OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: FEDERAL TRADE COMMISSION, Petitioner V.

TICOR TITLE INSURANCE COMPANY, ET AL.

CASE NO: 91-72

PLACE: Washington, D.C.

DATE: January 13, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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FEDERAL TRADE COMMISSION, :

Petitioner :

v. : No. 91-72

TICOR TITLE INSURANCE COMPANY :

ET AL. :

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Washington, D.C.

Monday, January 13, 1992

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

JOHN C. CHRISTIE, JR., ESQ., Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 91-72, Federal Trade Commission v. Ticor Title Insurance Company. Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE

ON BEHALF OF THE PETITIONER

MR. WALLACE: Thank you, Mr. Chief Justice and may it please the Court:

This Court has stated repeatedly that the starting point for statutory interpretation is the statutory text that Congress enacted. That admonition has relevance here, even though the question before the Court involves the scope of a judicially implied exception that is not itself to be found in the statutory text.

The comprehensiveness and unqualified nature of the prohibitions of restraints of trade and of unfair methods of competition that are in the text nonetheless have much to say about the proper resolution of this case. In the Parker against Brown line of decisions, this Court has held that those Federal statutory prohibitions of commercial conduct should not be interpreted to apply to the activities of the States themselves and derivatively to private conduct that implements the States' regulatory policies.

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Now, the basic error of the court of appeals in this case as we see it is that in its concern to give generous scope to this implied exemption, in its concern to give the exemption ample elbow room, it gave the exemption a penumbrile expanse that cuts into the quick of the statutory restraints on private conduct that Congress did enact, the statutory commands that embody what this Court has described as our national policy in favor of competition, and most emphatically in favor of price competition among horizontal competitors.

Contrary to the court of appeals approach, this Court's decisions have made clear that primacy is to be given to the statutory command and that the scope of the implied exemption is limited by the exemption's purposes and is to be delimited so as to preserve the effectiveness of Congress's prohibition of privately imposed trade restraints. This is the jurisprudential perspective we see reflected in the rigorous two-prong test for exemption of private conduct that this Court unanimously adopted in the Midcal Aluminum case and that the Court has elaborated in subsequent decisions.

The first prong of that test, that there must be a clearly articulated State policy, is not at issue in this case as it reaches this Court, but the reasons why that prong alone does not suffice to exempt private

conduct are illuminating in considering the function that the second prong must play, because if merely a clearly articulated State policy that private conduct would be exempt from the antitrust laws would suffice, the States would in effect be given the power to repeal the Sherman Act and the other antitrust laws industry by industry as they choose.

And in Parker against Brown itself the Court recognized that that cannot be the case under our constitutional system and under the supremacy clause, and said that a State does not give immunity to those who violate the Sherman Act by authorizing them to violate or by declaring that their action is lawful, something that the Court quoted again just a year or so ago in the Omni case.

So the second prong is of crucial importance here, and the second prong as it was formulated and as it's been repeated every time, says that the conduct must be actively supervised by the State itself, and every time the Court has formulated this prong it has used the modifier actively.

QUESTION: Mr. Wallace, under your standard as proposed, I wonder how a regulated entity or business would ever know whether the action was going to be protected by Parker immunity? It seems to me that it is

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an area where we're better off with a clearer line so that these businesses know one way or another whether there's going to be Parker immunity.

MR. WALLACE: Of course --

QUESTION: And to leave it open, as you suggest, to evaluating in each case the extent to which the State is -- the quality of its activity seems to me problematic.

MR. WALLACE: If I may say so, Justice O'Connor, that's several questions rolled into one, and to start at the end, the standard we are proposing and the standard you just described are two different standards. I think what you just described is the way others have portrayed our approach to this question. To us the inquiry is a much simpler one. It is whether there has been review and approval by State officials of the proposed rates, and we mean approval of the substance of the restraints.

QUESTION: Well, do you mean the States could never employ the so-called negative option approach that was used here whereby you file the rate, it goes into effect unless the State disapproves it? It would appear to me that then you're suggesting that isn't a possible --

MR. WALLACE: Professors Areeda and Turner in their analysis came to the conclusion that the negative option approach really cannot suffice as an adequate method of State supervision.

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We don't go that far. We think that there can be a showing that the option was exercised in a way that showed that the State officials did in fact approve the policies and -- except that they were reviewed, and that the State can manifest its approval in any way it sees fit, including a failure to disapprove, as long as there is assurance that the State has reviewed and approved the restraint, the particular restraint as consistent with the State's regulatory policies.

It's harder to manifest that in a negative option system of regulation, but it can be manifested.

QUESTION: Aren't you getting into the substance of the State regulation if you go that far?

MR. WALLACE: We don't believe so. We think that the only inquiry is whether the State made that determination, whether State officials determined not that the filing was approved for filing, that it had all the requisites, as we explain in footnote 16 of our brief, that are required for a filing to be put into the file, perhaps made available for public scrutiny, but that the officials have determined that the rate itself that has been agreed upon, the uniform rate that was submitted, is consistent with the State's regulatory policy. We --

QUESTION: Excuse me, how does the individual who has to know whether he can apply that rate that he's

agreed with, with other people pursuant to this State scheme, how does he know it -- I mean if the State agency just has a regular procedure whereby the clerk of the State agency after 30 days issues an order saying the rates are hereby approved and the individual doesn't really know whether they looked at them or didn't look at them? What's he supposed to do?

MR. WALLACE: Then he has to find out before he engages in conduct that would be a per se violation of the Sherman Act and similarly a violation of section 5 of the Federal Trade Commission Act.

QUESTION: But how does he find out? Tell me how he would do that.

MR. WALLACE: He has to find out by asking the officials so that he's got an answer from the State that will stand up under scrutiny in proceedings of this kind so that he can make his defense that yes, I engaged in price fixing with my competitors, but the prices were approved by the State.

QUESTION: What if the order is not signed by the clerk but is in fact signed by the agency heads, a majority of them or all of them, but in fact they don't look at it, they just sign it routinely. It comes around after 30 days and they sign it and they haven't looked at it all. Does that protect them?

MR. WALLACE: This is a difficult question of fact.

QUESTION: I know it is. What's the answer?

MR. WALLACE: I'm not going to say the fact that the agency officials signed an order is a conclusive showing that they reviewed and approved the rates.

QUESTION: It is not.

MR. WALLACE: It's not a conclusive showing. It is strong evidence.

QUESTION: You're really putting the title companies in an extraordinary position. They're trying to get rates approved, they file them before the insurance commission or whoever it is in Phoenix or whatever city, the insurance commission indicates approval, and the attorney is supposed to call them up and ask them did you really mean to approve it? That's a strange burden to put on them.

MR. WALLACE: They are acting on the advice of counsel in conducting their business. They're aware of the constraints imposed by the Federal antitrust laws on price fixing among horizontal competitors, and they're aware of the nature of the particular State program and can find out more about the nature of the particular State program, and they're --

QUESTION: How would they go about finding out

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more about -- I take it what you're suggesting is that they interrogate the people responsible for the decision as to how the decision in that particular case was reached?

MR. WALLACE: Well, that is one way of going about it.

QUESTION: What would be another way?

MR. WALLACE: Well, obviously with a public utility commission that issues a decision or that holds a hearing, you've got a written record. It's in these negative option systems that it gets more difficult to the point, as I said, where Professors Areeda and Turner thought they just won't suffice, and I do think it's more of a burden for the regulated competitors to be able to make the requisite showing when that is the kind of system that the State is utilizing, but our concern has to be that unless they can establish that defense to price fixing, Congress has without qualification comprehensively prohibited price fixing among competitors.

QUESTION: In a close case it seems to me that the inquiry will be after the fact of the conduct. That is to say, the title company has no assurance in a close case what resources the State can or will devote to reviewing the price fixing until after it's submitted, and yet the title company has to know at the time that it

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makes the submission or has its meetings that the conduct is protected.

MR. WALLACE: Well, it has to know, for business planning purposes it certainly is better for it to know that none of these State schemes compel the companies to charge uniform rates, even if a submission has been made. They are still free to deviate from those under these schemes.

These are not tariff schemes of the kind that you've got where there has -- you know, at the ICC or something of that sort, so the prudent course of action is for them to continue to engage in price competition unless and until they can assure themselves that they have had review and approval, or that the scheme has a system of review and approval that they are entitled to rely upon as having been applied in their case, a system of actual review and approval.

I'm not -- the commission has said that an aberrational failure to apply the scheme accurately and properly in a particular case is not going to defeat the exemption, but they look to see whether the rates have been submitted into a scheme where there is in fact review and approval of the rates themselves as consistent with the State regulatory policy.

It is hard to see what else suffices under the

very standards that this Court has articulated about what constitutes satisfaction of the active supervision prong of the Midcal test. The Court has said that there must be review of the particular restraint that's being imposed and the State must make it its own rather than just an authorization that private competitors can set their own prices.

QUESTION: May I interrupt with a question, Mr. Wallace? I know it's not an issue, or I know the case only involves the second prong of this two-prong test, but what is the State policy that justifies the State program? Is it one to protect the companies from bankruptcy, or is it one to prevent them from charging too much?

MR. WALLACE: Well, the various statutes articulate mostly policies to assure that there will not be discriminatory practices and that there will not be unreasonable rate practices, and the submissions --

QUESTION: In other words, it's more like the Motor Carrier Act.

MR. WALLACE: The submissions do require supporting data, although in practice sometimes those data were not submitted.

QUESTION: Does the State policy require all the companies to join in the joint program?

MR. WALLACE: Not so far as I am aware. They

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authorize it, but they do not typically require them --

QUESTION: So that if a big company like --

MR. WALLACE: To join in the rate bureau.

QUESTION: -- Security Title wanted to stay out it could price independently and it wouldn't affect the State policy.

MR. WALLACE: I'm not aware of any of these programs in which companies are required to join in a rate bureau filing. So far as I know it did not determine --

QUESTION: And in fact, are any of these programs still in existence or have they all been abandoned?

MR. WALLACE: I am told, though it's not in the record in this case, that the programs are not presently in use, at least pending the outcome of this case.

QUESTION: My guess it probably wouldn't work because they couldn't get the biggest company to participate.

MR. WALLACE: After the commission's complaint was filed in this case there were some treble damage actions brought and consolidated in the Eastern District of Pennsylvania. That case was settled out, but since that time the rate bureaus have been discontinued. That's my understanding. Perhaps counsel would correct me if I don't understand it correctly when he gets up, but none of

that is in the record of this case.

QUESTION: The reason I asked you about the first prong, it seems to me that in order to judge whether there's been adequate supervision of carrying out the State policy, you kind of ought to know what the State policy is, and I'm a little puzzled from the briefs as to just what the States are trying to do here, other than maybe just approve of a joint ratemaking that the companies wanted to get.

MR. WALLACE: Well, we shy away from what we're accused of by filings on the other side from an evaluation of the quality of the State policy, so the Court's cases have made it quite clear in Hoover against Ronwin and others that the States can choose their own policy and it isn't up to Federal courts in deciding whether to confer an antitrust exemption to evaluate whether the policy is a wise one, whether the policy adequately protects consumers in comparison with the antitrust laws and so forth.

So we see the second prong inquiry as a rather simpler one, and that is just to determine the fact that State officials have looked at the rate and substantively determine whether the rate itself complies with whatever the State's policy is. That's what suffices, and that is what the commission found lacking here.

QUESTION: Let me ask one other question. Is

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there any distinction between the rates for the -- premiums for the title insurance itself and the charges for the title searches, of the charges? Are they both covered in the same manner by these rate agreements --

MR. WALLACE: The --

QUESTION: -- or proceedings, I should say.

MR. WALLACE: There are package rates involved in the submissions to the State officials. The commission challenged only the search and examination components, which are the larger share of it, because of the McCarran-Ferguson Act exemption for the business of insurance. Search and examination are conducted separately by other persons than insurance companies in many instances, and the commission's theory was that that is not part of the business of insurance within the exemption.

Now, in one of the States at issue it was found that there was no review and that State -- and this is -- I'm speaking of Connecticut -- and that State authorities had no authority to review a very important element of the insurer's expenses, namely commissions to the broker or sales agent, and those commissions could affect all of the charges, you see, including those for search and examination services, so the charges can get

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intermixed and intertwined in a way that affects the portion of the price-fixing that the commission and we contend is not within the McCarran-Ferguson Act exemption.

Now, we do not believe that this Court has left the governing principles obscure, and we've quoted in our brief relevant portions from this Court's opinions, including its recent opinion in Patrick against Burget. Respondents and their amici differ in how they would modify the principles this Court has so carefully formulated, and which we don't believe require improvement, and we certainly don't believe would be improved by their modifications.

Respondents themselves defend the standard adopted by the court of appeals that there must be some basic level of activity. It's rather hard to see exactly how that standard can be reconciled with a sentence in this Court's opinion in Patrick against Burget saying on page 101 of volume 486, the mere presence of some State involvement or monitoring does not suffice, and then with a supporting citation to 324 Liquor --

QUESTION: But in Patrick against Burget the State authority had no authority to review at all the actions of the private authority, did it not?

MR. WALLACE: That is true in that case, but not in 324 Liquor, for which the Court relied in the citation

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immediately following that sentence. In any event, the inquiry if -- it certainly would be an elaborate process to try to reconcile what it is that constitutes some basic level of activity that does not constitute reviewing the rate itself and deciding whether the rate is consistent with the State's regulatory policies. If anything would generate uncertainty it would be a standard that looks not to the rate but looks to activities that are really off point for the purposes of the exemption.

QUESTION: Well, Mr. Wallace, you say reviewing the rate itself, which is what you say should be done, and yet you said in answer to a question from Justice Scalia, I believe, that a certificate or an order signed by a majority of the commissioners saying we have reviewed the rate and find it conforms to the State policy would not be conclusive.

MR. WALLACE: Well, you have added a little bit to the way he formulated the hypothetical I believe, Mr. Chief Justice, and it would be stronger evidence if they said we have reviewed the substance of the rate.

QUESTION: Would it be conclusive?

MR. WALLACE: I hesitate to say that any one piece of evidence would always be conclusive regardless of what other evidence there is in a particular case. I think that as you formulated it, it would be extremely

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hard to overcome in any case. That's as far as I could go. I couldn't really commit the commission beyond that or anticipate every case that might arise. It's an evidentiary question, and it's seldom that any one piece of evidence is conclusive for all cases and all possible hypotheticals that could be imagined.

QUESTION: At any rate, you're dealing with something that usually is a question of fact in every case.

MR. WALLACE: Exactly so.

QUESTION: There's no presumption of regularity given to administrative proceedings, so that ordinarily turns those things into more questions of law than questions of fact.

MR. WALLACE: Well, the presumption of regularity applies when there is a duty to do something and then it's a rebuttable presumption in a particular case. We've discussed that in a footnote in our brief.

It gets closer, it seems to me, when we speak of the presumption of regularity, to the structural test that some of the amici suggest as a replacement for the court of appeals test and for the formulations this Court has used, a test that would just say whether State authorities had -- the State officials had the authority whether they used it or not, contrary to what this Court has said, that

they must have and exercise the authority. This would require not a simple question of fact of whether the matter was reviewed, but a really quite contentious inquiry into what are the duties of the State officials under the particular scheme.

As you can see from the filings in this case, there's much disagreement about what were the legal duties of the officials in the four States at issue here, and one way to introduce evidence about how should their duties be interpreted is to look at what they in fact have been doing as the officials' own interpretation of the duties, and it seems to me that this leads to a much more contentious kind of judgment on whether the officials are properly carrying out their duties under State law than the simple inquiry that we think this Court's cases look to, the simple factual question of did they review and approve the rates as consistent with their policy or didn't they, regardless of whether they should have under State law.

QUESTION: Assume the statute itself told the agency that one of your duties is to review these rate filings to see if you should object to them, and that they have the staff to do it, they've got the money to do it and the State expects the agency to carry out its duties. Do you think that you need some more proof?

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MR. WALLACE: Well --

QUESTION: I guess you do.

MR. WALLACE: I do, because all of those are questions that are subject to debate in a particular case, whether that's a discretionary duty or a mandatory duty, whether the funding and the staff are adequate to perform the duty or inadequate and they really can't perform the duty.

QUESTION: I know, but it wouldn't be -- it wouldn't make any difference to you how clearly the duty was spelled out, how well it was funded, and how much staff there was available.

MR. WALLACE: Because price restraints must be the policy of the State, the State must have adopted the particular restraint as consistent with its regulatory policies. If the State --

QUESTION: That certainly puts quite a gloss on what we've said before, don't you think, that it takes a specific action of the State to approve the price restraint that --

MR. WALLACE: What the court has said is that State involvement in what are actually privately imposed price restraints --

QUESTION: That's a far cry from saying they have to approve them, expressly the price restraint.

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MR. WALLACE: Well, it's hard to see why they don't emanate from the private parties themselves if the State has not reviewed and approved them.

If I may reserve the --

QUESTION: Well, I know, but here the -- here the State has got a mandatory scheme in its law set up to require examination and approval of these rates.

MR. WALLACE: I trust you mean, here is a hypothetical, because --

QUESTION: In my hypothetical.

MR. WALLACE: The 36 States that filed --

QUESTION: Well, I know, but the rule --

MR. WALLACE: -- in this case describe this differently.

QUESTION: The rule you're asking us to adopt is precisely that. It just doesn't make any difference.

MR. WALLACE: If I may reserve the balance of my time.

QUESTION: Very well, Mr. Wallace. Mr. Christie, we'll hear from you.

ORAL ARGUMENT OF JOHN C. CHRISTIE, JR.

ON BEHALF OF THE RESPONDENT

MR. CHRISTIE: Thank you, Mr. Chief Justice, and may it please the Court:

The opinion of the Third Circuit Court of

Appeals below should be affirmed by this Court because the standard of active supervision which it utilized strikes a carefully constructed balance, we submit, between the goals of the Federal antitrust laws on the one hand and the principles of federalism which underlie State action.

The circuit court standard provides assurance that the States have enacted a legitimate regulatory program while leaving to the States themselves the task of assuring its strictness or its effectiveness.

Each of the States here had enacted a system of regulation with agencies staffed and funded and charged with a duty to assure that the States' rate policies were adhered to, and over the period of time encompassed by this proceeding these regulators had given administrative attention to these bureaus and their filings.

QUESTION: Mr. Christie, can I just ask one factual question? Were these State agencies -- was this the sole responsibility of the agency or was this something that they did in addition to other duties?

MR. CHRISTIE: Well, the agencies in every case, Justice Stevens, were State insurance departments.

QUESTION: I see.

MR. CHRISTIE: They only had to worry about insurance matters, but of course they had many lines of insurance in addition to title insurance.

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QUESTION: But the same insurance board, State board that would govern fire insurance, life insurance and everything else.

MR. CHRISTIE: That's correct.

QUESTION: This was an additional duty for them.

MR. CHRISTIE: That's correct, and if I may respond as well to your question to Mr. Wallace, Justice Stevens, about the underlying State policies that these statutes were designed in effect to enforce, all of the statutes in question required that the rates be not excessive, inadequate, or discriminatory.

Those essentially set out and the States defined what they meant by all those concepts what I think the State was worried about. They wanted the rates not to be excessive because they wanted consumers to have reasonable rates. They were worried about inadequacy issues. These are insurance companies, and the States wanted to be sure that a policyholder, when it comes time to make a claim, has someone to make a claim against, and lastly they worry about discriminatory practices. That is, is one line of consumers being unfairly charged as opposed to another line.

QUESTION: That's the other half of my question. In most of the insurance bureaus I understand all the insurance companies must have their rates approved, but

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that was not true in this area, is that right?

MR. CHRISTIE: No, Your Honor. In all of these States, all title insurance rates were required to be filed, and you could file them either individually or you could file them by designating a license rating bureau --

QUESTION: I see.

MR. CHRISTIE: To file them.

QUESTION: So even a company that did not participate in joint ratemaking would nevertheless have to file and have its rates approved by the same procedure.

MR. CHRISTIE: That's correct.

QUESTION: I see.

MR. CHRISTIE: That's correct.

QUESTION: And the State had no special procedure to review those joint filings.

MR. CHRISTIE: Justice White, they had no special procedure, although several regulators in the record in this case testified that they gave extra special attention to rates filed by rating bureaus.

QUESTION: Well, I suppose just single filings might take one standard of review and joint filings would be a different kettle of fish, wouldn't they?

MR. CHRISTIE: The Court will recall Justice Powell's discussion of this in Southern Motor Carriers. He discussed the utility of the existence of rating

bureaus from a regulator's point of view because it allowed the regulator the efficiencies of looking at one filing rather than having to confront multiple filings from separate companies.

QUESTION: Let me also -- let ask you, as long as I've got you interrupted, what do you think the court below meant by the words that the activity is in place, staffed and funded, and shows some basic level of activity?

MR. CHRISTIE: I think the Third Circuit intended by those words to suggest that it's appropriate for an antitrust court simply to confirm the seriousness of the State's intent to assure that its policies were being adhered to by looking to see whether in fact the regulatory activity existed. The emphasis is on, was there an indication that the regulators were in place, and was there some indication that they were in fact acting, that they were -- as we put it in our brief, that the cop was on the beat.

QUESTION: Well, I suppose it would be a very basic level of activity if they just received the rates and put them in the right folder without ever -- without ever looking at them in terms of whether they were reasonable or whatever the standard was.

MR. CHRISTIE: Well, I don't think -- if you

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intend by your hypothetical, Justice White, to suggest that -- to ask whether the Third Circuit's test is filed -- is met if the regulators do nothing, I would agree, I don't think the Third Circuit's test would be met. But if there is some indication that they have acted, and clearly the record here amply supported their conclusion, then the Third Circuit says we won't go any farther. That is sufficient to show that the State has gone beyond just simply articulating an anticompetitive policy and doing nothing more, the kind of situation that this Court faced in Midcal.

QUESTION: Well, if the State's policy -- if you define the State's policy as a decision to permit noncompetitive rate-making, well, all you would have to do is to look at these filed rates and say, why, of course these people have agreed. They've eliminated competition among themselves. The rates obviously then are carrying out the State policy, right?

MR. CHRISTIE: Well, the regulators are charged by their statute to consider more. They are charged to consider whether the rates are excessive, inadequate, or discriminatory. That's the determination that the statutes give them an obligation to consider.

QUESTION: That's with respect to joint rates and --

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MR. CHRISTIE: And individually filed rates. The basic statutory obligation on the regulator is no different in either case.

QUESTION: Now, there's an amicus brief filed by 30-some-odd States in this case suggesting there's no active supervision here.

MR. CHRISTIE: Justice O'Connor, you're right. We think that they misperceive the record in this case. Obviously, it's the record itself that demonstrates whether or not these States were regulating and not the arguments of counsel. We think the record here amply indicates, as we've laid out at some length in our brief, that the regulators in these States looked at the filings, that they asked questions about the filings, that they asked -- that they demanded that these rating bureaus provide increasingly sophisticated and expensive justifications for their rates, and ultimately the regulators approved the rates and allowed them to become effective.

QUESTION: Although it wasn't specific in the submission of the States that were supporting the petitioner, there was a suggestion that perhaps a State should participate at two levels, both at the level at which the rate is initially determined before filing and in the review after filing. Do any States have State

representatives that participate in formulating the rating bureau recommendations?

MR. CHRISTIE: I don't think, at least, Justice Kennedy, insofar as the record is established here, that there's an indication that the regulators participated in the sense of sitting down with the bureau itself as it determined what rates it wished to file.

What your question does address, an issue that is appropriate, I think, for the Court to consider, there obviously -- in the course of a regulator's review of a rate there is a need to look at it when it is first filed. There is also the desirability of keeping some sense of what the continuing impact of the rate is over the years the rate is in effect.

We think in this case these departments did both. They reviewed the rate when it was filed, and they made effort to -- by demanding that the bureaus produce profitability studies showing the impact of the rate over the years that ensued, they made an effort to keep track of the impact of the rate in that respect as well.

QUESTION: Mr. Christie, are there any States today that use this negative option approach for this industry?

MR. CHRISTIE: Justice O'Connor, the amicus brief filed by the American Insurance Association sets out

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at considerable length in an appendix all of the States classified by various ways in which they in effect allow rates to become in effect, and their catalogue of what States do suggests that the most frequently used procedure which the States have designed is the so-called demur or negative option procedure.

This is a procedure, in other words, not just the brain-child of the legislatures in these four States with respect to title insurance, but it is used widely throughout many lines of insurance in many States and I think insofar as regulation of other economic enterprises is concerned as well.

QUESTION: What is the advantage, though? It saves the clerk from signing something saying the commission has considered this rate and it's okay?

MR. CHRISTIE: Justice Scalia, I think from the State legislature's point of view, the advantage is simply that it doesn't force the insurance regulator to look at each and every filing and take the time to make an affirmative determination that it meets the statutory standard.

QUESTION: Right. I was going to ask about that.

MR. CHRISTIE: Because obviously, some filings are more significant in terms of their ultimate impact on

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consumers than other filings.

QUESTION: Well, suppose the State agency has a general rule -- I don't see how it would apply to this title insurance, but it would apply to some other fields of regulation -- that any rate that will affect all of the consumers in a total amount of less than $30 million simply won't be reviewed, which might make sense given the staff that the particular agency has available. Suppose they have that rule, we just won't look at them if the take on this particular rate is less than $30 million? Is that okay?

MR. CHRISTIE: Well, I don't know that I would think it would be okay. If that's all that the record suggested they did --

QUESTION: That's all they do. That's their rule. But you said that that's good, that some of these rates aren't worth the trouble.

MR. CHRISTIE: Well --

QUESTION: This is what they think. Okay, make it $1 million -- $1 million.

MR. CHRISTIE: That is true, but they were making an individual assessment on a filing by filing basis that this filing doesn't need intensive review on our part because it has minimal consumer impact. They weren't just setting a -- I'll call it an arbitrary line

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below which they wouldn't look at rates.

QUESTION: Why? I don't -- how would you decide what's minimal consumer impact? I assume you pick some number, don't you? Don't you want to be consistent?

MR. CHRISTIE: I submit, Justice Scalia, that these States -- this is within the discretion that they give to the regulator. They want the regulator to make that kind of decision.

QUESTION: I understand they do, but --

MR. CHRISTIE: They don't want the regulator to be forced to spend the resources she has looking at each and every rate.

QUESTION: So the situation you have left, then, is that under the Federal antitrust laws within that State, people can collude to fix rates so long as they know the take on it isn't more than $1 million within that State, or $30 million, whatever level the State agency picks. Isn't that the result?

MR. CHRISTIE: As I understand the Third Circuit's -- as I read the Third Circuit's opinion, the basic level of activity that they're looking for wouldn't be met in the context of the decision not to look at any rates below --

QUESTION: Well, you can't have it both ways, it seems to me, Mr. Christie. Either this is administrative

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efficiency you're talking about, and that's why it's useful, in which case I do think any agency will make general cuts like that. They say, we're not going to look at this entire category, and that's administratively efficient. I thought that was your argument. But my point is, if that is the case, then you have this whole unregulated area. You're saying the Sherman Act shall not apply even though this area is unregulated.

MR. CHRISTIE: Well, I'm saying that if the record shows, as you look at all that the State did, that State regulators charged with a duty of making sure that their State statutory standards are met in addition to that perform some level of activity consistent with their statutory duty, that that I suffice -- suggest is active supervision and it would meet the Third Circuit standard.

QUESTION: Would the answer to Justice Scalia's hypothetical be that it could be sound regulatory practice to rely on the market to take care of these fringe minimum smaller filings?

MR. CHRISTIE: Well, Justice Stevens, in fact that was precisely the judgment that regulators in Wisconsin made with respect to filings that they considered minor. They scrutinized very carefully the contents of these filings, but they made a judgment that they wouldn't look as intensely at rates underlying these

filings, among other reasons because in their experience there was some competition among and between title insurers, even title insurers who were members of the bureau, with respect to those rates.

QUESTION: In these States that you represent, was there some legislative explanation for why the decision was made that competition should not be the rule among title insurance companies with respect to examining titles, wholly aside from the insurance?

MR. CHRISTIE: Justice --

QUESTION: It may be historic that --

MR. CHRISTIE: Justice White, the insurance statutes didn't distinguish in terms of the rate standard that was to be applied or the duties of the regulators with respect to whether it was that component of the charge that represented the search and examination or that component of the charge that represented the charge for the risk.

QUESTION: Was there some determination that -- some explanation of why they thought competition shouldn't be the rule among insurance companies?

MR. CHRISTIE: I don't think that there is any legislative history that would illuminate this intent, with one exception. It's very clear that the statute in Arizona which for the first time vested authority in the

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State Insurance Department to regulate title insurance rates and which also permitted rating bureaus to operate was done so because two title insurance companies in Arizona had become insolvent shortly before the passage of the legislation.

QUESTION: Because they'd been competing?

MR. CHRISTIE: I don't know why they became insolvent. It's very clear that --

QUESTION: Or why they would draw this conclusion from the fact that two companies went broke that there shouldn't be competition.

MR. CHRISTIE: Well, they obviously were concerned about insurer insolvency and they felt it was in the State's interests in their wisdom to begin to regulate the rates for title insurance companies and in that instance to permit rating bureaus to operate.

We submit that the type of qualitative analysis which permeates the Federal Trade Commission's decision below is an inappropriate standard for active supervision. Both the Third Circuit and the First Circuit in the New England Motor Carriers case criticize the Federal Trade Commission for insisting on sitting in judgment of the strictness or effectiveness of what these States did which became in effect an overly intrusive -- an intrusion into the prerogatives of these States to regulate as they see

fit.

We think that their decision is consistent with this Court's precedent, which has evidenced a determination to give the States some breathing room to regulate. In Southern Motor Carriers the Court held that the Sherman Act was not designed to compromise a State's ability to regulate, and rejected a compulsion requirement for Midcal's prong one test.

In Town of Hallie, the Court also rejected an intense inquiry into legislative intent as undermining the policies of federalism. In the most recent State-actioned opinion, the Omni case, decided by this Court last term, the Court rejected an inquiry into whether the municipal regulation of billboards was in some way procedurally or substantively defective or deficient. The Court also rejected a conspiracy exception to State action, suggesting that the probing into the intent of a regulator was anathema to the federalism principles that underlie State action.

Several of the members of the Court, in questioning Mr. Wallace, have expressed concern about the problems which private parties would face if the Federal Trade Commission's analysis of active supervision became the law, and indeed we submit that would be a practical problem which would cause the withdrawal of companies from

otherwise accepting this kind of option just as it caused these companies to withdraw from the rating bureaus in this case.

Mr. Wallace suggests that to meet the commission's affirmative determination test, all a company would have to do would be to in effect communicate with an insurance department or in some other fashion endeavor to evaluate ahead of the fact what they might do. I submit that however cautiously and carefully a company considering entering into a rating bureau and joining in a collective filing might be, there just is no way to assure that ultimately, whatever commentary is received in advance, the department will act in a way which might satisfy the Federal Trade Commission.

Any test, we submit, that leaves for later judicial assessment the quality of what a regulator has done defies predictability.

QUESTION: Mr. Christie, something just crossed my mind. Maybe it doesn't really go to the force of your argument, which is very strong, but is the -- if your test is correct and the Third Circuit's test is correct, isn't the McCarran-Ferguson statute pretty much redundant now?

MR. CHRISTIE: Well, Justice Stevens, at least measured by the commission's perception of the application of the McCarran Act here, you might call it redundant.

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Obviously, however, they are two different -- they involve two different issues. They are analyzed differently.

QUESTION: What I mean is -- and I'm not saying you're not absolutely correct, but if this is all that's necessary, I'm sure every insurance department throughout the country engages in at least this basic level of activity, so you don't really need a statutory exemption because it will be all taken care of under Parker against Brown.

MR. CHRISTIE: Well, certainly -- certainly as Your Honor recites it, that kind of definition of Parker Brown may in many cases make it unnecessary, if you will, for an insurance company to separately establish a McCarran-Ferguson exemption, but I don't think that should in any way affect this Court's analysis of either.

QUESTION: It just suggests that maybe the Southeastern Underwriters case was wrongly decided.

QUESTION: Well, I take it the FTC's position is that the McCarran-Ferguson Act furnishes no protection for what is challenged in this case.

MR. CHRISTIE: That's correct, Justice White.

QUESTION: What did the Federal court of appeals say about that, or didn't it reach it?

MR. CHRISTIE: They said only that they would defer the issue because having decided for the respondents

on the basis --

QUESTION: Was it your position before the commission that McCarran-Ferguson protected you?

MR. CHRISTIE: Absolutely, Justice White, because these search and examination services which title insurers conduct, they conduct as a necessary part of the process of underwriting that they go through, are necessary because it's through this process that they come to conclude what they're willing to insure under the policy and what they're not willing to insure under the policy.

QUESTION: The only reason McCarran-Ferguson doesn't cover the whole thing is that some of the activities arguably are not the business of insurance.

MR. CHRISTIE: That's correct, Justice Stevens.

QUESTION: My hypothetical earlier was assuming, talking only about the business of insurance, and I think under your analysis, and it may well be right, we really don't need the McCarran-Ferguson amendment any more.

MR. CHRISTIE: Well, of course there are some folks over on the Hill across the street who agree with that.

QUESTION: Or the title insurance companies needn't rely on the State action doctrine.

MR. CHRISTIE: I'm sorry, Justice White, I

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missed it.

QUESTION: Well, they don't need both. I'll put it that way. You could get along either with your State action doctrine or McCarran-Ferguson.

MR. CHRISTIE: Well, in --

QUESTION: That was your position, I take it, before the commission.

MR. CHRISTIE: That was our position before the commission. The commission determined that search and examination services were not a part of the business of insurance, and that issue remains still unresolved.

QUESTION: Well, of course, with McCarran-Ferguson you would prevail even if it were a totally inactive State. Indeed, if there were no State regulatory agency I assume you'd prevail, wouldn't you?

MR. CHRISTIE: Well, I think the regulation by State law aspect of the McCarran-Ferguson Act exemption has been pretty well established to be a test that requires a court to simply look at whether by legislation a State has permitted or prohibited the activity in question.

The analysis, of course, that the Third Circuit took of the active supervision issue here is more elaborate. It looks to see whether by legislation regulators have and exercise the power to review private

conduct and to disapprove what doesn't comport with State policy.

They look to see that the regulators have ample duty and power under those statutes, and finally they look to make sure, as we put it, that the cop is on the beat, that these regulators are staffed and funded, and that there's confirmation that in fact regulation exists.

QUESTION: And you think that that's less intrusive upon State sovereignty than simply looking to see whether in fact the rate was considered? Don't care how many people considered it, how good they were, was the rate considered?

MR. CHRISTIE: I think it is less intrusive because it looks to the existence as opposed to any effort to assess the quality of the regulation. What I would concede, as many of our amici have very forcefully argued, that any test that goes beyond looking to the statutory structure of regulation runs some risk of lapsing into some sort of qualitative analysis of what is going on. I also concede that it lessens the possibility of certainty or predictability for private parties considering whether to accept an option which the State has provided for them.

However, if this Court believes that the appropriate test of active supervision requires going to some degree beyond just what the statutes say, I submit

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that the Third Circuit's test is a focused and deferential test that is adequately sensitive to the underlying principles of federalism and to this Court's precedent.

QUESTION: Mr. Christie, may I ask -- and perhaps this isn't a proper question, but to what extent is this still a live issue? Have these activities pretty well come to a halt?

MR. CHRISTIE: Well, as I said earlier, Justice Stevens, all of these companies withdrew when the commission began its investigation. None of the respondents to my knowledge today belongs to a rating bureau that is actively filing rates with the State official. Frankly, if the commission's opinion were to stand I don't think there'd be any way that some antitrust counselor could safely advise a client as to whether it was prudent to engage in a bureau. The Third Circuit's test I think is a much more realistic test, a more meaningful test, and even if there remains some degree of risk it is more clearly discernible in advance than the commission's analysis. If there are no more questions from the Court, thank you very much.

QUESTION: Thank you, Mr. Christie. Mr. Wallace, you have a minute remaining.

REBUTTAL ARGUMENT OF LAWRENCE G. WALLACE

ON BEHALF OF THE PETITIONER

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MR. WALLACE: 36 States have filed a brief saying that their regulatory options are in fact being constricted by this decision because relatively modest programs would have drastic consequences on consumers.

On pages 6 to 8 we have summarized the evidence found by the commission in these States in which rates were allowed to go into effect for years without supporting data being submitted even when requested, and the title insurance company certainly knew they weren't submitting the requested supporting data.

Of course, it's easier for them if they can rely on the mere existence of a program, but it is harder on the States than on the consumers and on the policies of the Sherman Act.

QUESTION: Any one of these States could change its policy without any leave from this Court and beef up its regulatory process, couldn't it?

MR. WALLACE: That is correct, but the States are arguing that principles of federalism would support their having the option to do more modest programs without having the drastic consequences found here.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wallace. The case is submitted.

(Whereupon, at 1:58 p.m., the case in the in the above-entitled matter was submitted.)

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BY Michelle Sanders

(REPORTER)