

**IN THE  
INDIANA COURT OF APPEALS**

---

**No. 49 A02-1110-PL-971**

---

STEPHEN W. ROBERTSON, INSURANCE )	
COMMISSIONER OF THE STATE OF )	
INDIANA, in his official capacity only and not )	
in his individual capacity, on behalf of the )	
INDIANA DEPARTMENT OF INSURANCE, )	Appeal from Final Judgment of
)	Marion Superior Court
Appellant (Respondent Below), )	
)	No. 49D10-1010-PL-043363
v. )	
)	The Honorable
TICOR TITLE INSURANCE COMPANY OF )	David Dreyer, Judge
FLORIDA, now known as Chicago Title )	
Insurance Company, successor by merger, )	
)	
Appellee (Petitioner Below). )	
)	
)	

---

**AMICUS BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE  
COMMISSIONERS IN SUPPORT OF BRIEF OF APPELLANT**

---

Karl L. Mulvaney, #9255-49  
Margaret M. Christensen, #27061-49  
BINGHAM GREENEBAUM DOLL LLP  
2700 Market Tower, 10 West Market St.  
Indianapolis, IN 46204-4900  
(317) 635-8900  
(317) 236-9907 Fax  
[kmulvaney@bgdlegal.com](mailto:kmulvaney@bgdlegal.com)  
[mchristensen@bgdlegal.com](mailto:mchristensen@bgdlegal.com)  
Attorneys for *Amicus Curiae*,  
National Association of Insurance  
Commissioners

REC'D AT COUNTER ON:

MAR 14 2012  
AT 4:51 AM/PM  
*[Signature]*  
CLERK OF COURTS  
STATE OF INDIANA

**IN THE  
INDIANA COURT OF APPEALS**

---

**No. 49 A02-1110-PL-971**

---

STEPHEN W. ROBERTSON, INSURANCE )	
COMMISSIONER OF THE STATE OF )	
INDIANA, in his official capacity only and not )	
in his individual capacity, on behalf of the )	
INDIANA DEPARTMENT OF INSURANCE, )	Appeal from Final Judgment of
)	Marion Superior Court
Appellant (Respondent Below), )	
)	No. 49D10-1010-PL-043363
v. )	
)	The Honorable
TICOR TITLE INSURANCE COMPANY OF )	David Dreyer, Judge
FLORIDA, now known as Chicago Title )	
Insurance Company, successor by merger, )	
)	
Appellee (Petitioner Below). )	
)	
)	

---

**AMICUS BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE  
COMMISSIONERS IN SUPPORT OF BRIEF OF APPELLANT**

---

Karl L. Mulvaney, #9255-49  
Margaret M. Christensen, #27061-49  
BINGHAM GREENEBAUM DOLL LLP  
2700 Market Tower, 10 West Market St.  
Indianapolis, IN 46204-4900  
(317) 635-8900  
(317) 236-9907 Fax  
[kmulvaney@bgdlegal.com](mailto:kmulvaney@bgdlegal.com)  
[mchristensen@bgdlegal.com](mailto:mchristensen@bgdlegal.com)  
Attorneys for *Amicus Curiae*,  
National Association of Insurance  
Commissioners

## TABLE OF CONTENTS

TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	iii
I. IDENTITY AND INTEREST OF AMICUS CURIAE.....	1
A. THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS (“NAIC”).....	1
B. INTEREST OF THE NAIC.....	2
II. STATEMENT OF CASE.....	3
III. STATEMENT OF FACTS .....	3
IV. SUMMARY OF THE ARGUMENT .....	3
V. ARGUMENT .....	5
A. STANDARD OF REVIEW .....	5
B. THE TRIAL COURT ERRED BY NOT ACCORDING APPROPRIATE DEFERENCE TO THE IDOI’S STATUTORY ROLE, EXPERTISE AND DISCRETION TO INTERPRET AND APPLY THE INDIANA UNFAIR METHODS OF COMPETITION AND UNFAIR AND DECEPTIVE ACTS AND PRACTICES LAW.....	5
C. THE TRIAL COURT ERRED BY DISREGARDING THE ESTABLISHED REGULATORY SCHEME IN PLACE IN INDIANA AND NATIONWIDE TO EXAMINE WHETHER INSURERS’ MARKET CONDUCT PRACTICES COMPLY WITH APPLICABLE LAWS AND REGULATIONS.....	8
1. The Governing Laws Applied by IDOI are Consistent with Those of Its Partners in the National System of State-Based Insurance Regulation .....	8
2. The Trial Court’s Determinations are Inconsistent with the Governing Laws and Guidance in Place in the National System of State-Based Insurance Regulation .....	11
3. If Upheld, the Trial Court’s Determinations Risk Destabilizing the Title Insurance Market by Calling into Question the Established Application of the Governing Laws and Guidance in Place in the National System of State-Based Insurance Regulation .....	17
VI. CONCLUSION.....	19

WORD COUNT CERTIFICATE ..... 20  
CERTIFICATE OF SERVICE..... 21

## TABLE OF AUTHORITIES

### CASES

<i>Amoco Oil Co. v. Commissioner of Labor</i> , 726 N.E.2d 869 (Ind. Ct. App. 2000) .....	7
<i>Clarkson v. Dept. of Ins.</i> , 425 N.E.2d 203 (Ind. Ct. App. 1981) .....	7
<i>Hatcher v. Smith</i> , 283 N.E.2d 582 (Ind. Ct. App. 1972) .....	7
<i>Ins. Services Office v. Whaland</i> , 378 A.2d 743 (N.H. 1977) .....	6
<i>Lightpoint Impressions, Inc. v. Metro. Dev. Comm’n of Marion Co.</i> , 941 N.E.2d 1055 (Ind. Ct. App. 2010) .....	6
<i>Mass. Auto Rating Accident Prevention Bureau v. Comm’r of Ins.</i> , 453 N.E.2d 381 (Mass. 1983) .....	6
<i>Office of the Public Counselor v. Indianapolis Power and Light Co.</i> , 413 N.E.2d 672 (Ind. Ct. App. 1980) .....	7
<i>Pendleton v. McCarty</i> , 747 N.E.2d 56 (Ind. Ct. App. 2001) .....	7

### STATUTES

IND. CODE § 4-21.5-1-1, <i>et seq.</i> .....	6
IND. CODE §§ 27-1-3.1-1--27-1-3.1-18 .....	5
IND. CODE § 27-1-22-2 .....	10
IND. CODE §§ 27-1-22.2.5--27-1-22-4 .....	5
IND. CODE §§ 27-4-1-1--27-4-1-18 .....	2, 11, 14
IND. CODE § 27-4-1-4 .....	3, 4, 5, 6, 8, 9, 10, 13, 16, 18
IND. CODE §§ 27-7-3-1--27-7-3-21 .....	5

### REGULATIONS

OFFICIAL NAIC ANNUAL STATEMENT INSTRUCTIONS—TITLE 74 (2011) .....	15
---	----

### OTHER AUTHORITIES

FIRE, MARINE AND INLAND MARINE RATE REGULATORY BILL .....	10
---	----

INSURANCE DEPARTMENT RESOURCES REPORT 4 (2011).....	18
NAIC, ACCOUNTING PRACTICES AND PROCEDURES MANUAL 57-4 (2011).....	15
NAIC, ACCOUNTING PRACTICES AND PROCEDURES MANUAL 71-3 (2011).....	15
NAIC, <u>Compendium of State Laws on Insurance Topics II-PA-10-1--22</u> (2011).....	17
NAIC, <u>Market Regulation Handbook 346</u> (2011).....	12
NAIC, Model Laws, Regulations and Guidelines, p. ST-880-4 (2011).....	11
Proceedings of the NAIC (1946).....	10
Proceedings of the NAIC (1971).....	1, 9, 10
Proceedings of the NAIC, Vol. II (1992).....	10
Robert W. Klein, <u>A Regulator's Introduction to the Insurance Industry 140</u> (2d ed. 2005) .....	11, 14
Unfair Trade Practices Act, NAIC, <i>Model Laws, Regulations and Guidelines</i> , Vol. VI, p. 880 (2011) .....	9, 10, 11

**I.**  
**IDENTITY AND INTEREST OF AMICUS CURIAE**

**A. THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS (“NAIC”)**

The NAIC is the U.S. standard-setting and regulatory support organization created and governed by the chief insurance regulators from the 50 states, the District of Columbia, and five U.S. territories. Through the NAIC, state insurance regulators establish standards and best practices, conduct peer review, and coordinate regulatory oversight. NAIC staff supports these efforts and represents the collective views of state regulators domestically and internationally. The NAIC members, together with the central resources of the NAIC, form the national system of state-based insurance regulation in the U.S.

The NAIC’s purpose is to provide its members with a national forum enabling them to work cooperatively on regulatory matters that transcend the boundaries of their own jurisdictions. Collectively, the state insurance commissioners work to develop model legislation, rules, regulations, white papers and actuarial guidelines that promote and establish uniform regulatory policy. Their overriding objectives are to protect consumers as well as assist in maintaining the financial stability of the insurance industry.

The NAIC performs numerous crucial services on behalf of state governments including: developing and publishing model laws, regulations, bulletins, financial and accounting standards, white papers, consumer guides, handbooks, periodicals and the *Proceedings of the NAIC*. Hundreds of state and federal laws assign duties to the NAIC and incorporate NAIC standards, models and other publications. In addition, the NAIC

manages and coordinates the accreditation review of insurance departments as well as maintains regulatory and financial databases of insurance company financial data.

**B. INTEREST OF THE NAIC**

The interest of the NAIC in this case arises from each member's interest in protecting the consumers of their states. The NAIC has a strong interest in ensuring insurance regulators retain the necessary discretion to enforce applicable laws and regulations through administrative decisions and to ensure consumers are treated fairly. The NAIC members understand the interests of insurance consumers and work daily to protect those interests.

Individually and collectively, the NAIC members and the state agencies over which they preside have a wealth of experience in the regulation of insurance. Regulators have unique knowledge and expertise of the insurance industry and their expertise should be given the deference it deserves. The Marion Superior Court overturned the Indiana Department of Insurance's ("IDOI") reasoned decision making, exhibited in the course of the market conduct examination and during the administrative proceedings, and substituted its own judgment for that of the IDOI officials charged with enforcing the insurance laws and regulations in Indiana.

The NAIC also has an interest in promoting the uniformity of insurance laws and regulations among the states. Indiana's Unfair Competition and Unfair or Deceptive Acts and Practices, Indiana Code sections 27-4-1-1 to 27-4-1-18 is based on the NAIC's Unfair Trade Practices Model Act which has been enacted by almost all NAIC members.



The trial court's decision may affect the interpretation of the NAIC Model Act as enacted in other states and calls into question the IDOI's authority and ability to conduct routine administrative proceedings. The NAIC members are uniquely qualified and situated to assist this Court by presenting the regulatory and public policy concerns involved in this case.

**II.  
STATEMENT OF CASE**

The NAIC as *amicus curiae* agrees with the Statement of the Case set forth in the brief submitted by the Appellant and respectfully incorporates by reference Appellant's Statement of the Case.

**III.  
STATEMENT OF FACTS**

The NAIC as *amicus curiae* agrees with the Statement of the Facts set forth in the brief submitted by the Appellant and respectfully incorporates by reference Appellant's Statement of the Facts.

**IV.  
SUMMARY OF THE ARGUMENT**

Respectfully, the trial court erred by reweighing the evidence presented to the IDOI rather than affording deference to the IDOI's experience, technical competence, and specialized knowledge of Indiana's Rate Statute, Indiana Code section 27-4-1-4(a)(7)(C)(i). By substituting its own judgment for that of the IDOI, where the evidence supported the IDOI's conclusion that Ticor had violated the Rate Statute, the trial court failed to afford proper deference to the IDOI.

Additionally, the trial court's interpretation of the Rate Statute is inconsistent with the overall regulatory framework governing insurers operating in Indiana. The trial court accepted Ticor's interpretation of the Rate Statute by requiring an analysis of both Ticor's and Homequest's costs in order to determine whether Ticor charged excessive and unfairly discriminatory rates. This interpretation, not only fails to afford proper deference to the IDOI's reasonable interpretation of the statute it was empowered to enforce, it also fails to recognize that an insurer's costs are considered in the IDOI's interpretation of the Rate Statute. First, Ticor's costs already form the basis of the rates in Ticor's Ratebook, so the trial court erroneously found that there should be a cost analysis. Second, there was no showing by Ticor why local agents did not recover their costs for selling insurance where they retained 70% of the Ratebook premium and where the market conduct examination actually showed that Homequest charged more than the Ratebook premium.

The IDOI's Administrative Order merely attempts to regulate the premiums charged by Ticor and its local agents for title insurance. The IDOI has no interest and does not purport to regulate the fees charged for additional services provided by the local agents. To the extent that Ticor and its agents could not identify which portion of the fees charged to consumers amount to insurance premiums, and which portion is properly considered settlement costs, the IDOI was required to assess these costs pursuant to charges shown on individual settlement statements. The methodology used to determine that the title insurance rates Homequest charged were excessive is sound, and the trial court erred in failing to give deference to the Commissioner. Respectfully, the IDOI's

conclusion that Ticor charged excessive and discriminatory premium rates should be upheld and Ticor should be accountable for its admitted failure to monitor the premium rates charged by its local agents.

## V. ARGUMENT

### A. STANDARD OF REVIEW

The NAIC as *amicus curiae* agrees with the standard of review set forth in the brief submitted by the Appellant and respectfully incorporates by reference the Appellant's summary of the Standard of Review.

### B. **THE TRIAL COURT ERRED BY NOT ACCORDING APPROPRIATE DEFERENCE TO THE IDOI'S STATUTORY ROLE, EXPERTISE AND DISCRETION TO INTERPRET AND APPLY THE INDIANA UNFAIR METHODS OF COMPETITION AND UNFAIR AND DECEPTIVE ACTS AND PRACTICES LAW**

Insurance regulators are statutorily charged with protecting consumers in a number of ways: overseeing the solvency of insurance companies; licensing insurance companies and producers who solicit the purchase of insurance; reviewing and approving insurance products sold to consumers; and investigating and examining the market practices of insurance companies. *See, e.g.*, Ind. Code §§ 27-7-3-1 to 27-7-3-21; 27-1-22.2.5 to 27-1-22-4; 27-1-3.1-1 to 27-1-3.1-18 and 27-4-1-4 (2011). These statutes are merely a sample of the features of the comprehensive statutory framework in place nationwide to carry out the twin purposes of consumer protection and marketplace solvency.

The Insurance Commissioner, operating pursuant to his authority, instituted a market conduct examination to determine if Ticor's title insurance premium rates were

being applied fairly, uniformly and consistently with Ticor's premium rates specified in Ticor's Ratebook, which provided for uniform statewide premium rates. The contracts between Ticor and its independent agents specified that the agents would charge the premium rates specified in the Ratebook. Based on the analysis conducted on behalf of the Commissioner, which considered different methodologies, the examiner determined that the title insurance rates were not being uniformly applied to all Indiana consumers. Subsequently, the IDOI conducted an administrative hearing allowing Ticor representatives along with its agents, to present testimony regarding its rates. Based on this hearing, the IDOI issued certain fines and sanctions against the company.

Courts have long recognized and deferred to the discretion of the insurance commissioner to analyze and regulate insurance rates. *See Mass. Auto Rating Accident Prevention Bureau v. Comm'r of Ins.*, 453 N.E.2d 381, 385 (Mass. 1983) (courts give "due weight to the Commissioner's experience, technical competence, and specialized knowledge as well as the discretionary authority vested in the Commissioner by the Legislature"). *See also Ins. Services Office v. Whaland*, 378 A.2d 743, 746 (N.H. 1977) (Due to its complexity. . . "rate-making is left to the discretion of the insurance commissioner who is a specialist in the field and upon whose expertise we must rely.") Indiana follows the rule of deference and limited judicial review. *See Ind. Code § 4-21.5-1-1, et seq.*; *Lightpoint Impressions, Inc. v. Metro. Dev. Comm'n of Marion Co.*, 941 N.E.2d 1055, 1059 (Ind. Ct. App. 2010). Here, based on the Commissioner's discretion and expertise, the Commissioner determined that Ticor's agents were not applying the contractual rates in accordance with Indiana Code section 27-4-1-4 (a)(7)(C)(1).

It is well established that courts must defer to regulatory agencies regarding the interpretation of laws those agencies enforce. In reviewing an administrative decision, a court may not reweigh the evidence. *Clarkson v. Dept. of Ins.*, 425 N.E.2d 203, 206 (Ind. Ct. App. 1981) (citing *Office of the Public Counselor v. Indianapolis Power and Light Co.*, 413 N.E.2d 672 (Ind. Ct. App. 1980)). Instead, judicial review shall be limited to, among others, whether the order was based upon substantial evidence. *Id.* at 207. Arbitrary and capricious action on behalf of an agency has been described as willful and unreasonable conduct without consideration and in disregard of the facts of the case; action taken without some basis which would lead a reasonable person to such action. *Id.* (citing *Hatcher v. Smith*, 283 N.E.2d 582 (Ind. Ct. App. 1972)). Reviewing courts must consider the record in the light most favorable to the administrative proceedings, and may not reweigh the evidence or assess the credibility of witnesses. *Pendleton v. McCarty*, 747 N.E.2d 56, 61 (Ind. Ct. App. 2001) (citing *Amoco Oil Co. v. Commissioner of Labor*, 726 N.E.2d 869 (Ind. Ct. App. 2000)).

Despite this clear precedent requiring deference to the authority and discretion of the Insurance Commissioner, the trial court substituted its judgment and re-weighed the evidence. The IDOI presented evidence from its experts found during the course of the market conduct proceeding and the hearing officer considered the evidence presented. The hearing officer heard testimony from various parties and entered his finding on behalf of the Commissioner. The trial court was not free to accept the methodology of Tigor's expert where the reasoned determination of the Commissioner was supported by

evidence that the rates charged by Homequest were excessive and discriminatory when compared to the rates of the other two local Ticor agents.

The NAIC as *amicus curiae* fully supports the Commissioner's administrative discretion to interpret the statutes he is charged with enforcing and to review rates for insurance products sold to Indiana's consumers. This Court should defer to the Commissioner's discretion and reasoned analysis of information gathered from many sources in issuing the administrative action and penalty against Ticor.

**C. THE TRIAL COURT ERRED BY DISREGARDING THE ESTABLISHED REGULATORY SCHEME IN PLACE IN INDIANA AND NATIONWIDE TO EXAMINE WHETHER INSURERS' MARKET CONDUCT PRACTICES COMPLY WITH APPLICABLE LAWS AND REGULATIONS.**

The NAIC as *amicus curiae* is uniquely situated to assist this Court in understanding the potentially negative impact of the trial court's decision in the larger environment of the national system of state-based insurance regulation. Specifically, the decision will undermine the regulators' goals of a consistent regulatory scheme and consistent enforcement nationwide.

**1. The Governing Laws Applied by IDOI are Consistent with Those of Its Partners in the National System of State-Based Insurance Regulation**

State laws prohibiting "unfair discrimination" in insurance premium rate making are found in state insurance laws nationwide as well as in Indiana Code section 27-4-1-4 (a)(7)(C)(i), which enumerates as an unfair method of competition and unfair and deceptive act and practice in the business of insurance:

Making or permitting ... [e]xcessive or inadequate charges for premiums, policy fees, assessments, or rates, or making or permitting any unfair

discrimination between persons of the same class involving essentially the same hazards, in the amount of premiums, policy fees, assessments, or rates charged or made for ... policies or contracts of ... abstract and title insurance[.]

*Id.*

The operative provision of the Indiana Code is based very closely on the model NAIC Unfair Trade Practices Act. Unfair Trade Practices Act, NAIC, *Model Laws, Regulations and Guidelines*, Vol. VI, p. 880 (2011). Section 4G(4) of the model act defines unfair discrimination in the area of accident and health insurance using nearly identical language to that of the Indiana provision quoted above:

Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees or rates charged for any accident or health insurance policy or in the benefits payable thereunder, or in any of the terms or conditions of such policy, or in any other manner.

This model act was first adopted by the NAIC in 1947. Section 4G(4) appeared in the original 1947 version of the model act with exactly the same wording as it provides today. Every state and district of the United States, along with the territories of Puerto Rico, Northern Mariana Islands and Virgin Islands, have adopted this model act or similar legislation.

This Court may observe that Indiana Code section 27-4-1-4(a)(7)(C)(i) is specific to title insurance, unlike the model act. The historical Proceedings of the NAIC shed light on this distinction. When amendments to the model act were under consideration in 1971, the drafters discussed but recommended against inclusion of practices that might, in the general scheme of statutory enactments, be duplicative of other portions of the

insurance law. The drafters specifically opined that prohibition of unfair discrimination in fire and casualty rates – akin to the title insurance rates at issue in this case – should appear in the rating laws rather than the model act. This was because the Commissioner’s authority to reach such practices was more logically presented in the context of the Commissioner’s full authority to regulate the area in which the unfair practice might arise. Proceedings of the NAIC, p. 345-46 (1971).

At the time Indiana adopted Indiana Code section 27-4-1-4, the corresponding provision prohibiting excessive, inadequate or unfairly discriminatory rates in property and casualty insurance was contained in the NAIC model Fire, Marine and Inland Marine Rate Regulatory Bill (the “Model Rating Bill”). Proceedings of the NAIC, p. 410-422 (1946). When initially adopted, the Model Rating Bill did not specifically include or exclude title insurance—it was silent as to whether it applied to title insurance. An express exemption for title insurance was added to the Model Rating Bill in 1992. Proceedings of the NAIC, Vol. II, p. 756-64 (1992). Indiana’s insurance code contains the same exemption at Indiana Code section 27-1-22-2, which means that title insurance premium rates are exempt from regulatory filing, review and approval.

Following the logic of the drafters of the model NAIC Unfair Trade Practices Act that specific unfair practice provisions should be located in the respective chapters establishing regulation of the specific type of insurance, in states like Indiana that follow the NAIC framework and exempt title insurance premium rates from regulatory filing, review and approval, it is logical to assume that the provisions applicable to title insurance that define and prohibit excessive, inadequate or unfairly discriminatory rates



would be located in Indiana's version of the model NAIC Unfair Trade Practices Act. As publisher of the Model Acts, Regulations and Guidelines, the NAIC has concluded that Indiana's Unfair Methods of Competition and Unfair and Deceptive Acts and Practices Law is substantially similar to the model NAIC Unfair Trade Practices Act. NAIC, Model Laws, Regulations and Guidelines, p. ST-880-4 (2011).

**2. The Trial Court's Determinations are Inconsistent with the Governing Laws and Guidance in Place in the National System of State-Based Insurance Regulation**

State adoptions of the model NAIC Unfair Trade Practices Act form the backbone of what is known in insurance regulation as market conduct regulation. Market conduct regulation stands on equal footing with its partner, financial regulation, in ensuring the ability of state insurance regulators to carry out their statutory duties to protect the public interest and promote competitive markets. By requiring insurers to meet certain financial standards and take corrective action when necessary, financial regulation is how regulators ensure insurers deliver on their promise to pay claims. Robert W. Klein, A Regulator's Introduction to the Insurance Industry 140 (2d ed. 2005). Market regulation's fundamental objective is to "promote the proper functioning of insurance markets to serve the interests of consumers and the general public." *Id.* at 174.

As discussed above, Indiana's Unfair Methods of Competition and Unfair and Deceptive Acts and Practices Law is substantially similar to the model NAIC Unfair Trade Practices Act. Likewise, this Court should be aware that existing NAIC guidance sheds light on the Commissioner's actions in conducting a market conduct examination

and issuing the administrative order at issue in this case. The Commissioner's actions were consistent with existing NAIC guidance.

One way that insurance regulators monitor the proper functioning of insurance markets is to examine the performance and compliance of individual insurers through market conduct examinations. The suggested procedures to be followed in market conduct examinations, as well as other methods of market regulation, are detailed in another NAIC publication drafted and adopted by the NAIC membership: the Market Regulation Handbook (the "Handbook").

Chapter 18 sets forth the standards, priorities, procedures and criteria for conducting market conduct examinations of title insurance companies and title insurance agents. This chapter includes standards applicable to examining the rating and underwriting practices of title insurance companies such as Tigor Title Insurance Company of Florida, the appellee in this case. The Handbook provides specific direction regarding the practices reviewed by the Commissioner's examiner:

It is necessary to determine if the title insurance company is in compliance with rating systems which have been filed with and, in some cases, approved by, the various state insurance departments. **Where rates are not required to be filed with an applicable regulatory agency, it is prudent to determine if rates are being applied consistently and in accordance with the title insurance company's own rating methods.** In general, rates should not be unfairly discriminatory. Wide-scale application of incorrect rates by a title insurance company may raise financial solvency questions or be indicative of inadequate management oversight. Deviation from established rating plans may also indicate that a title insurance company is engaged in unfair competitive practices. **Inconsistent application of rates, individual risk premium modifications, modification factors and deviations can result in unfair discrimination.**

NAIC, Market Regulation Handbook 346 (2011) (emphasis added).

The NAIC as *amicus curiae* fully supports Appellant's argument that unfair discrimination should be defined by the statutory language prohibiting unjustified discrimination in premium rates charged to persons of the same class involving essentially the same hazards." Ind. Code section 27-4-1-4(a)(7)(C)(i). The NAIC also urges the Court to observe that the indicators for unfair discrimination identified in the Commissioner's order follow those identified in the Handbook. The Commissioner applied valid, carefully promulgated, and nationally supported criteria in reviewing the Appellee's business practices. The Commissioner, as the statutory insurance regulator charged with overseeing the market practices of insurance companies and trained to apply the applicable law to the facts determined through examination, should have been afforded deference by the trial court.

Respectfully, the trial court's decision is inconsistent with the governing laws and guidance, and effectively precludes the IDOI from providing meaningful regulation of title insurance premiums as contemplated by the General Assembly. In this case the trial court decision is fatally flawed because it fails to take into account that title insurance premium rates are already cost-based for both the principal and agent. (App. 127) Tigor's rates are calculated to cover expected costs and allow it and its agents a reasonable profit. (Id.) Pursuant to its contract with Tigor, the independent agent in this case was entitled to 70% of the Ratebook premium. (App. 23) No evidence was presented that the either Homequest or the other two independent agents were not able to cover their costs and realize a profit by adhering to their contracts and retaining 70% of the Tigor Ratebook premium. Indeed, an agent could set its own fees for related

settlement costs. Ticor's expert Miller testified that "[t]o the extent that the agent does not find the premium sufficient to cover all of their expenses in Indiana, the agents can charge – can add a charge for these other services that they are performing." (App. 667)

The IDOI's interest is in regulating title insurance premiums, not the settlement costs charged by local agents. The Indiana Unfair Methods of Competition and Unfair Deceptive Acts and Practices Law focuses on the title insurance premium component of closing costs in directing that the premium shall not be excessive or discriminatory. It is permissible for the agent to independently establish and impose charges for title searches and other settlement services. But it is not permissible for a title company to allow its agents to charge whatever the market will bear for title insurance coverage exclusive of settlement services. The wide variance in title insurance premium rates charged by Homequest was properly identified by the IDOI as a violation of the Indiana insurance code.

Existing NAIC guidance confirms that the costs of acquiring title insurance business, including the commissions due agents pursuant to contract are incorporated into the Ratebook premium. A fundamental principle of insurance regulation is that the price of insurance has two components: pure premium and expenses. Robert W. Klein, A Regulator's Introduction to the Insurance Industry 19 (2d ed. 2005). The expenses component of premium comprises all of the costs incurred by insurers in acquiring business, providing coverage and servicing a policy. Id. Agent commissions are a primary cost of acquiring business. This concept is illustrated in existing guidance

provided to insurance companies in properly accounting for their premium revenue in statutory financial statements filed with insurance regulators and the NAIC.

Acquisition costs are those costs that are incurred in the acquisition of new and renewal insurance contracts and include those costs that vary with and are primarily related to the acquisition of insurance contracts (e.g., agent and broker commissions, certain underwriting and policy issue costs, and medical and inspection fees). Acquisition costs and commissions shall be expensed as incurred.

NAIC, ACCOUNTING PRACTICES AND PROCEDURES MANUAL 71-3 (2011). The Statement of Statutory Accounting Principles specific to title insurance directs that “[a]mounts paid to or retained by agents shall be reported as an expense” in recognizing premium revenue. NAIC, ACCOUNTING PRACTICES AND PROCEDURES MANUAL 57-4 (2011). This direction is carried out when insurers are instructed to report amounts paid to or retained by title agents as operating expenses on their annual statutory financial statements. Amounts paid to or retained by title agents are defined as “[a]ll amounts paid directly or indirectly to the title agent. It can include commissions or fees paid directly to the title agents. It can also include any amounts collected from the insureds for title insurance premiums that are retained by the title agent, and not remitted to the company.” NAIC, OFFICIAL NAIC ANNUAL STATEMENT INSTRUCTIONS—TITLE 74 (2011). This guidance supports the Commissioner’s finding that Ticor wrongfully excluded commissions from its scheduled premium calculations, and this guidance casts doubt on the trial court’s finding that the agents’ costs in issuing title insurance policies were not accounted for in the contractual premium rates.

Upon close review of the evidence, there is no justification for the reversal by the trial court. Ticor made no showing that as to the sale of title insurance the contractually agreed-upon commission percentage, based on the Ticor Ratebook, was insufficient to cover the costs of Homequest's sale of that insurance.

The evidence is also clear that Ticor abdicated any responsibility to monitor title insurance rates its local agents were charging in Indiana because it turned off its internal control mechanism that would have reviewed the premiums being charged. Ticor admitted that irrespective of the contract to charge Ticor Ratebook rates, it simply allowed the local agents to charge what the market would bear. Allowing its agents to charge whatever they wanted to charge, to bundle charges in such a way that the rates for title insurance could not be ascertained, and to abdicate any responsibility for oversight is a clear violation of Indiana Code section 27-4-1-4(a)(7)(C)(i). The result, as outlined by the IDOI's Brief of Appellant, was that Homequest charged \$95,000 more than the rates permitted by the Ratebook for the year 2007, and in many cases vastly exceeded the rates per \$1000 of title insurance the other two local independent agents charged.<sup>1</sup> This evidence was more than sufficient to show deceptive practices, as well as excessive and discriminatory rate charges. Because there was evidence to support the administrative decision, the trial court decision which substituted its judgment for that of the IDOI Commissioner, should be reversed.

---

<sup>1</sup>The IDOI Brief of Appellant, sets out in greater detail the evidence supporting the Commissioner's determination that the rates charged by Homequest, which Ticor allowed to be charged, constituted a violation of I.C. 27-4-1-4(a)(7)(C)(i). (Appellant's Brief, pp. 49-52)

**3. If Upheld, the Trial Court's Determinations Risk Destabilizing the Title Insurance Market by Calling into Question the Established Application of the Governing Laws and Guidance in Place in the National System of State-Based Insurance Regulation**

The NAIC as *amicus curiae* fully supports the Commissioner's administrative discretion to interpret the statutes the Commissioner is charged with enforcing. The Commissioner properly exercised this discretion when reviewing the examination report and issuing the corresponding Administrative Order. If this Court holds that the Commissioner does not have the discretion to identify and balance all relevant factors in determining whether rates are excessive, inadequate or unfairly discriminatory, it has the potential to destabilize a key aspect of insurance regulation and will have far reaching effects to all states and the industry as a whole.

Six other states follow Indiana's system of not requiring title insurers to file premium rates for regulatory review. An additional 36 states require filing of premium rates, but these states generally deem the rates approved once specified time periods have passed. Only four states require affirmative approval of rates prior to use. NAIC, Compendium of State Laws on Insurance Topics II-PA-10-1 to 22 (2011). These statistics indicate that regulation of title insurance companies is heavily reliant on market conduct oversight such as that performed by the Commissioner to ensure that the system is functioning as intended. Insurance regulators should be afforded deference because they have the expertise to evaluate market practices and apply the law to the inherently complex and highly regulated business of insurance.

Further illustrative of the complexity inherent in market regulation across the spectrum of insurance companies and products is the fact that market regulation personnel make up more than 5% of the insurance department staffing on a national basis. NAIC, INSURANCE DEPARTMENT RESOURCES REPORT 4 (2011). State insurance departments employed more than 335 people as market conduct examiners in 2010, exclusive of contract examiners as well as supervisory, analyst, legal and support staff. Id. at 9. State insurance departments completed 1,026 market conduct examinations in 2010. Id. at 42.

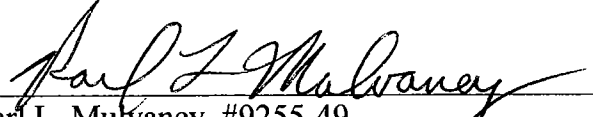
The IDOI has the experience and skill to properly interpret the Rate Statute and make determinations as to Ticor's compliance. The determinations of the Commissioner are aligned with the policy goals of insurance regulators nationwide and his considerable technical expertise should be afforded deference in accordance with the Legislature's grant of authority to the IDOI.



**VI.  
CONCLUSION**

For all of the foregoing reasons, the trial court's decision should be reversed.

Respectfully submitted,



Karl L. Mulvaney, #9255-49  
Margaret M. Christensen, #27061-49  
BINGHAM GREENEBAUM DOLL LLP  
2700 Market Tower, 10 West Market St.  
Indianapolis, IN 46204-4900  
(317) 635-8900  
(317) 236-9907 Fax  
[kmulvaney@bgdlegal.com](mailto:kmulvaney@bgdlegal.com)  
[mchristensen@bgdlegal.com](mailto:mchristensen@bgdlegal.com)

Attorneys for *Amicus Curiae*,  
National Association of Insurance  
Commissioners

**WORD COUNT CERTIFICATE**

The undersigned hereby certifies that the foregoing Amicus Brief in Support of Brief of Appellant complies with Indiana Appellate Rule 44 word limitation in that it contains 4,596 words, which does not exceed the 7,000 word limit.

Respectfully submitted,



---

Karl L. Mulvaney, #9255-49  
Margaret M. Christensen, #27061-49  
BINGHAM GREENEBAUM DOLL LLP  
2700 Market Tower, 10 West Market St.  
Indianapolis, IN 46204-4900  
(317) 635-8900  
(317) 236-9907 Fax  
[kmulvaney@bgdlegal.com](mailto:kmulvaney@bgdlegal.com)  
[mchristensen@bgdlegal.com](mailto:mchristensen@bgdlegal.com)

Attorneys for *Amicus Curiae*,  
National Association of Insurance  
Commissioners

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing has been served upon the following counsel of record by first class United States Mail, postage prepaid, this 14~~th~~ day of March, 2012.

Jan M. Carroll  
Sean P. Burke  
BARNES & THORNBURG, LLP  
11 South Meridian Street  
Indianapolis, Indiana 46204


Todd L. Padnos  
Danielle T. Kennedy  
DEWEY & LEBOEUF  
1950 University Avenue  
Suite 500  
East Palo Alto, CA 94303

David C. Hancock  
DEWEY & LEBOEUF  
One Embarcadero Center  
Suite 400  
San Francisco, CA 94111

Gregory F. Hahn  
Bryan H. Babb  
Joel T. Nagle  
Kevin M. Quinn  
BOSE MCKINNEY & EVANS LLP  
111 Monument Circle, Suite 2700  
Indianapolis, IN 46204

Wade D. Fulford  
Indiana Department of Insurance  
311 West Washington Street  
Suite 300  
Indianapolis, IN 46204

Kate Shelby  
Deputy Attorney General  
Office of the Indiana Attorney General  
Indiana Government Center South, 5<sup>th</sup>  
Floor  
302 West Washington Street  
Indianapolis, IN 46204-2770

  
Karl L. Mulvaney, #9255-49  
Margaret M. Christensen, #27061-49  
BINGHAM GREENEBAUM DOLL LLP  
2700 Market Tower, 10 West Market St.  
Indianapolis, IN 46204-4900  
(317) 635-8900  
(317) 236-9907 Fax  
[kmulvaney@bgdlegal.com](mailto:kmulvaney@bgdlegal.com)  
[mchristensen@bgdlegal.com](mailto:mchristensen@bgdlegal.com)  
Attorneys for *Amicus Curiae*,  
National Association of Insurance Commissioners