

FILED

STATE OF WASHINGTON
BEFORE THE OFFICE OF THE INSURANCE COMMISSIONER

26 W
2011 SEP 21 A 9:50

In the Matter of:

STEWART TITLE GUARANTY
COMPANY,

An Authorized Title Insurer.

Docket No. 11-0106

STEWART TITLE GUARANTY
COMPANY'S REPLY IN SUPPORT
OF CROSS-MOTION FOR
SUMMARY JUDGMENT

Hearing Unit, DIC
Public Affairs, Sen
Office of Insurance Services

I. NO FACT ISSUES.

The link to Nest on the Rainier web site has not been available since July 22, 2010, before Stewart was notified of the alleged violation. Before filing its Response, Stewart's counsel requested copy of the link from OIC's counsel, who could not locate it. *Exh. A.* On September 16, 2011, the day after Stewart's Response was filed, OIC's counsel provided a copy of that web page.

With this Reply we submit the Declaration of Dwight Bickel, corporate counsel for Rainier Title LLC. He testifies that he believes the pages provided by the OIC are accurate views of the web site. Thus, there is no remaining fact issue regarding the contents of the allegedly offending link, and this matter can be decided on summary judgment without hearing or argument.

As a matter of law, Rainier Title did not violate WAC 284-29-215. But regardless of whether Rainier violated the regulation, as a matter of law, Stewart Title is not liable for Rainier's actions because they are outside of the scope of its agency agreement with Rainier.

II. STEWART IS NOT BOUND BY RAINIER'S CONSENT ORDER.

The OIC argues that Stewart did not request a hearing before Rainier signed the Consent Order, so Stewart is now bound by Rainier's "admission." The OIC is incorrect.

First, there is no evidence that Stewart intended to be bound, or that

Rainier was authorized by Stewart to bind it, to an alleged admission of a regulatory violation. In fact, Stewart and the OIC could not reach agreement because Stewart *refused* to admit vicarious liability.

Second, Stewart lacked standing to demand a hearing in the OIC's action against Rainier. That action was not against Stewart. The OIC's actions were brought separately, at different times. The OIC never asked Stewart to consent to the Rainier order. Stewart had neither the right nor the duty to demand a hearing in proceedings to which it was not a party.

Third, Stewart's decision to negotiate rather than litigate (*i.e.*, demand a hearing) cannot be used as an admission of liability. The fact of attempted settlement is not admissible to show liability. ER 408. Stewart was trying to reach an agreement with the OIC that would *avoid* a hearing.

III. THE OIC HAS FAILED TO DEMONSTRATE THAT RAINIER VIOLATED WAC 284-29-215.

The OIC has now provided a copy of the link of which it complains. But the OIC fails to identify how the link constitutes "advertising," or how Nest Financial qualifies as a "provider" under WAC 284-29 215(2).

Mr. Bickel explains that in the last few years, real estate brokers have expected escrow agents to negotiate with lenders when a real estate closing involved short sale. Rainier was uncomfortable providing such services, but needed some means of meeting needs and expectations of the parties to transactions involving short sales. Its relationship with Nest Financial arose out of this dilemma. Bickel Decl. ¶¶ 5, 6.

Nest Financial, as a short sale negotiator, was not an "insurance producer" under RCW 48.29.010(1)(e) because it was not in a position to influence the selection of a title insurer or title insurance agent. By the time a short sale negotiator such as Nest was involved in the sale process, a purchase and sale agreement that designated a title

insurer had already been signed and a title commitment had already been issued. *Nest did not influence the selection of the title agent or insurer because the title agent or insurer had already been designated by the time Nest became involved.* Bickel Decl. ¶ 7.

Moreover, the OIC has made no showing that the web page constituted advertising prohibited by WAC 284-29-215(2). The web page was unrelated to “advertising real property for sale or lease,” advertising or promoting the listings of real property for sale,” or “advertising in connection with promotion, sale or encumbrance of real property.” See Bickel Decl. ¶ 8.

IV. THE OIC HAS CITED NO AUTHORITY MAKING STEWART TITLE LIABLE FOR RAINIER TITLE’S ALLEGED VIOLATION.

The OIC cites only two sections of the Insurance Code to support its claim that Stewart Title is vicariously liable for Rainier Title’s alleged advertising violation. Those are RCW 48.17.010(15), which defines “title insurance agent,” and RCW 48.17.160, which prohibits a title company from acting as an agent of a title insurer unless it becomes “appointed” in accordance with the insurance commissioner’s procedures. Neither of these statutes makes the title insurer *per se* liable for a UTC’s regulatory misdeeds that are outside the scope of the agency.

The OIC argues that as long as an entity has been “appointed” as an agent, no further inquiry need be made as to whether the agent’s wrongful act was within the scope of its agency. It cites *Reynolds v. Pacific Marine Ins. Co.*, 105 Wash. 666, 178 Pac. 811 (1919), and *Day v. St. Paul Fire & Marine Ins. Co.*, 111 Wash. 49, 189 Pac. 95 (1920). In both, the issue was whether an alleged agent’s knowledge regarding facts pertinent to the issuance of an insurance policy could be imputed to the insurer. Both are inapposite.

First, just as this Court should decline to find vicarious liability, those courts declined to impute the “agent’s” knowledge to the insurer. *Second*, even if an

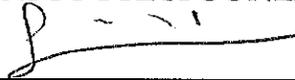
agency relationship had existed, the "agent's" knowledge would have been imputable only because it was directly related to the risk the insurer was underwriting. In our case, Rainier's activity (providing the link) had nothing to do with the risks to be assumed by the title insurer.

A UTC's knowledge relating to representations made in connection with the issuance of a Stewart title policy may well be imputed to Stewart. The issue here, however, is whether Stewart is responsible for a page of Rainier's website that informed a viewer about an entity that assisted with negotiating short sales, but that provided no information about, made no representation regarding, and was unrelated to the issuance of any title insurance policy. As explained by Rainier's counsel, Dwight Bickel, Rainier's relationship with Nest Financial was an offshoot of its *escrow* business, not its title business. Bickel Decl. ¶¶ 5, 6. The relationship between Rainier and Nest had nothing to do with the issuance of title policies underwritten by Stewart.

The OIC can cite to no authority that make a title insurer liable for the advertising missteps of its agent that are outside the scope of the agency agreement. Summary judgment should be entered in Stewart Title's favor.

DATED: September 23, 2011.

SIRIANNI YOUTZ SPOONEMORE



Stephen J. Sirianni (WSBA #6957)
999 Third Avenue, Suite 3650, Seattle, WA 98104
T: 206.223.0303 • F: 206.223.0246 • ssirianni@syllaw.com
Attorneys for Stewart Title Guaranty Co.

Ann Merryfield

From: Stickler, Marcia (OIC) [MarciaS@OIC.WA.GOV]
Sent: Tuesday, September 13, 2011 11:04 AM
To: Ann Merryfield
Subject: RE: Complaint vs. Rainier Title, LLC

I wish I did, but I don't. Rainier did not deny the link and will likely testify (if it comes to that) that indeed it did place the link on its website. Obviously, it is long gone from Rainier's website.

From: Ann Merryfield [mailto:Ann@sylaw.com]
Sent: Tuesday, September 13, 2011 10:55 AM
To: Stickler, Marcia (OIC)
Cc: Steve Sirianni
Subject: RE: Complaint vs. Rainier Title, LLC

Thank you Marcia.

Do you also have a copy of the actual link to Nest Financial from the Rainier Title website?

Ann Merryfield

From: Stickler, Marcia (OIC) [mailto:MarciaS@OIC.WA.GOV]
Sent: Tuesday, September 13, 2011 10:43 AM
To: Ann Merryfield
Subject: Complaint vs. Rainier Title, LLC

Attached is a pdf with the original complaint that we received anonymously. It contained a website operated by a real estate agent, Marsha Cunningham, that provided a link to Rainier Title. We ultimately determined that Rainier Title was not in violation since it did not authorize Ms. Cunningham to place the link on her website. However, in reviewing Rainier's website, we noted that it provided a link to Nest Financial, a producer of title insurance business. The contents of the Nest Financial advertisement is also attached. The info is from a view of the website on July 20, 2010. It has since been removed. Rainier paid a fine of \$500 for the violation of WAC 284-29-215. I hope this helps.

EXHIBIT A

RECEIVED

SEP 26 2011

FILED

STATE OF WASHINGTON
BEFORE THE OFFICE OF THE INSURANCE COMMISSIONER
INSURANCE COMMISSIONER
LEGAL AFFAIRS DIVISION

2011 SEP 27 A 9:51
26 KAM

IN THE MATTER OF:

**STEWART TITLE GUARANTY
COMPANY,**

An Authorized Title Insurer.

Docket No. 11-0106

Hearings Unit, DIC
Patricia D. Petersen

DECLARATION OF DWIGHT BICKEL

I declare, under penalty of perjury and in accordance with the laws of the State of Washington:

1. I am Dwight A. Bickel. I have personal knowledge of the facts below.
2. I have been the corporate counsel for Rainier Title LLC ("Rainier") since May 27, 2009, to the present. I am licensed as an attorney in the State of Washington.
3. Rainier maintains a website, the contents and form of which change frequently.

I believe Exhibits A and B reflect accurate views of Rainier's website as it existed beginning soon after September, 28, 2009, through July 22, 2010.

4. Exhibit A shows the home page of www.RainierTitle.com. It shows a number of tabs that when clicked upon, presented information or resources to viewers. One of the tabs at that time was called "short sale." If a viewer clicked on the "short sale" tab, he or she was taken to a separate page of Rainier's website, shown upon Exhibit B. At the bottom of the "short sale" page was a "Click Here" link following the words, "To Get Started:". By clicking, the viewer activated a hyperlink to the website of Nest Financial, LLC. Rainier had no control or supervision over the form or contents of the Nest Financial website.

5. Beginning in 2008, many property owners in our area found that they were “under water,” i.e., they owed more on their property than the property was worth. In order for proposed sales of these properties to close, someone would have to negotiate with the lenders to accept a short payoff. Many real estate brokers assumed that burden, but most expected the escrow agent to provide that assistance. In 2009, most of Rainier’s competitor title and escrow companies did provide someone in-house to negotiate on behalf of the seller to obtain short payoff approvals allowing the escrow to be able to close the sale. Rainier, however, was very uncomfortable with allowing its escrow employees to serve in the role of a short sale negotiator. As a competitive necessity, Rainier was required to provide its “short sale solution” on its website to satisfy the expectation of real estate broker customers.

6. Nest Financial LLC was in the business of serving as a short sale negotiator. Nest Financial discussed with Rainier that its need for specialized escrow services required the commitment of an escrow company to provide specially trained employees and procedures. Nest Financial designated Rainier as its preferred provider of escrow services due only to Rainier’s ability to provide the requested escrow services. Rainier received no compensation from Nest Financial other than escrow fees. Rainier did not provide a discounted escrow fee for Nest Financial. Rainier often added a surcharge for unusual and additional escrow services. Nest Financial did not request for Rainier to provide a hyperlink on Rainier’s website.

7. I did not believe in 2010, and still do not believe, that Nest Financial, LLC was a “producer” of title insurance business as defined in RCW 48.29.010(e) and WAC 284-29-205(8). That is because by the time a short sale negotiator like Nest Financial became involved in a transaction, the parties to the transaction had already designated the title insurance company in the purchase and sale agreement and a title insurance commitment had been issued.

8. I did not believe in 2010, and still do not believe, that the inclusion of the name of Nest Financial and the hyperlink to Nest Financial's website contained on the Rainier website was a prohibited advertisement on behalf of, for, or with a producer as defined by WAC 284-29-215(2). That is because Rainier's website was self-promotion, which is totally dissimilar to "advertising real property for sale or lease," "advertising or promoting the listings of real property for sale," or "advertising in connection with promotion, sale or encumbrance of real property" described by that regulation.

9. Nest Financial acted as a short sale negotiator in many transactions where the parties designated a different escrow services provider. Nest Financial acted as a short sale negotiator in many transactions where the parties designated a different title insurance provider. Rainier acted as the escrow closing agent for parties to short sale transactions where Nest Financial was hired as the short sale negotiator and a competitor title insurance company insured the purchaser and new lender.

10. On July 22, 2010, Marcia Stickler, an attorney with the Washington Insurance Commissioner "OIC," called to state that she believed the Rainier website contained information that was not in compliance with the applicable regulations because of the Nest Financial link on Rainier's website. Although I told her I disagreed that the link was a violation of any law or regulation, Rainier immediately removed the link to avoid a dispute with the OIC. Since that day, Rainier's home page eliminated the "short sale" tab, and the page shown as Exhibit B has been removed completely.

11. Rainier entered into a Consent Order that states a conclusion of law that by advertising with Nest Financial, Rainier violated WAC 284-29-215(2). The OIC required Rainier to enter into the Consent Order to avoid alternate proceedings that were stated to include suspension or termination of Rainier's license as a title agent. Rainier signed that Consent Order despite its disagreement with the conclusion, based upon the advice of outside counsel retained to advise Rainier and represent its interests in discussions with OIC. The decision to enter into the Consent Order to settle the dispute with a \$500 fine was based upon economic and practical considerations that it was better for Rainier to enter into that agreement and preserve a good relationship with the OIC, rather than to incur the costs and potentially higher consequences that could result from litigation with OIC.

12. Rainier's escrow business is separate from its title business. Approximately 34% of the revenue Rainier receives is from our escrow business. Stewart Title receives no revenue based on Rainier escrow business. Rainier's escrow activities are outside the scope of the underwriting agreement with Stewart Title. In fact, Stewart Title exercises no control over the escrow activities of Rainier. In accordance with the underwriting agreement, Rainier pays 10% of the premiums to Stewart Title for the Stewart Title insurance policies that Rainier issues. That 10% remission is the only payment Stewart receives from Rainier's business activities.

13. No person at Rainier informed, or sought approval from, Stewart Title Guaranty Company before Rainier published its website including a link to short sale information and a hyperlink to Nest Financial. There would have been no reason to involve Stewart Title, since Rainier's escrow business, the content of Rainier's website, and Rainier's escrow marketing activities are outside the scope of the underwriting agreement between Stewart Title and Rainier.

14. No person at Rainier sought approval from Stewart Title Guaranty Company before Rainier signed the Consent Order. Rainier hired its own legal representation in this matter. Stewart Title was not involved with Rainier's decision to sign the Consent Order. There would have been no reason to involve Stewart Title, since Rainier's escrow business, the content of Rainier's website and Rainier's escrow marketing activities are outside the scope of the underwriting agreement between Stewart Title and Rainier.

DATED September 21, 2011, at 3:35 PM

A handwritten signature in black ink, appearing to read "Dwight A. Bickel", is written over a horizontal line.

Dwight A. Bickel

WSBA 12293

EXHIBIT A

100% Locally Owned and Operated
We provide high-quality title insurance, property information, and escrow services in King, Pierce, and Snohomish Counties

[Home](#) [Orders](#) [Industry Tools](#) [Client Tools](#) [About](#) [Rates](#) [Short Sale](#) [First Time Home Buyer](#)

Site Search



Place Orders

- [Order Title & Escrow](#)
- [Order Customer Service](#)
- [Order Supplemental](#)
- [Access Existing Orders](#)

Welcome to Rainier Title

We protect your rights of ownership by providing the highest quality title insurance, property information and escrow services in King, Pierce & Snohomish Counties.

We are well known in the local Real Estate Community and understand local customs and procedures. You can depend on Rainier Title to provide you with consistent, accurate and timely service for all of your title and escrow needs.

[Place Your Orders Online...](#)

Personalized Support

Our employees are trained to offer friendly, personalized support for you and your customers.

Superior Service

Our various products are delivered from centralized locations, enabling us to provide you with consistently superior service.

[RAINIER TITLE HOMEPAGE](#) [ONLINE ORDERS](#) [INDUSTRY TOOLS](#) [USEFUL RESOURCES](#) [ABOUT RAINIER TITLE](#)
[RATE SHEETS](#) [SHORT SALE](#) [FIRST TIME HOME BUYER](#)

© 2007-08, Rainier Title, LLC - all rights reserved
[View our Privacy Policy](#)

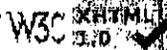


EXHIBIT B



Short Sales

Choose a professional team to handle the details for a successful and timely closing!

Rainier Title is 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.

What are the facts?

How can we help?

- Real Estate Agents DO receive commissions on short sales.
- While Short Sales can be difficult, the reality is that much of our current inventory of properties is distressed in one way or another.
- A Foreclosure is far more damaging to a homeowner's credit than a Short Sale. A homeowner who successfully negotiates and closes a Short Sale will be eligible for a Fannie Mae backed mortgage after only 2 years.
- In a properly managed Short Sale, the home is sold at a price that should be close to market value, and in most cases, that reduces or eliminates the bank's right to a deficiency from the borrower.
- Banks prefer Short Sales to Foreclosure as they help mitigate their losses.
- It takes a professional team to successfully close a short sale. The professional skills and experience of a listing agent, an outside negotiator, and an escrow company, each knowing the right steps and how to coordinate with each other and with the seller, are needed to turn your listing into a closed sale.
- Nest has expertise in the banking & mortgage industry, with proven success in securing Loan Modifications & Short Sales for their clients. They are licensed mortgage brokers.
- Nest will do everything possible to protect Real Estate Agent commissions. Their processing fee can either be paid by the bank, the listing agent, or shared.
- Nest will do all the required paperwork and manage all package submittals for the agent and the seller, keeping everyone informed along the way.
- Nest will use its skills and experience throughout the process to negotiate on behalf of the homeowner to get a waiver of the deficiency by the bank.
- To Get Started: [Click Here](#)



W3C
7-20-10