

FILED

STATE OF WASHINGTON
BEFORE THE OFFICE OF THE INSURANCE COMMISSIONER
2011 NOV 19 AM 9:00

In the Matter of:

STEWART TITLE GUARANTY
COMPANY,

An Authorized Title Insurer.

Docket No. 11-0106

STEWART TITLE GUARANTY
COMPANY'S HEARING
MEMORANDUM

Hearing Panel, OIC
Patricia D. Halpin
Chief Clerk

A. WITNESSES

Stewart Title will call two witnesses at the hearing to demonstrate that Stewart had no right to, nor did it in fact, exercise any control over Rainier Title's advertising, marketing or website activities. Mark Pillette, Stewart Title's Agency Services Division Manager, serves as liaison between the agencies and Stewart's headquarters, and was the Stewart employee with the most significant contact with Rainier Title. Dwight Bickel was corporate counsel for Rainier Title during the relevant time. Both will testify as to the limited nature of the Agency Agreement and the limited control Stewart exerted over Rainier Title. If needed, Stewart will ask Mary Thomas, home office legal department, to testify by phone.

B. SUMMARY OF ARGUMENT

In order to hold a principal liable for the wrongful acts of its agent, there must be a showing that the principal had the right to control the particular wrongful activity. *Kroshus v. Koury*, 30 Wn.App. 258, 633 P.2d 909 (1981). Stewart will demonstrate that its control over its independent, policy-issuing agent Rainier Title was limited to activities that directly affected the issuance of title insurance policies. It had no right under the Agency Agreement to, nor did it, exert any control over Rainier's advertising, marketing, or website activities.

Stewart's witnesses will testify as to the highly competitive nature of the title insurance business, and that Stewart Title actually competes with Rainier for

business. For that reason, Rainier is very guarded with its proprietary sales information. Mr. Bickel will testify that Rainier would not enter into an Agency Agreement that allows an underwriter/competitor access to this information.

Stewart's control under the Agency Agreement is limited to matters affecting the issuance of title policies. It does not reach general business overhead items like marketing. For example, ¶ 3(e) of the Agreement allows Stewart to audit for *title problems*. That is because Stewart is largely responsible for title-related losses. Stewart's power to audit for title problems is not a general power of audit. The power is limited to items for which Stewart is liable under the title policies it underwrites.

It is obvious why Stewart reserves the right to audit regarding title policies on which it is at risk. But ¶ 3(e) also reserves to Stewart the right the audit escrow files. This right, as well, is designed to minimize Stewart's exposure on the policies it underwrites. When money is put into escrow in connection with a closing, it is often intended to pay off a lien or other monetary encumbrance that has to be cleared prior to closing so that the insured lender or purchaser can obtain clear title. If those funds are stolen or misapplied, there will be insufficient funds in escrow to clear the relevant title defects—defects which Stewart will have agreed to insure against in the belief that such defects would be paid off with escrow funds. Thus, the auditing of escrow accounts avoids liability for the underwriter on the title policies issued in its name. This is completely unrelated to Agency advertising and Agency marketing activities.

Many plaintiffs who have been harmed by an agent's handling of an escrow account have claimed the underwriter is liable for the agent's misdeeds. These claims are made even though the standard Agency clause states that the Agency is not an agent for escrow purposes, *e.g.*, the Agency Agreement, ¶ 4(f). Courts agree that the underwriter's right to audit escrow accounts is *not* the sort of control that would render

the underwriter vicariously liable for the escrow agent's mishandling of the escrow. As the court in *Proctor v. Metropolitan Money Store*, 579 F.Supp.2d 724, 739 (D.Md. 2008), explained: "[G]eneral requirements concerning the basic structure of escrow accounts, the need for monthly reconciliations, access for audits, and indemnification, although indicia of some level of control by the title insurers, are primarily geared toward minimizing risk of a loss under the title insurance policy"

The court notes that the escrow agent "wears two hats, only one of which—his or her role in the provision of title insurance—involves a general agency relationship with the title insurance company sufficient to establish vicarious liability." *Id.* at 739. See also *Business Bank of St. Louis v. Old Republic National Title*, 322 S.W.2d 548, 554 (Mo. App. 2010) (limited right to audit escrow files "in no way equals the requisite level of control for an agency relationship"); *Fidelity National Title Ins. Co. v. Mussman*, 930 N.E.2d 1160, 1166 (Ind. App. 2010) (clause permitting underwriter to audit escrow accounts did not render it liable for misdeeds of escrow agent).

The right to audit an Agency's escrow account does not make the underwriter vicariously liable for the Agency's escrow defalcations. This is true even when, as in the above cases, the audit is of the very Agency activity giving rise to the wrongdoing. It follows that the right to audit escrow accounts, which are *unrelated* to Agency marketing missteps, as in this case, creates no right to control the relevant Agency marketing activities.

C. THE RECORD

Stewart has submitted, and this tribunal has considered, the following:

- (1) Stewart's Opposition to Motion and Cross-Motion for Summary Judgment (September 15, 2011);
- (2) Declaration of Dwight Bickel, with Exhibits A and B (September 21, 2011);

- (3) Declaration of Mark Pillette, with Exhibit A (September 14, 2011);
- (4) Declaration of Mary Thomas (September 16, 2011);
- (5) Stewart's Reply in Support of Cross-Motion for Summary Judgment (September 23, 2011);
- (6) Letter from Stephen J. Sirianni (October 27, 2011);
- (7) Letter from Stephen J. Sirianni (November 1, 2011);
- (8) Stewart's Hearing Memorandum (November 14, 2011); and
- (9) Live testimony of Dwight Bickel and Mark Pillette (November 15, 2011).

DATED: November 15, 2011.

SIRIANNI YOUTZ SPOONEMORE



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