

FILED

2009 MAR -5 P 12:02

Hearings Unit, DIC  
Patricia D. Petersen  
Chief Hearing Officer

STATE OF WASHINGTON  
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of  
  
**CHICAGO TITLE INSURANCE  
COMPANY,**  
  
An authorized insurer

Docket No. 2008-INS-0002  
OIC No. D 07-308

**MOTION RE: NECESSITY TO  
BRING A "MOTION TO STRIKE"**

**BACKGROUND AND ISSUE PRESENTED**

Is a party to an administrative proceeding before an administrative law judge required to bring a "motion to strike" as the procedural method to object to the admissibility of evidence offered in support of a motion for summary judgment? In an e-mail to Wendy Galloway dated March 4, 2009, Chicago Title Insurance Company ("Chicago Title") has recently raised this issue and urged that the answer is "yes." But for the following five reasons set forth in the "argument" section below, the OIC Staff believes the answer is clearly "no," and accordingly moves this tribunal to determine that, as a matter of law, a party to an administrative proceeding before an administrative law judge is not required to bring a "motion to strike" as the procedural method to object to the admissibility of evidence offered in support of a motion for summary judgment.

**ARGUMENT**

First, the APA provides that the Washington Rules of Evidence ("ER") "shall" be referred to as "guidelines" for evidentiary rulings. This makes clear that while the ERs are not obligatory — since indeed it is clear that strict adherence to the ERs is not required (*see* WAC 284-02-070(2)(b)) — they are advisory, at the least. And these ERs begin with the somewhat fundamental principle that the question of the admissibility of evidence "shall" be

1 determined by the court as a “preliminary question.” ER 104(a). This principle reflects a  
2 rather obvious tenet underlying our system of justice — that judges ought not rely on  
3 inadmissible evidence to support a finding. This principle rings true regardless of whether  
4 the forum is an administrative tribunal or a superior court. Quite simply, ER 104(a)  
5 establishes that in proceedings governed by the ERs, the threshold question of admissibility is  
6 a nondiscretionary assessment that “shall” be considered first by the judge. This rule, and the  
7 fundamental principle it embodies, does not support an argument that a party must bring some  
8 “motion to strike” to see a judge do what that they are already bound to do — to always  
9 consider the “preliminary question” of admissibility.

10 Second, and notwithstanding the above, the APA contemplates that while a judge in  
11 the instant proceedings may make a finding of fact “based on the kind of evidence on which  
12 reasonably prudent persons are accustomed to rely on in the conduct of their affairs,” if that  
13 finding is based on evidence that “would be inadmissible in a civil trial” — such as the  
14 subject inadmissible conclusory assertions and improper lay opinions the OIC has expressly  
15 objected to here — then the APA requires that the judge’s “basis for this determination shall  
16 appear in the order.” RCW 34.05.461(4). Like ER 104(a), RCW 34.05.461 plainly  
17 contemplates that a judge must always consider the preliminary question of admissibility.  
18 Moreover, no part of RCW 34.05.461 or any other APA provision requires a party to file a  
19 “motion to strike” to contest the “admissibility” question that a judge is already duty-bound  
20 to decide in the first instance.

21 Third, Chicago Title’s argument that a formal “motion to strike” is needed to object to  
22 inadmissible evidence in a summary judgment motion before an administrative law judge is  
23 also contrary to what the Washington Superior Court Civil Rules contemplate for a “motion to  
strike.” The apparent origin of the term “motion to strike” is CR 12, which is one of the  
formal rules of pleading. CR 12 provides that a “motion to strike” may be made before  
responding to a pleading when a party seeks to strike any “redundant, immaterial, impertinent,  
or scandalous matter.” It applies when a party wishes to strike from a *pleading*

1 something “redundant, immaterial, impertinent, or scandalous.” Of course, CR 12 does not  
2 speak to how one must — or even should — object to *inadmissible evidence*, let alone  
3 inadmissible evidence offered in a summary judgment motion before an administrative law  
4 judge, since pleadings are generally not offers of evidence. Moreover, the rule governing  
5 administrative proceedings like these makes clear that such proceedings are “informal in  
6 nature” such that “compliance with the formal rules of pleading ... is not required.” WAC  
7 284-02-070(2)(b)). So, even if, *arguendo*, some parties in some superior court cases in some  
8 courts in Washington have in the past sometimes used a “motion to strike” as a means to  
9 assert an objection to evidence offered in support of or in opposition to a summary judgment  
10 motion, nothing requires such an approach be taken here.

11 Fourth, the rule that both parties here have agreed governs the instant motion for  
12 summary judgment, CR 56, details every aspect of what must occur in the context of a  
13 summary judgment motion, but it makes no mention of the term “motion to strike.” For  
14 example, the rule gives detailed instructions and the specific timeframe for making the  
15 motion, any response, and any reply. It details what can and what must occur to make a  
16 motion for summary judgment. But while it provides all of the details about the motion for  
17 summary judgment, nowhere does it require or even contemplate a “motion to strike.” And  
18 consistent with the foregoing, this rule also provides that only “admissible” evidence is to be  
19 considered. CR 56(e).

20 Fifth, for decades, the law in the State of Washington has been that “unsupported,  
21 conclusional statements cannot be considered by a court in a motion for summary judgment.”  
22 *Mansfield v. Holcomb*, 5 Wn. App. 881, 886, 491 P.2d 672 (1971); *Brown v. Child*, 3 Wn.  
23 App. 342, 343, 474 P.2d 908 (1970); *see also Hash v. Children's Orthopedic Hosp. & Med.*  
*Ctr.*, 49 Wn. App. 130, 133, 741 P.2d 584 (1987), *aff'd*, 110 Wn.2d 912, 757 P.2d 507  
(1988). And while this same line of cases was cited in OIC’s brief in response and opposition  
to Chicago Title’s motion for summary judgment (*see* pages 13 and 33 of the OIC’s brief),  
Chicago Title did not dispute it or oppose that it is in fact the law.

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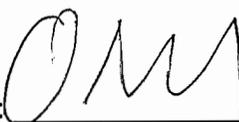
**CONCLUSION**

It is fundamental that a judge has the affirmative duty to determine the preliminary question of the admissibility of evidence, and that no judge needs spurring or a self-styled "motion to strike" to perform this duty, particularly in the instant administrative forum. This duty is simply one that all judges enjoy, without regard to how or even whether any party objects to the evidence being offered. It is a duty that cannot and should not be skirted or overlooked by any judge, and there is simply no basis in any governing rule or law to conclude that a party *must* file a "motion to strike" to ensure that the judge perform his or her duty affirmatively. The undersigned OIC Staff respectfully submits that the fact that no "motion to strike" was made to the inadmissible evidence offered by Chicago Title below is of no moment, particularly given the OIC's clear and express objection to such evidence being offered.

Because Chicago Title has urged this tribunal to adopt a position that is not supported by the law, the OIC Staff respectfully requests this tribunal to determine that as a matter of law, a party to an administrative proceeding before an administrative law judge is **not** required to bring a "motion to strike" as the procedural method to object to the admissibility of evidence offered in support of a motion for summary judgment.

Respectfully submitted this 5 day of March, 2009.

OFFICE OF INSURANCE COMMISSIONER

By:   
\_\_\_\_\_  
Alan Michael Singer  
Staff Attorney  
Legal Affairs Division



FILED

MAR 16 2009

Hearings Unit, OIC  
Patrick D. Petersen  
Chief Hearing Officer

STATE OF WASHINGTON  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE OFFICE OF INSURANCE COMMISSIONER

In Re:

CHICAGO TITLE INSURANCE COMPANY,

An authorized insurer

Docket No. 2008-INS-0002  
OIC No. D07-308

CHICAGO TITLE INSURANCE  
COMPANY'S RESPONSE TO OIC'S  
MOTION RE: NECESSITY TO BRING  
A MOTION TO STRIKE

Chicago Title Insurance Company ("CTIC") briefly responds to the Office of the Insurance Commissioner's ("OIC") Motion Re: Necessity to Bring a Motion to Strike (the "Motion") as follows:

The OIC asserts that it filed the Motion because "[CTIC] has urged this tribunal to adopt a position that is not supported by the law" that a court must consider all evidence on a motion for summary judgment, unless a motion to strike is filed. CTIC has made no such assertion, to the tribunal, or otherwise.

The Motion appears to have been prompted by an email from Wendy Galloway, assistant to Judge Petersen, to Alan Singer, attorney for the OIC, in which she inquired as to whether Judge Burdue admitted CTIC's motion for summary judgment, and the declarations in support thereof, in to evidence at the hearing on the motion. A copy of the email is appended to this response. Mr. Singer responded to Ms. Galloway's inquiry with legal argument that the OIC believes that Judge Burdue

CHICAGO TITLE INSURANCE COMPANY'S  
RESPONSE TO OIC'S MOTION RE: NECESSITY  
TO BRING A MOTION TO STRIKE - 1

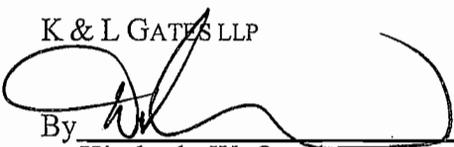
1 improperly considered evidence, and copied CTIC's counsel. With respect to the legal arguments  
2 raised by Mr. Singer in his email to Ms. Galloway, CTIC stated its belief that Judge Burdue properly  
3 considered the motion and declarations, that it did not recall that a motion to strike any declaration  
4 had been filed, and finally, expressed its belief that emails to the Judge's assistant were not the  
5 proper forum to be making legal arguments after the record is closed. These statements were not  
6 "arguments to the tribunal," but merely made in the context of an email between counsel and the  
7 judge's assistant. At no time has CTIC made an argument to the Court regarding the necessity of a  
8 motion to strike.

9 Given the above, the purpose of the OIC's Motion is unclear. In its Petition for Review, the  
10 OIC did contend that Judge Burdue had improperly considered some evidence, and CTIC responded  
11 to those arguments. The briefing on the Petition for Review, however, is closed. CTIC has  
12 submitted no additional briefing arguing that Judge Burdue properly considered otherwise  
13 inadmissible evidence because the OIC failed to file a motion to strike. Because the record is closed,  
14 such briefing would have been untimely and improper, as it would be improper for the OIC to  
15 submit additional briefing on why specific evidence should not have been considered.

16 Simply put, the necessity of filing a motion to strike is not an issue before the Court.  
17 Because there is no need for the Court to opine on legal principles that are not at issue, CTIC  
18 believes that the Motion should be denied.

19 DATED this 16th day of March, 2009.

20  
21 K & L GATES LLP

22 By 

23 Kimberly W. Osenbaugh, WSBA # 5307

24 David C. Neu, WSBA #33143

25 Jessica A. Skelton, WSBA #36748

26 Attorneys for Chicago Title Insurance Company

925 4th Avenue, Suite 2900

Seattle, WA 98104-1158

Phone: (206) 623-7580

Fax: (206) 623-7022

1 **CERTIFICATE OF SERVICE**

2 The undersigned declares under the penalty of perjury under the laws of the State of  
3 Washington that I am now and at all times herein mentioned a citizen of the United States, a resident  
4 of the State of Washington, over the age of eighteen years, not a party-to or interested-in the above-  
entitled action, and competent to be a witness herein.

5 On the date below, I caused to be served:

6 Chicago Title Insurance Company's Response to OIC's Motion Re: Necessity to Bring a  
"Motion to Strike."

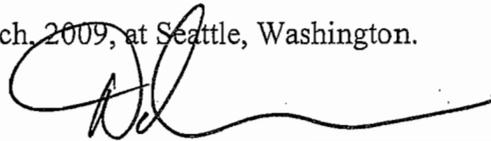
7 in the manner indicated:

8 Alan Michael Singer  
9 Staff Attorney  
10 Legal Affairs  
11 Office of the Insurance Commissioner  
12 5000 Capitol Boulevard  
13 Tumwater, WA 98504  
14 (X) Via U.S. Mail  
15 (X) Via email ([AlanS@OIC.WA.Gov](mailto:AlanS@OIC.WA.Gov))

16 Alan Michael Singer  
17 Staff Attorney  
18 Legal Affairs  
19 Office of the Insurance Commissioner  
20 PO Box 40255  
21 Olympia, WA 98504-0255  
22 (X) Via U.S. Mail

23 Hon. Patricia D. Petersen  
24 Chief Hearing Officer  
25 Office of the Insurance Commissioner of Washington  
26 Insurance 5000 Building  
5000 Capitol Boulevard  
Tumwater, WA 98504  
(X) Via email ([WendyG@OIC.WA.GOV](mailto:WendyG@OIC.WA.GOV))  
(X) Via U.S. Mail

EXECUTED this 16th day of March, 2009, at Seattle, Washington.



David C. Neu

**Neu, David**

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**Subject:** RE: Chicago Title - Question re Motion for Summary Judgment held before Judge Burdue

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**From:** Neu, David [mailto:david.neu@klgates.com]  
**Sent:** Wednesday, March 04, 2009 11:13 AM  
**To:** Singer, Alan (OIC); Galloway, Wendy (OIC)  
**Cc:** Sureau, Carol (OIC); Rowland, Tom (OIC); Brown, Charles (OIC)  
**Subject:** RE: Chicago Title - Question re Motion for Summary Judgment held before Judge Burdue

I believe Judge Burdue properly considered the motions and supporting declarations, and there was no basis to deny admissibility. I do not recall that there was ever a motion to strike any portion of the declarations or motion filed. I also believe that it is improper in the context of these emails to make arguments as to why Judge Burdue should or should not have considered evidence.

**David C. Neu**  
**K&L Gates, LLP**  
925 Fourth Avenue, Suite 2900  
Seattle, WA 98104  
☎ (206) 370-8125  
✉ david.neu@klgates.com  
🌐 <http://www.klgates.com>

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**From:** Singer, Alan (OIC) [mailto:AlanS@OIC.WA.GOV]  
**Sent:** Wednesday, March 04, 2009 11:07  
**To:** Galloway, Wendy (OIC); Neu, David  
**Cc:** Sureau, Carol (OIC); Rowland, Tom (OIC); Brown, Charles (OIC)  
**Subject:** RE: Chicago Title - Question re Motion for Summary Judgment held before Judge Burdue

Hi Wendy and David,

Wendy, no, I don't recall Judge Burdue ever expressly indicating whether the materials received were "admitted," although page one of the October 31, 2008 initial order lists, without any elaboration or explanation, "material considered." That said, if you are asking whether Judge Burdue failed to address the issue of the admissibility of the evidence submitted, I do believe you are correct that "it appears it wasn't done."

OIC's summary judgment response brief expressly alerted Judge Burdue that Chicago Title was attempting to improperly support its motion with inadmissible evidence, and asked Judge Burdue to strike and to not consider such inadmissible evidence. For example, at page 13 and footnote 50 of the OIC summary judgment response brief, it was stated that certain evidence offered in the declarations submitted by Chicago Title was "inadmissible, should be stricken, and should not be considered" as some of it was improper and conclusory and the law provides that such proffered evidence "**cannot** be considered by a court in a motion for summary judgment." (Emphasis added.) Cases supporting that statement were also cited at page 13, and again at page 33. I believe that Chicago Title's reply cited no cases or law disputing that statement of the law, although I would have to review their briefing again to be certain.

My recollection is that Judge Burdue failed at both oral argument and in the October 31, 2008 initial order to even consider whether any of the evidence submitted may have been inadmissible or improper to rely on at

3/16/2009

summary judgment. As was pointed out in paragraph 14 of the declaration filed in support of the OIC's petition to review the October 31, 2008 initial order, Judge Burdue's order erroneously relied on inadmissible evidence that should never have been admitted, that should never have been considered, and that instead should have been stricken.

David, perhaps you can add to this?

Thanks,

Alan

Alan Michael Singer  
Staff Attorney  
Legal Affairs  
Office of the Insurance Commissioner  
PO Box 40255  
Olympia, WA 98504-0255  
360-725-7046  
360-586-0152 Fax

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**From:** Galloway, Wendy (OIC)  
**Sent:** Wednesday, March 04, 2009 9:37 AM  
**To:** Singer, Alan (OIC)  
**Subject:** Chicago Title - Question re Motion for Summary Judgment held before Judge Burdue

Hi Alan,

I have been listening to the oral argument held on 10/6/08 before ALJ Cindy Burdue - my question to you is do you recall Judge Burdue *admitting* the motion, declarations, and/or the hearing file as exhibits? So far in listening to the recording - it appears it wasn't done? Do you have any recollection?

Wendy Galloway  
Paralegal  
OIC Hearings Unit  
☎ Phone: 360-725-7002  
Fax: 360-664-2782

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FILED

MAR 19 2009

Hearing Unit, OIC  
Patricia O. Petersen  
Chief Hearing Officer

STATE OF WASHINGTON  
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of

**CHICAGO TITLE INSURANCE  
COMPANY,**

An authorized insurer

Docket No. 2008-INS-0002  
OIC No. D 07-308

**REPLY RE: MOTION RE:  
NECESSITY TO BRING A  
"MOTION TO STRIKE"**

The OIC Staff offers this brief reply in support of its "Motion Re: Necessity to Bring a Motion to Strike."

Chicago Title's response denies that its earlier e-mailed statements "made an argument to the Court regarding the necessity of a motion to strike."<sup>1</sup> See Chicago Title's response at p. 2, lines 7-8. Instead, it believes its statements were mere "email between counsel and the judge's assistant" in response to OIC Staff's "legal argument." See Chicago Title's response at p. 2, line 1. Regardless of what Chicago Title claims it intended or believes it intended to communicate, the first half of Chicago Title's e-mail only stated:

I believe Judge Burdue properly considered the motions and supporting declarations, and there was no basis to deny admissibility. I do not recall that there was ever a motion to strike any portion of the declarations or motion filed. [...]

When OIC Staff read this, it perceived Chicago Title to be arguing that because no "motion to strike" had been made, Judge Burdue's consideration and treatment of the evidence was 'proper.' Chicago Title may believe it was not making this argument in its e-mail, but Chicago Title's e-mailed words did not clearly communicate that belief.

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<sup>1</sup> Chicago Title's response also denies that its e-mail made such an assertion "to the tribunal or otherwise." See Chicago Title's response at p. 1, lines 19-20.

1 Further, while Chicago Title's response also states that it believes its e-mail stated its  
2 belief that "emails to the Judge's assistant were not the proper forum to be making legal  
3 arguments *after the record is closed*," (see Chicago Title's response at p. 2, lines 4-5,  
4 emphasis added), that was not what Chicago Title's e-mail actually stated:

5 [...] I also believe that it is improper in the context of these emails to make  
6 arguments as to why Judge Burdue should or should not have considered  
7 evidence.

8 When OIC Staff read this, it perceived Chicago Title to also be arguing that it believed that e-  
9 mail communication — as opposed to more formal motions or pleadings made to the Court —  
10 was an "improper" vehicle through which to respond to Ms. Galloway's e-mailed question.  
11 Again, while Chicago Title may *think* its e-mail expressed its belief that "emails to the  
12 Judge's assistant were not the proper forum to be making legal arguments *after the record is*  
13 *closed*," (emphasis added), its e-mailed words did not express that belief clearly — if at all.

14 While Chicago Title's e-mailed words may have failed to clearly express what  
15 Chicago Title now asseverates it believed or argued, the purpose of the OIC's motion is clear.  
16 It was brought because Chicago Title had no response when asked whether Judge Burdue  
17 failed to address the issue of the admissibility of the evidence presented — other than to argue  
18 that there was no "motion to strike" and it was also improper in the context of email to make  
19 such arguments. But since OIC's written and oral objections explicitly asked Judge Burdue to  
20 strike specific inadmissible evidence, no "motion to strike" was required. Nor has Chicago  
21 Title presented authority to the contrary. Accordingly, the OIC's motion should be granted.

22 Respectfully submitted this 18 day of March, 2009.

23 OFFICE OF INSURANCE COMMISSIONER

By:   
Alan Michael Singer  
Staff Attorney  
Legal Affairs Division

1 **CERTIFICATE OF SERVICE**

2 The undersigned certifies under the penalty of perjury under the laws of the State of  
3 Washington that on the date given below I caused to be served the foregoing **REPLY RE:**  
4 **MOTION RE: NECESSITY TO BRING A "MOTION TO STRIKE** on the following  
5 individuals in the manner indicated:  
6

7  
8 David C. Neu  
9 K&L Gates LLP  
10 925 Fourth Avenue, Suite 2900  
11 Seattle, Washington 98104-1158  
12 (XXX) Via depositing into the U.S. Mail  
13 (XXX) Via Email

14 Hon. Patricia Petersen  
15 Chief Presiding Officer  
16 Office of the Insurance Commissioner  
17 PO Box 40255  
18 Olympia, WA 98504-0255  
19 (XXX) Via Hand Delivery  
20 (XXX) Via Email

21  
22 **SIGNED** this 18<sup>th</sup> day of March, 2009, at Tumwater, Washington.

23  
  
Christine Tribe