



## *Title insurance in tatters*

*One vital issue that isn't being taken up by state lawmakers meeting in special session in Santa Fe.*

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It is highly unusual for an industry to ask to be regulated, but that is exactly what happened in March of 1985 when the New Mexico legislature passed a bill regulating title insurance at the behest of the industry.

The story of how this law came about actually began two months earlier on January 7, 1985, when President Ronald Reagan's Federal Trade Commission (FTC) filed price-fixing charges against six major title insurance companies. The FTC alleged that the price fixing had occurred in 13 states, including New Mexico, and sought to prevent the industry from engaging in such practices in the future.

An industry spokesman responded at the time not by denying the charges but by stating, "We believe that our activities are exempt from [federal] antitrust laws because [we] are regulated by the states."

Indeed, since the 1945 passage of the federal McCarran-Ferguson Act, Congress has exempted insurance companies from federal antitrust laws and given the states the authority to regulate the entire insurance industry. That authority to regulate is known as the "state action doctrine," which allows certain anti-competitive activities within a state to remain exempt from federal antitrust laws if the state has authorized the activity and actively supervises it.

However, because New Mexico did not have its own law regulating the title insurance industry in January of 1985, the FTC challenged whether the McCarran-Ferguson Act could protect the title insurance industry in New Mexico. If there were no "state action," then the major title insurance companies could have faced enormous liability for price fixing in New Mexico.

Within two weeks of the FTC filing its price fixing charges, the same major title insurance companies had drafted a bill innocuously titled the "New Mexico Title Insurance Law." The bill stated at the outset that "[t]he purpose of the New Mexico Title Insurance Law is to provide a comprehensive body of law for the effective regulation and active supervision of the business of title insurance transacted within this state in response to the McCarran-Ferguson Act."

The industry took its bill to the senate majority floor leader, who introduced it as Senate Bill 52. The bill passed the Senate 20-7 and the House 46-6 without any substantive amendments. Within two months

of introduction, the bill was law. It remains on the books today.

The law had its desired effect for the title insurance industry. The fact that the Legislature had passed a bill that would regulate the industry created state action sufficient to satisfy the McCarran-Ferguson Act and the FTC was forced to drop New Mexico from its enforcement action.

Unfortunately, Senate Bill 52 went beyond merely exempting the title insurance industry from federal antitrust laws and the price fixing allegations confronting the industry at that time. Buried in the New Mexico Title Insurance Law is a small provision which states: “The [insurance] superintendent shall promulgate such laws and regulations as are necessary to carry out the provisions of the New Mexico Title Insurance Law, including rules and regulations requiring *uniform forms of policies and uniform premiums.*” (Emphasis added)

To legislators wading through hundreds of complicated bills, this particular provision could easily have been missed, since there was no active public opposition and no media coverage of Senate Bill 52. The bill may have appeared to simply regulate an unregulated insurance industry.

However, the result of this seemingly minor provision was that when the law went into effect, on July 1, 1985, the free market in New Mexico stopped setting the price of title insurance. Rather, the Superintendent of Insurance (a division of the Public Regulation Commission) sets a single price that all title insurance companies must charge. In addition, the superintendent, not the free market, decides which types of title insurance policies may be offered to consumers.

After the bill’s passage, the title insurance industry moved quickly to control the rulemaking process. Bob Philo, a member of the New Mexico and Texas Land-Title Associations, industry trade groups, was hired by the Public Regulation Commission’s (PRC) predecessor, the State Corporation Commission, to draft the regulations. The regulations and the published ratemaking schedule clarified that there would be only a single rate offered to consumers.

### **The aftermath of the new law**

Only three states in the country allow the government to set prices for the title insurance industry: New Mexico, Texas and Florida. As of 2006, all three states were in the top five for the price of title insurance, according to a 50 state comparison performed by Bankrate.com.

Although the PRC commendably lowered New Mexico’s title insurance rates by approximately 6.3 percent in 2007, New Mexico remains in the top third among states for title insurance costs, even though

New Mexico is in the bottom quintile for income.

In fact, New Mexico ranks eighth highest among the 50 states for closing costs. It also ranks eighth highest for the cost of title insurance relative to income. The cost of a title insurance policy for a \$200,000 home is nearly a quarter of the median monthly income for a New Mexico family.

Because New Mexico's title insurance law forces the PRC to set a single price for title insurance, it is pointless for homebuyers to shop around for title insurance. For example, when a New Mexico family purchases a \$300,000 home anywhere in the state, they pay \$1,248 for the title insurance because that is the rate promulgated by the Insurance Department in 2007.

Not only does current New Mexico law prohibit the title insurance companies from competing on price, they are also frequently prohibited from competing on the basis of innovation and new products. In many cases, the very products that consumers most want are illegal and the entrepreneurs who want to offer those products are frozen out of the market.

For example, many consumers who refinance a mortgage would like to have the option of purchasing a pared down "lien protection" policy in lieu of the expensive new title insurance policy that is generally required. Under those circumstances, paying for a whole new title policy seems unjust when the probability that the title has acquired new defects since the homeowner bought it is miniscule.

Since March of 2006, homeowners in Iowa have been able to purchase this type of streamlined policy when refinancing for a mere \$90. Unfortunately, there is no "uniform policy" for "lien protection" and it is, therefore, illegal in New Mexico to sell such a policy, even though it could save New Mexico homebuyers millions of dollars annually.

Perhaps the only one burdened more by this absurd law than homebuyers is the superintendent of insurance. After all, the law requires the superintendent of insurance to undertake the Herculean task of centrally managing the title insurance market in New Mexico. In effect, the Superintendent must set the price of title insurance prospectively for the next year without a crystal ball to reveal what sort of economic conditions will prevail. By contrast, businesses that adhere to America's free market system set their own prices and can adjust those prices to changing market conditions.

Indeed, for the superintendent of insurance, it is the classic no-win situation. Set the price too high and the Superintendent is accused of gouging the consumer. Set the price too low and the superintendent is accused of engaging in price controls. (The annual rate hearings themselves cost homebuyers \$500,000 annually, paid for through a tax on their title policy premiums.)

Since the Title Insurance Law was passed in 1985, the PRC and its predecessor, the State Corporation

Commission, have historically sided with the industry on price. That has finally begun to change under the leadership of former PRC Chairman Ben Ray Lujan Jr., and the trend has continued under new Chairman Jason Marks. In addition, the Superintendent of Insurance, Mo Chavez, has cut the price of title insurance and is genuinely attempting to strike a balance between the needs of consumers and industry when setting the price.

Beyond the high price of title insurance in New Mexico, there are serious questions about how much protection it actually affords homebuyers and business owners.

In 1999, Senate Bill 297 was enacted establishing the Title Insurance Guaranty Fund. Buried in the 15 pages of technical language was a small provision that, like the “uniform premiums” in the original Title Insurance Law, went largely unnoticed by the media and legislators. The provision read:

“The New Mexico Title Insurance Law is not intended and should not be construed to create any duty so search and examine that runs to the benefit of or to create any right or cause of action in favor of, any person other than a title insurer.”

Translated from the legalese, this provision meant that title insurers could not be sued by homebuyers for failing to perform a reasonable search of the public record to look for problems with the title.