a hands-off policy in dealing with title insurers." ID at 97.

The 1971 rates, which represented historical rates charged before the formation of the bureau, were approved although supporting justifications were not filed until 1978. ID at 57. The 1981 filing, which represented a substantial rate increase of 11 percent, was accompanied by supporting data that was checked only for accuracy. The Office of the Commissioner of Insurance made no inquiry into insurer expenses, "notwithstanding recognition by the state office that title rates cannot be effectively regulated without such a [sic] scrutiny." ID at 58. A 1982 filing was given a "cursory reading," and the supporting materials "were not even checked for accuracy before the rate increase was accepted." ID at 59. **[24]**

Respondents assert that as to the 1971 filing, the insurance department stated it would accept the filing contingent upon submission of a statistical rate justification when the rating bureau gained more experience in title insurance. RAB at 32. The state questioned the rating bureau "frequently" about its rate justification methods. RAB at 33. Eventually, the rating bureau hired an economic consultant. RAB at 33. As to the 1981 rate filing, respondents contend that rating bureau and state insurance officials discussed the filing extensively. RAB at 36. The 1981 filing was "checked for mathematical accuracy," the proposed rates were compared with rates in neighboring states, and the effect on total revenues was analyzed. RAB at 36. Respondents argue that insurer expenses were examined. RAB at 38. For example, expense data was looked at. Transcript at 1777.

Complaint counsel argues, in turn, that the first rate filing was in effect for over seven years without any supporting justification being provided. CCAB at 117. The department's review of the 1981 filing merely looked for mathematical accuracy. Mr. Wirtz of the insurance department admitted that the department did not have the resources to conduct reviews of rates to determine whether they were reasonable. F. 144. Wirtz Testimony at 1785-86. [25]

The rating bureau also filed numerous endorsements and amendments between 1976 and 1984. CCAB at 121. No supporting cost information was provided for any of these amendment and endorsement filings. Nor was there any review of these filings. F. 142 n.217.

The Commission concludes that a law violation finding as to Wisconsin rests on several grounds. As with Connecticut, the state insurance department did not examine insurer expenses. A key official of the state testified as follows:

> Q. Now, the department didn't have any idea what an efficient company's expenses would be for search and examination services?
>
> A. No.
>
> Q. But it is your opinion that you would really have to study the search and examination expenses of the individual companies in order to effectively regulate the charges for search and examination expenses?
>
> A. Yes.[10] [26]

Respondents' generalized assertions of review do not withstand scrutiny. We adopt the ALJ's evaluation that Wisconsin followed a "hands-off policy in dealing with title insurers." ID at 97. For example, the 1971 filing was in effect for seven years prior to the filing of any justification.

Inherent in the active supervision criterion is the notion that the review be meaningful. If review is not meaningful because a state regulator fails or is unable to evaluate whether rates are "reasonable" as required by statute, then the rates are the product of private and not state action:

> And again, it was a state official [in Wisconsin] called by respondents who readily acknowledged that insurer expenses were simply not examined although the state recognized how critical those expenses were in rate making. ID at 97-98.

For example, checking rates merely for mathematical accuracy under a statute that provides that rates must be reasonable is insufficient

[10] Wirtz Testimony at 1778-1779. *See* ID at 58.

supervision. Further, nearly two dozen endorsements and amendments went into effect without being examined at all. However, even if the economic effects of these changes were not substantial, there is no *de minimis* exception to the antitrust laws. **[27]**

3. Arizona

The ALJ found that while the state insurance department had a wide range of latent regulatory powers, the actual use of these powers was more hypothetical than real. F. 147-48. Between 1968 and 1981 the insurance department conducted no examination of the rating bureau although there is a statutory requirement for such an examination at least once every five years. F. 148. The ALJ found that there were "minor rate amendments, adjustments, and endorsements filed throughout the period 1968 to 1980 . . ." F. 152. He advised that "[t]here is nothing in the record indicating that justifications were submitted with these ancillary filings, and the record is inconclusive as to the kind of review, if any, to which they were subject." ID at 61, n.233.

A 1968 rate filing brought an inquiry from the state as to how the risk component of the filed rate was derived, but there was "no convincing evidence that the rate was either justified by the bureau or reviewed by the state." ID at 61, n.233. It appears that the 1968 rate, used from 1968 to 1983, apparently represented the rates charged by some members before the bureau was formed. *Id.*

However, on November 3, 1980, the Arizona Department of Insurance announced that a broad investigation of the rating bureau would be conducted. Before the investigation could be **[28]** completed, a federal civil complaint challenging the propriety of the collective fixing of escrow rates was filed by the United States. The ALJ did not believe there were adequate grounds for questioning state supervision, notwithstanding Arizona's apparent willingness to accept with little or no justification (under its "deemer" statute) prevailing rates that were simply adopted by the rating bureau. He thought that the state validly was involved in what it considered to be a more immediate problem—the rating bureau's attempt to raise and then engraft collectively-set escrow fees onto the existing rate structure. He also believed it unseemly for a federal agency to second-guess Arizona's supervision priorities when the federal government's own investigation of title insurance in Arizona in 1980 zeroed in on escrow rates. ID at 96. Consequently, the ALJ accepted the state action defense in Arizona.

Respondents agree with the ALJ that active supervision was present in Arizona. Disputing complaint counsel's chronology of events, respondents state that the 1968 rate filing was "supportable under express statutory language permitting rates to be justified on the basis of the experience of the filing title insurer or rating organization or other title insurers," RRB at 29, citing Ariz. Rev. Stat. Ann Section 20-377. Respondents note that the rating bureau hired an accounting firm to compile industry statistics beginning in 1971; the state insurance department requested these reports in 1977. RRB at 30. The **[29]** rating bureau hired a rate consultant in 1977 and consulted with the Director of Insurance "and developed financial and statistical reporting plans for TIRBA members and subscribers." RRB at 30. "By the end of 1978, ADL [consultant Arthur D. Little] had drafted its first profitability analysis of the Arizona title insurance industry, covering the years 1972-77 . . . and had submitted to the Director complete financial and statistical reporting plans, and financial reports for the years 1972 through 1977. RRB at 31. Other reporting and review processes are detailed by Respondents. RRB at 32-35.

Respondents also argue that the doctrine of *res judicata* bars the requested relief. In 1980, the Department of Justice filed a complaint alleging that filing of rates for escrow service by Title Insurance Rating Bureau of Arizona, Inc., (TIRBA) violated Section 1 of the Sherman Act. *See United States v. Title Insurance Rating Bureau of Arizona, Inc.*, ("*TIRBA*"), 700 F.2d. 1247 (9th Cir. 1983). Respondents argue that the respondents in the instant proceeding were members of TIRBA and subject to the judgment finding liability in that case. The United States is also a party to both actions. The *res judicata* doctrine prohibits splitting a cause of action:

> A party seeking to enforce a cause of action must present to the court, either by pleading or proof, or both, all the grounds upon which such cause of action **[30]** is predicated. He is not at liberty to split up his demand and prosecute it by piecemeal or to present a part of the grounds upon which such cause of action is founded and leave the rest to be presented in a subsequent suit . . ." RRB at 36.

Respondents thus argue that the United States has initiated a second lawsuit under the same price-fixing theory used in *TIRBA*. The government may not now attempt to enlarge the relief it obtained in the original action or subject the insurers to additional claims that it could have pursued then. RRB at 36.

Complaint counsel argues that there was no active supervision in Arizona. The March 1968 filing was filed without any supporting data. From 1968 to 1981 the rating bureau submitted numerous rate changes and endorsement filings, none of which contained any cost or expense data. Complaint counsel states that in Arizona title insurance rates become effective 15 days after they are filed if the insurance department takes no action—they are "deemed" to meet the requirements of the statute. The 1968 filing was allowed to become effective in this manner. CCAB at 83. The president of the rating bureau recognized that the department of insurance, which was then in a transition period, "accepted the filing without any question and without any justification thereof." CCRB at 29. The state insurance official admitted that no review was conducted between [31] 1973 and 1982. Barberich Testimony at 2289. The department head also could not recall any specific department review of various amendments. Accepting prevailing rates is not permissible, complaint counsel argues, for it is no excuse that the prices fixed are themselves reasonable, citing *Catalano Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980). *See also United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927).

Complaint counsel also contends that whatever supervision occurred with regard to collectively-set escrow fees does not, as a matter of law, remedy the lack of active supervision over price-fixing for search and examination services. CCAB at 86. Further, complaint counsel argues that, as in Wisconsin and Connecticut, the state did not examine crucial aspects of the ratemaking process, *i.e.*, insurer expenses. CCAB at 87.

Complaint counsel also asserts that *res judicata* does not bar relief in Arizona. "Respondents interpret the doctrine of *res judicata* and its rule against splitting a cause of action to mean that once defendants have been found guilty of price-fixing for one product or service, they become insulated from attack with respect to any other contemporaneous price-fixing that could have been raised in the first action. This contention is wrong." CCRB at 32. Complaint counsel believes that the doctrine against splitting a cause of action prevents bringing multiple lawsuits using different legal theories to remedy the same wrong. [32] CCRB at 33. This case assertedly does not involve use of a different legal theory to remedy the same wrong, *i.e.*, price-fixing on escrow services. This is a different wrong—price-fixing on search and examination services.

The Commission finds a violation of Section 5 of the FTC Act as to Arizona because there was no active supervision. The Commission also finds that the doctrine of *res judicata* does not bar this lawsuit. First, between 1968 and 1981 the insurance department conducted no examination of the rating bureau although there is a statutory requirement for such an examination at least once every five years. F. 148. No active supervision can be said to exist when a state agency does not even carry out the bare minimum of statutory duties entrusted to it. The ALJ found that there were "minor rate amendments, adjustments, and endorsements filed throughout the period 1968 to 1980 . . ." F. 152. He advised that "[t]here is nothing in the record indicating that justifications were submitted with these ancillary filings, and the record is inconclusive as to the kind of review, if any, to which they were subject." ID 61, n.233. As stated above, there is no *de minimis* exception to the antitrust laws. While the record is said to be inconclusive on the kind of review, if any, that occurred, the burden of establishing this defense was on respondents. *See* discussion of proponent's burden, *supra,* as set forth in *Patrick v. Burget,* 108 S. Ct. at 1663. **[33]**

Although a 1968 rate filing brought an inquiry from the state as to how the risk component of the filed rate was derived, there was "no convincing evidence that the rate was either justified by the bureau or reviewed by the state." ID at 61, n.233. It appears that this rate, used from 1968 to 1983, represented the rates charged by some members before the bureau was formed. *Id.* Even if one assumes the historical rates were reasonable, this is not a defense under *Catalano* and related cases. A state may not merely allow private parties to fix prices without active state supervision. When a state allows a historical rate to go into effect unexamined, it has done just that.

Nonetheless, the ALJ accepted the state action defense because the state was involved in the rating bureau's attempt to raise and then engraft collectively set escrow fees onto the existing rate structure. ID at 61-63, 96. We disagree. A state may not pick and choose which classifications of rates it is going to supervise actively and which it will ignore. There must be a "program of supervision," under which the state actively supervises all types of rates. "The mere presence of some state involvement or monitoring does not suffice." *Patrick v. Burget,* 108 S. Ct. at 1663. **[34]**

The lack of active supervision can be seen in a variety of instances. For example, respondents state that the rating bureau hired an accounting firm to compile industry statistics beginning in 1971. Yet the fact remains that the state insurance department requested these reports only in 1977. RRB at 30. The rating bureau hired a rate consultant in 1977. But it was not until the end of 1978 that the consultant had drafted the first profitability analysis of the Arizona title insurance industry, covering the years 1972-77. Thus, there was a substantial time during which there could not have been active supervision. For example, while the original rates were filed in 1968, the rating bureau did not even begin to initiate a submittal process until hiring outside help in 1971.

Further, in Arizona title insurance rates become effective 15 days after they are filed if the insurance department takes no action—they are "deemed" to meet the requirements of the statute. The 1968 filing was allowed to become effective in this manner. CCAB at 83. The president of the rating bureau recognized that the Department of Insurance, which was then in a transition period, "accepted the filing without any question and without any justification thereof." CCRB at 29. This lack of substantive review does not comport with the *Midcal* active supervision requirement. **[35]**

We hold also that the doctrine of *res judicata* does not bar the Commission's action as to respondents' activities in Arizona. Respondents argue that "the United States has initiated a second lawsuit under the same price-fixing theory relied upon in *TIRBA*, premised upon the same rate filing activity by the same rating bureau during the same period." RRB at 37. This argument is based on an erroneous recitation of the facts.

"In general, the doctrine of *res judicata* serves the interest of judicial economy and finality in disposition of disputes by precluding parties to a judgment and their privies [footnote omitted] from relitigating the same 'cause of action.'" *Durhan v. Neopolitan*, No. 88-2108, slip op. at 5 (7th Cir. April 20, 1989). In order to determine whether *res judicata* applies because of the final *TIRBA* order concerning escrow fees, we must decide if the cause of action which is asserted in the instant case is the same cause of action that was advanced in *TIRBA*.

Federal courts increasingly have adopted a "transactional" analytical approach to *res judicata.*[11] *Durhan v. Neopolitan*, slip op. at 6. In

[11] This is in comparison with the "proof" or "evidence" approach, under which a second action is barred where there is identity of facts essential to the maintenance of both cases. "Under most factual settings, the transactional approach will result in broader preclusive effect since several theories of recovery may emanate from the same transaction without complete identity of the evidence necessary to sustain each theory." *Durhan v. Neopolitan*, slip op. at 6.

the Restatement (Second) of [36] Judgments §24 (1982), causes of action are the same if they arise from the same "transaction" or "common nucleus of operative facts." *Id.* §24 at 199.[12] "Among the factors relevant to a determination whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes." *Id.*

The record shows that the activity at issue here is separate in time, space, origin and motivation from the activity at issue in *TIRBA*. As to the instant case, the 1968 rate filing involving search and examination rates was in effect from 1968 to 1983. Wilkie 2074-77, ID at 61, n.233. The 1968 rate filing for search and examination rates had as its basis "a meeting or series of meetings" (prior to the 1968 filing) involving all the companies issuing title insurance policies. Wilkie 2113. Yet, there was no convincing evidence that the 1968 rate filing was either justified by the rate bureau or reviewed by the state before it went into effect. ID at 61, n. 233. *See also* Wilkie 2112.

In comparison, it was not until 1977 that the title insurance code of Arizona was amended to include escrow services, the type of services at issue in *TIRBA*. Wilkie at 2090-91. The [37] escrow rates were first filed in 1977 in reaction to that legislative change. Wilkie 2107, 2121; Barberich 2266. By then, the search and examination rates at issue herein had been in effect for almost a decade. When the 1977 escrow filing was submitted, it was a separate schedule from the search and examination schedule. Wilkie 2132. And when the escrow schedule was refiled as amended in 1978, the search and examination rate structure stayed the same. Wilkie 2099.

These facts show that the respondents' activities as to escrow fees and search and examination fees are not so related in time, space, origin or motivation as to justify preclusion of the Commission's lawsuit. For example, the period during which the respondents agreed to submit collective search and examination rates predated the filing of escrow rates by about a decade. The search and examination rates were permitted to go into effect and remained in effect in the absence of active supervision for many years prior to the legislative change that led to the collective filing of escrow rates. And when the escrow rates were filed, there was no effect on the search and examination rate structure. We conclude, therefore, that the doctrine of *res*

[12] The Supreme Court, among others, has referred with approval to the conceptual framework of the Restatement (Second) of Judgments §24 (1982). *See Nevada v. United States*, 463 U.S. 110, 130, n.12.

judicata does not bar the Commission's lawsuit in Arizona as to search and examination fees. [38]

4. Idaho

The ALJ found active supervision in Idaho. He stated that the rating bureau was financially audited by the state insurance department. F. 164. A 1975 rate filing was referred to the department's outside consultant, who provided an analysis. F. 168. The state insurance department also held a public hearing on a variety of matters such as minimum rates. F. 168. A 1980 across-the-board rate increase resulted in the department subpoenaing data from the bureau members relating to insurer expenses and the outside consultant analyzing data. F. 168. The ALJ found that there was "no convincing evidence that the Idaho Insurance Department has failed to consider any insurer expense which might impact on rates, including agent retention expense." F. 169. We note, however, that the ALJ found that "[m]iscellaneous rate adjustments, forms, and endorsements were filed and approved throughout the period 1974-84 with apparently little or no review by the insurance department." ID at 68, n. 259, citing Mitchell Testimony at 2925-39, Fraundorf Testimony at 3434-42, CX 62A-71B and RX 207-223.

Respondents generally agree with the ALJ's analysis. Respondents state that complaint counsel's "preoccupation with the Bureau's filings of miscellaneous forms and endorsements and specialized policies is . . . misguided." "Complaint counsel's implication that lack of recall, years after the fact, suggests [39] lack of regulatory supervision, is specious. Moreover, complaint counsel have made no showing that these endorsements had any real economic impact on title insurance consumers or companies." RRB at 51.

Complaint counsel argues, however, that "an official of the rating bureau conceded at trial that the department had not conducted any inquiry into the reasonableness of the title insurers' expenses which were used as the basis for filing the rate increase." CCAB at 104, citing Mitchell Testimony at 2924. Complaint counsel also argues that numerous endorsements and amendments were filed, CCAB at 104, and were approved almost as soon as they were filed, in violation of the statutory 30-day waiting period, and despite the fact that they were unsupported by any justification data. "The department's analyst who approved the rates testified that he was unaware of what work a title insurer had to perform before the various endorsements could be issued. In addition, he was unaware of the costs or revenues associated with issuing any particular endorsement." CCAB at 104-05. Thus, complaint counsel argues, a $25 charge for issuance of a variable rate mortgage endorsement (which had been rejected in Connecticut because it represented a 25 percent increase in the cost of a $50,000 mortgage title insurance policy, without providing any apparent additional coverage) was accepted in Idaho "without any justification and without any questions or review by the department." CCAB at 106. **[40]**

Commissioners Strenio and Calvani would find that liability exists in Idaho because of the state's failure to actively supervise the filing of endorsements and amendments.[13] Complaint counsel argues persuasively that there was no review of these filings and, as held above, there is no *de minimis* exception to the Sherman Act. While sampling techniques used within rate filings may be permissible, a state reviewing agency may not unilaterally exempt an entire category of filings from its scrutiny. In effect, the state here was saying that it would actively supervise rates for apples but not for oranges. Perhaps its rationale was that the endorsements were less significant economically. However, when a per se violation of the antitrust laws for price-fixing is involved, one need not judge economic import, *e.g.*, whether the fixed rate is reasonable. *See United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927). One is not required to evaluate whether a fixed price on what may be a small item crosses some threshold of economic concern. There is no necessity to make a "minute inquiry" into the substantial nature of a fixed price. *Id.* **[41]**

5. Montana

The ALJ found that the Montana Rating Bureau made only one major rate filing, in 1983. "[The] bureau's filing included a commitment to gather statistical data and undertake a profitability study for all underwriters and agents in Montana during the year 1984 in order to provide further support for the rate." F. 176. "In connection with the February 22, 1983 filing, a representative of the Montana Rating Bureau met with officials of the Montana insurance department, and apparently was told that while the increase would go into effect immediately, additional support would have to be provided in the form

[13] The Commission was evenly divided on the finding of liability as to Idaho. Under the circumstances, the Commission has determined to dismiss the complaint allegations as to Idaho. The reasoning in this paragraph is adopted only by Commissioners Strenio and Calvani. *See* the separate statement of Commissioner Azcuenaga.

of financial data showing the profitability of agents and insurance companies for the past six years. There is no evidence that this material was ever provided." F. 177. The ALJ found, however, that "Montana insurance officials examined agent retention expenses both before and after the creation of the Montana Rating Bureau, and there is no evidence that the state's method of dealing with the problem, *i.e.*, by giving the insurance commissioner specific authority to disapprove excessive rates, has been ineffectual." F. 178. Montana also had a statutory provision permitting "file and use" rates. F. 174.

The ALJ found also that in Montana, "where there has been a history of state involvement in the controlled business and agent commission problems (culminating in specific legislation giving **[42]** the insurance commissioner authority to review and reject excessive commissions), there is inadequate basis on this record for questioning state supervision during the brief existence of the rating bureau." ID at 96.

Respondents state that the 1983 rate filing, upon which complaint counsel focuses, "was personally reviewed and accepted for filing by a Department official in charge of title insurance rate filings." RRB at 52. "The Department concurred in MTISO's [the rating bureau] plan to supply additional financial data on title insurance industry profitability to supplement the information presented in the rate filing." RRB at 53. Respondents argue that the 1983 rate filing "was, in fact, supported by information discussing the declining profitability of the title insurance industry." RRB at 53. "The filing conveyed MTISO's plan for developing additional data that would allow the Department to reexamine the rates filed." *Id.*

Complaint counsel states that in Montana, title insurance rates can be used as soon as they are filed.

> In line with this hands-off approach to regulation, from 1974 to November, 1984, the insurance department had only one full-time employee in the Rates and Forms Section of the Property and Casualty Division, and that employee was responsible for all rate and form filings in all property **[43]** and casualty lines of insurance as well as in miscellaneous other lines, such as title insurance. As the evidence illustrates, that employee's duties did not involve substantive rate review; only insurance forms had to be approved. CCAB 89.

The 1983 rate filing "was stamped approved in Mr. Stratton's [director of the title insurance rating bureau] presence without any discussion of the rates it contained." CCAB at 89. Complaint counsel also argues that the "filing on its face acknowledged that it did not contain the support material required by statute . . ." CCAB at 89. "The supporting material was never provided." CCAB at 90.

Complaint counsel argues that the controlled business hearings and the enactment of a new statute, relied upon by the ALJ, cannot support a finding of active supervision. Controlled business hearings, which were held three years before the formation of the rating bureau, involved hearings on restrictive legislation designed to keep controllers of business—attorneys, real estate brokers, and lending institutions—out of the title insurance business. Complaint counsel argues that such hearings cannot substitute for supervision of the price-fixing in question. **[44]**

The Commission concludes that complaint counsel has the better of the argument and finds no active supervision in Montana. For example, the record demonstrates that rates from the 1983 filing went into effect without being examined. F. 177. There is no evidence that the additional data requested by the state was ever provided. *Id.* This does not constitute a "program of supervision." The state's subsequent enactment of legislation cannot cure the legal violation that occurred earlier. Otherwise, states would have carte blanche to enact laws retroactively immunizing entities from liability after they had violated a federal statute.

6. Ohio

In Ohio, the ALJ found that complaint counsel failed to prove the complaint allegation that respondents used the rating bureau to establish uniform charges for search and examination services. Between 1972 and 1983, all rates filed by the Ohio rating bureau covered "risk" only. None of the filings purported to contain charges for search and examination services or settlement services. F. 158. Respondents independently set and published charges for the latter and they were not submitted to the Ohio Department of Insurance. F. 160. Complaint counsel's entire case on the search and examination issue rested on the supposition that because "risk" rates were justified on the basis of rate of return on total capital they must of necessity be **[45]** inflated to include such non-risk elements as the cost of conducting search and examination and settlement services.

Respondents argue that if the settlement charges and the search and examination charges assessed independently by respondents actually covered the expenses associated with delivering such services, then the subsidization theory urged by complaint counsel "disintegrates." RRB at 57. "Since complaint counsel did not even attempt to prove that the revenues from search/examination and settlement persistently failed to cover the expenses of providing such services, their theoretical argument about the multi-faceted role of the risk rate in Ohio has no record support." RRB at 58.

Complaint counsel's challenge to respondents' conduct is that respondents used the collectively-set risk rate as a vehicle to obtain their desired level of profit on all their activities. The collectively-set risk rates filed with the insurance department were established by the rating bureau through a rate of return on total capital method of accounting. Under this method, the capital, revenues and expenses used to compute the risk rate include capital, revenues, and expenses attributable to "nonrisk" activities, "by far the most important of which are search and examination services and settlement services." CCAB at 94. Thus, the rating bureau determined what increases to file in the collectively-set risk rates by calculating how much **[46]** additional revenue was necessary to achieve a targeted rate of return on total capital for all of its members' Ohio operations. "The 1981 rate filing was designed to assure the title insurance industry a rate of return on total capital of 7.52%." "Although this price-fixing agreement did not result in uniform charges for search and examination and settlement services, the agreement clearly had a substantial impact on competition in those markets." CCAB at 96.

The Commission finds that there is no liability in Ohio. Although complaint counsel's argument has theoretical appeal, complaint counsel failed to establish a nexus, other than on a theoretical basis, between the collective filing of risk rates and the fees for search and examination and settlement services.

D. *Escrow and Settlement Services*

The ALJ stated that it "became apparent at the outset of this proceeding that the complaint allegation respecting settlement or escrow services was an ancillary issue." ID at 3. "[B]oth sides directed their efforts almost exclusively to the search and examination issue."

We hold that the complaint should be dismissed in its entirety as it relates to settlement or escrow services. The ALJ is correct that little attention was paid to this aspect of the **[47]** complaint. Indeed, complaint counsel did not clearly appeal the ALJ's adverse rulings in this area. Thus, we conclude that no case has been made as to these services.

IV. Business of Insurance

Broadly stated, the Commission also must determine whether respondents' business was the "business of insurance" and therefore exempt from antitrust challenge under §2(b) of the McCarran-Ferguson Act, 59 Stat. 34, as amended, 61 Stat. 448, 15 U.S.C. 1013(b). The initial decision describes respondents' "insurance" activities in full detail and also analyzes the general activities of the title insurance industry. We adopt this description by the ALJ and also conclude that respondents' collective rate setting for search and examination services is not exempt from antitrust challenge. We highlight some of the more pertinent facts below.

Preliminarily, it is important to understand the nature of the antitrust exemption at issue. The statutory exemption itself has been discussed in detail by the Supreme Court in *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), and also has been applied by the Supreme Court in *Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119 (1982). **[48]**

In *Group Life & Health Ins. Co. v. Royal Drug Co.,* the Supreme Court, after noting that antitrust exemptions are to be construed narrowly, stated that the exemption is for the "business of insurance," not the "business of insurers." Referring to *SEC v. National Securities, Inc.,* the Court noted:

> The statute did not purport to make the States supreme in regulating all the activities of insurance companies; its language refers not to the persons or companies who are subject to state regulation, but to laws 'regulating the business of insurance.' Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the 'business of insurance' does the statute apply. *SEC v. National Securities,* 393 U.S. 453, 459-60 (emphasis in original.)

In *Royal Drug,* the Supreme Court adopted a three-pronged test. Whether a particular practice is the business of insurance depends first on whether the practice has the effect of transferring or spreading a policyholders' risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry. *See also Pireno,* 458 U.S. at 129. **[49]**

The Supreme Court noted, with regard to the first prong, that the "primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk." *Royal Drug,* 440 U.S. at 211. "It is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it." *Id.* (citation omitted). Underwriting or spreading of risk was said to be "an indispensable characteristic of insurance . . .". *Id.* at 212.

The Pharmacy Agreements in *Royal Drug* were not part of the business of insurance because they did not "involve any underwriting or spreading of risk, but are merely arrangements for the purchase of goods and services by Blue Shield." *Id.* at 214. The Court, agreeing with the United States position that "there is an important distinction between risk underwriting and risk reduction . . .", *Id.* at 214, n.12, noted that the cost savings arrangements at issue "may well be sound business practice, and may well inure ultimately to the benefit of policyholders in the form of lower premiums, but they are not the 'business of insurance.'" *Id.* at 214. Thus, the Pharmacy Agreements were held to be legally indistinguishable from "countless other business arrangements that may be made by insurance companies to keep their costs low" such as a contract between the insurance company and a drug chain whereby its **[50]** policyholders could obtain drugs under their policies only from stores operated by the chain. *Id.* at 215.

As to the second prong, regarding the policy relationship between the insurer and the insured, the Court noted that Congress, in enacting the McCarran-Ferguson Act, had been concerned with the "relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation and enforcement—these were the core of the "business of insurance." *Id.* at 215-16, quoting *SEC v. National Securities, Inc.,* 393 U.S. 453, 460 (1969). As to the Pharmacy Agreements in question, the Court stated:

> At the most, the petitioners have demonstrated that the Pharmacy Agreements result in cost savings to Blue Shield which may be reflected in lower premiums if the cost savings are passed on to policyholders. But in that sense, every business decision made by an insurance company has some impact upon its reliability, its ratemaking, and its status as a reliable insurer . . . *Id.* at 216-17.

As to the third prong, whether the practice was limited to entities within the insurance industry, the Court referred extensively to the

Act's legislative history, noting that in enacting McCarran-Ferguson, "the primary concern of both [51] representatives of the insurance industry and the Congress was that cooperative ratemaking efforts be exempt from the antitrust laws." *Id.* at 221. This was attributed to the "widespread view that it [was] very difficult to underwrite risks in an informed and responsible way without intra-industry cooperation." *Id.* The Court adopted the explanation from one of the early House Reports that "[t]he theory of insurance is the distribution of risk according to hazard, experience, and the laws of averages. These factors are not within the control of insuring companies in the sense that the producer or manufacturer may control cost factors." *Id.* at 221, quoting H.R. Rep. No. 873, 78th Cong., 1st Sess. 8-9 (1943). Further, the Court noted an underlying rationale for the exemption was that to "prohibit combined efforts for statistical and rate-making purposes would be a backward step . . .". *Id.* at 221-22 (citation omitted).

In *Union Labor Life Ins. Co. v. Pireno, supra,* the Supreme Court reconfirmed the three-pronged test from *Royal Drug.* The Court held that the arrangement in question between an insurance company and a number of chiropractors was not part of the business of insurance since the practice was aimed at reducing the cost of satisfying claims, not spreading risk. Also, the Court explained that the practice must be "logically and [52] temporally" connected to the spreading of risk. 458 U.S. at 130.[14]

Turning now to respondents' arguments, they assert that the ALJ improperly relied upon just the first "risk spreading" *Royal Drug* criterion in ruling on the business of insurance exemption issue.[15] RAB at 45. They cite *Pireno* for the proposition that "[n]one of these criteria is necessarily determinative in itself." 458 U.S. at 129. Respondents argue that the McCarran Act exemption may apply where the second and third criteria are satisfied but the first is not.

Respondents then argue that in any event, the search and examination process in title insurance satisfies the first "risk spreading" criterion. They cite *Pireno* for the proposition that the "fundamental principle of insurance [is] that the insurance policy defines the scope of the risk assumed by the insurer from the

[14] In addition to these Supreme Court decisions, a Court of Appeals addressed the conduct of respondents herein in a similar context in *United States v. Title Ins. Rating Bureau of Ariz.* ("*TIRBA*"), 700 F.2d 1247 (9th Cir.), *cert. denied,* 104 S. Ct. 3509 (1984).

[15] A recitation of complaint counsel's arguments would be superfluous given our substantial agreement with

insured." 458 U.S. at 131. In title insurance, this role of identifying the risk to be insured is performed through the search examination. "Since every real estate title is unique, an [53] insurer cannot reliably assess on an actuarial or statistical basis whether the purchaser will be vested with a fee simple . . .". RAB at 48. Thus, respondents think there is a "logical and temporal" relationship between title search and examination and the underwriting of title insurance risk, because the search has to precede the issuance of the insurance. The process of checking and perfecting title is a substitute for the risk; it eliminates or at least minimizes it. RAB at 53, n.44. Respondents would thus conclude that the fees for performing this risk assessment can be set collectively.

Respondents also think the ALJ too narrowly interpreted the legislative history of McCarran. Although the Supreme Court in *Royal Drug* stated that the primary purpose of the McCarran Act was to permit cooperation in insurance ratemaking, the ALJ concluded that the Act "cannot be interpreted so as to cover insurance company ratemaking that is unrelated to a pooling of risk experience" among insurance companies. ID at 83. Respondents dispute this by citing *SEC v. National Securities,* 393 U.S. 453 (1969) for the proposition that "the fixing of rates is part of this [insurance] business." 393 U.S. at 459.

Respondents then assert that *Royal Drug,* following *National Securities,* stated that there was a dual purpose behind McCarran: the primary purpose was to protect the states' power to tax and regulate insurance against Commerce Clause attack, while the [54] secondary purpose was to carve out a limited antitrust exemption for insurance company activities. RAB at 55-56. Thus, quoting the Supreme Court in *Royal Drug,* the Act "should be read as protecting the right of the States to regulate what they traditionally regulated." 440 U.S. at 218-219, n.18. Further, "[b]ecause of the widespread view that it is very difficult to underwrite risks in an informed and responsible way without intra-industry cooperation, the primary concern of . . . [Congress] . . . was that cooperative ratemaking efforts be exempt from the antitrust laws." *Id.* at 221. Respondents assert this language means that insurance ratemaking was an exempt category of conduct wholly apart from the question of risk spreading. RAB at 56, and n.45.

Respondents take the position, however, that they "need not and do not base their McCarran Act arguments on any assertion that the Act constitutes 'a blanket approval of all rate fixing by insurers irrespective of the connection to risk allocation.'" RAB at 58, n.47. "The activity challenged is ratemaking with respect to an insurance function that is directly related to the insurer's decision concerning what risks will be assumed under its policies." *Id.*

We now discuss some of the more pertinent facts in the proceeding. We agree with the ALJ's assessment that title insurance policies basically are assurances to the buyer or **[55]** lender that defects in title discoverable from examining the public record have been brought to the attention of the buyer or lender so they can cure the defect or decide not to go ahead with the deal. ID at 18. A secondary purpose of title insurance, going beyond the scope of an abstract or attorney's opinion,[16] is to protect the buyer or lender from hidden or "off-record" risks not discoverable from examination of public records (such as missing heirs, etc.). ID at 18. But the fees for such protection are separate from the search and examination fees involved herein.[17]

A title insurance policy may be based on a search and examination conducted by an independent abstractor or an unaffiliated independent attorney. ID at 19. Most title insurance policies, though, involve searches and examinations **[56]** made by attorney-agents, approved attorneys,[18] or employees of the title insurers. ID at 19. A person may wear more than one hat in this business, *e.g.*, an approved attorney may also function as an unaffiliated independent attorney.

Regardless of the form in which the buyer or lender is assured of good title (*e.g.*, through attorneys' opinion, or title "insurance") the condition of the title is determined by essentially the same search and examination process. Further, the objective is the same under all forms or processes—to uncover significant impediments to ownership. ID at 23. The nature of the search and examination service, then, is to provide a statement of the status or condition of title and to call to the attention of the buyer or lender defects discoverable from the public records. ID at 24. In respondent's view, this process determines what risks they are willing to "insure." ID at 24.

[16] An attorney's opinion is a substitute in many states for title insurance, especially in New England and the Southeastern U.S. ID at 18, n.53. The attorney's opinion, like title insurance, involves a critical review of the public records and an interpretation of the legal significance of documents uncovered in the search. ID at 15.

[17] An exceptions schedule to the title report or title policy will contain "off-record" exceptions, meaning the insured will not be covered under those conditions. For example, excepted from coverage will be "[r]ights or claims of parties in possession not shown by the public records" or "[e]asements or claims of easements not shown by the public records." F. 87. Some of these exceptions may be removed by off-record procedures. F. 88. But removal of these off-record exceptions also requires the purchase of extended coverage. F. 88. The charges for extended coverage are not covered by the search and examination fees at issue.

[18] Approved attorneys are independent attorneys who have been formally designated by respondent insurers as qualified to conduct a search and examination. ID at 20.

Respondents' basic argument is that the search and examination undertaken prior to the issuance of the title insurance policy is "underwriting" because it is on the basis of the search and examination that risk is identified and a decision is made whether to accept or reject it. ID at 28. We agree with the ALJ's assessment that this open-ended definition of **[57]** underwriting is illogical because the search and examination conducted for title insurance purposes is virtually the same as the process used for the purposes of rendering abstracts and attorneys' opinions. Further, regardless of the purpose, search and examination is carried out by a corps of searchers, abstractors, conveyancers, attorney-agents, and approved attorneys who move freely from one form of title work to another, without a perceptible difference in what they do. ID at 29.

Respondents' effort to expand the definition of underwriting is unpersuasive because the record evidence is that this is an industry in which standard forms predominate, company manuals prescribe a set routine, and the basic approach of the title insurance business is not to assume any significant risks uncovered by searchers and examiners. ID at 29. The search and examination undertaken prior to the issuance of insurance is intended to provide an accurate search of the public records for title defects, which are to be cured by the insured or excepted from coverage. ID at 30. Thus, we conclude that the search and examination function is not underwriting in the sense of assuming and spreading risk among a universe of insureds. ID at 30. *Cf. Royal Drug,* 440 U.S. at 205.

Instead, the guiding principle of title insurers is to avoid risk. Operating manuals throughout the industry are replete with admonitions that risks are to be excepted from coverage. **[58]** ID at 30. These operating manuals instruct agents that they must be followed or the agents may be liable for damages. ID at 30, n.109. Standard title reports contain standard limitations in the form of a general notice that the policy will not insure against loss from any title defects listed in an exceptions schedule attached to the report, or any new title defect arising between the date of the report and satisfaction of the standard requirements. ID at 32.[19] The title insurers strictly require their agents and employees to list all enforceable or even doubtful title defects, liens, and encumbrances in the exceptions schedule (called Schedule B). ID at 32.

[19] The "standard requirements" are the payment of the purchase price for the property, recordation of the deed, and payment of the title insurance premium.

Respondents claim, though, that agents and employees, as searchers and examiners, exercise underwriting discretion in writing title reports or final policies. However, the testimony revealed such "discretion" is limited to insignificant defects such as ancient and patently unenforceable mortgages. ID at 33. This is consistent with the finding that there is no credible evidence that respondents have incurred any significant losses traceable to the exercise of discretion by searchers and examiners in eliminating minor title defects. ID at 33. Additionally, the insurer-agent agreements and company directives contain explicit requirements that the agent, without discretion, must include all material title defects as exceptions to the **[59]** policy. ID at 33. The "common rule in the title insurance industry is that enforceable title defects appearing on Schedule B of the title report will inevitably appear as specific exceptions on Schedule B of the final policy unless the insured takes specific steps (for example, payment of mortgage money or posting of bonds to satisfy existing tax or judgment liens) to cure them." ID at 35. *See also* ID at 36-38.

It follows, then, that the most significant "risk" that title insurers face is whatever peril attaches to conducting a competent search and examination of the public records. ID at 38. But this "risk" has nothing to do with the notion of risk as it is commonly encountered in casualty insurance. In the latter, there is a risk that an unforeseen or uncontrollable event will affect the insured. In search and examination work, the risk is that the title searcher will not perform competently. Thus, the event triggering compensation here is something caused by or under the control of the title insurer.[20] Even this "risk" of incompetence (a "risk" indistinguishable from that incurred by all employers in all lines of enterprise) is reduced, though, by the contractual relationship between insurers on the one hand, and abstractors, independent attorneys, etc. on the other, which **[60]** places upon the latter liability for negligence in conducting the search and examination. ID at 38.

It is only in a rare number of cases that respondents may give affirmative coverage if an uncovered title defect is not cured. The risk must be calculable and low, and indemnities or extra premiums are required. Agents and branch employees of title insurers are prohibited from giving such affirmative coverage without prior approval from

[20] *Cf.* the *Royal Drug* Court's definition of insurance: "The theory of insurance is the distribution of risk according to hazard, experience, and the laws of averages. These factors are not within the control of insuring companies in the sense that the producer or manufacturer may control cost factors." *Royal Drug,* 440 U.S. at 221, quoting H.R. Rep. No. 873, 78th Cong., 1st Sess. 8-9 (1943).

supervisory or home office staff (and we emphasize that this relates only to a limited set of circumstances). ID at 39, and n.141 at 39. Again, we stress that these rare circumstances properly cannot be subsumed under the search and examination ratemaking at issue since additional fees are charged for such affirmative coverage.

Given these herculean efforts to eliminate risk, it is not surprising that the trial elicited no evidence that any title insurer has incurred any loss by reason of an agent's decision to issue insurance without obtaining prior approval despite the presence of a known title defect. F. 95. Similarly, there is no evidence on the record that in those rare instances when an insurer decides to issue insurance despite the existence of some uncovered risk that this involves a pooling of risk experience or **[61]** represents an actuarial assessment of risk by an individual insurer. ID at 40, F. 114.[21]

Consequently, there is a sharp distinction between the two things title insurance companies do: (1) provide a service informing buyers and lenders about known title defects, and (2) in a small number of cases indemnify buyers or lenders under separately charged "risk rates." The bifurcated nature of the business is evident from industry rate manuals that separate out a relatively small charge (the "risk rate") for indemnification. ID at 41. The separate risk rate is not challenged in this proceeding (except in Ohio, as discussed *supra*). The risk rate stands in marked contrast to the relatively substantial charge for providing information based on the search and examination. ID at 42.

Significantly, title insurance rates are not set collectively through rate bureaus in order to facilitate intra-industry cooperation in the pooling of risk information. ID at 44. The evidence shows that where a title insurance rating **[62]** bureau establishes either an inclusive rate or a separate rate schedule for search and examination, the cost studies used to support these rates dwell mainly on the cost of carrying out the search and examination, including the fixed costs of title plants and employee staffs. ID at 44; Plotkin Testimony at 2462. "This cost is not only easily ascertainable by each insurer, but is also within the control of the individual insurer, and therefore the basic

[21] *Compare Royal Drug*, 440 U.S. at 221 ("[t]he theory of insurance is the distribution of risk according to hazard, experience, and the laws of averages.") *with* F. 114: "there is no evidence that any title insurer, whether operating through a rating bureau or otherwise, sets rates by referring to actuarially determined loss experience." According to the New Jersey Title Insurance Rating Bureau, "it is not possible to set up an actuarial standard for risk assumption based on loss experience. Risks in the title insurance industry are of too low an incidence and too random a character to justify this type of rate determination." Respondents' Exhibit 3Z-4.

tenet of the McCarran Act—that is, the presumed need for insurers to combine for the purpose of sharing their experience relating to an uncontrollable element (future claims) which is then spread among a large universe of insureds—is not present." ID at 86-87. Uniform rates are established that apply to all members despite any cost differences the members individually face when conducting searches and examinations. ID at 44.

The Commission finds that respondents' search and examination services are not the "business of insurance." Accordingly, the cooperative rate setting in which they engaged regarding those services is not properly exempt from the application of the antitrust laws. We agree with the ALJ's evaluation that search and examination services essentially are non-insurance services often performed by other entities (such as independent attorneys) outside of an "insurance" context. ID at 85. The industry itself separates out the concept of risk by having separate "risk" rates (not at issue herein). Search and **[63]** examination services "are regarded by respondents themselves as discrete services which are usually billed at a price that is entirely removed from any consideration of whatever risk element may be involved in title insurance." ID at 86.

Our only substantive disagreement with the ALJ is with some of his analysis under the *Royal Drug* standard. The ALJ confined his analysis of the second and third *Royal Drug* criteria to a footnote. ID at 88, n.286. He found that there is no evidence that respondents extended their price-fixing beyond their own agents and employees. He also ruled that these services (and the charges for these services) are part of the relationship between the insurer and the insured in the sense that the search and examination determines what is excluded from the policy and the collective rate-making determines how much the insured pays for the coverage received. ID at 88, n.286. Although our application of the *Royal Drug* criteria to the facts differs from the ALJ's, our conclusion is the same—the antitrust exemption is inapplicable.

The Supreme Court's analyses in *Royal Drug* and *Pireno* each begin with the admonition that antitrust exemptions are to be narrowly construed. As noted previously, the exemption here is limited to the business of insurance, not the business of insurers. An indispensable characteristic of the business of **[64]** insurance is the spreading and underwriting of a policyholder's risk. *Royal Drug,* 440 U.S. at 211-212; *Pireno,* 458 U.S. at 127.

The parties expended considerable energy arguing about the relative importance of the three criteria set forth in *Royal Drug.* Our analysis proceeds from the Supreme Court's statement in *Pireno* that "[n]one of these criteria is necessarily determinative in itself, . . . 458 U.S. at 129." Support for the contention that none of the criteria is determinative is found in the fact that the court examined all three criteria in both *Pireno* and *Royal Drug.* An alternative contention stresses the "necessarily" in the Court's language in *Pireno,* suggesting that in a particular case one criterion might be determinative. Under this view, the Court's review of all three factors in both cases may have been undertaken for the purpose of illustrating how the criteria should be interpreted. We find both contentions plausible.

Given this conundrum, we could choose a method of analysis that utilizes a balancing test while examining all three criteria. Such a balancing approach could flow from the statement in *Pireno* that "[w]e may assume the challenged peer review practices need not be denied the §2(b) exemption solely because they involve parties outside the insurance industry. But the involvement of such parties, even if not dispositive, constitutes part of the inquiry mandated by the *Royal Drug* **[65]** analysis." 458 U.S. at 133 (emphasis in original). This is consistent with the Court's language in the same opinion that "[n]one of these criteria is necessarily determinative in itself." 458 U.S. at 129. (Note, again, the use of the word "necessarily" in this last statement—it may mean that in an individual case a single criterion could be determinative.) We need not engage in any balancing of the *Royal Drug* criteria here, though, since our examination reveals that the activity in question fails to meet all three criteria.

A second, parallel method of analysis would be to treat underwriting and risk spreading as the essence of all three criteria. This is suggested by the Court's statement that underwriting and risk spreading is an "indispensable" element of insurance. Further, when the *Pireno* court examined the second criterion, it focused on the fact that the peer review under scrutiny occurred only after the risk had been transferred—"the challenged peer review arrangement is logically and temporally unconnected to the transfer of risk accomplished by ULL's insurance policies." 458 U.S. at 130. The Court also noted that the third criterion arose out of the need to protect "intra-industry cooperation" in the underwriting of risks—"[a]rrangements between insurance companies and parties outside the insurance industry can hardly be said to lie at the center of that legislative concern." 458 U.S. at 133. Under this second method of analysis, we conclude that respondents' search and **[66]** examination services are not the business of insurance. We now elaborate upon the basis for this conclusion.

As to the first *Royal Drug* criterion, we hold that the practice under scrutiny here does not underwrite or spread risk. Separate risk rates are not at issue. The complaint challenged collectively set rates that have as their foundation the noninsurance service of informing buyers and lenders of the existence of title defects on properties. FF. 102-103. The costs of performing these services (including the fixed costs of the title plants)—and not claims from losses incurred by insuring against risks—largely drive the rates charged. F. 99. Thus, we are not convinced by respondents' argument that the search and examination defines the risk that is transferred. Rather, respondents' search and examination activities, in addition to informing buyers and lenders about the status of the title, also serve to reduce respondents' expenses by excluding risk (*e.g.*, liens, etc.) from coverage.

Search and examination services, like the Pharmacy Agreements in *Royal Drug,* are indistinguishable "from countless other business arrangements that may be made by insurance companies to keep their costs low." *Royal Drug,* 440 U.S. at 215. As the Supreme Court noted in *Royal Drug,* "there is an important distinction between risk underwriting and risk reduction. By reducing the total amount it must pay to policyholders, an **[67]** insurer reduces its liability and therefore its risk. But unless there is some element of spreading risk more widely, there is no underwriting of risk." *Royal Drug,* 440 U.S. at 214-15 n.12.

The record shows that this is an industry in which there is little, if any, real discretion during the search and examination process, precisely because the title insurers want to eliminate risk coverage from the contract with the insured. FF. 72, 75-83, ID at 85. Risks in fact are excluded routinely from coverage (with the limited exceptions noted in the record for which an additional "risk" fee is charged). Indeed, the rates charged to the insured are not based on the risk associated with that particular property but rather on the purchase price of the property. F. 100.

Our finding is consistent with the decision by the ninth circuit in *TIRBA* which held that the provision of escrow services by title insurance companies does not fall within the business of insurance exemption.[22] The escrow services at issue are similar to those under scrutiny here in that "the escrow agent reviews documents demonstrating the removal of encumbrances which would otherwise have to be excluded from insurance coverage." **[68]** 700 F.2d at 1251. As noted above, the purpose of search and examination is to find defects which then are excepted from coverage. The *TIRBA* court accepted the government's argument that the escrow agent performed "merely ministerial functions" and determined that the escrow process itself "does not spread or underwrite risk." *Id.* The court rejected the argument that "mechanisms that merely reduce costs to the insurer are part of the business of insurance." *Id.*

The second criterion involves the policy relationship between the insurer and the insured and focuses on "the type of policy which could be issued, its reliability, interpretation, and enforcement." *Pireno,* 458 U.S. at 128. We are convinced that the risk spreading or underwriting concept applies to this criterion. CCAB at 27.[23]

The title examiner's search and examination does not involve the spreading or underwriting of risks. Instead, a search and examination only provides information to the insured and the lender as to the status of title. The insurance company separately determines what must be excluded from the policy that is later issued. FF. 59 and 74. The general rule of title insurers is that all identified liens and encumbrances must be **[69]** listed on the policy as exceptions to coverage. The title examiner does not decide to provide coverage; the title insurer has already decided, as a matter of company policy, not to assume the risk of loss from existing liens and encumbrances. CCAB at 29.

We agree with complaint counsel that correctly applied to title insurance, the "insurer-insured" relationship only extends to the decision of whether a particular defect should be given coverage, such as whether or not to provide coverage for mechanics liens. CCAB at 29. "The legal examination of title that merely reports, in a given case, whether a mechanics' lien has been filed, is a legal determination that is unrelated to insurance company decisions regarding the coverage of policies." CCAB at 29-30. We thus hold that the search

[22] The *TIRBA* court noted also that the pre-*Royal Drug* cases cited by TIRBA were not helpful to TIRBA's position. *See* 700 F.2d at 1251, n.1. We agree. Prior to *Royal Drug,* there existed "an expansive interpretation of the 'business of insurance' requirement . . .". *Id.* We thus decline to rely upon those same pre-*Royal Drug* cases now cited by respondents.

[23] In accord is *TIRBA,* 700 F.2d at 1252, where, in analyzing the second criterion, the ninth circuit rejected TIRBA's argument that the escrow process is essential in determining what risks will be accepted by the title insurer.

and examination, as properly interpreted, is not a part of the "insurer-insured" relationship.

The third criterion concerns whether the practice is limited to entities within the industry. In *Pireno,* the Court stated that the involvement of outside parties need not result in a denial of the exemption, "[b]ut the involvement of such parties, even if not dispositive, constitutes part of the inquiry mandated by the *Royal Drug* analysis." 458 U.S. at 133. Referring to *Royal Drug,* the *Pireno* court then noted that "§ 2(b) [of McCarran-Ferguson] was intended primarily to protect 'intra-industry **[70]** cooperation' in the underwriting of risks." *Id.* "Arrangements between insurance companies and parties outside the industry can hardly be said to lie at the center of that legislative concern." *Id.* "More importantly, such arrangements may prove contrary to the spirit as well as the letter of §2(b), because they have the potential to restrain competition in noninsurance markets." *Id.*

In its examination of the third criterion, the *TIRBA* court granted that the fixing of escrow service prices took place among members of the industry. "Thus, TIRBA's activity would seem at first glance to satisfy the third requirement." *TIRBA*, 700 F.2d at 1252. The "complication," as the *TIRBA* court termed it, was that entities other than insurance companies perform escrow services, "so that immunizing price-setting by insurance companies who perform escrow services would distort competition by those who are not insurance companies." *Id.* As a consequence, the *TIRBA* court ruled that the escrow service price fixing did not satisfy the third criterion. This result seems compatible with the concern expressed in *Pireno* about avoiding the restraint of competition in noninsurance markets.

Our reasoning is in accord with that of the ninth circuit in *TIRBA*. Both the escrow services at issue in *TIRBA* and the search and examination services at issue here are ministerial and noninsurance in nature. *TIRBA*, 700 F.2d at 1251. Further, both escrow and search and examination services are commonly provided **[71]** apart from any "insurance" trappings. The escrow services in *TIRBA* could be bought apart from buying title insurance. *Id.* at 1252. In the instant case, attorneys' opinions can be a substitute for title insurance. Thus, immunizing price-setting by insurance companies who perform search and examination services may distort competition in non-insurance markets, *e.g.*, in states where the use of an attorney's opinion is still commonplace. F. 35.

There is an additional reason why respondents' activities do not meet the third criterion. As we read *Pireno's* discussion of the third criterion, the Supreme Court was concerned with protecting the legitimate "intra-industry cooperation" needs of the insurance industry for the purpose of underwriting risks. 458 U.S. at 133. Yet, the industry itself believes that it is not possible to set up an actuarial standard for risk assumption based on loss experience. F. 114. As the ALJ found, there "is no evidence that title insurance rates are set collectively through rating bureaus as a way of obtaining intra-industry cooperation in the pooling of risk information." F. 114. *See* FF. 112-115 generally. It is noteworthy that the search and examination services are provided by both insurance companies and persons that do not participate in the insurance business (such as independent attorneys providing opinions), indicating the lack of need for intra-industry cooperation. While the price-fixing encountered here encompasses charges for tasks performed by the **[72]** employees and agents of the title insurers, we conclude that those employees and agents are not performing an insurance function at the time.

Respondents assert, however, that one Court of Appeals has expressly rejected the view that only ratemaking arrangements limited to the risk or loss portion of insurer's expenses are exempt, citing the pre-*Pireno* case of *Proctor v. State Farm,* 675 F.2d 308, 323 (D.C. Cir. 1982), *cert. denied,* 459 U.S. 839 (1982):

> Risk probability is only one element of the ratemaking formula, however. Insurers must also factor in the magnitude of the loss . . . *i.e.,* the cost of repairing (or replacing) the damaged vehicle . . . . In this case, insurers have allegedly collected and shared data on the cost of repair . . . such activity is closely akin to cooperative ratemaking since it involves a necessary part of the ratemaking process.

The reasoning of this case does not help respondents.[24] Clearly, a single insurer's ability to predict costs of repair on a car may be improved by examining industry average data, *e.g.,* **[73]** by surveying 1000 cases to determine what garages charge to repair a fender on a particular car. Obviously, it would be easier to do this by sharing data among insurance companies. This type of actuarial assessment, however, does not take place in the title insurance industry for search and examination rates. Respondents state that the title history of each transaction is unique and consequently "an insurer cannot reliably

[24] There is serious question whether *Proctor* has continuing vitality in light of *Pireno.* The *Proctor* court expressly disagreed with the second circuit's decision in *Pireno,* 650 F.2d 387, 394-95 (2d Cir. 1981). The Supreme Court, however, affirmed the second circuit's decision. *Pireno,* 458 U.S. at 134.

assess on an actuarial or statistical basis whether the purchaser will be vested with fee simple title or whether any defects or encumbrances exist with respect to the particular property to be insured." RAB at 48. *See also* F. 114. Instead, search and examination rates are set essentially by looking at the costs of bureaucratic operations rather than claims experience. Such costs are individually ascertainable by each insurer. ID at 86-87.[25] **[74]**

We conclude, then, that the activities under scrutiny are not protected by the "business of insurance" exemption. The activities fail to meet all three of the *Royal Drug* criteria. In addition, "search and examination" services, performed by noninsurers and insurance companies alike, do not have the indispensable element of risk spreading or underwriting necessary to qualify as the business of insurance.

V. The Noerr-Pennington Defense

Respondents argue that the activities in question are protected from antitrust challenge under the *Noerr-Pennington* doctrine.[26] That doctrine, generally speaking, establishes that concerted private efforts to persuade governmental authorities to take action to restrain competition are not subject to the Sherman Act, absent circumstances where such concerted petitioning constitutes a "sham," or an abuse of process.

The ALJ held that arguing that forbidding the collective fixing of rates by competitors somehow interferes with their right of political advocacy is analogous to saying that contractors should be allowed to conspire to rig bids on government projects, "so long as the results of the conspiracy **[75]** are wrapped in the trappings of a 'petition' or proposal which may be said to convey policy information to official decision-makers." ID at 99. The ALJ thus denied use of the defense.

[25] Respondents also rely upon *In re Equifax Inc.*, 96 FTC 844 (1980). Complaint counsel counters that in *Equifax*, "the Commission found exempt the collection of medical information from doctors by a consumer reporting agency for use by insurance companies in deciding whether to accept insurance applications and pay claims. [footnote omitted] In *Pireno*, the district court found exempt the collection of medical information by insurance companies from a peer review committee of chiropractors for the purpose of deciding what would constitute reasonable claim payments. [footnote omitted] The Second Circuit and the Supreme Court, however, held that the activity [in *Pireno*] was not part of the 'business of insurance.' [footnote omitted] The information gathering function in *Equifax* did not even provide as strong an argument for an exemption as was the case in *Pireno* because in *Equifax* the information gathering was done by an independent company, not by the insurer." CCAB 37. We agree with the assessment of complaint counsel that *Equifax* is no longer good law in light of *Pireno*. CCAB at 36-40.

[26] This doctrine is based upon: *Eastern R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); and *California Motor Transport Co. v. Trucking, Unlimited*, 404 U.S. 508 (1971).

Respondents argue, *inter alia*, that the ALJ's ruling conflicts with *Horsemen's Benevolent and Protective Association, Inc. v. Pennsylvania Horse Racing Commission*, 530 F. Supp. 1098 (E.D. Pa.) *aff'd mem.*, 688 F.2d 821 (3d Cir. 1982). "In that case, a jockeys' guild allegedly conspired to restrain trade by petitioning the state racing commission to increase jockey fees. The jockeys allegedly agreed among themselves on a proposed schedule of fees, then urged the commission to adopt the schedule." RAB at 74. In *Horsemen's*, the court held that the jockeys' guild's successful attempt to influence a state commission to increase the jockeys' pay was protected by *Noerr* and thus did not violate the antitrust laws, 530 F. Supp. at 1109.

Respondents further argue that they were required to file rates with the state and could not legally charge rates that the state disapproved. Respondents, moreover, disagree with the ALJ's bid rigging analogy. Bid rigging is not "joint petitioning," but "a furtive, fraudulent effort to deprive the state's purchasing agents of the benefits of competition. Bidriggers make no effort to provide relevant information to state policymakers." RAB at 76. "By contrast, respondents **[76]** sought to influence state policy . . ." RAB at 77. "Unlike bidriggers, respondents engaged in this activity openly and above-board. They responded, in fact, to explicit invitations by the state to petition collectively." RAB at 77.

Respondents also state that the ALJ's reliance on *United States v. Southern Motor Carriers Rate Conference, Inc.*, 672 F.2d 469 (5th Cir. 1982), *rev'd*, 471 U.S. 48 (1985), is misplaced. Respondents assert that although the Supreme Court granted *certiorari* in *Southern Motor Carriers* on the *Noerr* issue the Court did not rule on it. The Court of Appeals decision in that case is said to be "illogical." RAB at 78.

Complaint counsel argues that respondents' *Noerr* standard would mean in effect that a group of competitors could collectively file and use rates without any active state supervision and yet still be exempt from the antitrust laws. Labeling that argument as "clearly wrong," complaint counsel asserts that *Noerr* merely protects collective petitioning to induce lawful government action. It does not protect agreements to use collectively determined rates that may or may not be adopted by the government. CCAB at 138.[27] **[77]**

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[27] Complaint counsel proposes the following *Noerr* standard. CCAB at 140. *Noerr* should complement the state action doctrine. *Noerr* deals solely with collective proposals to influence and obtain anticompetitive government action. The state action doctrine explains that the state must clearly articulate and actively supervise before the parties to the proposal can implement their proposals. Thus, if a state permits a collective proposal to become effective without active supervision then implementation of the proposal is unlawful. The

(footnote cont'd)

We find the *Noerr* defense inapplicable here. First, we are not being asked to consider the legitimacy of collective attempts to lobby the state to require concerted rate-making.[28] Rather, respondents merely agreed on what rates should be submitted to the state for consideration, after which they implemented the collectively-set rates. If respondents had instead agreed on a political advocacy campaign to convince the state to adopt or change a ratemaking policy, such activity would be protected.[29] The agreements in this case, however, were not coincident to the formulation of positions on the desirability of collective **[78]** rates.[30] We thus think respondents mischaracterized the evidence when they stated that they "sought to influence state policy . . .". RAB at 77.

The Supreme Court's recent pronouncement on *Noerr* in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 108 S. Ct. 1931 (1988), is directly relevant here. The Court stated that "*Noerr* immunity of anticompetitive activity intended to influence the government depends not only on its impact, but also on the context and nature of the activity." 108 S. Ct. at 1939. The context and nature of the defendant's activity in *Allied* made it "the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves." *Id.*[31] Consequently, *Noerr* protection was not available in that case. **[79]**

Using the *Allied* analysis, we must evaluate the "context and nature" of respondents' activity to determine whether it is the type

proposal (and the agreement on price that preceded the proposal) is protected by *Noerr* but the implementation constitutes anticompetitive private action for which the private actors may be held liable. In the instant case, more than petitioning took place. Respondents also proceeded to charge the collectively-set rates. CCAB at 144.

[28] Respondents also cite in passing *Llewellyn v. Crothers*, 765 F.2d 769 (9th Cir. 1985). The court, with sparse language, ruled there was a valid *Noerr* defense where "lobbying efforts" by a public corporation defendant (SAIF) "resulted in lawful action" by the state workers' compensation department. *Id.* at 775. However, the instant case does not involve lobbying—it involves collective rate setting.

[29] Such a distinction is important because in *Noerr*, the Supreme Court distinguished collective lobbying activities from the kinds of combinations "ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom . . . through the use of such devices as price-fixing agreements . . . and other similar arrangements." 365 U.S. at 136.

[30] *Cf. Litton Systems, Inc. v. AT&T Co.*, 1982-83 CCH Trade Cas. ¶ 65,194 (2d Cir. 1983), at 71,777:

> AT&T erroneously assumes that a mere incident of regulation—the tariff filing requirement—is tantamount to a request for governmental action akin to the conduct held protected in Noerr and Pennington . . . The decision to impose and maintain the interface tariff was made in the AT&T boardroom, not at the FCC . . .".

[31] As we stated in *New England*, slip op. at 23, "[b]ecause of its context (private standard-setting) and nature (packing the annual meeting) the Court concluded that Allied's activity, in essence promoting agreements not to manufacture, distribute, or purchase plaintiff's product, *id.* at 1937, was 'the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves,' *id.* at 1939."

that has "traditionally had its validity determined by the antitrust laws themselves." Respondents' collective rate formulation and adoption were equivalent to a horizontal price agreement among competitors. Such an arrangement traditionally has had its validity determined by the antitrust laws. Immunizing respondents' conduct would lead to the result the Supreme Court in *Indian Head* said should be avoided:

> Just as the antitrust laws should not regulate political activities simply because those activities have a commercial impact [citation omitted] so the antitrust laws should not necessarily immunize what are in essence commercial activities simply because they have a political impact. [footnote omitted]

Indeed, the Court in *Allied* employed an example that is telling:

> We cannot agree with [Allied's] absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action. If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as **[80]** they wished to propose that price as an appropriate level for governmental ratemaking or price supports.

108 S. Ct. at 1938-39.

Thus, respondents' collective rate setting efforts can "more aptly be characterized as commercial activity with a political impact," 108 S. Ct. at 1941, than as political activity with a commercial impact. Consequently, we hold that the *Noerr* doctrine does not immunize respondents' collective ratemaking from the antitrust laws.

Horsemen's, a case on which respondents rely, was decided before *Allied.* It did not include in its reasoning the *Allied* formulation that the antitrust laws should not necessarily immunize what are in essence commercial activities simply because they have some political impact. The factual premise in *Horsemen's,* furthermore, differs from that herein. *Horsemen's* was based on an "information" rationale:

> The *Noerr-Pennington* doctrine is applicable here. The members of the [jockey] Guild, in the exercise of their First Amendment rights of association and to petition the government, may jointly submit a proposal to increase jockey fees to the Horse Racing Commission. Since the law permits them to do this, it follows that **[81]** they must be permitted to confer and to agree upon the fees they wish to propose. [citation omitted] It is vital to the effective functioning of the Commission that it be informed by the jockeys and other interested parties concerning the effectiveness or inadequacy of the current jockey fee schedule. * * * In order to accomplish this objective, it is

clearly permissible for the Commission to consider data and suggestions submitted by the jockeys themselves who unquestionably are the most fertile source of information concerning the adequacy of their compensation. [footnote omitted]

In other words, the *Horsemen's* court placed reliance on the necessity for private collective action in order to enable the governmental authorities to receive vital information and accomplish the underlying objective of the state regulatory scheme.

As such, *Horsemen's* does not help respondents' argument. The *Horsemen's* court relied on the needed participation in the decision-making process of the regulated parties, who provided data that helped the state carry out its regulatory program. But as noted herein, there is no such "need" for participation by the regulated parties here. The collective setting of search and examination rates has no logical connection with underwriting and risk spreading; there is no evidence that collective ratemaking **[82]** is undertaken by title insurers for the purposes of sharing their collective risk experience.

To the contrary, the record evidence is overwhelming that both joint and individual rates for title insurance (*i.e.*, apart from the "risk" rate) are set by looking to the cost of performing the search and examination service rather than the claims experience of insurers. This cost is not only easily ascertainable by each insurer, but is also within the control of the individual insurer, and <u>therefore the basic rationale of the McCarran Act—that is, the presumed need for insurers to combine for the purpose of sharing their experience relating to an uncontrollable element (future claims) which is then spread among a large universe of insureds—is not present</u>. (Emphasis supplied)

ID at 86. We thus conclude that *Horsemen's,* even if it is good law after *Allied,* is inapposite. If anything, respondents' provision of information can be characterized essentially as a "sham," analogous to the unprotected "sham" petitioning behavior in **[83]** *California Motor Transport* v. *Trucking Unlimited,* 404 U.S. 508, 513-16 (1972).[32]

VI. Rule of Reason

The ALJ held that the collective ratemaking activities of a rating bureau are not governed by the rule of reason because such agreements are per se illegal. ID at 100. Respondents argue, *inter alia,* however, that the Supreme Court's pronouncements in *Broad-*

[32] We note in passing that nothing in our decision would prohibit parties collectively from providing meaningful information to state authorities, such as proposing statistical methodologies by which a state commission could determine whether individual submissions and rate requests by members of the industry were "reasonable."

cast Music, Inc. v. CBS, 441 U.S. 1 (1979), and *NCAA v. Board of Regents of the University of Oklahoma,* 468 U.S. 85 (1984), stand for the proposition that price-fixing should not be treated automatically as a *per se* violation of the antitrust laws. Respondents also contend that the rate filings in this case cannot be considered *per se* unlawful because they were filed through state-sanctioned rating bureaus and because such rates must meet certain statutory standards (*e.g.*, reasonableness).

We disagree with respondents' argument. Using the reasoning we employed in *Massachusetts Board of Registration in Optometry,* 110 FTC 549 (1988), we find the challenged agreements are inherently suspect. *Id.* at 604. Respondents have not advanced, **[84]** and we cannot conceive of, any plausible efficiency justification for their price-fixing activities. Nor can they argue that title insurance would be unavailable but for their price-fixing—the record is clear that in the majority of states such practices are not permitted and title "insurance" still is provided. Accordingly, we hold that respondents' price fixing violates Section 5 of the FTC Act.

VII. Remedy

The ALJ would issue an order limited to the states where there was a law violation and prohibit respondents perpetually from discussing, proposing, setting or filing any rates for title search and examination services through a rating bureau. We concur with this assessment of the appropriate scope of the order although we have expanded the number of states included in the order.

To the extent an order is appropriate, respondents argue that the ALJ's order is overly broad in that it would not permit rate bureau participation even where protected by the state action doctrine.[33] We agree with this point and the attached **[85]** order incorporates an appropriate reflection of the state action doctrine.

Respondents also contend that the order should not be perpetual, stating that their participation in the rating bureaus was conducted openly and in good faith observance of existing legal standards. RAB at 85-86, RRB at 111. "The current volatility of the law of state

[33] Complaint counsel agrees that any order should contain a state action proviso. However, complaint counsel's proposed proviso would limit the defense to those states that provided for active supervision through notice, comment and written decision procedures. CCAB at 157. We reject such an approach as being too rigid an application of the active supervision requirement.

Respondents also opposed complaint counsel's suggestions that the order should encompass all forms of price fixing and not be limited in geographic coverage. We need not discuss those arguments in view of the relief ordered.

action immunity, as well as the possibility of future changes in state regulatory practices, warrants that any decree that purports to spell out a standard of 'active supervision' be of limited duration." RRB at 111-112.

Our proposed order enjoins the respondents from fixing prices for title search and examination services in perpetuity. It is the general policy of the Commission, in order to foster deterrence, that conduct prohibitions be perpetual. Respondents' claim that courts and the Commission have found it necessary to limit the duration of orders "in similar circumstances" (see RAB at 86) is unfounded. For example, respondents cite for this point *In the Matter of Kraftco Corporation*, 89 FTC 46, *rev'd on other grounds*, 565 F.2d 807 (1977). In this case, Kraftco was found to have violated both the Clayton Act and the FTC Act by **[86]** use of an interlocking directorate. *Kraftco*, 89 FTC at 60. While the Commission did limit the duration of the provision of the order specifying a particular means of compliance with the order, the Commission in no way limited the duration of the order's core prohibition against such practice. *Kraftco*, 89 FTC at 69-70.[34]

Respondents also cite *Occidental Petroleum Corp., et al.*, 101 FTC 373 (1983). However, that case involved removal of a perpetual conduct provision under the order modification process after consideration of a petition and opportunity for public comment and after passage of time under the order had demonstrated there was no need for the perpetual provision. The Commission expressly reiterated that perpetual conduct orders remain appropriate. *Occidental*, 101 FTC at 374.

Respondents' assertion that the order should not be of perpetual duration because it responds to actions taken openly and in good faith is unpersuasive. The order against respondents is narrowly crafted and will not impede their lawful business activities. Further, the perpetual aspect merely forbids conduct—horizontal price-fixing—which is per se unlawful. **[87]** Respondents' "good faith" assertions remain unproven among contradicting hypotheses. But, in any event, once stripped of the inadequate state action and business of insurance justifications, these activities have been shown to constitute pernicious antitrust violations.

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[34] Similarly inapposite is respondents' citation of *Lenox, Inc. v. Federal Trade Commission*, 417 F.2d 126 (2d Cir. 1969). The three-year term limitations there were imposed upon fencing-in provisions, not core conduct provisions. *See In the Matter of Lenox, Incorporated*, 77 FTC 860, 861 (1970).

SEPARATE STATEMENT OF COMMISSIONER TERRY CALVANI

I concur in the Commission's decision, with one exception. I would affirm the Administrative Law Judge's findings that New Jersey and Pennsylvania have clearly articulated a policy to displace competition.

In each state, the statutory language suggests that its authorization of collective rate-making for insurance might not extend to services provided by insurance company attorney-agents. Each statute, after describing the scope of regulated fees, provides that those do not include charges paid to an attorney. For each state, the Administrative Law Judge resolved what he perceived as statutory ambiguity by examining the state's practice and intent. Pennsylvania filed an amicus brief explaining that it interprets its own law to make regulated inclusive insurance rates (that is, those that include search and examination) applicable to attorney-agents, and that the legislature merely intended by the proviso to exclude from this regulatory scheme those aspects of an attorney-agent's law practice that are unrelated to title insurance, such as issuing opinions. New Jersey did not submit a brief, but its evidence showed that its practice is similar to Pennsylvania's.

In *Southern Motor Carriers*, the Court said that special deference should be given to a state administrative agency's interpretation of its own regulatory statute. 471 U.S. at 64. The two states' agencies interpret their statutes as requiring filing of fees by all agents who issue commitments and policies, including those who are lawyers. There is no case law authority in either state contradicting the agencies' interpretation of their powers, nor indeed has anyone in either state previously contested them. The statutes are comprehensive regulatory schemes, placing the conduct and fees of all title insurance agents within the agencies' regulatory jurisdiction regardless of attorney status. The provisos are best read as the Administrative Law Judge read them, rhetorical concessions to the bar to alleviate concerns that the agencies not regulate legal fees unrelated to title insurance transactions.

The Commission should not lightly substitute its own interpretation of state laws in contradiction to the states' own interpretation, with no support but its own reading of the texts. I am sensitive to the danger of allowing agency bootstrapping into *ultra vires* territory, *see FMC v. Seatrain Lines*, 411 U.S. 726, 745 (1973). But the Commission may not always be the proper agent to prevent that. The issue here is whether the respondents have violated the law because the states had not articulated their policy against competition clearly enough. Here, the state agencies have formally appeared on the record to assert that their law does indeed articulate such a policy. The laws are not as ambiguous as the Administrative Law Judge believed, but the states' practice leaves no room for doubt about what they think they mean.

SEPARATE STATEMENT OF COMMISSIONER MARY L. AZCUENAGA CONCURRING IN PART AND DISSENTING IN PART

I agree with the majority that the collective ratemaking for title search and examination services engaged in by the respondents in Arizona, Connecticut, Idaho, Montana, New Jersey, Pennsylvania, and Wisconsin was unlawful price fixing. I agree that title search and examination services are not the "business of insurance," and that the respondents' collective ratemaking activities are not protected under the *Noerr-Pennington* doctrine. I also agree that the respondents' collective ratemaking in Montana, New Jersey, Pennsylvania, and Wisconsin are not protected by the state action doctrine. I disagree, however, with the conclusion of the majority that the respondents' collective ratemaking was not actively supervised in Arizona and Connecticut, and I also disagree with the conclusion of Commissioners Strenio and Calvani that the respondents were not actively supervised in Idaho.

Active supervision is not established merely by the existence of statutory authority to review anticompetitive acts of private parties and disapprove those that fail to accord with state policy. We must also consider whether state officials exercise that authority. *Patrick v. Burget,* [2] 108 S. Ct. 1658, 1663 (1988). We know from *Patrick* that active supervision requires a review sufficient to ascertain consistency with state policy. I therefore agree with the majority's holding that the active supervision requirement is satisfied only where a state official or agency has engaged in a "substantive review" of the collective rate proposals. Slip op. at 9.[1]

[1] The following abbreviations are used in this statement:

Slip op.	—	slip opinion of the majority
I.D.	—	initial decision
I.D.F.	—	initial decision finding
Tr.	—	transcript of testimony
CX	—	complaint counsel's exhibit
RX	—	respondents' exhibit
JXA		joint physical exhibit A

The majority's statement that the active supervision requirement is satisfied "only where the state agency has acted affirmatively to review and approve the proposed tariff or rate," *id.*, along with its quotation of the majority's statement in *New England Motor Rate Bureau,* Docket No. 9170 (Aug. 18, 1989), that "[n]o clear inference of conscious state approval . . . can be drawn from a state agency's passive acceptance . . . of rate filings," *id.* (quoting *New England,* slip op. at 15), suggests that the majority would find active supervision only when the agency engages in some visible activity. By suggesting that evidence of affirmative activity is required, the majority apparently excludes as a basis for active supervision the use of so-called "negative option" procedures, pursuant to **[3]** which a proposed rate is deemed approved if it is not rejected or suspended by the state agency before a certain number of days have passed.[2] As I explained in my separate statement concurring in part and dissenting in part in *New England,* slip op. at 3-5 (Azcuenaga, concurring in part and dissenting in part), this approach may be too facile and may overlook a genuine review on the merits.

The majority's statement that an affirmative, substantive review "ensures that the state agency has consciously considered the anticompetitive consequences of the activity," slip op. at 14, reveals a fundamental misunderstanding of the gravamen of the state action doctrine. The agency need not consider the anticompetitive consequences of the private acts it is reviewing; it need only examine the consonance of those acts with the state's regulatory policy. Although we may earnestly believe that it is a mistake for a state to choose to displace competition among title insurance firms with a regulatory system that permits those firms to set prices collectively, it is not our place to use the federal antitrust laws to displace that state's decision. The majority's apparent distaste for state-regulated price-fixing, which I share, perhaps carries more **[4]** weight than it should in the majority's analysis of active supervision.

The decision of the majority with respect to active supervision is particularly difficult, if not impossible, to reconcile with the recent decision of the Commission regarding active supervision in *New England Motor Rate Bureau,* Docket No. 9170 (Aug. 18, 1989). In *New England,* the majority found active supervision in the state of Rhode Island apparently based solely on one post-complaint hearing

[2] Negative option procedures (also known as "file and use," "use and file," or "deemer" procedures) were used in Connecticut, Wisconsin, Arizona, and Montana. In Idaho, by contrast, rate filings were not effective until they were approved by the department of insurance. *See, e.g.,* I.D.F. 165.

and the fact that the Rhode Island agency could point to written orders indicating that rates had been approved. *New England,* slip op. at 6-7, 21-22. To the extent that the majority prefers visible activity of review over the testimony of state officials that review in fact occurred, there is far more evidence of such activity in Connecticut, Arizona and Idaho than there was in the *New England* case in Rhode Island.

Connecticut

The Connecticut rating bureau filed only two general rate proposals, one in 1966 and one in 1981. I.D.F. 130. The majority concludes that Connecticut did not actively supervise the rating bureau because it did not "meaningfully examine" either of those filings. Slip op. at 12. The majority also **[5]** concludes that Connecticut did not give sufficient review to a number of ancillary filings. *Id.*

As the ALJ noted, "[w]ith the passage of time, the facts relating to the 1966 filing are elusive." I.D.F. 130. The record does show that the Connecticut insurance department wrote to the rating bureau on April 3, 1966, to request additional information and to schedule a meeting between the insurance commissioner and the president of the rating bureau, RX 104; that the rating bureau wrote its members seeking additional statistical data, RX 105; that the rating bureau told the insurance department that it was "preparing the data requested by you" and expected to submit that data soon after May 24, 1966, RX 105A; that the rating bureau withdrew its original filing in favor of a revised filing, RX 106-07; and that the department approved the revised rate filing several weeks later, RX 110.

The majority agrees with the ALJ's finding that "there is no evidence that the department's request for justification relating to this rate was ever answered satisfactorily." Slip op. at 12, *quoting* I.D.F. 130.[3] Of course, the record contains no evidence **[6]** that the

[3] At first glance, the situation in Montana may appear similar. But I agree with the majority that there is no evidence of active supervision in Montana, although my reasons are somewhat different. The record contains virtually no information about the Montana insurance department's supervision of the 1983 filing, which was the only general rate filing submitted by the Montana rating bureau in the two and one-half years of its existence. The parties stipulated that the department official who was responsible for reviewing the 1983 filing met with the former director of the rating bureau, Robert L. Stratton, the day he submitted that filing, but that she has no recollection of what was said at that meeting or whether the rating bureau provided any additional financial or statistical data to the department at a later time. CX 343A-D.

According to the majority, Montana requested additional data about that filing, but "[t]here is no evidence that the additional data requested by the state was ever provided." Slip op. at 23 (*citing* I.D.F. 177). It is not clear that Montana did seek any additional data about the 1983 filing; the state insurance department sent a letter to the rating bureau seeking additional information concerning a supplemental filing submitted in 1984, RX 227, but I am unable to find on the record any such letter concerning the 1983 filing. Although the 1984 letter appears to anticipate a review on the merits, there exists no other evidence suggesting that such a

(footnote cont'd)

department's request was not answered satisfactorily. Even assuming that the department's request was in fact not answered, this would tell us very little, if anything, about whether the department performed a substantive review of the rate filing. **[7]**

The letter of April 3, 1966, and the subsequent exchange of correspondence demonstrates at least that personnel in the insurance department were aware of the 1966 filing and that they took some steps that indicate attention on their part relevant to a review of that filing on the merits. The more plausible reading of the evidence is that the department's approval of the 1966 collective rate filing was predicated on a review of the filing on the merits.[4] My confidence in this reading is strengthened by the clear evidence of active supervision of the 1981 collective rate filing.

The director of the Connecticut insurance department's Property and Casualty Rating Division, Waldo R. DiSanto, testified that he and another employee of the department, Mr. Walter S. Bell, reviewed the 1981 filing. Tr. at 2744. Mr. DiSanto concluded that the rate filing, which he described as "well-supported and detailed," met the statutory requirements, so it was approved. *Id.* at 2744-45. Mr. Bell testified that he read the filing itself as well as an Arthur D. Little Company report justifying the proposed rates from cover to cover, and that he compared the proposed rates to previous filings. Tr. at 2827-28. The majority nevertheless concludes that the department **[8]** did not actively supervise the 1981 rate filing because it lacked the statutory authority to control the allegedly excessive commissions paid by respondents to their attorney-agents.[5] According to the

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review in fact occurred in Montana at any time. In Connecticut, Arizona, and Idaho, by contrast, there is credible evidence that state officials reviewed some rate filings on the merits; in the absence of evidence to the contrary, it is reasonable to infer that review on the merits also took place at other times.

In his separate additional statement, Commissioner Strenio characterizes my approach as a "some review" active supervision standard, under which "evidence that state officials occasionally exercised their authority" is enough to demonstrate that active supervision has taken place. My colleague apparently misunderstands the basis for my conclusion that Connecticut, Arizona, and Idaho actively supervised respondents' collective rate filings. In those three states, there is general evidence that state officials reviewed rate filings for consistency with state policy, and particular evidence that certain filings were reviewed. In the absence of evidence that no review of other filings was conducted, I believe it is more reasonable to infer that review of those filings did take place. In Wisconsin, by contrast, where there is evidence that no review of certain filings took place, I conclude that the respondents were not actively supervised. *See supra* note 6.

[4] The majority's approach disregards the usual presumption that official actions by public officers have been regularly performed. C. McCormick, *Law of Evidence* § 343, at 807 (2d ed. 1972).

[5] Mr. DiSanto testified that he thought commission expenses were "very high," but that his agency had statutory authority only to verify the validity and accuracy of an insurer's claimed expenses. *Id.* at 2738, 2740. Mr. DiSanto also testified that

> [T]he reason that commission costs are high is that the title insurance companies do not control or make a market.

(footnote cont'd)

majority, Connecticut's failure to "meaningfully regulate a critical component of the ratemaking process" demonstrates that it did not actively supervise the 1981 collective rate.[6] Slip op. at 12. **[9]**

The Connecticut statute states that insurance rates may not be excessive. *Conn. Gen. Stat.* § 38-201c(a) (JXA at 141). If the insurance commissioner finds that a rate is excessive or otherwise unlawful, he may prohibit the use of the rate. *Id.* at § 38-201p(d). The statute does not provide for the direct review of expenses and does not authorize the commissioner to prohibit excessive expenses. If the commissioner concludes that an insurer's proposed rate is excessive because its expenses are excessive, his remedy is to disapprove the rate, not to regulate the expense. Implicit in Mr. DiSanto's conclusion that the 1981 filing satisfied the requirements of the statute is the conclusion that those proposed rates were not excessive. His testimony that commission expenses were "very high" is not necessarily inconsistent with such a conclusion.

The Connecticut statute also provides that the insurance department shall consider, among other things, "past and prospective expenses both country-wide and those specially applicable to this state." *Id.* at § 38-201c(b). The Connecticut insurance department certainly considered the issue of commission expenses. Mr. DiSanto testified that his discussions of the 1981 **[10]** filing with the members of the rating bureau "centered around" commission expenses. Tr. at 2737.

The evidence indicates that the Connecticut insurance department did all that was required of it by the statute. The majority does not question that the Connecticut statute meets the "clear articulation"

> The market is controlled and made by attorneys. They control the business because people purchasing homes need an attorney and go to him for these functions.
>
> The attorney has the ability in most instances . . . to deal with any title insurance company he wants. . . .

Tr. at 2799. Finally, Mr. DiSanto testified that he had no suspicion that the attorney-agents had agreed to fix the commissions they would charge respondents or had pressured the respondents improperly in order to secure higher commissions. *Id.* at 2804.

[6] The majority finds a similar problem in Wisconsin. Although I agree that Wisconsin did not actively supervise the respondents, I do not base my conclusion, as the majority does, on Wisconsin's failure to scrutinize the reasonableness of each "critical component" of the respondents' expenses. Norman J. Wirtz, a rate analyst in the Wisconsin insurance commissioner's office, testified that "we did not review" the rates filed by the rating bureau for new policy endorsements because it was assumed that competition among the rating bureau members would drive those rates down. Tr. at 1768-69, 1802-08. Even if Mr. Wirtz's assumption were correct—and he admitted that he did not know whether competition had driven the endorsement rates down—the competitive price would be fortuitous, not a result of active supervision. The state action doctrine allows a state to displace competition with regulation. Wisconsin intended to displace competition by authorizing regulated ratemaking, but the state officials who were given the authority to regulate simply decided not to exercise that authority.

part of the state action doctrine. It is not justifiable to insist that the insurance department do more than the statute authorizes it to do in order to satisfy the active supervision requirement. The majority may believe that attorney-agents of title insurance companies are paid excessive commissions, but the issue here is active supervision, not whether commissions are too high.

The majority's holding that the 1981 filing was not actively supervised because Connecticut did not "meaningfully regulate a critical component" of the proposed rates has other troubling implications. Commissions to attorney-agents are a significant expense for title insurers, but by no means their only significant expense that the agency might need to consider. The majority's opinion in effect may require a degree of government involvement in the business decisions of regulated firms that begins to look like co-management rather than external supervision in the form of judgments that proposed rates are or are not excessive or otherwise inconsistent with state policy. One other point deserves mention. Assume that the commissions **[11]** paid to attorney-agents in Connecticut are excessive—perhaps because those attorney-agents colluded, or due to some market failure. It would be punishing the victims for the Connecticut insurance department to disapprove proposed rates or to take some other action against title insurers.

The Connecticut insurance department has the authority to disapprove excessive rates, but it concluded after its review of the 1981 filing that the proposed rates were not excessive. The Commission has no reason to doubt that active supervision took place.

The majority also holds that what the ALJ characterized as Connecticut's "minimal review" of some of the "ancillary" endorsements and amendments filed between 1966 and 1983 was insufficient. Slip op. at 12. The record shows, however, that Connecticut gave appropriate review to all these filings. As the ALJ noted, some of the ancillary filings were "carefully reviewed." I.D. at 51 n.192. In fact, at least three filings were either disapproved or withdrawn and revised by the rate bureau after state insurance officials questioned certain features of those filings. Tr. at 2759-69. The ALJ's characterization of the review of some other filings as "minimal" seems to be based on Mr. DiSanto's statement that insurance department officials gave greater scrutiny to filings that had greater significance to consumers, and less scrutiny to filings **[12]** of less importance. *Id.* at 2772. But Mr. DiSanto also testified that the Connecticut insurance department "reviews every filing that we receive." *Id.* at 2758. Mr. DiSanto's unrefuted testimony that all the filings were reviewed, along with the evidence that some filings were formally or informally disapproved, is sufficient to support a finding that all the ancillary filings were reviewed.

Arizona

The majority concludes that Arizona did not actively supervise respondents' collective ratemaking between 1968 and 1981 because the state insurance department "conducted no examination of the rating bureau although there is a statutory requirement for such an examination at least once every five years." According to the majority, "[n]o active supervision can be said to exist when a state agency does not even carry out the bare minimum of statutory duties entrusted to it." Slip op. at 17.

Although the majority's reasoning on this point has some appeal, I am not persuaded that an agency's failure to perform each and every one of its statutory duties necessarily demonstrates that it has failed to supervise rates. The Arizona statute that requires examinations of rating bureaus does not specify what is to be examined or why. **[13]** *Ariz. Rev. Stat. Ann.* § 20-370. Nothing on the face of that statute suggests that the required examination is necessary or even related to the state insurance department's review of rates for conformance with state policy.[7]

I presume that the examination requirement was intended seriously by the legislature, and I do not dismiss as insignificant the department's failure to perform examinations. But the focus of the active supervision part of the state action doctrine is whether the state agency conducted a review sufficient to ascertain that the private acts conform with state policy. Looking to the agency's performance of ancillary functions, however important those functions may be, may actually detract from what should be our primary concern: that is, whether the agency looked at the proposed rates and concluded that they were consistent with state policy.

[7] Of course, nothing on the face of the statute prevents the insurance department from using the required examination as a vehicle for the review of proposed rates. In 1980, the director of the insurance department announced his intention to perform an examination, one purpose of which was to assist the department in the performance of its responsibility to regulate rates. Even if we assume that the examinations that should have been performed before 1980 also would have focused, in part or in whole, on the reasonableness of proposed rates, it is clear that the department had the ability to review those rates through other means. The evidence discussed below, including the testimony of Mr. Barberich, indicates that rates were reviewed even though no examinations were performed until 1980.

The majority also concludes that Arizona did not actively supervise certain "minor rate amendments, adjustments, and [14] endorsements" filed between 1968 and 1981 because "there is nothing in the record indicating that justifications were submitted with these ancillary filings, and the record is inconclusive as to the kind of review, if any, to which they were subject." Slip op. at 17 (*quoting* I.D. 61, n.233).

Emil L. Barberich, who was the chief deputy director of the Arizona insurance department between 1973 and 1982, testified that every rate filing submitted during those years

> was examined to see if it met the statutory requirements. It was scrutinized and it was either approved or disapproved. There would be sometimes situations where more information was needed and once that was obtained and it met the requirements, it would be approved.

Tr. at 2230. He also testified that the department would have acted promptly if it had believed that any title insurance company was earning excessive profits. *Id.* at 2262.

The majority points to nothing that would call into question the truthfulness or accuracy of this testimony, but concludes nonetheless that the respondents have failed to establish that Arizona actively supervised their collective filings. Mr. Barberich's unchallenged testimony that his department did [15] scrutinize all such filings is credible evidence that it did actively supervise collective rate filings between 1973 and 1982.

The record contains very little information about how the department operated before Mr. Barberich went to work there in 1973, which is unfortunate. It appears that no examination of the rating bureau was performed between 1968 and 1973, but that does not distinguish the earlier period from the tenure of Mr. Barberich. One could infer from this sparse record that the department probably failed to review rate filings.[8] It seems more reasonable, however, to draw inferences from the record evidence about the department's review of rate filings between 1973 and 1982. Government agencies, like all institutions, change as time passes. But it would be surprising

[8] The record does contain a letter written by a rating bureau official on October 23, 1969, which says that the department accepted the rating bureau's 1968 general rate filing "without any question and without requirement of any justification thereof." RX-60A. This letter tells us only that the author was not asked to provide justification or otherwise questioned about that filing—it does not purport to describe what did or did not occur inside the state agency. The department's failure to seek additional information, like a failure to hold a hearing on a proposed rate, does not demonstrate that no review occurred.

if (and we have no reason to think that) the Arizona insurance department's policies, procedures, and personnel changed completely when Mr. Barberich arrived in 1973. Delores Williamson, who succeeded Mr. Barberich, testified that the department's current rate review procedures were similar to those that existed during his tenure. *See, e.g.*, Tr. at 2190-92. In the absence of evidence to the **[16]** contrary, the more likely inference is that the department followed similar procedures before Mr. Barberich was appointed to his position.[9] Having concluded that the department did actively supervise rate filings submitted after 1973, I conclude that it is more probable than not that the department also reviewed filings submitted before 1973.

In his separate additional statement, Commissioner Strenio also concludes that Arizona could not have actively supervised the respondents' collective rate filings because the personnel in its insurance department were not "qualified" to evaluate the reasonableness of those rates. I do not question my colleague's statement, based on his experience as a member of the Interstate Commerce Commission, that "reviewing rates for reasonableness or possible discrimination is a very difficult task that generally requires highly qualified experts." But I believe the Commission should decline to accept his invitation to base our active supervision determinations in part on a review of the resumes of state regulatory personnel. Federal oversight of the qualifications of state regulatory personnel is hard to distinguish from federal oversight of state regulatory decisionmaking. For example, a decision that actuaries are qualified to be insurance rate reviewers but that accountants **[17]** (or lawyers or economists or MBA's) are not is essentially a decision that only a particular mode of analysis is acceptable.

Idaho

The Idaho insurance department audited the title insurance rating bureau three times between 1974, when the rating bureau was organized, and 1984, when it was dissolved. I.D.F. 164, 171. The department also suspended the rating bureau's first major rate filing until after it held a public hearing and amended a regulation relating to a variety of title insurance matters. I.D.F. 168. The rating bureau's only other general rate filing was approved only after the department

[9] The majority's holding in Arizona suggests that it would never find that active supervision occurred in a particular time period unless the state employee who reviewed the rates filed during that period so testified. If that is their intention, perhaps it would be well to state it straight out.

subpoenaed additional expense data from the rating bureau members and hired a consultant to examine the filing. I.D.F. 169. Despite this evidence, Commissioners Strenio and Calvani conclude that Idaho did not actively supervise a number of miscellaneous rate adjustments, forms, and endorsements filed by the rating bureau because there was "apparently little or no review" of these filings. Slip op. at 20 (*quoting* I.D. at 68 n.259).

That conclusion seems to be based on nothing more than the inability of Robert A. Fraundorf, the insurance department official who was responsible for the review of those miscellaneous filings, to remember much about the details of those reviews. Given that title insurance filings constituted a **[18]** relatively small number of the filings that this official was also responsible for reviewing—he also reviewed filings for property and casualty insurance, disability insurance, and several other lines of insurance—and that several years had passed since the filings in question had been submitted, it is not altogether surprising that the official's recall of specifics was less than impressive. On cross-examination, Mr. Fraundorf did testify that he never permitted a title insurance filing to go into effect without reviewing it, and that he "definitely" would have asked questions about each rate filing he reviewed until he was satisfied that the rate was proper. Tr. at 3446-48.

Idaho clearly engaged in active supervision of some of the respondents' collective filings. Mr. Fraundorf's unrefuted testimony that he reviewed all the filings submitted to the department is credible and, along with the other evidence of review by the Idaho insurance department, is sufficient to support a finding of active supervision of all the filings in question.

Conclusion

The majority's reading of the evidence and application of the state action doctrine loads the dice heavily against the **[19]** respondents. The majority finds a lack of active supervision even when the record contains direct evidence that substantive review occurred, choosing instead to emphasize various perceived deficiencies. The failure to carry out any statutory requirement, whether that requirement has anything to do with a review of proposed rates for consistency with state policy or not, is taken as proof that active supervision of rates did not take place. On the other hand, the failure to take action to limit commissions paid to attorneys demonstrates a lack of supervision even where such action is not authorized by the agency's enabling statute; the agency must review each and every "critical component" of a proposed rate even if the state legislature intended only that it review the reasonableness of the rate itself. This comes perilously close to a "heads we win, tails you lose" standard.

As in *New England Motor Rate Bureau*, the majority appears to approach state action as a doctrine to be narrowly construed as an exemption to the federal policy favoring competition. The state action doctrine involves principles of preemption of state or local law by federal law. *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40, 60-70 (1982) (Rehnquist, J., dissenting); *accord, 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345-46 n.8 (1987); *Fisher v. City of Berkeley*, 475 U.S. 260, 264-65 (1986). It is not our role to question the correctness of a state agency's decision that proposed rates are reasonable or **[20]** unreasonable but rather to examine whether a state agency in fact exercises its authority to review privately fixed prices. As an agency concerned with promoting competition, the Commission generally prefers to see prices set by the competitive forces of the market. We have no authority, however, to impose this preference for competition on unwilling states that choose instead to regulate certain industries. To do so would establish the Commission as the arbiter of state policy, a result that the principle of federalism underlying the state action doctrine precludes.

The complaint allegations of violations in Connecticut and Arizona should be dismissed.

ADDITIONAL STATEMENT OF COMMISSIONER ANDREW J. STRENIO, JR.

The majority and Commissioner Azcuenaga ("minority") hold contrasting views on how to apply the active supervision requirement of the state action doctrine. The majority insists upon taking a good look at whether state officials actually have exercised their regulatory authority.[1] The minority, however, as I read the eloquent statement by Commissioner Azcuenaga, would be satisfied by a casual glance. In my judgment, this minority position is shortsighted, apart and aside from the potential harm consumers would be exposed to from price

[1] The insistence by the majority is consistent with the unanimous Commission decision to appear on the brief before the Supreme Court alongside the Department of Justice in *Patrick v. Burget*. The brief, filed jointly, emphasized regarding the active supervision issue that "[m]erely finding some state involvement or monitoring does not suffice." [citations omitted] Brief for the United States As Amicus Curiae Supporting Petitioner at 8, *Patrick v. Burget*, No. 86-1145.

fixing should a quick glimpse approach prevail. As I see it, the position espoused in the minority statement is inconsistent with the principles of a number of state action cases including *Patrick v. Burget,* 108 S. Ct. 1658 (1988), impractical, and inclined to pay far more deference to the presumption of the regular performance of public duties than warranted here.

To begin with, the minority approach apparently would consider the active supervision requirement of substantive review to be fulfilled if there is evidence that state officials **[2]** occasionally exercised their authority. For example, the minority statement asserts that "[i]n Connecticut, Arizona, and Idaho, there is credible evidence that state officials reviewed some rate filings on the merits; in the absence of evidence to the contrary, it is reasonable to infer that review on the merits also took place at other times." Minority statement at 4, n.3. But this logic flies in the face of *Patrick,* where the Court held not only that there must be a "program of supervision," but also that "[t]he mere presence of some state involvement or monitoring does not suffice." 108 S. Ct. at 1663. Nowhere does the Court suggest that "some review" is adequate to provide active supervision.[2]

Indeed, the discussion in *Patrick* belies any notion that "some review" by supervisory agencies or courts will do. The Court said that "the Oregon courts have indicated that even if they were to provide judicial review of hospital peer-review proceedings, the review would be of a very limited nature." **[3]** 108 S. Ct. at 1665. "This kind of review would fail to satisfy the state action doctrine's requirement of active supervision." *Id.* "Such constricted review does not convert the action of a private party in terminating a physician's privileges into the action of the State for purposes of the state action doctrine." *Id.* Similarly, haphazard evidence of some review of some rate filings can not by alchemy transform the lead of general inattention into the gold of active supervision.

The impractical nature of the minority position on active supervision stems from the difficulty of securing firm footing on such a slippery

[2] In accord with *Patrick's* holding that "the mere presence of some state involvement or monitoring does not suffice" is *324 Liquor Corp. v. Duffy,* 479 U.S. 335, 345, n.7 (1987). The *Patrick* Court characterized *Duffy* as deciding that "certain forms of state scrutiny . . . did not constitute active supervision because they did not 'exer[t] any significant control over' the terms of the restraint." 108 S. Ct. at 1663. A "some review" standard also would run counter to the Court's admonition in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 106 (1980) that "[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." Contrary to a "some review" line of analysis, these Supreme Court cases stand for the proposition that even a little bit of unsupervised price fixing is impermissible.

slope. After all, a "some review" standard would beg a series of difficult questions as to just when and where partial review will be tolerated. For instance, would there be active supervision when regulatory officials exercise their authority fifty-one percent of the time? On Tuesdays and Thursdays? When staff is inadequately trained or otherwise incapable of monitoring all types of the private conduct involved?

Another difficult question arises from the minority's dismissal of the evidence that the Arizona Department of Insurance for many years did not carry out a **[4]** statutorily-required, regular examination of the state rating bureau.[3] The minority expresses skepticism that "an agency's failure to perform each and every one of its statutory duties necessarily demonstrates that it has failed to supervise rates." Minority statement at 8. Yet the minority does not explain which of these failures to comply with statutory duties are to be excused and which are to be deemed of consequence.[4] Nor does the minority **[5]** explain which principle of federalism provides the lodestar for deciding when a state legislature's directives to a state agency are to be treated seriously and when they are to be treated as optional.

Moving along, the minority complains that "[t]he majority's approach disregards the usual presumption that official actions by public officers have been regularly performed." Minority statement at 4, n.4. To the contrary, the majority here concluded following careful

[3] Note that as recently as the *Duffy* case, the Supreme Court found active supervision was lacking in a state because it "does not monitor market conditions or engage in any 'pointed reexamination' of the program." 479 U.S. at 345.

[4] The minority statement seems internally inconsistent in this regard. How could the Arizona Insurance Department have been examining "the consonance of [the private acts at issue] with the state's regulatory policy" at one and the same time that—despite a statutory requirement which must be deemed part of the state's regulatory policy—the Department was not examining the state rating bureau?

To be sure, the minority statement argues that nothing on the face of the Arizona statute requiring review directly specifies "what is to be examined or why." Minority statement at 8. But the statute requires an examination, and the Arizona Insurance Department had a clear idea of the type of examination needed. *See* RX 93-93B (letter from Arizona Department of Insurance Director Low to Title Insurance Rating Bureau of Arizona, Inc., November 3, 1980). When the Department at long last did initiate a statutorily-required examination, it sought to conduct, among other things, "[a]n evaluation of the extent to which there is competition among title insurers doing business in Arizona . . .". RX 93. *See* Finding 152 for a more detailed list.

Of course, the minority statement contends that "[n]othing on the face of that statute suggests that the required examination is necessary or even related to the state insurance department's review of rates for conformance with state policy." Minority statement at 8. However, Director Low had no difficulty in drawing the connection. He wrote in his letter of November 3, 1980 that "I believe this examination is a necessary undertaking on behalf of the Department. As you may be aware, the Department has never, to the best of my knowledge, conducted an examination of the title insurance rating organization, notwithstanding the fact that ARS § 20-370 requires such an examination at least once every five years." After noting that "the Department has not, as yet, approved the statistical plan prepared and filed on behalf of TIRBA by Arthur D. Little . . .", Director Low added that "I believe this examination is of critical importance in permitting the Department to carry out its statutory rate regulatory responsibility over title insurers . . .". RX 93A-B.

deliberation that the weight of the evidence overcame any presumption of the regular performance of official duties. In contrast, the minority at times seems inclined to go to inordinate lengths in constructing chains of reasoning in support of the presumed existence of official regularity. For example, the minority expresses confidence that active supervision took place in Connecticut in 1966 because of evidence assertedly showing active supervision in 1981. Minority statement at 5. But, such a leap of faith can not surmount the chasm of fifteen years. Too much can change by way of policy and personnel to justify a retroactive finding of active supervision covering the entire period. **[6]**

Caution also is warranted lest excessive reliance be placed upon the presumption of official regularity. *Patrick* and *Duffy* make clear that the mere creation of a state regulatory mechanism hardly establishes the presence of active supervision. In the realm of state action law, it is advisable to keep in mind the abuses that could flow from credulity toward all claims of active supervision. As the Supreme Court said in *Patrick*, "[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State." 108 S. Ct. at 1663. That is one reason the Court "sought to ensure that private parties could claim state action immunity from Sherman Act liability only when their anticompetitive acts were truly the product of state regulation" by establishing a "rigorous two-pronged test . . .". 108 S. Ct. at 1662.

Turning now to some of the individual state findings, although a detailed restatement of the majority's assessment is unnecessary, a few comments are worth making in support of the majority's conclusion that active supervision was lacking in Connecticut and Arizona. I do not discuss Idaho below, since an equally-divided Commission found no liability as to that state. **[7]**

Connecticut

The minority statement makes much of the exchange of correspondence requesting or promising to supply information about the 1966 filing, but brushes aside the fact that no further evidence tending to show the existence of active supervision has been introduced.[5]

[5] The minority statement also asserts that ancillary rate filings were adequately supervised. However, although some ancillary rate filings were disapproved, overall the review process was inadequate. Mr. DiSanto testified that the department never examined insurance company expenses for reasonableness. DiSanto Testimony at 2793. DiSanto testified further that expense information supplied by the title insurers in their

(footnote cont'd)

According to the minority, the "more plausible reading of the evidence is that the department's approval of the collective rate filing was predicated on a review of the filing on the merits." Minority statement at 4. This observation does not carry the day. In the first place, respondents had the burden of showing active supervision and did not do so here. The Supreme Court in *Patrick* reaffirmed its long-held tenet that respondents have the burden of demonstrating the actual exercise of regulatory authority. *See* Slip Op. at 9-10. *See also City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 400 (1978).

Further, I think the most plausible reading of the evidence is quite different from the conclusion reached by the minority. **[8]** It seems to me that a rational agency regularly performing its official duties would retain in its files the most important documentation that exists while discarding the trivia. Here, there is no record whatever of substantiating data—or of any work that was performed upon such hypothetical data. Yet, the relatively unimportant correspondence between the parties has been preserved carefully. To me, this suggests strongly that the agency kept on file everything of the slightest consequence and that substantiating data is missing simply because it never was supplied to the state.

The minority proceeds to infer from the record that the state agency "concluded after its review of the 1981 filing that the proposed rates were not excessive." Minority statement at 7. However, that inference is not readily reconciled with much of the record evidence. The Connecticut statute says that insurance rates may not be excessive,[6] and also authorizes the state insurance department to prohibit the use of excessive rates by title insurers.[7] Here, though, there is testimony from the Chief of the Connecticut Insurance Department's Property and Casualty Division, Mr. DiSanto, that he approved the rates despite a "disproportionate allowance for commissions." DiSanto **[9]** Testimony at 2737.[8] Mr. DiSanto testified further that in his view the agent's commission component of title insurer expenses was "very high,"[9] that this was the main problem area in title insurance,[10] and

annual statements was not even broken out by state. *Id.* at 2795. Without such data, the insurance department lacked the ability to conduct a meaningful review.

[6] *Conn. Gen. Stat.* § 38-201c(a).

[7] *Id.* at § 38-201p(d).

[8] *See also* DiSanto Testimony at 2756: "Again, one of the things discussed was the impact of commissions and a discussion of alternative means that could effectively address the disproportionate expense loading for commissions."

[9] DiSanto Testimony at 2737. DiSanto estimated that agents' commissions "are about 60 percent" of the title insurance premium. DiSanto Testimony at 2797.

[10] DiSanto Testimony at 2797.

that this was driving up the cost of title insurance.[11] In light of this evidence, it is more reasonable to infer that either the state agency should have disapproved the rates as excessive, or that the Connecticut regulatory system failed to confer to the state agency adequate power in practice to block the imposition of excessive rates. *See* Slip Op. at 12.

Regarding the latter inference, recall the Supreme Court's admonition that "a gauzy cloak of state involvement" can not thwart the national policy in favor of competition. Indeed, a state legislature may clearly articulate and affirmatively express an intent to displace competition (thus meeting the first prong of the state action test), but fall short of the mark set by the second prong if an inadequate system of regulation subsequently is established. After all, in *Duffy* the Supreme Court found clear articulation but not active supervision since, **[10]** *inter alia,* the state "d[id] not monitor market conditions or engage in any 'pointed reexamination' of the program."[12] *Duffy,* 479 U.S. at 345. Nor did the state "control month-to-month variations in posted prices."[13] *Id.* In ringing and relevant words, the Court held that active supervision was lacking because the state "has displaced competition among liquor retailers without substituting an adequate system of regulation." *Id.*

Arizona

I have discussed above the extended time during which the state insurance department did not conduct the statutorily-required examination of the state rating bureau, and Director Low's conclusion that such an examination was "of critical importance in permitting the Department to carry out its state **[11]** regulatory responsibility over title insurers . . .".[14] In addition, Mr. Wilkie's testimony merits consideration in connection with the majority's finding about ancillary filings.

Mr. Wilkie had worked in the Arizona title insurance industry since

[11] DiSanto Testimony at 2738.

[12] This, of course, was exactly the situation in Arizona during the time no examination of the state rating bureau was conducted despite the statutory mandate.

[13] In other words, the state must exert significant control over all aspects of price fixing by private parties. The majority found, accordingly, that this principle was violated by inactivity such as that displayed by those state insurance agencies that did not examine amendments to the general rate schedules.

The majority opinion notes that the use of scientifically-sound sampling techniques to examine a rate filing might be defensible. Slip Op. at 12. This is because sound sampling techniques may provide an accurate survey of a filing as a whole. The majority opinion goes on to stress the simple point that state agencies may not engage in "hit-or-miss" review by ignoring some filings (or some category of filings) in their entirety. *Id.*

[14] *See* footnote 4, *supra.*

1946, and had held a senior position with Lawyers Title of Arizona since about 1957. Wilkie Testimony at 2056. His testimony overall conveys an intimate knowledge of the industry and the operations of the rating bureau. Yet Wilkie, as noted by the ALJ in his Initial Decision at 61, n.233, had no recollection of any communication between the rating bureau and the state agency regarding the numerous amendments that were filed. Given other testimony pointing in a different direction, I agree with the ALJ that the record is inconclusive on this point. However, it bears repeating that respondent has the burden of showing active supervision.

The minority statement does not address other instances of non-supervision cited in the majority opinion. Slip Op. at 18. The minority argues that a likely inference to make about pre-1973 procedures is that they were the same as followed under Mr. Barberich, who was Chief Deputy Director of the Arizona Department of Insurance from 1973 to 1982. Minority statement at 9. However, Mr. Barberich testified that the insurance department hired an outside firm to conduct an examination of the **[12]** data submitted in 1983 by Tillinghast, Nelson & Warren, Inc. (filed in response to Arizona's tardy efforts to examine the title insurance industry), because "no one in the insurance department had a good handle of what went on with title insurance companies . . .". Barberich Testimony at 2277. Barberich said that during the period 1973 to 1982 he "tried to find someone that could give us a rate review. Going back to 1974 and '75, I remember we paid somebody $1,000 to just give us an idea what it was all about. The report we got didn't tell us anything." Barberich Testimony at 2281. Barberich also testified that the insurance "department did not do anything with respect to that basic rate between 1973 and 1982 . . .". Barberich Testimony at 2289.

This testimony lends further support for two propositions. The first proposition is that the rates in use in Arizona were not actively supervised during the time in question. The insurance department was confronted with complex submissions and yet had no personnel who "had a good handle" on the title insurance industry and the rate justifications that were submitted.[15] As noted previously, the rates were in effect for a number of years before any serious attempt was

[15] Commissioner Azcuenaga suggests that this conclusion is derived from my "review of the resumes of state regulatory personnel." Minority statement at 10. To the contrary, this conclusion is derived from Mr. Barberich's assessment that "no one in the insurance department had a good handle of what went on with title insurance companies . . .". Barberich Testimony at 2277.

made to evaluate **[13]** them.[16] The second proposition is that—where highly complex matters are involved, such as reviewing rates for reasonableness—one must be wary about automatically following presumptions to the effect that substantive reviews are being conducted.[17] Arizona here could not actively supervise the industry for an extended period because it had no qualified personnel.[18] In the context of something as intricate and challenging as the active supervision of rate filings, it thus is necessary for reviewing courts and agencies to sift through the available evidence rather than sit back and presume that all is in order.

Conclusion

The minority concludes that the majority's standard "loads the dice heavily against the respondents" by emphasizing "various perceived deficiencies" in the review process. Minority **[14]** statement at 11. Yet, as shown here and in the majority opinion, the deficiencies were real and substantial. The case law is clear that state regulatory agencies may not pick and choose when they will exercise their authority; merely providing some state involvement or monitoring can not substitute for active supervision. Further, the non-performance here of statutory duties was directly related to the relevant state policy. *See e.g.*, the discussion of Arizona's non-examination of the title insurance industry. The majority view, accordingly, follows from the Supreme Court's establishment of a "rigorous two-pronged test" (*Patrick v. Burget,* 108 S. Ct. at 1662) requiring that a state "exercise ultimate control over the challenged anticompetitive conduct." *Id.* at 1663.

Final Order

This matter has been heard by the Commission upon the appeals of respondents and complaint counsel from the initial decision and upon briefs and oral argument in support of and in opposition to the respective appeals. For the reasons stated in the accompanying

[16] *See also* Slip Op. at 18.

[17] As a former commissioner at the Interstate Commerce Commission, I know from experience that reviewing rates for reasonableness or possible discrimination is a very difficult task that generally requires highly qualified experts. Director Low of the Arizona Department of Insurance apparently would agree. In commenting on the proposed study of the Arizona title insurance industry, his recommendation of a specific firm for the examination was made on the basis of "the extremely technical nature of this examination, including the obvious need for substantial actuarial and economic expertise in this area . . .". RX 93A.

[18] The absence of sufficiently trained personnel seems substantively equivalent to not having an "adequate system of regulation." *Cf. Duffy,* 479 U.S. at 345.

opinion, the Commission has determined to deny the respondents' appeal (except as to the insertion of a "state action" proviso in the order) and grant complaint counsel's appeal in part. Accordingly,

It is ordered, That the initial decision of the administrative law judge be adopted as findings of fact and conclusions of law except to the extent inconsistent with the accompanying opinion. Other findings of fact and conclusions of law of the Commission are contained in the accompanying opinion.

I.

For purposes of this order, the following definition shall apply:

a. *"Title search and examination services"* means all activities which are designed to identify and describe the ownership of a particular parcel of real property as well as any other actual or potential rights to, encumbrances on, or interest in the property.

II.

It is ordered, That each respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or indirectly, through any corporation, subsidiary, division or other device in connection with the sale of title search and examination services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist in New Jersey, Pennsylvania, Connecticut, Wisconsin, Arizona, and Montana, from discussing, proposing, setting, or filing any rates for title search and examination services through a rating bureau.

A. *Provided* that nothing in this order shall prohibit respondents from collectively setting or adhering to prices for title search and examination services in any state where such collective activity is engaged in pursuant to clearly articulated and affirmatively expressed state policy and where such collective activity is actively supervised by a state regulatory body.

III.

It is further ordered, That each respondent shall within thirty days after service of this order deliver a copy of this order to all its present officers, directors, and personnel having any responsibility in determining company prices as well as to the commissioner of insurance in each state listed in Paragraph II. of this order.

IV.

It is further ordered, That each respondent notify the Commission at least thirty days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

V.

It is further ordered, That each respondent shall, within ninety days after service upon it of this order, and at such other times as the Commission shall require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Calvani and Commissioner Azcuenaga concurring in part and dissenting in part, and Commissioner Machol not participating.*

*Prior to leaving the Commission, former Chairman Oliver registered his vote in the affirmative for the Final Order and the Opinion of the Commission in this matter. Chairman Steiger did not register a vote in this matter.