

Active Supervision After *Ticor*: Be Careful of What You Wish For!¹

The Antitrust Modernization Commission (“AMC”) requested that the Immunities and Exemptions Study Group analyze issues relating to antitrust immunities and exemptions and, based on that analysis, recommend to the AMC issues within that category that warrant substantive review. One of the immunities and exemptions issues isolated for analysis was the broad question: “Should the state action doctrine be clarified or otherwise changed?”² Within that broad question, the AMC has requested public commentary on the active supervision component of the well-established *Midcal*³ test for the application of the state action doctrine to the conduct of private parties. Specifically, the AMC asked: “Should courts change or clarify application of the active supervision prong? Do courts currently interpret the ‘active supervision’ prong of the state action doctrine so as to subject immunized activity to meaningful state oversight? Should courts rely on the elements proposed by the FTC Staff’s State Action Task Force . . . to determine whether the ‘active supervision’ prong is satisfied? Are these elements workable in practice? . . . Should courts make any other changes when interpreting and applying the ‘active supervision’ prong?”⁴

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² Immunities and Exemptions Study Group Memorandum, Immunities and Exemptions Study Plan, May 6, 2005 at <http://www.amc.gov/pdf/meetings/ImmunitiesExemptionsStudyPlan.pdf> (last visited September 22, 2005).

³ *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Under the *Midcal* two-prong test, a state’s regulatory program must be “clearly articulated and affirmatively expressed as state policy” and the activity of private parties conducted pursuant to that policy must be “‘actively supervised’ by the [s]tate itself.” 445 U.S. at 105.

⁴ See, Request for Public Comment, Immunities and Exemptions, 70 Fed. Reg. 28902, 28905 (May 19, 2005).

Over a decade ago, the Supreme Court last addressed the “active supervision” component of *Midcal* in *FTC v. Tigor*.⁵ This commentary discusses the *Tigor* decision, examines the evolution of the active supervision aspect of the state action doctrine in the years since *Tigor* (including a brief review of recent cases and of the FTC Task Force Report) and, finally, considers whether the AMC might usefully recommend further clarification of the issue.

The Legal Landscape – The Tigor Decision

Prior to *Tigor*, in three cases, including *Midcal* itself, the Supreme Court had interpreted the active supervision requirement.⁶ However, in each of those cases, the states involved had authorized private anticompetitive conduct but had failed to establish any regulatory system for the supervision of that conduct, making the outcome on the active supervision issue quite predictable, at least if there were to be any separate significance to *Midcal*'s second prong. *Tigor* advanced the development of the law on this subject because, in that case, all of the states involved had established regulatory systems for the supervision of authorized anticompetitive conduct and the question was what more need be shown.

In *Tigor*, on the way to the Supreme Court, the Third Circuit criticized the FTC's approach to active supervision in the case as improperly “sitting ‘in judgment upon the degree of *strictness* or *effectiveness* with which a state carries out its own statutes,’ . . . ‘in effect, try[ing] the state regulator.’”⁷ Instead, the Third Circuit adopted a standard of active supervision

⁵ *Federal Trade Commission v. Tigor Title Ins. Co.*, 504 U.S. 621 (1992).

⁶ *Midcal*, 445 U.S. at 105; *Patrick v. Burget*, 486 U.S. 94 (1988); *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987).

⁷ *Tigor Title Ins. Co. v. Federal Trade Comm'n*, 922 F.2d 1122, 1138 (3d Cir. 1991) (quoting *New England Motor Rate Bureau, Inc. v. Federal Trade Commission*, 908 F.2d 1064 (1st Cir. 1990)).

previously formulated by the First Circuit.⁸ If the state had staffed and funded the regulatory system and if that system was evidencing some “basic level” of activity directed toward seeing that the private actors carried out the state’s policy, these circuit courts concluded that there was active supervision.⁹ By avoiding an evaluation of the *quality* or *effectiveness* of that activity, these two courts believed that standard of active supervision respected state regulatory autonomy at the heart of the state action doctrine itself while at the same time requiring sufficient evidence that a state’s regulatory control was actually being exercised. As the First Circuit explained, if more were required, “the state action doctrine would be turned on its head. Instead of being a doctrine of preemption, allowing room for the state’s own action, it would become a means for federal oversight of state officials and their programs.”¹⁰

In *Ticor*, the Supreme Court majority rejected the circuit court active supervision standard, holding that the existence of a state regulatory program, staffed, funded and empowered by law and exhibiting a “basic level” of activity was only “a beginning point” in an active supervision analysis.¹¹ “The mere presence of some state involvement or monitoring does not suffice.”¹² Instead, a party claiming antitrust immunity must demonstrate that state officials had exercised “sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention.”¹³ In effect, the question is whether there has been “substantial state participation.”¹⁴ As characterized by the

⁸ *New England Motor Rate Bureau, Inc. v. F TC*, 908 F.2d 1064 (1st Cir. 1990).

⁹ *Id.* at 1071.

¹⁰ *Id.*

¹¹ *Ticor*, 504 U.S. at 637-38.

¹² *Patrick v. Burget*, 486 U.S. at 101.

¹³ *Ticor*, 504 U.S. at 634.

¹⁴ *Id.* at 639.

Court majority, the record in the case demonstrated that “the potential for active supervision was not realized in fact” because “at most the rate filings were checked for mathematical accuracy.”¹⁵

On the other hand, although active supervision required “substantial state participation,” the Court majority appeared to suggest that it was not the purpose of the active supervision inquiry to mandate a particular kind of regulation or some particular regulatory standard. “We do not imply that some particular form of state or local regulation is required.”¹⁶ Moreover, it is not the purpose of the active supervision inquiry to determine whether the state has met some “normative standard.”¹⁷

Lingering Questions Post-Ticor

At a practical level for the future, what did all of this mean? *Ticor* appeared to leave open at least two fundamental questions. First, exactly what level of state regulatory activity would suffice to meet this standard? Obviously the Court majority had in mind more than some “basic level” of supervision -- something more than merely checking mathematical accuracy. But at what level beyond some “basic level” does state regulatory activity become “substantial state participation?” At what level do the “details” of rates or prices become the product of “state intervention?” Second, is the evaluation of the regulatory history surrounding private conduct by a federal court to be only a *quantitative* one or must it also include a *qualitative* judgment? Is the question only whether the regulator has “done enough” or is it also whether the regulator has “done *well* enough?”

¹⁵ *Id.* at 638.

¹⁶ *Id.* at 639.

¹⁷ *Id.* at 634.

That these lingering uncertainties about active supervision continued to exist has been one thing that post-*Ticor* commentators have universally agreed upon. In fact, members of the *Ticor* Court itself were the first to weigh in with this observation. In his dissenting opinion, Chief Justice Rehnquist asserted that “[t]he Court simply does not say just how active a State’s regulators must be before the ‘active supervision’ requirement will be satisfied.”¹⁸ Justice Scalia, who joined in the Court’s majority opinion, separately predicted in a brief concurring opinion that the majority opinion would be “a fertile source of uncertainty and (hence) litigation.”¹⁹ Shortly after the opinion was announced, two antitrust practitioners suggested that *Ticor* “raises more questions than it answers. The decision casts an uncertainty over state action immunity that may reduce substantially the success and use of the doctrine.”²⁰ And, much more recently, the FTC Task Force on State Action acknowledged that “[a]part from these general directives, [*Ticor* and other Supreme Court active supervision] cases do not provide much specific guidance on what kind of state review would constitute ‘active’ supervision, in terms of either the kind of scrutiny required by the state official or procedural requirements.”²¹

These lingering uncertainties regarding active supervision are an antitrust counselor’s nightmare. More importantly, the impact of these uncertainties is compounded by the fact that private actors proceeding in reliance on the existence of the state action doctrine can never precisely know the exact dimensions of state “intervention” until after the state actors have acted. Justice O’Connor envisioned this problem in her dissent in *Ticor*:

¹⁸ *Id.* at 644.

¹⁹ *Id.* at 640.

²⁰ Cross and Ahern, “FTC v. *Ticor* Title Insurance: Supreme Court Puts State Action Immunity Under the Lens,” 7 *Antitrust* 1 (Fall/Winter 1992), p. 24.

²¹ FTC State Action Task Force Report (September, 2003) at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>, p. 37 (last visited September 22, 2005) (hereinafter “FTC Task Force Report”).

The regulated entity has no control over the regulator, and very likely will have no idea as to the degree of scrutiny that its filings may receive. Thus, a party could engage in exactly the same conduct in two States, each of which had exactly the same policy of allowing anticompetitive behavior and exactly the same regulatory structure, and discover afterward that its actions in one State were immune from antitrust prosecution, but that its action in the other resulted in treble-damages liability.²²

Moreover, because of these continuing uncertainties, it may be the case that some private actors have shied away from accepting the state's invitation to participate in various forms of state regulated activity. Although some critics of the state action doctrine might applaud this result, it undermines the ability of the states to regulate, the underlying purpose of the state action doctrine. "The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce."²³

Decisions Post-Ticor

Although significant time has now passed since *Ticor* and both federal courts and the federal antitrust agencies have worked to interpret the decision, the concept of active supervision remains elusive. This is at least in part because in most of the cases in which the issue has been raised, the record suggests that the state regulators had either been particularly active or virtually inactive, thereby prompting a relatively easy result without the need for much hard analysis. Put another way, the decision-makers up to now have taken a more or less "we know it when we see it (or when we don't see it)" approach to the issue.

²² *Ticor*, 504 U.S. at 647.

²³ *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 (1985).

Federal courts that have applied *Ticor* and found active supervision have done so most frequently in utilities cases – electricity, gas and telecommunications.²⁴ Traditionally public utilities have been highly regulated industries with elaborate monitoring mechanisms created by detailed state regulatory schemes and intense public interest. For example, most states regulate public utilities with a public utility commission that regularly holds contested hearings that approach the formality of adjudications.²⁵ In addition, many issue written decisions or reports explaining at length the reasons behind their actions.²⁶ It is no surprise, therefore, to find courts regularly concluding in such a context that active supervision exists.

The other end of the spectrum of state regulatory activity might best be illustrated by the recent FTC case against the Kentucky Household Goods Carrier Association, a rating bureau of household goods movers.²⁷ On June 21, 2005, Chairman Majoras, on behalf of a unanimous Commission, found active supervision to be absent based upon a review of the litigated record developed before an administrative law judge (“ALJ”). That record suggested that one part time employee (with considerable other job responsibilities) used his knowledge about the industry and the *Wall Street Journal* to assess the reasonableness of proposed rate increases. Reviewing cases before and after *Ticor*, the Commission’s opinion identified a number of state supervisory

²⁴ See, e.g., *North Star Steel Co. v. MidAmerican Energy Holdings Co.*, 184 F.3d 732, 739 (8th Cir. 1999) (Iowa Utilities Board actively supervised exclusive delivery territories); *Yeager’s Fuel, Inc. et al. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260 (3d Cir. 1994) (finding that the public utility commission actively supervised incentives provided to encourage use of electric power and the rates charged); *DFW Metro Line Services v. Southwestern Bell Telephone Corp.*, 988 F.2d 601 (5th Cir. 1993) (public utility commission actively supervised telephone rates and contracts).

²⁵ For example, in addition to having authority to establish rates and review every aspect of the utilities’ businesses, the utility commission in Texas “provides a forum for complaints” and issues formal written decisions after conducting hearings. See, *DFW Metro*, at 606.

²⁶ See, e.g., *Yeager’s Fuel*, 22 F.3d at 1271 (discussing the significance of the commission’s written report addressing the issues in the litigation).

²⁷ *In the Matter of Kentucky Household Goods Carriers Assoc., Inc.*, 2005 FTC LEXIS 124 (June 21, 2005). This case was one of a series of recent FTC cases brought against state licensed rate bureaus of household goods movers. The others were settled. See discussion, *infra*.

activities that have been found to support a determination of active supervision: “where the state collects business data (including revenues and expenses), conducts economic studies, reviews profit levels and develops standards or measures such as operating ratios, disapproves rates that fail to meet the state’s standards, conducts hearings and issues written decisions.”²⁸ However, inasmuch as the litigation record suggested that none of these indicia existed in this case, active supervision was found to be absent:

The ALJ concluded, and we agree, that no single measure identified . . . by the courts or the Commission is necessarily a prerequisite for active supervision in this case. . . . However, the ALJ’s finding that the state of Kentucky has taken none of the measures identified by the courts and the Commission plainly supports a conclusion that the level of state supervision of the challenged private activity does not meet the active supervision standard.²⁹

In so holding, the Commission’s opinion notes that “[t]his is not a difficult case in which we are called upon to decide whether a state’s implementation of certain supervisory steps but not of others satisfies the active supervision requirement.”³⁰

FTC Task Force Report

Presumably stimulated by then Chairman Muris’ continuing interest in this subject,³¹ the FTC in recent years has been particularly active in the state action arena. In July, 2001, the Commission’s Office of Policy Planning convened a State Action Task Force which issued the FTC Task Force Report in September 2003. In addition to the *Kentucky Household Goods*

²⁸ *Id. at* *23.

²⁹ *Id. at* *25-26.

³⁰ *Id. at* *35.

³¹ In a speech shortly after taking office in the new Bush administration, Chairman Muris said: “The Transition Report prepared by the ABA Antitrust Section stated that the state action exemption still presents concerns from a competition standpoint. The Report recommended a reexamination of the scope of the exemption. We are doing that.” *Antitrust Enforcement at the Federal Trade Commission: In a Word – Continuity*, August 7, 2001 at <http://www.ftc.gov/speeches/muris/murisaba.htm> (last visited September 22, 2005).

Carriers case referenced above, the Commission also instituted a series of cases against other state household goods carriers rating bureaus touted as providing “an opportunity for the Commission and the courts to provide greater analysis and elaboration of the state action doctrine as a defense under the antitrust laws.”³²

It does not appear that the FTC Office of Policy Planning began its intense study of state action immunity in response to federal court decisions finding active supervision in circumstances with which it disagreed. Although the FTC Task Force Report discusses in some detail a variety of federal court decisions that it believes have distorted the state action doctrine, not a single one of the criticized cases involved the active supervision element of the state action doctrine. As discussed above, that may well be the case because, on this issue, there was either ample evidence of state regulatory activity and a finding of active supervision or, on the other hand, a virtual absence of regulatory activity and a finding that active supervision was absent.

On the subject of active supervision, the FTC Task Force Report ultimately concludes with a recommendation that the Commission “could” identify “specific elements” that it would consider in the future in determining whether active supervision was present.³³ The FTC Task Force Report suggested that these elements “would likely include” the following: 1) “the development of an adequate factual record, including notice and an opportunity to be heard,” 2) “a written decision on the merits; and” 3) “a specific assessment – *both* qualitative and

³² Federal Trade Commission, Press Release, July 9, 2003 announcing “FTC Approves Filing of Antitrust Complaints against Associations in Three States,” quoting Joe Simons, Director of the Bureau of Competition. *See, In the Matter of Alabama Trucking Assoc., Inc.* Docket No. 9307; *In the Matter of Movers Conference of Mississippi, Inc.*, Docket No. 9308; *In the Matter of New Hampshire Motor Transport Association*, File No. 021-0115; *In the Matter of Indiana Household Movers and Warehousemen, Inc.*, File No. 021-0115; *In the Matter of Minnesota Transport Services Association*, File No. 021-0115; *In the Matter of Iowa Movers and Warehousemen’s Association*, File No. 021-0115; *In the Matter of Kentucky Household Goods Carriers Association, Inc.*, Docket No. 9309.

³³ *See*, FTC Task Force Report at p. 55.

quantitative – of how private action comports with the substantive standards established by the state legislature.”³⁴

Although the later Commission opinion in the *Kentucky Household Goods Carriers* case references the FTC Task Force Report’s proposed standard for active supervision, it does not embrace it despite the opportunity to do so. However in the other cases against state associations of household goods carriers, the Commission utilized the Task Force standard as a standard by which future state action claims by these associations would be measured and/or a standard by which their past reliance on state action was evaluated.³⁵

In four of these cases filed (and settled) – Indiana, Minnesota, Iowa and New Hampshire – neither the complaints nor the subsequent Analysis of Consent Order to Aid Public Comment contains any meaningful recitation of facts describing the state’s involvement in rate-setting or any reasoning behind the FTC conclusion that active supervision did not exist. Instead the FTC asserted in a conclusory fashion that the state action doctrine did not apply because “the State . . . does not actively supervise the tariffs filed by Respondent.”³⁶ However, in two other cases filed (and settled) – Alabama and Mississippi – the Analysis includes some discussion of the Commission’s perception of the facts and why the standard was not met. Although the abbreviated discussion makes it difficult to evaluate the Commission’s ultimate conclusion, it

³⁴ See, FTC Task Force Report, p. 55 (emphasis added).

³⁵ Although not publicly issued until September 2003, it appears from the consent decrees filed in the household goods carriers cases beginning in March 2003 that the vast majority of the work on the report had been accomplished by early 2003. Perhaps a timing quirk delayed official release of the report and explains the Report’s suggestion that the Commission could identify specific elements to be considered when assessing active supervision after several of the consents in these cases suggests that this had already occurred.

³⁶ See, *In the Matter of Indiana Household Movers and Warehousemen, Inc.*, Analysis of Proposed Consent Order to Aid Public Comment, 68 Fed. Reg. 14234 (March 24, 2003); *In the Matter of Minnesota Transport Services Association*, Analysis of Proposed Consent Order to Aid Public Comment, 68 Fed. Reg. 47571 (August 11, 2003); *In the Matter of Iowa Movers and Warehousemen’s Association*, Analysis of Proposed Consent Order to Aid Public Comment, 68 Fed. Reg. 47568 (August 11, 2003); Analysis of Proposed Consent Order to aid Public Comment in *New Hampshire Motor Transport Association*, 68 Fed. Reg. 62606 (November 11, 2003).

provides a little insight into how the proposed FTC Task Force Report standard might be applied in a practical context.³⁷

The Alabama Analysis suggests that, although Alabama was not intimately involved in the rate setting, it did more than simply rubber stamp submitted requests. The movers were required to submit, “fairly specific written assertions that movers’ costs had increased.”³⁸ In an effort to understand the movers’ costs, Alabama was said to have monitored fuel and labor rates and the rates contained in the federally filed tariffs.³⁹ Although in the past Alabama apparently had held hearings, it had been some time since such hearings had been held.⁴⁰

The FTC found four major deficiencies with the Alabama program. First, there was no written decision approving the rates. Second, there was not always public notice followed by a hearing. Third, there was no evidence that Alabama had done the “necessary research into the economic conditions of the moving industry in Alabama” nor did it independently verify the accuracy of the data the movers submitted.⁴¹ Finally, the Commission determined that there was no evidence demonstrating the process by which Alabama determined that the rates met the statutory criteria. Accordingly, the FTC concluded that the state action doctrine did not apply.

³⁷ Although DOJ has been less noticeably active in the state action arena, a recent competitive impact statement filed in support of a proposed consent decree resolving a complaint against two West Virginia hospitals suggests that it accepts at least some of the elements of the FTC Task Force Report’s formulation for active supervision. *United States v. Bluefield Regional Medical Center, Inc.*, Civ. Action No. 1:05-0234 (S.D. W. Va.) (March 21, 2005). The DOJ Statement recites that a West Virginia state health care authority has not purported to actively supervise the defendants’ agreements “as it did not (1) develop a factual record concerning the initial or ongoing nature and effect of the agreements, (2) issue a written decision approving the agreements, or (3) assess whether the agreements further criteria established by the West Virginia legislature.” Competitive Impact Statement at p. 11.

³⁸ See, Analysis of Proposed Consent Order to Aid Public Comment in *Alabama Trucking Assoc., Inc.* 68 Fed. Reg. 62597, 62599 (November 5, 2003).

³⁹ *Id.*

⁴⁰ *Id.* at 62600.

⁴¹ *Id.* at 62599-62600.

The Analysis of the Mississippi consent suggests that Mississippi was more involved than Alabama, yet it too failed to meet the FTC’s perception of active supervision.⁴² The movers filed general assertions of cost increases with a state agency. The state reviewed the requested increases and verified, for example, whether packaging costs had increased as the movers alleged.⁴³ In addition, Mississippi monitored the Bureau of Labor Statistics information regarding the consumer price index and changes in the federal minimum wage. As a regular part of the process, the state held hearings, including live testimony, before setting a new rate.⁴⁴ Finally, Mississippi issued a written notice of its decision. The notice informed the public of the decision but, according to the Commission’s Analysis, did not analyze the decision or the reasons behind it.⁴⁵

Using the same criteria described above, the FTC found that Mississippi’s supervision fell short of “active.” According to the FTC, while Mississippi conducted some verification of costs generally, that did not demonstrate “that the State had done the necessary research into the economic conditions of the moving industry in Mississippi that would enable it to assess the impact of the [movers’] proposal.”⁴⁶ While the FTC acknowledged that Mississippi met one of its criteria – notice and a hearing – it concluded that, “the mere fact of a hearing will not

⁴² Analysis of Proposed Consent Order to Aid Public Comment in *Movers Conference of Mississippi, Inc.*, 68 Fed. Reg. 62601 (November 5, 2003).

⁴³ *Id.* at 62604.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

establish active supervision.”⁴⁷ Although Mississippi issued a written opinion, it was apparently insufficiently analytical to meet the FTC threshold.⁴⁸

The Task Force Test – Appropriate Active Supervision Standard?

The FTC Task Force can be applauded for having attempted to provide some greater certainty to the post-*Ticor* concept of active supervision. However, one can reasonably question whether the active supervision standard articulated in the FTC Task Force Report comports with *Ticor* and is sufficiently sensitive to the principles of state sovereignty and federalism that are central to the state action doctrine.

The first issue the standard raises is its apparent rigidity – its “one size fits all” approach to active supervision, particularly with respect to its procedurally oriented elements. As the Comments of the ABA Antitrust Section on the FTC Task Force Report in this respect aptly state: “what is sufficiently ‘active’ for active supervision will vary based on the conduct, industry, regulatory scheme, as well as other factors.”⁴⁹

The procedural elements of the FTC Task Force Report’s test – namely that there be adequate notice, an opportunity to be heard and a written opinion – resuscitate a procedurally oriented active supervision test advanced by the Bureau of Competition in both the *New England Motor Rate Bureau* and *Ticor* cases. Although in each case the Commission itself found active supervision to be lacking, in each case these procedural standards were rejected because of their rigidity and because of their tendency to elevate form over substance:

⁴⁷ *Id.*

⁴⁸ *Id.* at 62604-62605.

⁴⁹ Comments of ABA Section of Antitrust Law on FTC Report re State Action Doctrine, *at* <http://www.abanet.org/antitrust/comments/2005/05-05/at-state-action-05.pdf> p. 17 (last visited September 22, 2005).

A finding that the state engages in substantive review of the private conduct is essential to a finding of “active state supervision.” Thus the [notice and an opportunity to be heard] test that complaint counsel propose is overinclusive, because it would permit a finding of state action immunity where the state has merely adopted particular procedures designed to assure fairness. . . . *Oversight on merely formal terms does not establish a “pointed reexamination” of private action.* One the other hand, we are hesitant to limit to a written opinion the forms of evidence that could be used to show that a state has actually engaged in a substantive review of the merits of a proposal for private conduct. *States should be afforded greater latitude in structuring supervisory schemes.*⁵⁰

Surely nothing the Supreme Court wrote in *Ticor* would seem to have changed the validity of these earlier observations by the Commission about the weaknesses of a procedurally oriented standard. In fact, given the Court’s disavowal of any requirement that there be any particular *form* of state regulation, there is reason to believe that the *Ticor* Court might well have rejected such a standard.⁵¹

Moreover, the FTC Task Force Report standard would appear to beg a later federal assessment of how well the state regulators performed by a measure yet to be determined. It mandates the development of an “adequate” factual record. It requires a written decision “on the merits.” It speaks of the need for a “specific” assessment – “*both qualitative and quantitative.*”⁵²

Even if a higher – but uncertain - level of supervision was demanded for the future application of state action, the *Ticor* Court majority can be read as having rejected later federal

⁵⁰ See, *In the Matter of New England Motor Rate Bureau, Inc.*, 1989 F.T.C. LEXIS 62 (August 18, 1989) p. *46 n. 14 (emphasis added). These same proposed standards for active supervision were subsequently again rejected by the same Commission in *Ticor, In the Matter of Ticor Title Ins. Co., et al.*, 1989 F.T.C. LEXIS 80 (1989) p. *22, n. 9. They had fared no better at the hands of the *Ticor* ALJ: “[B]y 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.” Initial Decision, ALJ Needelman, 1989 F.T.C. LEXIS 115 p.*146-47.

⁵¹ There is even a hint that the Commission, as presently constituted, may well not embrace this portion of the suggested standard: “neither we nor the ALJ have held that notice and a hearing are absolute requirements for a state’s program of active supervision.” See, *Kentucky Household Goods Carriers*, Opinion of the Commission at p. *39.

⁵² See, FTC Task Force Report *supra*.

second-guessing about the quality of the state’s supervision, a concern which obviously motivated the circuit courts in the formulation of their approach to this issue. If this is not the case, what did the majority have in mind when it expressly rejected an approach to active supervision that would determine whether a state had met “some normative standard”⁵³ of regulation. In fact, there are some post-*Ticor* federal court decisions that have suggested that, whatever quantitative amount of regulation *Ticor* might require, it does not require a qualitative evaluation of how well the regulators did their job. Although finding the state regulators to have actively supervised state workers compensation rating bureaus, the court in *Gulf Marine Repair*⁵⁴ refused to evaluate “how well state regulation work[ed].”⁵⁵ In dicta in *Ehlinger & Associates v. Louisiana Architects Assoc.*, the court said, “state action immunity is not dependent upon how well the Board carries out its statutory mandate.”⁵⁶

Active Supervision and the Antitrust Modernization Commission

With respect to active supervision, the AMC’s bottom line question is whether the courts should “change or clarify” this part of the *Midcal* test. As discussed above, no one seems to believe that the judicial track record since *Ticor* suggests that change is warranted. On the other hand, given the continuing uncertainties attached to active supervision and the risks posed to

⁵³ *Ticor*, at 634.

⁵⁴ *Gulf Marine Repair Corp. v. Liberty Mutual Ins. Co.*, 1995-1 Trade Cas. (CCH) ¶ 70,968 (M.D. Fla. 1995) (this decision has been designated as not for publication and should not be cited as precedent except in accordance with the rules of the court); *Ehlinger & Assoc. et al. v. Louisiana Architects Assoc.*, 989 F. Supp. 775, 784 (E.D. La. 1998).

⁵⁵ *Gulf Marine Repair*, at p. 74,451, citing *Ticor*.

⁵⁶ See, *Ehlinger*, 989 F. Supp. at 784. The rigidity and subjectivity of the FTC Task Force Report standard can be seen in the Analysis accompanying the Alabama and Mississippi settlements. In Alabama there was “not always” public notice followed by a hearing. In Mississippi, although the regulators always had hearings with notice, the “mere fact” of a hearing was deemed insufficient. In neither state did the regulators perform the “necessary” research nor “independently” verify the data submitted. See, Analysis of Proposed Consent Order to Aid Public Comment in *Alabama Trucking Assoc., Inc.* Docket No. 9307 at p. 7-8; Analysis of Proposed Consent Order to Aid Public Comment in *Movers Conference of Mississippi, Inc.*, Docket No. 9308 at p. 7-8.

private actors subject to state regulation, there is a lot to be said for efforts to achieve additional clarity.

However, for the reasons discussed above, the FTC Task Force Report's effort to accomplish this forces state regulators into a procedural straightjacket. The varying circumstances of state regulation demand a more flexible standard – as the Commission asserted in *New England Motor Rate Bureau, supra*, “[s]tates should be afforded greater latitude in structuring supervisory schemes.”⁵⁷ Moreover, the FTC Task Force Report standard appears to encompass a later day federal evaluation of the quality of the regulatory record that only adds – rather than lessens - uncertainty to the application of the state action doctrine.

Genuine state regulation can take many different forms and any standard of active supervision must recognize that fact. For that reason, it may well be that any conceptual standard formulated in the abstract might not sufficiently encompass “substantial state participation” in every instance, thereby either leaving out some acceptable regulatory activity or, alternatively, leaving in some unacceptable form of regulatory activity. As a result, despite the continuing uncertainty, and the downsides that go with it, further evolution of the concept might best occur as decision-makers deliberate upon the facts as developed upon a full litigation record.

⁵⁷ *In the Matter of New England Motor Rate Bureau, Inc.*, at *46 n. 14.