

STATE OF WASHINGTON

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OFFICE OF
INSURANCE COMMISSIONER

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BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

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|------------------------------|---|----------------------------|
| In the Matter of: |) | No. 11-0106 |
| |) | |
| STEWART TITLE GUARANTY |) | ORDER ON OIC'S MOTION FOR |
| COMPANY, |) | SUMMARY JUDGMENT AND |
| |) | STEWART TITLE GUARANTY |
| |) | COMPANY'S CROSS MOTION FOR |
| An Authorized Title Insurer. |) | SUMMARY JUDGMENT |
| _____ |) | |

TO: Stephen J. Sirianni, Esq.
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COPY TO: Mike Kreidler, Insurance Commissioner
Michael G. Watson, Chief Deputy Insurance Commissioner
Carol Sureau, Esq., Deputy Commissioner, Legal Affairs Division
Marcia Stickler, Esq., Staff Attorney, Legal Affairs Division
Jim Odiorne, Deputy Commissioner, Company Supervision
Office of the Insurance Commissioner
PO Box 40255
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On June 1, 2011, the Washington State Insurance Commissioner (OIC) issued a Notice of Hearing in this matter, asserting that Stewart Title Insurance Company (Stewart) is liable for Rainier Title, LLC's ("Rainier") violations of WAC 284-29-215(2) committed while Rainier was exclusively an agent for Stewart. Said Notice requested the hearing herein asking the



undersigned to consider the allegations and the sanctions to be imposed upon Stewart pursuant to RCW 48.04.010 and 48.05.185. Subsequently, on August 24, the OIC filed a Motion for Summary Judgment herein; on September 15, Stewart filed Stewart Title Guaranty Company's Opposition to Motion and Cross-Motion for Summary Judgment (with Declaration of Mark Pillette and Declaration of Mary Thomas); on September 22, the OIC filed OIC Response to Stewart Title's Opposition to Motion and Cross-Motion for Summary Judgment; and on September 26 Stewart filed Stewart Title Guaranty Company's Reply in Support of Cross-Motion for Summary Judgment (with Declaration of Dwight Bickel). The OIC asks the undersigned to determine as a matter of law that as the appointing insurer, Stewart is liable for the regulatory violations of its duly appointed agent, Rainier, and that as a result a fine in an amount of no less than \$250 and no more than \$10,000 should be imposed on Stewart in accordance with RCW 48.05.185. Stewart cross-moves for summary judgment on the issue of vicarious liability of Stewart for the acts of Rainier, arguing that regardless of whether Rainier violated any law or regulation, as a matter of law, Stewart is not responsible for that violation and summary judgment should be entered in its favor dismissing this matter.

OIC's Motion

I. The OIC asserts that there are no genuine issues of material fact in this matter because Rainier admitted in its Consent Order with the OIC 1) that its activities constituted "advertising" as contemplated by WAC 284-29-215(2); and 2) that Nest Financial, LLC was a "producer of title insurance business or producer" as also contemplated therein and defined in RCW 48.29.010(3)(e); and that therefore Rainier violated WAC 284-29-215(2). This argument need not be addressed.

II. The OIC also contends that a review of these materials must be found by the undersigned as a matter of fact to constitute "advertising" on behalf of, for, or with a "producer of title insurance business," that Rainier, as a matter of law, therefore violated WAC 284-29-215(2). Further, the OIC contends, because Rainier was acting as a duly appointed title insurance agent of Stewart then Stewart, as a matter of law, is liable for Rainier's acts and therefore also violated WAC 284-29-215(2). Therefore, the OIC asserts, the OIC is entitled to summary judgment that Stewart violated WAC 284-29-215(2).

Stewart's Cross-Motion

I. Stewart asserts that Rainier's admissions in its Consent Order do not bind either it or the undersigned to a finding that Rainier's activities constitute "advertising" as contemplated by WAC 284-29-215(2) or that Nest Financial was a "producer of title insurance business or producer" as contemplated therein and defined in RCW 48.29.010(3)(e). As above, this issue need not be addressed.

II. Stewart also argues that a review of the subject web site materials, together with the Declaration of Dwight Bickel, lead to a finding that there are no genuine issues of material fact in that the facts are clear that 1) the subject web site materials were not “advertising” prohibited by WAC 284-29-215(2); and that 2) Nest Financial was not a “producer of title insurance business or producer” under RCW 48.29.010(3)(e) [in citing RCW 48.29.010(1)(e) presumably Stewart meant to cite RCW 48.29.010(3)(e)], as contemplated by WAC 284-29-215(2), because Nest Financial was not in a position to influence the selection of a title insurer or title insurance agent. For these reasons, Stewart argues, Rainier did not violate WAC 284-29-215(2) and even if Rainier did violate WAC 284-29-215(2) Stewart is not liable for Rainier’s acts. Therefore, Stewart argues, Stewart is entitled to summary judgment in its favor dismissing this matter.

STANDARD OF REVIEW

Either party’s Motion should be granted if, after viewing the pleadings, affidavits and the entire hearing file, and applying all reasonable inferences that may be drawn therefrom in the light most favorable to the nonmoving party, it can be found: I. that there are no genuine issues of material fact; II. that all reasonable persons could reach only one conclusion; and III. that the moving party is entitled to judgment as a matter of law. The undersigned has reviewed and considered each of the pleadings, affidavits, attachments and the entire hearing file, and considered each party’s Motion separately. Because the facts and applicable law are the same, the following analysis and determinations respond to both Motions.

DISCUSSION

- I. Can it be determined on summary judgment that there are no genuine issues of material fact that Rainier, a duly appointed title insurance agent of Stewart, advertised on behalf of, for, or with Nest Financial, a producer of title insurance?

Yes.

WAC 284-29-215(2), the rule at issue in this matter, provides:

(2) ... a title company must not directly, indirectly, by payment to a third-party or otherwise, use any means of communication or media to advertise on behalf of, for or with a producer....”

Stewart and Rainier are both “Title Companies” for the purposes of WAC 284-29-215(2). Although the parties do not dispute this issue, for purposes of WAC 284-29-215(2), “title company” is defined by WAC 284-29-205(13) to mean *either a title insurance company authorized to conduct title insurance business in this state under chapter 48.05 RCW or a title insurance agent defined in RCW 48.17.010(15), or both.* It is undisputed that Stewart is a title

insurance company authorized to conduct title insurance business in Washington under chapter 48.05 RCW and that Rainier is a title insurance agent defined in RCW 48.17.010(16).

Rainier did advertise on behalf of, for or with Nest Financial, LLC as contemplated by WAC 284-29-215(2). RCW 48.17.010(14) defines “solicit” as *attempting to sell insurance or asking or urging a person to apply for a particular kind of insurance from a particular insurer*. Stewart’s argument that the material published by Rainier is not an “advertisement” is recognized, but the weight of the evidence leads to a finding that the materials published by Rainier on its website constitutes one form of solicitation, or advertising. Further, it is undisputed that Rainier and Nest Financial, LLC (“Nest Financial”) conducted this activity together.

Nest Financial is a “producer” as contemplated by WAC 284-29-215(2). It is undisputed that Nest Financial is a mortgage broker. RCW 48.29.010(3)(e) defines “producer of title insurance business” (shortened in that rule to identify producers of title insurance business as “producers”), with these producers defined as being *...real estate agents and brokers, lawyers, mortgagees, mortgage loan brokers, financial institutions, escrow agents, ...* [Emphasis added.] While the undersigned recognizes Stewart’s argument that Nest Financial was perhaps in this situation not in a position to generate title insurance business for Rainier (and Stewart), this argument is not persuasive, particularly given that the definition of “producer” set forth in RCW 48.29.010(3)(e) includes mortgage loan brokers. Nest Financial is a producer of title insurance as defined in WAC 284-29-100(5), which incorporates RCW 48.29.010(3)(e) and 48.29.010(3)(f) and as contemplated by WAC 284-29-215(2).

Rainier is a duly appointed title insurance agent of Stewart. It is undisputed that by virtue of Stewart’s properly filing an Appointment form with the OIC on forms prescribed and furnished by the OIC as required by RCW 48.17.160, during all times pertinent hereto, i.e., March 20, 2009 to July 20, 2010, Rainier was properly appointed by Stewart to act as Stewart’s duly appointed title insurance agent.

Pursuant to RCW 48.17.010(15), *“Title insurance agent” means a business entity licensed under the laws of this state and appointed by an authorized title insurance company to sell, solicit, or negotiate insurance on behalf of the title insurance company.*

II. Having determined that there are no genuine issues of material fact that Rainier advertised on behalf of, for, or with Nest Financial, can it also be determined on summary judgment as a matter of law that Stewart, the appointing insurer, is either liable or not liable for the acts of Rainier, its appointed agent?

Certain legal issues in this matter can be resolved on summary judgment while others cannot.

The OIC asserts that 1) because Stewart appointed Rainier as its duly appointed title insurance agent during all times pertinent hereto, and therefore pursuant to RCW 48.17.010(15) Rainier

ORDER ON MOTION AND
CROSS MOTION FOR SUMMARY
JUDGMENT
No. 11-0106 – Page 5

was authorized to sell, solicit and negotiate insurance on Stewart's behalf; and 2) because Rainier's advertising, with Nest Financial, of the subject material on its website constituted a form of solicitation as contemplated in RCW 48.17.010(15); then 3) it should be found as a matter of law that Stewart is liable for Rainier's acts committed while virtually all of Rainier's title insurance business during the pertinent times was on behalf of underwriter Stewart, and therefore that Stewart is liable for violation of WAC 284-29-215(2) and the penalties imposed thereunder.

Stewart asserts that it is not liable for the acts of Rainier herein based upon its assertions that 1) Rainier is an Underwritten Title Company, which affects Stewart's liability for Rainier's acts; 2) Rainier was not soliciting in the capacity of a title insurance producer on behalf of Stewart, but instead was advertising for Rainier's escrow services or Rainier's other non-title services; 3) Stewart's Title Insurance Underwriting Agreement with Rainier limits Stewart's liability; and 4) the subject advertising does not even mention Stewart, and in fact only approximately 90% of the title insurance policies Rainier sells are Stewart title insurance policies (although Stewart does not specify whether these statistics apply to the time period in question).

First, pursuant to RCW 48.17.010(15), a "title insurance agent" is defined as "...a business entity licensed under the laws of the state and appointed by an authorized title insurance company to sell, solicit, or negotiate insurance on behalf of the title insurance company." Either 1) Rainier was a duly appointed "title insurance agent" of Stewart, which means it is allowed to *sell, solicit, or negotiate insurance* on behalf of Stewart; or 2) Rainier was not a duly appointed title insurance agent of Stewart, which means Rainier cannot *sell, solicit, or negotiate insurance* on behalf of Stewart. It was undisputed and was found above as a matter of fact that Rainier is a duly appointed "title insurance agent" of Stewart pursuant to RCW 48.17.010(15) and as such is authorized to *sell, solicit, or negotiate insurance* on Stewart's behalf as specifically set forth in RCW 48.17.010(15). Consideration is given to Stewart's argument that while Stewart had duly appointed Rainier to act as its "title insurance agent," because Stewart called Rainier an "Underwritten Title Company" Stewart's liability for Rainier's acts is somehow more limited than if Rainier were called an appointed "title insurance agent" under RCW 48.17.010(15). In response, however, there is no such term as an "Underwritten Title Company" in the Insurance Code: Stewart appointed Rainier as its duly appointed "title insurance agent," and whether or not Stewart chooses to call Rainier an "Underwritten Title Company" or call Rainier some other name does not change the nature of Rainier's specific legal identity as a "title insurance agent" authorized and appointed to act on behalf of Rainier in selling and soliciting title insurance on Stewart's behalf.

Second, Stewart asserts that Rainier was advertising in Rainier's capacity as a provider of escrow services and other non-title related services, and therefore Stewart cannot be liable for Rainier's advertising. As a matter of fact, was Rainier only advertising for its own non-title related services? If so, does this relieve Stewart of liability for Rainier's acts? After careful recognition and consideration of Stewart's arguments on this issue, it is here found as a matter of fact that Rainier's advertisement advertised for the package of functions provided by Rainier including a solicitation for the purchase of title insurance as well as for the purchase of

ORDER ON MOTION AND
CROSS MOTION FOR SUMMARY
JUDGMENT
No. 11-0106 -- Page 6

Rainier's other related services such as escrow and other non-title related services. Therefore, because it has been found here that Rainier's advertising constituted a solicitation for title insurance as well as solicitation for Rainier's escrow and other non-title related services, it is not necessary to address the issue of liability of a title insurer where a title insurance agent's advertisement might advertise solely for its own escrow and other non-title related services.

Third, Stewart asserts that the agreement entered into between Stewart and Rainier, called a Title Insurance Underwriting Agreement [Ex. A to Declaration of Mark Pillette in Opposition to OIC's Motion for Summary Judgment] limits Stewart's authority as the principal in the area of solicitation and sales of the Stewart title insurance policies to the extent that it serves to relieve Stewart of liability in this matter. However, as a matter of law, can this insurer and agent, in entering into this private Title Insurance Underwriting Agreement, not only define their rights and privileges between themselves but 1) also alter the rights of third parties not involved in and unaware of the Agreement-e.g. customers-and 2) also alter the ability of the OIC to hold the insurer liable for the acts of the agent to the extent that it cannot be concluded that Stewart is liable for the acts of Rainier? This issue cannot be determined as a matter of law on summary judgment.

Fourth, Stewart asserts that it would be unreasonable to hold Stewart liable for Rainier's subject advertising because Rainier's advertisement does not even identify Stewart. It is undisputed, and here found as a matter of fact, that the subject advertisement does not include a reference to Stewart. While Stewart asserts that, in addition, in fact only approximately 90% of the policies sold by Rainier were Stewart title insurance policies (although Stewart does not assert that this 90% figure was during the pertinent period), the OIC states that Rainier issued title insurance "virtually exclusively" for Stewart during the pertinent period. There is insufficient information at this time to make a factual finding regarding how exclusive an agent Rainier was during the pertinent time. If "virtually all" of the title policies Rainier sold were those of Stewart (regardless of the fact, found here, that the Title Insurance Underwriting Agreement between Stewart and Rainier also includes the word "nonexclusive" in the title), does this effective exclusivity affect a determination as a matter of law that Stewart is or is not liable for Rainier's acts? This issue cannot be determined on summary judgment.

In summary, it has been concluded above that there is no genuine issue of material fact as to the acts of Rainier. It has also been concluded above that as a matter of law, first, the fact that Stewart calls Rainier an "Underwritten Title Company" does not alter Stewart's liability as appointing insurer for the acts of its appointed title insurance agent. Second, because it has been concluded that Rainier was advertising not only for its non-title services but also for the purchase of title insurance, we need not address the legal consequence should it have been found that Rainier was only advertising for its non-title functions. However, third, it cannot be determined as a matter of law on summary judgment that by entering into their existing Title Insurance Underwriting Agreement this insurer and appointed insurance agent are able not only to define their rights and privileges between themselves but also limit the authority of the Insurance Commissioner to the extent that the Insurance Commissioner cannot hold Stewart liable for the acts of Rainier. Fourth, it cannot be determined as a matter of law on summary

judgment that while Rainier's advertisement does not mention Stewart, if Rainier sold Stewart's policies "virtually exclusively" during the pertinent period, this fact supports a legal conclusion that Stewart is therefore liable for Rainier's acts. Based upon the undersigned's determination that it cannot be found that all reasonable persons can reach only one single conclusion as to these two latter legal issues identified as the third and fourth above, it cannot be concluded as a matter of law on summary judgment that Stewart is liable for the acts of Rainier herein or that either the OIC or Stewart are entitled to judgment as a matter of law.

ORDER

Based upon the above activity,

IT IS HEREBY ORDERED,

That that there are no genuine issues of material fact that Rainier Title, LLC, a duly appointed title insurance agent of Stewart Title Guaranty Company, advertised on behalf of, for, or with Nest Financial, LLC.

IT IS FURTHER ORDERED that based upon the above determination that it has not been found that all reasonable persons can reach only one single conclusion as to the third and fourth legal issues identified above, it cannot be concluded as a matter of law on summary judgment that Stewart is liable for the acts of Rainier or that either the OIC or Stewart are entitled to judgment as a matter of law. Therefore, both the OIC's and Stewart's Motions for Summary Judgment on the issue of Stewart's liability for Rainier's acts are denied.

IT IS FURTHER ORDERED that the adjudicative proceeding in this matter shall commence as previously scheduled on November 8, 2011, at 10:00 a.m., Pacific Standard Time, in the Office of the Insurance Commissioner, 5000 Capitol Boulevard, Tumwater, Washington 98501. The proceeding shall not include further argument on the facts found above.

ORDER ON MOTION AND
CROSS MOTION FOR SUMMARY
JUDGMENT

No. 11-0106 – Page 8

ENTERED AT TUMWATER, WASHINGTON, this 24th day of October, 2011, pursuant to
RCW 48.04, Title 34 RCW and applicable regulations.



PATRICIA D. PETERSEN, J.D.

Presiding Officer

Chief Hearing Officer

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, a true copy of this document to the following people at their addresses listed above: Stephen J. Sirianni, Esq., Mike Kreidler, Michael G. Watson, Carol Sureau, Esq., Marcia Stickler, Esq., and Jim Odiorne.

DATED this 24th day of October, 2011.



KELLY A. CAIRNS