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STATE OF WASHINGTON

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BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

In the Matter of: CHICAGO TITLE INSURANCE COMPANY, An Authorized Insurer.	OIC No. D07-308 OAH Docket No. 2008-INS-0002 SUMMARY OF FINAL FINDINGS OF FACTS, FINAL CONCLUSIONS OF LAW AND FINAL ORDER ON CHICAGO TITLE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT (PHASE I OF HEARING) (Eliminating Review Judge's Comments for Ease of Reference)

To: David C. Neu, Esquire
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[Note: The purpose of furnishing this form of Final Findings of Facts, Final Conclusions of Law and Final Order herein is simply to provide a version which is easier to read other than the

original document entered by the Review Judge on April 24, 2009 in this matter. While the Review Judge understands that it is more complete to furnish her comments and rationale upon entry of the Final Findings of Facts, Final Conclusions of Law and Final Order, due to the complexity of this case and need for extensive changes to the Initial Order, in that document she offered – and the parties accepted – to furnish this version which eliminates her comments and rationale purely for ease of reference. This simplified version contains no changes to the original Final Findings of Facts, Final Conclusions of Law and Final Order herein, and should an appeal ensue then the document for review above should be the original document including the Review Judge's comments and rationale (with this form being furnished again, solely for ease of reference]. Wording which is italicized is wording which was included in the Initial Order entered by the ALJ and adopted by the Review Judge in the Final Order. Wording which is underlined is wording which has been added by the Review Judge. Each Final Finding of Fact and Final Conclusion of Law retains the same number as it was assigned in the Initial Order and in the original Final Order.

On January 25, 2008, the Office of the Insurance Commissioner (OIC) entered a Notice of Hearing, and on March 27, 2008 an Amended Notice of Hearing, in this matter to impose penalties upon Chicago Title Insurance Company (Chicago) for seventeen alleged violations committed by Land Title Company of Kitsap County, Inc. (Land Title). In the Notice of Hearing and Amended Notice of Hearing, the OIC asserts that Chicago, through its duly appointed title insurance agent, Land Title, violated WAC 284-30-800, the Illegal Inducement Regulation, and for these violations the OIC seeks to impose a fine of $155,000 against Chicago pursuant to RCW 48.05.185.

On February 29, 2008, this matter was referred to the Office of Administrative Hearings (OAH) and the administrative hearing was held before Administrative Law Judge Cindy L. Burdue (ALJ), with the OIC's instructions to hear the case and enter Initial or Recommended Findings of Facts, Initial Conclusions of Law and Initial Order. During the course of that proceeding, the ALJ entered a First Pre-Hearing Order, and later an Amended First Pre-Hearing Order, bifurcating the issues in this case: Phase I involves *the preliminary issue of the legal responsibility of* [Chicago] *for the actions of Land Title ... being determined first.* Depending on the outcome of Phase I, the ALJ proposes to hear argument on, and enter an Initial or Recommended Order relative to, Phase II, which is the issue of *whether the expenditures of the Kitsap County company* [Land Title] *violate the law.* In accordance with this plan, on October 30, 2008, the ALJ entered Initial Findings of Facts, Initial Conclusions of Law and Initial Order Granting Summary Judgment (Initial Order) in Phase I, recommending that the undersigned

enter Final Findings of Facts, Final Conclusions of Law and Final Order (Final Order) ruling that Chicago is not liable for the illegal acts of Land Title in violating the Inducement Regulation and statute. (It is noted that in Initial Finding of Fact No. 2, the ALJ states that for purposes *of this Motion* [for Summary Judgment] *only*, it is stipulated that Land Title did commit the alleged violations of the Illegal Inducement Regulation.)

On November 10, 2008, the entire hearing file was transferred to the undersigned Review Judge for review and entry of a Final Order in Phase I, which, as above, the ALJ in her First Pre-Hearing Order, states *whether Chicago is legally responsible for the actions of Land Title ... in this matter.* Therefore the Final Findings of Facts, Final Conclusions of Law and Final Order herein relate only to the aforereferenced Phase I.

On November 18, 2008, pursuant to established procedure, Wendy Galloway, Paralegal to the undersigned, wrote a letter to all parties outlining the procedure for review and indicated that the undersigned requested presentation of oral argument from the parties for her consideration prior to entry of a Final Order in Phase I.

On November 19, 2008, the OIC filed the OIC's Brief in Support of Review of Initial Order and Declaration of Alan Michael Singer with the undersigned. Further, during that time 1) Chicago requested, and was granted by the undersigned, permission to file its Reply to the OIC's Brief in Support of Review of Initial Order on or before December 10, 2008; and 2) Chicago requested, and was granted by the undersigned, permission to file said brief by e-mail. On December 10, 2008, Chicago filed its Response to OIC's Brief In Support of Review of Initial Order. On December 10, 2008, Chicago also filed its Limited Motion to Strike Declaration of Alan Michael Singer. On January 22, 2009, the undersigned heard and granted Chicago's Limited Motion to Strike the November 19, 2008 Declaration of Alan Michael Singer (not the Declaration of Alan Michael Singer executed and filed on September 24, 2008), ruling that the statements of Alan Michael Singer therein would be considered only as argument in support of the OIC's Petition for Review of Initial Order and not as evidence. Finally, on February 5, 2009, the parties presented oral argument on review of the ALJ's Initial Order in person before the undersigned.

NATURE OF PROCEEDING

In her Initial Order Granting Summary Judgment entered October 30, 2008, the ALJ stated the issue as being *Whether Respondent* [Chicago] *is entitled to summary judgment on the issue of its liability for the regulatory violations committed by its issuing agent, Land Title Company* [sic], *under WAC 284-30-800 and/or RCW 48.30.150, because no genuine issue of material fact exists and, as a matter of law, Respondent is entitled to judgment in its favor?* In her Initial Conclusions of Law, the ALJ recommends that the undersigned Review Judge enter, among others, a Final Conclusion of Law that *no genuine issue of material fact exists as to the relationship between* [Chicago] *and* [Land Title] *and the actions of the parties within that relationship. Based on the findings and legal analysis above, the illegal acts of* [Land Title] *cannot be imputed to* [Chicago], and that *Summary Judgment is granted to* [Chicago] *on the issue of imputed liability for the illegal acts of* [Land Title] *in violating the inducement statute and regulation.* The ALJ further recommends the undersigned Review Judge enter a Final Order that [Chicago's] *Motion for Summary Judgment is GRANTED on the issue* [of] *whether it can be held vicariously liable for the illegal acts of the underwritten title company* [Land Title] *with whom it contracts.*

REVIEW JUDGE'S CONSIDERATION

1. Review. This matter has properly come before the undersigned Review Judge to review the Initial Order entered by the ALJ on October 30, 2008, with the parties submitting briefs and presenting oral argument on review. In the OIC's Brief in Support of Review of Initial Order, p. 4, the OIC contended, and at the outset of this oral argument Chicago agreed, that review of the Initial Order by the undersigned Review Judge is de novo.

2. Record of Proceeding. The record of this proceeding, including the entire hearing file and a recording of the proceeding before the ALJ, was presented to the undersigned Review Judge for her review and entry of Final Findings of Facts, Final Conclusions of Law and Final Order.

3. The Insurance Commissioner's Petition for Review. In addition to the automatic review which is required to be given to all Initial Orders entered relative to appeals of OIC actions, in the proceeding herein on November 19, 2008, the OIC filed its OIC's Brief in Support of Review

of Initial Order and its Declaration of Alan Michael Singer in Support of Petition for Review of Initial Order with the undersigned and on December 10, 2008, Chicago filed its Chicago Title Insurance Company's Response to OIC's Brief in Support of Review of Initial Order. On February 5, 2009, at the request of the undersigned, the parties presented oral argument in person to the undersigned.

4. Revision of Initial Order on Review: *Issue Presented:* in Initial Order: The OIC contemplates that the ALJ's statement of the issue may be a finding of fact and argues that as such it is not based on the evidence, and that it misapprehends the issue presented and is in error. First, the ALJ's statement is not presented as a finding of fact, but as a statement of the issue, providing the framework for the Initial Findings of Fact and Initial Conclusions of Law, as follows:

> *Whether* [Chicago] *is entitled to summary judgment on the issue of its liability for the regulatory violations committed by its issuing agent, Land Title Company, under WAC 284-30-800 and/or RCW 48.30.150, because no genuine issue of material fact exists and, as a matter of law,* [Chicago] *is entitled to judgment in its favor?*

Second, while not particularly inaccurate, the statement of the issue could be more concise. Therefore *Issue Presented:* in the Initial Order is replaced by the following:

> Can the Insurance Commissioner hold Chicago Title Insurance Company responsible for the illegal acts of Land Title Insurance Company of Kitsap County, Inc. in violating WAC 284-30-800, the Illegal Inducement Regulation?

5. Revision of Initial Order on Review: *Undisputed Findings of Fact* in Initial Order: In the ALJ's Initial Order Granting Summary Judgment, the ALJ titles all of her findings of fact as *Undisputed Findings of Fact.* While it is not entirely clear what is meant by this title, normally "undisputed findings of fact" are facts the verity of which no party disputes. However, in this Initial Order, many of the facts that are labeled by the ALJ as *Undisputed Findings of Fact* are actually disputed by the OIC in this proceeding, as summarized in the OIC's Brief in Support of Review of Initial Order and Declaration of Alan Michael Singer in Support of Petition for Review of Initial Order executed and filed November 19, 2008. For this reason, the undersigned replaces the title *Undisputed Findings of Fact* with Initial Findings of Fact, to clarify that while the facts at issue may have been disputed by the parties, the ALJ determined, by the weight of the evidence, the facts to be as stated in each of her Initial Findings of Fact.

6. Comment on Review: Admission of Evidence in Hearing before ALJ: It appears that the evidence presented by the OIC and Chicago was not actually admitted as evidence by the ALJ during the proceeding before the ALJ, and no Exhibit List was created during that proceeding. For this reason, because the undersigned has determined that the evidence presented would have been admitted if that process had been followed (see possible exceptions discussed immediately below), in the below Final Findings of Facts, the undersigned has identified the evidentiary documents by their names instead of by their exhibit numbers as is customarily done. Most significantly, this evidence includes the original and amended Notices of Hearing issued by the OIC; Chicago's Demand for Hearing; the ALJ's Order and Amended Order on First Pre-Hearing Conference, and other preliminary documents; Declaration of D. Gene Kennedy in Support of Chicago Title Insurance Company's Motion for Summary Judgment RE: Agency Liability; Declaration of Don Randolph in Support of Chicago Title Insurance Company's Motion for Summary Judgment Re: Agency Liability with Ex. A, which is the "Issuing Agency Agreement" executed by Chicago and Land Title; Declaration of Madeline Barewald in Support of Chicago Title Insurance Company's Motion for Summary Judgment Re: Agency Liability; Declaration of Brad London in Support of Chicago Title Insurance Company's Motion for Summary Judgment RE: Agency Liability; Declaration of Alan M. Singer executed September 24, 2008 with attached Exhibits A through P (designated hereafter as Decl. of Singer; not to be confused with Declaration of Alan Michael Singer in Support of Petition for Review of Initial Order executed and filed on November 19, 2008); and Declaration of Carol Sureau.

On March 5, 2009, the OIC filed a Motion RE: Necessity to Bring a "Motion to Strike." In this Motion to Strike, the OIC advised that it had objected to admission of certain pieces of evidence during the hearing before the ALJ, that the ALJ had never ruled on the OIC's objection and that the ALJ had improperly considered this evidence. In its Motion to Strike, the OIC further argued that it was not also required to bring a motion to strike this evidence before the ALJ or thereafter. On March 16, 2009, Chicago filed Chicago Title Insurance Company's Response to OIC's Motion RE: Necessity to Bring a Motion to Strike, asserting generally that it was not raising this argument, that the briefing on the Petition for Review was closed and therefore the necessity of filing a motion to strike is not an issue before the undersigned. The undersigned advises that while indeed in order for a party to have objections to evidence

presented at hearing considered by the presiding officer it is generally not also necessary under Title 34 RCW to bring a motion to strike this evidence, the briefing on review of this case is, as Chicago argues, closed. Additionally, as Chicago states, Chicago is not making the argument that such a motion to strike is required. The parties are advised that those pieces of evidence upon which the OIC objected during hearing and identified in its OIC's Petition for Review are noted and are dealt with in this Final Order if they have been considered by the undersigned to be of any evidentiary significance to the review herein.

7. The undersigned has reviewed each Initial Finding of Fact against the evidence presented at hearing before the ALJ and has set forth the Final Findings of Fact based upon the evidence presented during hearing before the ALJ, addressing each of the ALJ's *Initial Findings of Fact* number by number. Likewise, the label *Conclusions of Law* in the Initial Order is substituted with Initial Conclusions of Law, and the undersigned has reviewed each Initial Conclusion of Law based upon the Final Findings of Fact and legal authority argued by the parties, addressing each of the ALJ's Initial Conclusions of Law number by number. While the undersigned recognizes that this method results in a less than easy-to-read Final Order, it is understood that this is a more comprehensive method of review in that the reader is assured that each Initial Finding of Fact and Initial Conclusion of Law is specifically considered and, if changed, the reason for such changes are set forth. Further, this Final Order is even less easy-to-read, as many of the Initial Findings of Fact and Initial Conclusions of Law are redundant and therefore, the Final Order contains a plethora of redundant Final Findings of Fact and Final Conclusions of Law.

As above, the undersigned recognizes that this number-by-number review is often considered to be the more comprehensive means of displaying review as it indicates specific analysis of each Initial Finding and Initial Conclusion in addition to setting forth the Final Findings of Facts and Final Conclusions of Law. For this reason, and also because of the complexity and importance of the issue herein, the undersigned has followed this number-by-number format. However, should the parties agree to request an easier-to-read format, the undersigned is willing to enter Final Findings of Facts, Final Conclusions of Law and Final Order which would certainly be consistent with the Final Findings, Final Conclusions and Final Order herein, but would simply eliminate recitation of the Initial Findings and Initial

Conclusions – and their substantial redundancy – and would eliminate the undersigned's analyses of each. Said easier-to-read Final Order would not replace the document herein, and the document herein would be the subject of any appeal which might ensue, but would be attached hereto simply for ease of reference.

8. The undersigned Review Judge has reviewed the entire hearing file, including all documents and exhibits filed therein, the recording of the proceeding, the OIC's Brief in Support Review of Initial Order assigning error to the Initial Findings of Fact, Initial Conclusions of Law and Initial Order, Chicago's response to OIC's Brief in Support of Review of Initial Order of Review of Initial Order and Declaration of Alan Michael Singer in Support of Petition for Supporting the Initial Findings of Fact, Initial Conclusions of Law and Initial Order and the oral arguments of the parties on review.

ISSUE PRESENTED

Can the Insurance Commissioner hold Chicago Title Insurance Company responsible for the illegal acts of Land Title Insurance Company of Kitsap County, Inc. in violating WAC 284-30-800, the Illegal Inducement Regulation?

FINAL FINDINGS OF FACTS

Having considered the evidence and arguments presented at the hearing before the ALJ, the documents on file herein, the Initial Findings of Fact, Initial Conclusions of Law and Initial Order, the subsequent briefs filed by both parties on review and the oral argument presented by both parties on review before the undersigned, the undersigned duly appointed Review Judge makes the following Final Findings of Fact, first quoting the ALJ's Initial Findings of Fact number by number, and then revising the ALJ's Initial Findings of Fact number by number as appropriate.

1. The Office of the Insurance Commissioner (OIC) alleges that the Respondent, Chicago Title Insurance Company (Chicago), violated WAC 284-30-800, by and through the acts of its agent, Land Title Company of Kitsap County, Inc. (Land Title), which Chicago had legally appointed as its title insurance agent pursuant to RCW 48.17.160 to act on Chicago's behalf to solicit and effectuate Chicago's title insurance. [Notice of Hearing; Amended Notice of Hearing.] Chicago is a domestic Missouri title insurance corporation which has been authorized

by the OIC since 1977 as a title insurer to underwrite and sell title insurance in Washington and elsewhere. [Ex. A to Decl. of Singer; Decl. of London.] Land Title is a Washington corporation, incorporated in 1967, which is licensed by the OIC as a title insurance agent as defined in RCW 48.17.010. [Exs. A, B to Decl. of Singer; Decl. of Kennedy.] Since March 5, 1993, Chicago, as an insurer, has filed an Appointment with the OIC as required by RCW 48.17.160, on forms prescribed by the OIC, and paid the proper Appointment fee therefore, formally appointing Land Title to act as a title insurance agent to act on Chicago's behalf in Mason, Kitsap, Clallum and Jefferson counties (although Land Title is not undertaking these activities in Clallum and Jefferson counties). [Decl. of Randolph; Ex. C to Decl. of Singer.] Pursuant to specific authority given to appointed insurance agents under RCW 48.17.010 and 48.17.160, Land Title has at all times pertinent hereto had the authority to solicit, specifically on behalf of Chicago, applications for Chicago's title insurance, without the requirement of any further authority needed from the appointing insurer. Further, as specifically allowed under RCW 48.17.010 and 48.17.160, Chicago may authorize Land Title to act on Chicago's behalf to effectuate Chicago title insurance policies and to collect premiums on insurances so applied for or effectuated (on forms prescribed by Chicago and using rates prescribed by Chicago as required by the OIC). In fact, since May 1, 1992, Chicago has additionally authorized Land Title to effectuate Chicago title insurance policies on Chicago's behalf and to collect premiums therefore. [Decl. of Randolph; Exs. C, D, E, and G of Decl. of Singer; "Issuing Agency Agreement" entered into between Chicago and Land Title May 1, 1992 and included as Ex. A to Decl. of Randolph.] At all times pertinent hereto, Land Title was not appointed as an agent to represent, including solicit or effectuate insurance policies for, any other title insurance company [Exs. E, F of Decl. of Singer] and under its contract with Chicago, Land Title was prohibited from acting on behalf of any other title insurer. ["Issuing Agency Agreement."] Likewise, Chicago appointed Land Title as its exclusive agent to act on its behalf in these counties. If Land Title were not appointed to represent Chicago in these counties, Land Title would have no title insurance to market or sell to consumers. Further, because Chicago does not operate directly in these counties, the only way Chicago can solicit for and effectuate its title insurance there is through Land Title. [Exs. A-P of Decl. of Singer; "Issuing Agency Agreement."] Finally, Land Title collects the Chicago title insurance premiums, pays 12% of the gross

premium for each title policy effectuated to Chicago and retains the balance for itself. [Decl. of Randolph; "Issuing Agency Agreement."] Approximately 28% of Land Title's total revenue comes from escrow services [Decl. of Kennedy at 5; Initial Finding 25]; all the rest of its revenue – 72% - comes from selling Chicago's title insurance policies.

2. As found above, Land Title is licensed by the OIC as a title insurance agent. Land Title also conducts escrow services, which are not considered part of its business as an insurance agent. While not relevant, Land Title is not a party to this action. The OIC seeks to impose fines against Chicago, based upon the illegal acts of its appointed agent, Land Title acting on Chicago's behalf in soliciting Chicago's title insurance. *For the purposes of this motion only, it is stipulated that Land Title did commit the alleged violations of the inducement regulation.*

3. *The stipulated violations of the* WAC 284-30-800, the Illegal Inducement Regulation, *by Land Title include "wining and dining" of real estate agents, builders, and mortgage lenders with meals, golf tournaments, advertising for one real estate agent, purchases at a Board of Realtors auction; and professional football championship game tickets, in amounts over the $25.00 limit allowed by WAC 284-30-800. [Amended Notice of Hearing.]* Because the Illegal Inducement Regulation provides limitations on title insurers and their agents on giving things of value in excess of $25.00 to producers of title business, such as the above-referenced real estate agents and others who are in a position to direct the purchase of title insurance to certain title insurers over others, the act of either title insurers or their agents giving such inducements to such producers is clearly a form of solicitation for the purchase of title insurance.

4. Land Title is licensed as a title insurance agent by the OIC, and is formally appointed by Chicago to solicit for Chicago's title policies on Chicago's behalf. Although title insurance literature might also informally designate it as a "UTC," whether a title insurance agent is also referred to as a "UTC" is irrelevant; its nature as a title insurance agent, with the ensuing rights and responsibilities of a title insurance agent which acts on behalf of its appointing insurer(s), remains the same. In those counties where it wishes to sell Chicago title policies, Chicago may appoint a title insurance agent, such as Land Title, to act on Chicago's behalf to solicit for itself directly and/or to solicit and effectuate issuance of Chicago title policies. However, it is Chicago, as the insurer, which is the entity authorized by the OIC to write and issue Chicago title policies and to serve as the underwriter of those title policies. Chicago, as an insurer, is required by law

to legally appoint any entity which it authorizes to act on its behalf. This requires that Chicago file a formal Appointment form with the OIC, formally appointing Land Title, an insurance agent, to act as a title insurance agent representing Chicago. Chicago complied with this requirement beginning on March 5, 1993 and continuing during all pertinent times hereto and continuing currently. [Exs. A-P to Decl. of Singer.] Under the Insurance Code, agents which are legally appointed by insurers may solicit applications for insurance on the insurer's behalf and, if authorized so to do, the appointed agent may effectuate insurance contracts. Agents may also collect premiums on insurances so applied for or effectuated. As found above, in the case of Chicago's appointment of Land Title as an insurance agent, in addition to having the right to solicit applications for insurance on Chicago's behalf solely by virtue of its appointment, Land Title has also since 1993 been authorized by Chicago, as provided for under the Insurance Code, to effectuate Chicago's title policies [Decl. of Randolph; "Issuing Agency Agreement"] and to collect premiums for the Chicago title policies from purchasers (as required by the OIC, on forms prescribed by Chicago and premium rates as prescribed by Chicago). (Issuing Agency Agreement.)

5. *Chicago also conducts its own insurance and escrow business in eight Washington counties, and maintains or subscribes to title plants in these counties as required by law. In these geographic areas, Chicago has its own employees and agents, and maintains its own branch offices. In the counties where it does direct business, Chicago conducts marketing to sell its services.* (Decl. of Randolph; Decl. of London.)

6. Chicago conducts no direct marketing activities in Kitsap, Mason, Clallam and Jefferson counties. (Decl. of London.) Chicago relies solely on the efforts of Land Title, (Decl. of London; Decl. of Kennedy.) as its exclusive appointed insurance agent, to act, on behalf of Chicago, to solicit for and effectuate Chicago title policies in these counties and to collect Chicago's established premiums for these title policies (although Land Title does not actually operate in Clallam and Jefferson counties). (Ex. E to Decl. of Singer.)

7. *A minority share of Land Title stock (45%) is owned by Security Union Title Insurance Company (Security Union), which is a subsidiary of Chicago Title and Trust Company (CT Trust). CT Trust is a subsidiary of Fidelity National Title Group, Inc., which is, in turn, a subsidiary of Fidelity National Financial, Inc. Chicago is also a subsidiary of CT Trust. Thus,*

Land Title and Chicago are each subsidiaries of or partly owned by separate companies who share the same parent company, Fidelity National Financial, Inc. [Ex. 5, Decl. of Barewald.]

8. *Between 33 and 44% of the board members of Land Title, since 2002, work or have worked for the shared parent company, Fidelity National Financial, Inc., or one of its subsidiaries. [Ex. 9, Decl. of Singer, Ex. D, E]*

9. In Washington, there are a number of title insurance agents which also are called in title insurance literature, "UTCs"; these "UTCs," such as Land Title, are title insurance agents appointed by a title insurer(s), such as Chicago, to solicit for and effectuate title insurance policies issued and underwritten by the title insurer, mainly in counties where national title insurers do not solicit and effectuate their title policies directly. [Decl. of Randolph; Exs. A-P of Decl. of Singer.] In Washington, title literature has informally designated certain entities, such as Land Title, as "UTCs" or "independent title companies." Whether they are designated as "UTCs" or not, these entities, like Land Title, are only recognized by the Insurance code – and only authorized to represent title insurers – if they are licensed as title insurance agents by the OIC and are duly appointed by title insurer(s) to act on behalf of the title insurer to solicit for and, if authorized by the insurer, effectuate title policies on the insurer's behalf and collect premiums therefor. This arrangement occurs typically in counties, such as Mason and Kitsap counties, where title insurers do not solicit for and effectuate their title insurance policies directly, and Chicago has appointed some eleven of these entities to represent it in various counties throughout Washington state. [Decl. of Randolph.] As with any appointed insurance agent, whether the agent is designated a "UTC" or not, it derives its authority from being licensed by the OIC as a title insurance agent and then being appointed by a title insurer to act on the insurer's behalf; thereby Chicago has so appointed Land Title to solicit for Chicago's title insurance and is further authorized by Chicago, as permitted by the OIC, to effectuate Chicago's title insurance policies and to collect the premiums therefor, all on behalf of Chicago. In the situation at issue herein, Land Title also conducts the title search and, on behalf of Chicago, determines whether to effectuate a Chicago title policy in each specific case. If the title search was bad and there is a defect in title, then Chicago, as the insurer and underwriter of the title policy, must assume liability to the purchaser/policyholder for any loss as a result. Additionally,

Land Title conducts title searches in specific counties, where, as required by the OIC, it owns or subscribes to title plants in those counties where it operates. [Decl. of Randolph.]

10. *Chicago has no involvement in the title search with these contracted UTC's* [sic], *including Land Title. (Decl. Randolph)* UTCs, including Land Title, may market their own services, such as escrow services which are not part of Land Title's duties as an appointed insurance agent of Chicago, without the involvement or financial contribution of Chicago. As with other UTCs similarly situated to Land Title, as the only appointed agent of Chicago in the relevant counties and on behalf of the only insurer it is authorized to represent, Land Title also, all on behalf of Chicago, solicits for Chicago's title insurance, issues preliminary commitments for Chicago's title insurance, addresses exceptions to the title identified in the preliminary commitment; and effectuates the issuance of Chicago's title policies, all without Chicago's participation. [Decl. of Randolph; Exs. A-P of Decl. of Singer.] Whether or not Chicago chooses to be involved or otherwise participate in these activities which are conducted on its behalf does not affect the relationship of Chicago as the appointing insurer and Land Title as its appointed agent. In addition, as is typical of many insurer–agent relationships, for each Chicago title policy which Land Title effectuates, Land Title is required to pay 12% of the gross premium charged for each Chicago Title policy to Chicago and retains the balance for itself, thereby receiving financial remuneration from Chicago. [Decl. of Randolph; "Issuing Agency Agreement".]

11. *Chicago receives specific information from Land Title when it is called upon to insure a title policy: a policy number; the UTC's internal file number; the effective date of the policy; the type of policy; the premium paid; and the amount of liability. (Decl. Randolph) Unless the need arises, Chicago does not receive a copy of the preliminary commitment or any of the documents associated with the closing. (Decl. Randolph)* Unless the need arises, Chicago does not receive a copy of the preliminary commitment or any of the documents associated with the closing. [Decl. of Randolph.] Other than receiving this specific information, Chicago has chosen to normally exercise little control or supervision over Land Title in the solicitation and effectuation of Chicago title insurance conducted by Land Title on Chicago's behalf. Instead, Chicago has chosen to allow Land Title as its appointed insurance agent to act on Chicago's behalf somewhat independently, even though as the appointing insurer Chicago could have exercised more control

over the solicitation and effectuation activities of Land Title acting on Chicago's behalf. In fact, the only function Chicago has chosen to undertake in the insurance transaction in these counties is to insure the risk of later-discovered title imperfections (which it must do, as the insurer) and to receive the pertinent details of each Chicago policy sold, and to examine certain specified information on a regular basis or if it chooses to do so. However, the fact that Chicago chose to be uninvolved in all of these other aspects of the insurance transaction being conducted by Land Title on Chicago's behalf does not relieve Chicago for responsibility for Land Title's solicitation or other activities conducted on Chicago's behalf.

12. The fact that Chicago and Land Title have a private "Issuing Agency Agreement" between them is not relevant to a determination of the relationship between the parties. The OIC's disciplinary action taken against Chicago which is the subject of this appeal is an administrative, regulatory action, not a civil or criminal action. By virtue of Chicago's appointment of Land Title to act as its agent, it is the Insurance Code which determines the relationship of Chicago as insurer/principal and Land Title as appointed agent/agent. The Insurance Code defines the parties to a title insurance transaction including what entity may act on behalf of the insurer and what types of activities that entity may perform. A private contract between the insurer and the appointed insurance agent does not alter the rights and responsibilities set forth in the Insurance Code. *The contract requires Land Title to use Chicago to underwrite its title insurance, although an addendum allows Old Republic Insurance to underwrite for Land Title as well. However, Land Title has used only Chicago for this function for some years and Old Republic has never accomplished the legal requirements to be able to underwrite for Land Title. (Decl. Singer, and Ex. F)* Pursuant to the "Issuing Agency Agreement," and as is fairly common in insurer-agent transactions, Land Title collects the premium for the title insurance, in the amounts set by Chicago, and then pays a percentage of the gross premium charged for each title policy – here it is 12% by agreement - over to Chicago. [Decl. of Randolph; "Issuing Agency Agreement."]

13. As Chicago's duly appointed agent under the Insurance Code, Land Title is given the specific right, without also being required to have specific authorization from the appointing insurer elsewhere, to solicit on behalf of Chicago. Further, as specifically allowed under the Insurance Code if the appointing insurer authorizes the appointed agent, Land Title was in fact

given the authority to effectuate Chicago's title policies and also to collect the premiums therefor (in the amounts prescribed by Chicago and as Chicago has had to file with the OIC) in the "Issuing Agency Agreement." While not a requirement, it is noted that a review of the situation between these parties and the "Issuing Agency Agreement" shows that, as Chicago's exclusive agent and as the only insurer for whom Land Title can solicit and effectuate title policies, the private "Issuing Agency Agreement" does in fact give Land Title the right to solicit for Chicago's title insurance – by having the right to name Chicago in its advertising and printing, among other activities. Without Chicago, Land Title would have no title insurance to sell and without Land Title, Chicago, because it has chosen not to solicit directly in these counties, Chicago would have no one to solicit for its title policies. *Land Title employs its own sales personnel to market its services to potential customers in Kitsap County. (Decl. Kennedy) The marketing materials used by Land Title do not mention its relationship to Chicago. (Decl. Kennedy, Ex. A-E) However, the website of Land Title does have a hyperlink to "National Website" which takes the user to Chicago's website. (Decl. Singer, Ex. H) Otherwise, the Land Title website makes no mention of its underwriter or any connection to Chicago.* Therefore, while the marketing materials used by Land Title may not always indicate its relationship to Chicago [Decl. of Kennedy], under the terms of the "Issuing Agency Agreement" Land Title may use the name of Chicago in its advertising and printing. ["Issuing Agency Agreement".] Further, since Chicago is the only insurer which Land Title is appointed to solicit for (Finding No. 12 above) - and is allowed to represent under its "Issuing Agency Agreement" - Land Title is clearly advertising for Chicago's title insurance. In fact, only about 28% of Land Title's total revenue comes from escrow services [Decl. of Kennedy at 5; Initial Finding of Fact 25]; all the rest of its revenue, 72% - comes from selling Chicago's title insurance policies. Further, while the Land Title website may not mention its underwriter or any connection to Chicago, it does include a hyperlink to "National Website" which takes the user to Chicago's website. [Decl. of Singer, Exs. A-P.] Such activities clearly constitute solicitation by Land Title for Chicago's title insurance. All solicitation of title insurance by Land Title was done on behalf of Chicago, as Land Title's only appointing insurer.

14. It cannot be found that Chicago does not pay any of the business expenses of Land Title, nor pay for any of its services: under the terms of the "Issuing Agency Agreement," Land Title

collects the premiums for each Chicago title policy it effectuates, then sends just 12% of the gross premium for each policy to Chicago. [Decl. of Randolph; Issuing Agency Agreement.]

15. *In the contract, Chicago retains the right to examine the records of Land Title "which relate to the title insurance business carried on by Land Title for Chicago," including accounts, books, ledgers, searches, abstracts, and other related records." (Decl. Randolph, Ex. A) The contract also requires that Land Title preserve for ten years the documents upon which "title assurances and underwriting decisions were made, including searches, worksheets, maps, and affidavits." (Decl. Randolph, Ex. A)* Therefore Chicago had the right during the period at issue herein to review the records created preliminary to sales of Chicago's title policies and at other times, solely by virtue of its position as the appointing insurer of Land Title. While irrelevant to the issue herein, Chicago was also permitted under the "Issuing Agency Agreement" to review those records and to exercise other significant controls over Land Title. However, Chicago chose not to review any of these records or conduct many of the other activities of control it could have exercised over Land Title, either as its appointing insurer or in the "Issuing Agency Agreement" during the period at issue here. [Decl. of Randolph; "Issuing Agency Agreement."]

16. *Land Title is required by the contract to comply with all laws and regulations, and to notify Chicago of any alleged violations or complaints about Land Title's compliance with such laws and regulations. The OIC did not notify or include Chicago in its investigation of Land Title for the inducement violations at issue, but Land Title notified Chicago of the investigation and its results, as called for in the contract.* Simply because in the "Issuing Agency Agreement" Land Title has committed to comply with all laws and regulation and to notify Chicago of any alleged violations or complaints about Land Title's compliance with them does not affect Chicago's status as the appointing insurer and Land Title its appointed agent. Although not required in the analysis herein, in fact this provision supports the principal/agent relationship created under the Insurance Code, evidencing the principal's concern that its agent comply with applicable laws and regulations (which are imposed upon Land Title by the Insurance Code based upon its status as an insurance agent) and requiring that its agent notify the principal of any significant occurrences with regard to the agent's compliance.

17. The insurance customers are those of Chicago, which sells, through Land Title, Chicago title policies to those customers. In the "Issuing Agency Agreement," loss is allocated between

Chicago and Land Title, with the insurer being liable, as the insurer, to its policyholders for any failures of the title search, and Land Title being *"responsible to* [Chicago] *for all loss, cost or damage, ... caused by ... 9.B(1) Failure of Issuing Agent* [Land Title] *to comply with the ... rules, regulations or instructions given to Issuing Agent* [Land Title] *by Principal* [Chicago] and nearly all of Land Title's other activities .... and also for *(8) Allegations, against either* [Chicago] *or* [Land Title] *by reason of the activities of* [Land Title] *... or failure to comply with any Federal or State Law or regulation* .... [Decl. of Randolph; "Issuing Agency Agreement at 9(B)(1)-(8)."] Therefore, while not necessary to the analysis of the issue herein, the wording of the "Issuing Agency Agreement" clearly indicates that Chicago – exercising control over its agent - requires that Land Title comply with instructions given by Chicago to Land Title, and applicable laws, or face liability to Chicago for that failure. Further, as indicated, Chicago provides for the possibility that allegations might be made against Chicago for the acts of Land Title in violating federal or state laws or regulations including the Illegal Inducement Regulation. ["Issuing Agency Agreement at 9.B(8).] *The contract requires Land Title to indemnity Chicago against loss from Land Title's actions of fraud, conspiracy, or failure to comply with all Federal and State laws. (Decl. Randolph, Ex. A Sec. 9(B)(8)).* However, the fact that Chicago may be attempting in its "Issuing Agency Agreement" to somehow evade responsibility to the OIC or others for the acts of Land Title by requiring that Land Title indemnify Chicago against loss from Land Title's fraud, conspiracy or "failure to comply with Federal or State Law or regulation," including the Illegal Inducement Regulation, is irrelevant.

18. Land Title is authorized by the Insurance Code, as the appointed agent of Chicago, to solicit on behalf of Chicago for Chicago's title insurance. Additionally, Land Title is specifically authorized by Chicago to not only solicit for, but also to effectuate title policies on behalf of Chicago and collect the premiums therefor. [Decl. of Randolph; "Issuing Agency Agreement."] *Land Title is required to use forms provided by Chicago for these functions.*

19. *The contract specifically provides that Land Title, "...shall not be deemed or construed to be authorized to do any other act for principal not expressly authorized herein."* [Decl. of Randolph; "Issuing Agency Agreement".]

20. Chicago, as the appointing insurer, had the right to control the actions of Land Title, as its appointed insurance agent, in all activities conducted by Land Title on behalf of Chicago,

most specifically, solicitation and effectuation of Chicago title policies including Land Title's compliance with the Illegal Inducement Regulation in its solicitations. See Finding 17 above. Moreover, while not necessary to find herein, even under an analysis of common law agency and under the "Issuing Agency Agreement," Chicago had a clear right to control the actions of Land Title in solicitation and effectuating of Chicago's title insurance. ["Issuing Agency Agreement"]. Further, Chicago could have terminated Land Title's agreement appointment at any time. The evidence shows that Chicago may have chosen not to oversee or otherwise control Land Title's acts, conducted on behalf of Chicago, in solicitation of Chicago's title insurance either as the appointing insurer or as a common law principal. However, the fact that Chicago may have chosen to look the other way and not participate or control its agent's activities in this area does not relieve Chicago from being accountable for the acts of its appointed agent.

21. As found in Finding 14 above, it cannot be found that Chicago does not pay any of the business expenses of Land Title, nor pay for any of its services: under the terms of the "Issuing Agency Agreement," Land Title collects the premiums for each title policy it effectuates, then sends just 12% of the gross premium for each policy to Chicago. [Decl. of Randolph; Issuing Agency Agreement.]

22. *Extensive discovery has been undertaken in this matter, with large numbers of interrogatories answered by Chicago. (See Exhibits, Decl. Singer) Further, the OIC has authority to demand records from Chicago and Land Title, so there should be no evidence exclusively in the hands of Chicago or Land Title, to which the OIC has not had full access. A pre-hearing conference was held in this matter March 31, 2008, with discovery on-going since that time. No motions have been made to compel discovery of documents or other evidence about the involvement of Chicago in the business of Land Title.*

23. As found above, Chicago, as the appointing insurer, had at all pertinent times, the right to control Land Title, its appointed agent, in all activities conducted on behalf of Chicago. These activities include, as found above, all solicitation and effectuation of Chicago title insurance policies. This right to control the activities of Land Title in soliciting on its behalf specifically includes Chicago's right to control Land Title's compliance with the Illegal Inducement Regulation and statute, a well known problem which had been occurring for some time in the title industry and had been addressed many times by the OIC in its efforts to advise title insurers

and their agents for whom they were responsible, of the need for strict compliance with that regulation. [Decl. of Tompkins, with Exs.] The fact that Chicago and Land Title entered into a private "Issuing Agency Agreement" which appears to attempt to transfer responsibility from Chicago to Land Title for compliance with all applicable statutes and regulations, and many other activities, does not relieve Chicago of its responsibility for the acts of Land Title's and certainly for Land Title's violations of the Illegal Inducement Regulation and statute. *Chicago does not provide any advice to Land Title about compliance with the laws, including the inducement laws. (Decl. Kennedy.)*

24. As set forth in the Insurance Code, as Chicago's appointed insurance agent, Land Title markets for Chicago's title insurance on behalf of Chicago. While Chicago chose not to provide advice to Land Title regarding compliance with the Illegal Inducement Regulation and chose not to conduct any oversight of any of Land Title's marketing practices or procedures, and in fact Chicago appears to perhaps have attempted to evade its responsibility to the OIC and others by shifting responsibility for compliance to Land Title in its "Issuing Agency Agreement," this does not relieve Chicago of its responsibility for compliance with the Illegal Inducement Regulation whether through its direct acts or through the acts of its agent, Land Title. Further, although this was not required as a precondition to enforcement action against Chicago, Chicago and all title insurers operating in Washington were clearly apprised by the OIC of the problem of widespread violations of the Illegal Inducement Regulation and of insurers' liability for their appointed agents' violations of the Illegal Inducement Regulation. Title insurers were also informed that this area was of great priority and importance to the OIC. See Findings 26-30 below. In 1989, the OIC mailed a communication concerning the problem directly to Chicago. [Decl. of Tompkins, w/ Exs.] Further, in 2006, an OIC investigation and report found that Chicago was one of four title insurers operating in Washington involved in widespread violations of the Illegal Inducement Regulation. [Decl. of Tompkins, w/ Exs.] See Findings 26 – 30 below.

25. *In a typical year, about 28% of Land Title's revenue comes from the provision of escrow services, which are independent of its relationship with Chicago. Land Title keeps 100% of its earnings from escrow services. (Decl. Kennedy)*

26. *The OIC undertook a study of the title insurance business in Washington in 2006, and found widespread violations of the inducement laws by the major companies operating in Washington. Chicago was a violator, although the OIC's report notes that Chicago made "attempts" to comply with the law. (Decl. Tompkins, and Ex. A) The investigation and report focused on four major companies providing title insurance in Washington, including Chicago.*

27. *Because the violations of the inducement law were so widespread, the OIC opted not to take individual action against any of the offenders. Instead, it took remedial action, including the issuance of the report and a "Technical Assistance Advisory" on November 21, 2006. The Advisory was issued to all "Washington insurers and their title insurance agents." The stated purpose of the Advisory was to "clarify requirements for title insurers and their agents" of the requirements of the inducement and rebating laws. (Decl. Tompkins, Ex. B)* Thereby, although it was not a precondition to the OIC taking enforcement action against title insurers for violations of the Illegal Inducement Regulation by their agents, the OIC attempted to ensure that both title insurers and their agents were fully aware of the Illegal Inducement Regulation and the liability of title insurers for violations by their agents. [Decl. of Tompkins, Ex. B.]

28. The Advisory was issued simply to assist title insurers and their agents with compliance with the illegal inducement laws and further advised title insurers and their agents that title insurers *would be liable for violations of the inducement laws committed by their agents.* [Decl. of Tompkins, w/ Exs.] The fact that Chicago and Land Title might choose to refer to Land Title as a "UTC" or any other chosen designation makes no difference: Land Title is an appointed insurance agent of Chicago and, as advised in the OIC's communications with Chicago and other title insurers, title insurers would be held responsible for the acts of their agents in violating the Illegal Inducement Regulation. Chicago cannot possibly understand itself not to be a title insurer, or Land Title not to be Chicago's appointed title insurance agent. [Decl. of Tompkins, incl. Technical Assistance Advisory attached as Ex. B thereto.] The existence of private contracts between title insurers and their agents, and/or the parties' designation of a title insurance agent as a "UTC," does not change the identity of the "UTC" as an appointed title insurance agent acting on behalf of the appointing title insurance company, nor does the designation of "UTC" affect the liability of title insurers for their agents' violations of the Illegal Inducement Regulation and statute, or of any other statutes and regulations found in the

Insurance Code. *No mention is made of the UTC's, and the relationships between these underwritten title companies and the insurers, in the Advisory letter.*

29. *In 1989, the OIC also sent a letter to Chicago in Tacoma, Washington, stating specifically that the letter was to be given to "each of your branch offices and to each of your agents." The letter further elaborated that, "Title insurers are liable for any activity conducted by their agents regarding this regulation whether the title insurers have knowledge of the activity or not."* Therefore, in 1989 Chicago was directly advised by the OIC that title insurers are liable for any acts of their agents relative to compliance with the Illegal Inducement Regulation whether the title insurer has knowledge of the activity or not. [Ex. M to Decl. of Singer.] The regulation being referred to is the Illegal Inducement Regulation, which limits the amount that a title insurer or title insurance agent can spend on "items of value" given to potential producers of title insurance business such as builders and real estate agents/brokers, as inducements for referring title insurance business to those title insurers. [Ex. M to Decl. of Singer.] Contrary to the assertions of Chicago in this proceeding, there are no such different entities as "UTCs" or "underwritten title companies." Land Title and other similar entities exist as they were created by their voluntary compliance with the Insurance Code: since March 5, 1993, and because it chooses not to solicit and effectuate Chicago title policies directly in Mason, Kitsap, Jefferson and Clallam counties, Chicago has chosen to appoint Land Title as a title insurance agent to act on Chicago's behalf to solicit and effectuate Chicago title policies in those counties. Because Chicago has appointed Land Title to act on its behalf in solicitation of Chicago's title insurance in these counties, Chicago is responsible to the OIC as if Chicago had itself committed the subject violations of the Illegal Inducement Regulation, no matter what other label Chicago or Land Title, or others, or the private "Issuing Agency Agreement" may assign to Land Title.

30. *The OIC also addressed the Washington Land Title Association in September, 1989, about the on-going violations of the inducement laws, to put the title companies and agents present on notice that further violations would not be tolerated. (Decl. Singer, Ex. M)* The OIC's efforts, through letter to Chicago, by extensive investigation of Chicago and ensuing report of Chicago's violations of the Illegal Inducement Regulation, Technical Assistance Advisory, and by presentation before Washington Land Title Association were voluntary efforts by the OIC to further inform title insurers and agents – including Chicago - of the Illegal

Inducement Regulation and the consequences of their or their agents' violations of that Regulation. Performance of these efforts by the OIC was not a precondition to enforcement action against title insurers or their agents. [Decl. of Tompkins, w/ Exs.] Even so, Chicago had been aware of the Illegal Inducement Regulation and its liability for its agents' violation of the Regulation, for many years before the time period at issue herein. [Decl. of Tompkins, w/ Exs.]

31. *In August 2005, Chicago issued a letter to the OIC accepting liability up to $200,000 for any "fraudulent or dishonest acts by Land Title," specifying this was to meet the requirements of RCW 48.29.155, and was limited, "only in connection with those escrows for which [Land Title] issues a title insurance commitment or policy of Chicago." (Decl. Singer, Ex. I)*

32. *After the 2007 investigation of Land Title was completed, the OIC sent a proposed Consent Decree to Chicago to sign, agreeing that Chicago would pay a fine, and monitor and control the future behavior of Land Title in regard to the inducement regulation.*

33. [Finding added by Review Judge in its entirety.] It has been found in the Final Findings of Fact above that, based on the weight of the evidence presented, in order to market its title insurance policies in Mason, Kitsap, Jefferson and Clallam counties where Chicago does not market directly, in 1993 Chicago formally appointed Land Title as its exclusive agent to act on Chicago's behalf to market Chicago's policies and Land Title, in turn, committed to act as an agent only for Chicago. It has also been found above that pursuant to the Insurance Code, appointed agents are authorized to solicit insurance on behalf of the appointing insurer, which includes compliance with the Illegal Inducement Regulation because the giving of inducements to producers of title insurance is a form of solicitation for the purchase of insurance. It has also been found above that Land Title did perform all solicitation, on behalf of Chicago, for Chicago's title insurance in the pertinent counties and in fact was authorized by the OIC to solicit only on behalf of Chicago in those counties. Finally, it has been found that because Land Title was at all times acting on behalf of Chicago in soliciting for Chicago's title insurance, including the giving of illegal inducements in violation of the Illegal Inducement Regulation, the violations should be treated as if committed by Chicago itself. Therefore it is reasonable to find that Chicago can be held responsible to the OIC for Land Title's violations of the Illegal Inducement Regulation. Specifically, insofar as is relevant herein, the OIC may take action against Chicago, and hold Chicago responsible for, the illegal acts of Land Title in violation of

the Illegal Inducement Regulation and statute. For this reason, the ALJ's Initial Order Granting Summary Judgment to Chicago should be set aside and the parties should be instructed to proceed to Phase II of this proceeding.

CONCLUSIONS OF LAW

1. *The Office of Administrative Hearings and the undersigned Administrative Law Judge have jurisdiction over the parties and subject matter herein pursuant to RCW 48.04.010(5), Chapter 34.05 RCW, and Chapter 34.12 RCW. The provisions of Chapter 48 RCW, the Insurance Code, are applicable here.* Following Receipt of Demand for Hearing from Chicago, on request of Chicago and using discretion pursuant to RCW 48.04.010(5), the OIC referred this matter to the Office of Administrative Hearings, where Administrative Law Judge Cindy L. Burdue (ALJ) was assigned. The Office of Administrative Hearings and the assigned ALJ had jurisdiction over the parties and subject matter herein pursuant to RCW 48.04.010(5), Chapter 34.05 RCW and Chapter 34.12 RCW and regulations applicable thereto. The ALJ properly conducted prehearing activities, presided over the hearing and entered Initial Findings of Facts, Initial Conclusions of Law and Initial Order (Initial Order). Pursuant to Chapter 34.05 RCW and regulations applicable thereto, said Initial Order, along with the transcript of the proceedings and the entire hearing file, was transferred to the undersigned Review Judge for review and entry of Final Findings of Facts, Final Conclusions of Law and Final Order (Final Order). As stated above, on November 19, 2008, the OIC filed OIC's Brief in Support of Review of Initial Order and Declaration of Alan Michael Singer with the undersigned; on December 10, 2008, Chicago filed its Reply to the OIC's Brief in Support of Review of Initial Order; and at the request of the undersigned, on February 5, 2009, the parties presented oral argument on review before the undersigned, presenting detailed argument as to whether the Initial Order Granting Summary Judgment should be upheld or set aside. Further, at the outset of the parties' oral argument on review before the undersigned the parties agreed that the undersigned's review of the Initial Findings of Facts, Conclusions of Law and Initial Order should be de novo; said review is indeed de novo as provided for as provided for in RCW 34.05.464, WAC 284-02-080.

2. *Summary judgment may be granted if the written record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as matter of law. WAC*

10-08-135. The evidence presented, and all reasonable inferences from the facts, must be viewed in the light most favorable to the nonmoving party. Herron v. King Broadcasting, 112 Wn.2d 762, 776 P.2d 98 (1989). Where reasonable minds could reach but one conclusion from the admissible facts and evidence, summary judgment should be granted. White v. State, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).

3. *The initial burden of showing the absence of material fact rests with the moving party. Young v. Key Pharmaceuticals, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Only if the moving party meets this initial showing will the inquiry shift to the non-moving party. Herron v. King Broadcasting, 112 Wn.2d 762, 776 P.2d 98 (1989). In that case, the non-moving party must "counter with specific factual allegations revealing a genuine issue of fact. . ." Int'l. Union of Bricklayers v. Jaska, 752 F.2d 1401, 1405 (9th Cir. 1985).*

4. RCW 48.17.160(1) provides: *(1) Each insurer on appointing an agent in this state shall file written notice thereof with the commissioner on forms as prescribed and furnished by the commissioner, and shall pay the filing fee therefore as provided in RCW 48.14.010. The commissioner shall return the appointment of agent form to the insurer for distribution to the agent. .... (2) Each appointment shall be effective until the agent's license expires or is revoked, the appointment has expired or written notice of termination of the appointment is filed with the commissioner, whichever occurs first.*

Further, RCW 48.17.010 provides: *"Agent" means any person appointed by an insurer to solicit applications for insurance on its behalf. If authorized so to do, an agent may effectuate insurance contracts. An agent may collect premiums on insurances so applied for or effectuated.*

Land Title has been licensed by the OIC as an insurance agent for many years. Further, per Finding No. 4, on March 5, 1993 Chicago voluntarily and properly filed an Appointment form with the OIC, as prescribed and furnished by the OIC, legally appointing Land Title as its appointed title insurance agent. Pursuant to RCW 48.17.010, by virtue of Chicago's appointment of Land Title as its appointed agent, Land Title was specifically authorized by Chicago *to solicit applications for insurance on* [Chicago's] *behalf.* It has been further found above that, as not only Chicago's appointed agent but Chicago's exclusive agent in these counties, and being only appointed to solicit on behalf of Chicago, Land Title did, in fact and at all times pertinent hereto, solicit on behalf of Chicago including committing the acts which the

parties herein have stipulated for purposes of this motion to be violations of the Illegal Inducement Regulation and statute.

5. *The burden of proving that an agency relationship exists falls on the party asserting that relationship. Id.*

6. Entire Conclusion 6 delete. Not a Conclusion of Law.

7. Delete. Not a Conclusion of Law.

8. Delete. Not a Conclusion of Law.

9. ***The parties' positions:*** *The OIC urges that traditional principles of agency law do not apply in this case.* The OIC argues that traditional, or common law, principles of agency law do not apply in this case. Rather, the OIC argues that many years ago, in enacting RCW 48.17.160, the Legislature created a specific statutory means of creating principal-agent relationships between insurance companies and their agents, and the Legislature also defined the specific activities which the agent may perform on behalf of the insurer once the principal-agent relationship is created. (The Legislature also provided for specific means to notify the insurer and agent of the perfection of the principal-agent relationship and specific means of terminating the principal-agent relationship.) All insurers, whether title insurers or other types of insurers, must comply with these specific statutory requirements in order to create the principal-agent relationship and thereby authorize the agent to act on the insurer's behalf. *In the alternative, the OIC urges that Chicago can be held liable for the actions of its agent, Land Title, even applying traditional agency principles, on the theory of apparent authority. The issue whether Chicago had any "control" over Land Title is not relevant to the analysis, according to the OIC.*

10. *To the contrary, Chicago argues that traditional agency law principles apply, and that under these principles Chicago is not liable for the actions of Land Title. Chicago argues that the primary hallmark of an agency relationship is the principal's right to control the actions of the agent, and as that right is absent here, Chicago is not liable for the actions of Land Title. Those actions cannot be imputed, and Chicago is not "vicariously liable" for the illegal acts of Land Title, according to Chicago Title.*

11. The undersigned has carefully reviewed the briefs of the parties filed with the ALJ, the evidence presented by the parties at hearing before the ALJ, the transcript of the hearing before the ALJ, the briefs and oral arguments of the parties before the undersigned on review and the

entire hearing file. The undersigned concludes that, based upon Finding of Fact No. 4 above, and pursuant to RCW 48.17.160, on March 5, 1993, and continuing during all times pertinent hereto, Chicago voluntarily chose to appoint Land Title as its exclusive agent to act on Chicago's behalf soliciting Chicago policies in those four counties where Chicago does not solicit directly.

Specifically, pursuant to the requirements set forth in RCW 48.17.060 and 48.17.010, as cited in Conclusion 4 above, Chicago properly complied with the legal requirements set forth in RCW 48.17.060 by filing the required written Notice of Appointment with the OIC on forms prescribed and furnished by the OIC, paid the filing fee therefore, received the filed Notice of Appointment back from the OIC and retained said perfected appointment at all times pertinent hereto. Thereafter, RCW 48.17.010 provides that *"Agent" means any person appointed by an insurer to solicit applications for insurance on its behalf* [and] [i]*f authorized to do so, an agent may effectuate insurance contracts. An agent may collect premiums on insurances so applied for or effectuated.* Therefore, at the time Chicago appointed Land Title as its agent, pursuant to the facts found above and pursuant to RCW 48.17.060 and 48.17.010, as a matter of law a principle-agent relationship was created between Chicago and Land Title and continuing at all times pertinent hereto. As Chicago's agent, Land Title was specifically authorized by RCW 48.17.010 to *solicit applications for insurance on* [Chicago's] *behalf* and, as found in Finding No. 4 above, solicitation for insurance includes making payments to producers of title business as contemplated by the Illegal Inducement Regulation, WAC 284-30-800. Further as found above, by virtue of this principal-agent relationship, Land Title was authorized to solicit for Chicago's insurance on behalf of Chicago, and did in fact solicit for Chicago's insurance on behalf of Chicago, including making gifts of things of value to producers of title business as contemplated by the Illegal Inducement Regulation, WAC 284-30-800.

Based on the Conclusion directly above, there exists a clear principal-agent relationship between Chicago and Land Title created by statute; it is not necessary to apply a common law analysis to determine the existence of a principal-agent relationship between an insurer and insurance agent. By virtue of RCW 48.17.060 and 48.17.010 and by the acts of Chicago in complying with the requirements of RCW 48.17.060 in appointing Land Title to act on behalf of Chicago to solicit for Chicago's title insurance. Because, as found above, Land Title was soliciting on Chicago's behalf, as set forth in RCW 48.17.010, the acts of Land Title in violating

the Illegal Inducement Regulation and statute, which are acts of solicitation, are properly considered to be the acts of Chicago. Decades, a century, of well established case law in the insurance area repeatedly confirm that a principal-agent is created between the insurer and its appointed agent, and the means of statutorily creating the principal-agent/insurer-agent relationship are as set forth in the Insurance Code, that the relationship is defined by statute and need not be analyzed based on common law, and, finally, that appointing insurers are responsible for the act of their insurance agents. See the plethora of cases cited in the OIC's briefs, significantly *Paulson v. Western Life Ins. Co.*, 292 Or. 38, 636 P.2d 935 (1980) which construes a similar Oregon insurer-agent statute and was adopted by the Washington Supreme Court in *National Federation of Retired Persons v. Insurance Commissioner*, 120 Wn.2d 101, 838 P.2d 680 (1992) and even where the insurer is ignorant of the violation e.g. *Ellis v. William Penn Life Assurance Co.*, 124 Wn.2d 1, 873 P.2d 19985 (1994); *American Fidelity and Casualty Company v. Backstron*, 47 Wn.2d 77, 287 P.2d 124 (1955); *Miller v. United Pacific Casualty Company*, 187 Wn. 629, 60 P.2d 714 (1936). Therefore, it is hereby concluded that the OIC has shown that it has the legal authority to hold Chicago responsible for the acts of Land Title in violating the Illegal Inducement Regulation and statute.

12. ***Principal-Agent Status between Chicago and Land Title, by statute and contract:*** *The entities' characterization of their relationship is not controlling as to the nature of their relationship as an agency.* While it is somewhat relevant and helpful, the characterization which two parties may give to their relationship is not finally controlling as to the actual nature of their relationship as principal and agent. (It should be noted, however, that if one were to apply the common law theory of agency instead of the correct statutory creation of agency herein, given the wording of the "Issuing Agency Agreement" and the actual behavior of Chicago and Land Title as exclusive agent and exclusive appointing insurer, all as set forth in the Findings above, it is most likely that Conclusions of Law would determine that the traditional common law of agency analysis would also support a determination that a principal-agent relationship exists between Chicago and Land Title.")

13. A principle-agent relationship may be created either by the Insurance Code in the appointing insurer-appointed insurance agent situation, or by the dictates of traditional common law. Here, it is concluded that a principal-agent relationship was created by the Insurance Code.

It has long been the law that an agent can bind a principal while acting within the scope of the agency. See, Restatement (Third) Agency (2006). Decades of well established insurance and other case law have determined that an agent can bind a principal while acting within the scope of the agency, whether the principal-agent relationship has been created by statute or the common law of agency. Per Findings above, Land Title clearly had the authority specifically given to it by RCW 48.17.010 *to solicit applications for insurance on [Chicago's] behalf.*

14. In this matter, as concluded above, an agency relationship was created statutorily between Chicago and Land Title by virtue of Chicago's compliance with RCW 48.17.060 and 48.17.010 and Land Title's acceptance of that appointment, and both parties maintenance of that agency appointment since 1993; the parties designation of the appointed agent, Land Title, as a "UTC" makes no difference under the Insurance Code. (It should be noted, however, while not relevant herein because this issue is determined under statutory agency analyses, because OIC argues as an alternative that Land Title was also an agent of Chicago under common law, an agency relationship is indeed suggested by the contract between Chicago and Land Title.) These entities executed a contract which uses the term "Issuing Agent" for Land Title and "Principal" for Chicago to describe their relationship to each other, but in addition the actual substance of that contract together with the activities of Land Title in soliciting and effectuating contracts on behalf of Chicago as found above, do indeed, appear to also create a common law agency relationship between Chicago and Land Title. Additionally, in the "Issuing Agency Agreement" which gives Chicago significantly more control than found by the ALJ, and under analyses of both strict common law agency and also – although not necessary - the theory of apparent authority.)

15. Delete. Not a Conclusion of Law.

16. The Insurance Code, at RCW 48.17.010 and 48.17.060, specifically defines the requirements and procedures for insurers and insurance agents in order for them to create a principal-agent relationship as insurer-appointed insurance agent. Thereafter, decades of applicable case law analyzes the principal-agent relationship and dictates the rights and responsibilities of an insurer in its relationship with its appointed agent - and most significantly dictates that an insurer is liable for the acts of the insurer's appointed insurance agent, which agent is, pursuant to RCW 48.17.010, specifically acting on the insurer's behalf. A title insurer

and its appointed agent may not enter into an agreement, which Chicago appears to have attempted (albeit unsuccessfully as, as found above, even in the "Issuing Agency Agreement" Chicago retains control over Land Title) in conflict with the Insurance Code or regulations: i.e Chicago may not enter into a private "Issuing Agency Agreement" with Land Title which attempts to somehow restrict Chicago's right to supervise the activities of its legally appointed insurance agent, which agent has been specifically authorized by RCW 48.17.160 and 48.17.010 to conduct solicitation for Chicago on Chicago's behalf, and Chicago may not simply look the other way concerning acts of its legally appointed agent specifically authorized by RCW 48.17.160 and 48.17.010 to conduct solicitation for Chicago on Chicago's behalf, and thereby succeed in escaping its liability to the OIC and others for the acts of solicitation conducted by its appointed agent, Land Title, acting on Chicago's behalf. Further, "solicitation" for purposes of RCW 48.17.160 is given an extremely broad interpretation. In the landmark *National Federation of Retired Persons v. Insurance Commissioner*, 120 Wn.2d 101,110-111,838 P.2d 680 (1992), the Washington Supreme Court held that "solicitation" in the insurance industry includes the solicitation for the return of "cold lead" cards from consumers for later sale to insurance agents, even when no insurance company was identified. The giving of things of value to producers of title insurance business, with which the Illegal Inducement Regulation is concerned, clearly constitutes a form of "solicitation" which appointed agents are authorized to conduct, on behalf of their appointing insurers, pursuant to RCW 48.17.010. Therefore, Land Title was an appointed agent operating within the scope of its authority given to it by Chicago in appointing it as its agent pursuant to RCW 48.17.010 and 48.17.160.

17. Entire Conclusion. Delete.

18. Delete.

19. Delete.

20. Delete. *Stephens v. Omni Ins. Co.*, 138 Wn.App. 151, 153 P.3d 10 (1007), review accepted, 180 P.3d 1289 (2008) is unresolved as it is still on appeal to the Washington Supreme Court. *Omni* held that a debt collection firm to which insurers assigned subrogation claims was not the insurers' agent and that its unfair collection practices therefore could not be imputed to the insurers. This case, while also unresolved currently, is clearly distinguishable from the facts herein: the collection agency was not an appointed insurance agent of the insurer as is Land

Title, and was therefore not subject to RCW 48.17.010 and 48.17.160. For this reason, and various others concerning its contract and activities, the situation in *Omni* cannot remotely be compared to the situation herein.

21. Delete. See Conclusion 20 above.

22. Delete. See Conclusion 20 above.

23. Delete. See Conclusion 20 above.

24. As found in Findings of Facts above, Chicago had the right to control, but chose not to control, all of the actions of Land Title in the marketing and solicitation of Chicago's title insurance on behalf of Chicago under either 1) the proper analysis of insurer-appointed agent under RCW 48.17.060 and 48.17.010 or under, although it is not relevant here, 2) the common law agency analysis. Chicago cannot not escape liability for the acts of its appointed agent, which agent was clearly as authorized by statute (and was even allowed under the "Issuing Agency Agreement" even if the inapplicable common law of agency were to apply) soliciting for Chicago insurance on Chicago's behalf, by claiming to have had no control and/or have exercised no control and/or was unaware of its agent's acts on its behalf.

25. Per RCW 48.17.160 and 48.17.010, Land Title was specifically appointed by Chicago as an agent to act on behalf of Chicago in soliciting for Chicago's title insurance, among other activities.

26. Under a determination of the existence of the principal-agent relationship under the proper statutory analysis set forth in the Insurance Code (or the inapplicable common law analysis of agency including apparent authority), a secret, private contract between principal and agent cannot limit the liability of the principal for acts of its agent. Pursuant to the Finding of Fact above, Land Title conducted all activities involving solicitation and effectuation of Chicago's title policies, on behalf of Chicago, and Chicago chose to be uninvolved. Simply because Chicago chose to be uninvolved in its agent's activities does not exonerate Chicago from liability under the Insurance Code (or under the inapplicable common law theory of agency).

27. Delete.

28. Land Title is a duly appointed insurance agent of Chicago, which relationship was created by their voluntary acts under RCW 48.17.160 and 48.17.010, with the specific statutory right therein to solicit for Chicago title insurance policies on behalf of Chicago. For these

reasons, the OIC may hold Chicago responsible for the acts of Land Title in violating the illegal inducement statutes and regulation.

29. Delete entire Conclusion.

30. Delete Conclusion.

31. Delete entire Conclusion.

32. *The cases cited by the OIC indicate that the courts give deference to the OIC's interpretation of the Code when a provision of that Code or an OIC regulation is at issue*

33. Delete entire Conclusion. This is a misstatement of the OIC's position. Further, per Conclusions of Law above, this is an application of the wrong theory of principal-agent law (common law) and entirely ignores the specific statutory authority as provided for in the Insurance Code and as argued by the OIC.

34. Delete entire Conclusion.

35. Delete.

36. Based upon the above Findings of Facts and Conclusions of Law, Chicago is not entitled to summary judgment as a matter of law. Based on the above Findings of Facts and Conclusions of Law, Chicago, as the appointing insurer of Land Title, granting Land Title specific statutory authority to conduct solicitation of title insurance pursuant to RCW 48.17.160 and 48.17.010, specifically, under RCW 48.17.010 as an appointed agent acting on behalf of Chicago, OIC may impute the acts of Land Title in this area to Chicago. Therefore, the OIC may hold Chicago liable for the acts of Land Title for Land Title's alleged violations of the Illegal Inducement Regulations and statutes in its solicitation, on behalf of Chicago, of Chicago's title insurance.

37. Based upon the above Final Findings of Fact and Final Conclusions of Law, Chicago is not entitled as a matter of law to summary judgment herein. Chicago's Motion for Summary Judgment on the issue of imputed liability for the allegedly illegal acts of Land Title in violating the Illegal Inducement Regulations and statutes is denied.

ORDER

IT IS HEREBY ORDERED that the ALJ's Initial Order Granting Chicago Title Insurance Company's Motion for Summary Judgment is not adopted. Chicago Title Insurance Company's Motion for Summary Judgment is **DENIED** on the issue of whether it can be held

responsible for the allegedly illegal acts of Land Title of Kitsap County, Inc., which it has legally appointed as its exclusive title insurance agent in the relevant counties since March 5, 1993. It is determined herein that the OIC can hold Chicago Title Insurance Company responsible for the illegal acts of its legally appointed insurance agent, Land Title, in violating WAC 284-30-800, the Illegal Inducement Regulation and statute. The OIC may take action against Chicago for the illegal acts of Land Title in the manner it has done in its Notice of Hearing and Amended Notice of Hearing herein. This being the decision of the undersigned Review Judge,

IT IS FURTHER ORDERED that the hearing file should be transferred back to the Office of Administrative Hearings for commencement of Phase II of this proceeding as detailed above.

THIS ORDER IS ENTERED at Tumwater, Washington, this 26th day of May, 2009, pursuant to Title 48 RCW and particularly RCW 48.17.010, 48.17.160, 48.17.010 and 48.17.160, Title 34 RCW and regulations applicable thereto.

PATRICIA D. PETERSEN
Review Judge

Declaration of Mailing

I declare under penalty of perjury under the laws of the State of Washington that on the date listed below, I mailed or caused delivery through normal office mailing custom and procedure, a true copy of this document, Summary of Final Findings of Facts, Conclusions of Law and Order on Chicago Title Insurance Company's Motion for Summary Judgment (Phase I of Hearing), to all interested parties at their respective addresses listed on page one of this document.

DATED this 26th day of May, 2009.

Wendy Galloway
WENDY GALLOWAY