STATE OF WASHINGTON FILED
BEFORE THE OFFICE OF THE INSURANCE COMMISSIONER

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IN THE MATTER OF: **STEWART TITLE GUARANTY COMPANY,** **An Authorized Title Insurer.**	**Docket No. 11-0106** Hearings Unit, OIC Patricia Petersen Chief Hearing Officer **OIC Hearing Argument**

1. THE INSURANCE CODE

The Insurance Code has determined as a matter of law, since 1911, the rights and responsibilities of principal and agent in the insurance context. As far back as 1920, a line of cases from the Washington Supreme Court have consistently found that the principle insurer is bound by the acts of its duly appointed agent, including Day v. St Paul Fire and Marine (1920), Miller v. Unified Pacific Casualty(1936) and American Fidelity v. Backstrom (1955). The Court stated in the Day case that " the code expressly provides who shall be agents of the company, and was passed for the purpose of clearly defining the insurance company's duties and liabilities."

Here, Rainier Title was advertising with a producer in violation of the insurance regulations derived from the Insurance Code itself. The advertisement was part of Rainier Title's larger goal of selling, soliciting or negotiating title insurance policies under RCW 48.17.010(15) using its website. As the only appointment Rainier Title held at the relevant time was that from Stewart Title, any advertising for Rainier Title's services was, in effect, a solicitation for Stewart Title insurance policies. Stewart has never claimed that any of Rainer Title's escrow business during the timeframe at issue was performed in a transaction in the absence of an accompanying Stewart Title insurance policy. And in fact, the advertisement that Rainier Title ran on its website that

resulted in the violation stated that Rainier Title was "honored to be selected as the preferred provider of title ***and escrow*** services by Nest Financial, a premier provider of Loan Modification and Short Sale Solutions." Nest Financial is a licensed mortgage broker, a producer of title insurance business as defined in RCW 48.29.010(3)(e).

2. THE UNDERWRITING AGREEMENT

Stewart Title claims that its underwriting agreement can and does modify the principal=agent relationship established by the Insurance Code. They claim that they do not control the marketing or solicitation activities of Rainier Title because the Agreement only permits Rainier Title to "issue title policies". However, a reading of the Agreement contains several means Stewart has of control over Rainier Title's business activities, and nowhere states that a violation of the Insurance Code or the Commissioner's rules renders the agent out of the scope of the agency agreement. One is a right of Stewart to "audit" Rainier Title's "escrow account and the general books of accounts and of all accounts, checks, records, or files pertaining to transactions in which Stewart Policies are or will be issued." Stewart also has the right to have a list of Rainier Title employees that are authorized to countersign Stewart policies. Moreover, Stewart Title retains the right to place a lien on all of Rainier Title's assets if Rainier Title precipitates a financial loss for Stewart due to Rainier Title's fraud or intentional act or omission, or due to negligence. Most importantly, the Agreement allows Stewart to terminate the Agreement if Rainier Title violates the rules or regulations of the Insurance Commissioner. Thus, even under common law agency principles, Rainier Title is under sufficient control of Stewart to constitute an agent-principal relationship.

The supposition that Rainier Title was advertising primarily on its own behalf as an escrow provider does not defeat Stewart Title' responsibility for its regulatory violations. But even in the common law setting, such divergence of interest will not

necessarily defeat the claim that Stewart is liable for Rainier Title's acts. The Supreme Court stated in American Fidelity and Casualty Co. v. Backstrom:

> The rule as to what knowledge had by an agent will bind the principal was stated in *Miller v. United Pac. Cas. Ins. Co.*, 187 Wash. 629, 60 P. (2d) 714, wherein we quoted from 2 Mechem on Agency (2d ed.) 1397, § 1813 as follows:
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> *HN2* "'The law imputes to the principal, and charges him with, all notice or knowledge relating to the subject-matter of the agency which the agent acquires or obtains while acting as such agent and within the scope of his authority. . . Provided, however, that such notice or knowledge will not be imputed: (1) Where it is such as it is the agent's duty not to disclose; (2) Where the agent's relations to the subject-matter are so adverse as to practically destroy the relation of agency; and, (3) Where the person claiming the benefit of the notice, or those whom he represents, colluded with the agent to cheat or defraud the principal.'"

The Court further stated:

> I Restatement of the Law of Agency 627, § 282, defines the meaning of "acting adversely": "The mere fact that the agent's primary interests are not coincident with those of the principal does not prevent the latter from being affected by the knowledge of the agent if the agent is acting for the principal's interests." We do not feel justified, based upon surmise, in destroying the relationship of principal and agent **[**128]** which existed at the time the particular transaction occurred. Appellant (United Pacific Casualty) has failed to **[***13]** sustain the burden of proving that the knowledge of its agent as to ownership of the equipment was not imputed to and binding upon it.

Solicitation, advertising, marketing—no matter what words are used to describe Rainier Title's activities on its own as well as Stewart's behalf—are all part of the statutory definition of the authorized acts of a "title insurance agent," and cannot be limited or erased entirely by the wording in a private contract. In practice, taking Stewart's theory literally to its logical conclusion, under the Agreement, Rainier Title would have to passively wait for a customer to come into the office and request a title insurance policy, because the Agreement does not specifically authorize it to "sell, solicit, or negotiate" title insurance policies on Stewart's behalf, but only to "issue" them. The insurance

code itself provided Rainier Title that authorization the moment Stewart's notice of the appointment was sent to the Commissioner.

3. PUBLIC POLICY

It would be bad public policy to allow what is a clear statutory paradigm to be thrown out so that Stewart Title could always avoid liability for the acts or omissions of its duly appointed agent. An analogy can be drawn by a reading of *Rahman v. State of Washington*, a recent 2011 Supreme Court case. The situation was thus: Mr. Rahman was driving a State car from Olympia to Spokane on State business. He, contrary to State rules, permitted his wife to ride along with him. The two got into a serious accident wherein Mrs. Rahman was injured. She sued the State of Washington. The State said that because Mr. Rahman was violating State instructions at the time of the accident, that it was not liable inasmuch as Mr. Rahman was acting outside the scope of his employment. The doctrine of respondeat superior was discussed by the Court, a well-settled employer-employee principal for determining tort liability. The Court determined that Mr. Rahman was acting in both the State's interest (not deviating or frolicking) as well as his own interest (giving his wife a ride). The Court cited the Poundstone case of 1937 (189 Wash. 494) that points out that the very fact that an employer is in a position to impose workplace rules and standards justifies vicarious liability, even where the employee acts in a forbidden way. The Poundstone Court stated the obvious public policy bases for this standard:

> . . .for the master could always instruct his servant to use ordinary care under all circumstances. The servant's negligence would therefore always be contrary to orders and the nonliability of the master would follow. But such is not the law. The servant is within the scope of his employment when he is engaged in the master's service and furthering the master's business though the particular act is contrary to instructions. (Quoting Smith v. Yellow Cab Co., 173 Wis.33 (1920))

Although we are no explicitly discussing an employer-employee situation here, the analogy is apposite. By agreement, title insurers would always avoid liability for the acts of their agents by requiring them, in their agency agreements, to conform to the laws of the State or be acting outside the scope of their agency. Other insurers, non-title insurers, in Washington state have always known that when one of their agents violates the law, the Company makes the consumer whole because the harm an agent does is imputable to the Company, and they have never posited otherwise. Title Insurers are not exempt from this liability and should be shown that they must conform to the same standards as other insurers in Washington.