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BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

In the Matter of:)	No. 11-0106
)	
STEWART TITLE GUARANTY)	FINDINGS OF FACT,
COMPANY,)	CONCLUSIONS OF LAW
)	AND FINAL ORDER
)	
An Authorized Title Insurer.)	
_____)	

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Pursuant to RCW 34.05.434, 34.05.461, 48.04.010 and WAC 10-08-210, and after notice to all interested parties and persons the above-entitled matter came on regularly for hearing before the Washington State Insurance Commissioner commencing at 10:00 a.m. on November 15, 2011. All persons to be affected by the above-entitled matter were given the right to be present at such hearing during the giving of testimony, and had reasonable opportunity to inspect all documentary evidence. The Insurance Commissioner appeared pro se, by and through Marcia Stickler, Esq., Staff Attorney in his Legal Affairs Division. Stewart Title Guaranty Company



was represented by its attorney Stephen J. Sirianni, Esq. of Sirianni Youtz Spoonmore. By agreement of the parties, the Final Order in this proceeding was delayed until 1) *Chicago Title Insurance Company v. Washington State Office of the Insurance Commissioner*, No. 87215-5 (August 1, 2013) was heard and decided by the Washington State Supreme Court; and 2) the parties were allowed to submit briefs, responses and reply briefs after entry of the decision in *Chicago Title* regarding whether or not that decision was binding on the decision herein.

NATURE OF PROCEEDING

The purpose of the hearing was to take testimony and evidence and hear arguments as to whether the OIC can impose sanctions against Stewart Title Guaranty Company for violations of WAC 284-29-215(2) (illegal inducements in title insurance) committed by Rainier Title, LLC, while Rainier was working as a title insurance agent on behalf of Stewart in King, Snohomish and Pierce Counties. On June 1, 2011, the Washington State Insurance Commissioner issued a Notice of Hearing in this matter, asking the undersigned to consider the allegations and the sanctions to be imposed upon Stewart Title Guaranty Company pursuant to RCW 48.04.010 and 48.05.185. By mutual request of both the Insurance Commissioner and Stewart, the undersigned waited to enter her Final Order herein until the Washington State Supreme Court had entered its decision in *Chicago Title Insurance Company v. Washington State Office of the Insurance Commissioner*, No. 87215-5 (August 1, 2013); and 2) until, following entry of the Supreme Court's decision, the parties had had the opportunity to file written arguments for her consideration concerning whether or not the Supreme Court's decision in *Chicago Title* was binding on the decision in this matter.

EARLIER SUMMARY JUDGMENT ORDER

On August 24, 2011, the OIC filed a Motion for Summary Judgment, wherein the Washington State Insurance Commissioner asked the undersigned to determine as a matter of law that as the appointing insurer, Stewart Title Guaranty Company is liable for the regulatory violations of its duly appointed agent, Rainier Title Company, LLC, and that as a result a fine should be imposed on Stewart in accordance with RCW 48.05.185. On September 14, Stewart filed its Cross-Motion for Summary Judgment, asking the undersigned to determine as a matter of law that regardless of whether Rainier committed any violations, Stewart is not responsible for those violations and summary judgment should be entered in Stewart's favor dismissing this matter. On October 24, the undersigned entered her Order on the Insurance Commissioner's Motion for Summary Judgment and Stewart's Cross-Motion for Summary Judgment. This Order included the final decisions on both parties' Motions for Summary Judgment, and determined that there were 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, LLC, a mortgage loan broker. However, summary judgment was not granted on the issue of Stewart's liability for Rainier's actions because 1) on summary judgment it could not be determined as a matter of law whether, by entering into their existing Title Insurance Underwriting Agreement, Stewart and Rainier are legally able not only (a) to define their rights and privileges between themselves but also (b) to limit the authority of the Insurance Commissioner to the extent that the Insurance Commissioner

cannot hold Stewart liable for the acts of Rainier. Also, 2) the parties differed on the factual question of whether during the pertinent period Rainier represented Stewart exclusively or not, which might be relevant in deciding whether - even though Rainier's advertisement does not mention Stewart specifically - if Rainier sold Stewart's policies "exclusively" then Stewart is liable for Rainier's acts. [This factual question was subsequently resolved by Stewart which advised that, contrary to its previous Declaration, during the pertinent period Rainier did represent Stewart exclusively and this fact is set forth in Finding of Fact No. 6 below.]

FINDINGS OF FACT

Having considered the evidence and arguments presented at the hearing, and the documents on file herein, the undersigned presiding officer designated to hear and determine this matter finds as follows:

1. The hearing was duly and properly convened and all substantive and procedural requirements under the laws of the state of Washington have been satisfied. This Order is entered pursuant to Title 48 RCW; Title 34 RCW; and regulations applicable thereto.
2. Stewart Title Guaranty Company ("Stewart") is a publicly traded Texas domestic title insurer which is licensed to enter into contracts of title insurance ("title insurance policies," "title policies" or "title insurance contracts") in 49 states including Washington. [Declaration of Mark Pillette, Stewart's Agency Services Division Manager.]
3. It is undisputed that, in Washington and elsewhere, in order to solicit and/or sell title insurance policies of a title insurance company ("title insurer"), an entity 1) must be licensed by the Washington State Insurance Commissioner ("OIC") as a "title insurance agent" under RCW 48.17.060; and 2) must be appointed by a title insurance company to act on its behalf under RCW 48.17.160. [OIC Motion for Summary Judgment.]
4. Nationally, Stewart has two ways that it solicits consumers to purchase Stewart's title insurance policies:
 - 1) Stewart solicits and sells Stewart policies directly to consumers from its own offices, issuing its policies directly to consumers. Stewart hires its own staff for these "direct service" offices which handle the entire process from solicitation and negotiation to actual sales of Stewart policies. In Washington, Stewart operates its "direct service" offices in 14 counties, where it hires its own staff and conducts its own marketing and sales efforts to support sales of its title policies. [Declaration of Pillette.]
 - 2) Stewart also appoints title insurance agents to, it argues, just "sell" Stewart policies to consumers. In Washington, Stewart has appointed 18 title insurance agents located in 18 counties. [Declaration of Pillette.] However, instead of calling these title insurance agents "title insurance agents" or even "agents," which is their only correct identification, Stewart consistently calls them "Underwritten Title Companies" or "UTCs" which are misleading to consumers and others. In fact, just as with any other

agents, these “UTCs” are not licensed to insure title or any other risks and there is not, and has never been, any such license, designation or other type of authorization of any kind called an “Underwritten Title Company” or “UTC” -- or even mention of such an entity -- in the Insurance Code or even informally in the OIC’s practices and procedures which allows an “Underwritten Title Company” or “UTC” to conduct any title insurance business either on behalf of an insurer or somehow independently. The only way an entity can engage in activities involved in selling title insurance is in its capacity as a licensed and appointed title insurance agent. [OIC Motion.] Although it is of little consequence to the decision herein, there is insufficient evidence to support Stewart’s argument that in its private Title Insurance Underwriting Agreement between itself and Rainier (see Finding of Fact No. 6 below) it only authorized Rainier to “sell” its Stewart policies and did not authorize Rainier to do anything else. Indeed, in its Agreement with Stewart, Rainier also agrees to *conduct its business in a sound and ethical manner and shall issue title policies according to ... the rules and instructions given by [Stewart]....* Likewise, Stewart, as the title insurer and acknowledged underwriter of its title policies agrees to *Furnish Rainier ... with rules and instructions involving matters of importance to the business of title insurance. Promptly determine questions submitted by Rainier regarding the issuance of [Stewart’s] title policies.* Further, the parties agree that *Stewart shall defend at its own expense and pay all losses under its title policies* [Emphasis added.] [Title Insurance Underwriting Agreement, Ex. A to Declaration of Pillette.]

5. It is undisputed that during all times pertinent hereto, Rainier Title, LLC (“Rainier”) was a properly licensed title insurance agency under RCW 48.17.060. It is also undisputed that on or about December 17, 2008, Stewart properly appointed Rainier to act as a title insurance agent on Stewart’s behalf under RCW 48.17.160, and has so been appointed continuously since that date. [OIC Motion, Ex. 1.]

6. On December 3, 2008, Stewart and Rainier entered into a “Title Insurance Underwriting Agreement.” [Declaration of Pillette, Ex. A, Title Insurance Underwriting Agreement (“Agreement”).] Elsewhere, agreements between an insurer and its appointed agent are normally called “Agency Agreements.” Although this Agreement was technically not exclusive, during the pertinent times the only appointment Rainier had from any insurer was its appointment to act as an agent on behalf of Stewart. Therefore, contrary to Stewart’s Declaration, it is now undisputed that during the pertinent period 100% of the policies Rainier sold in King, Snohomish and Pierce Counties were Stewart’s title policies. [Stewart Letter to the undersigned filed November 1, 2011.] In addition, once again, although the Agreement was technically not exclusive, the only title agent Stewart had appointed in King, Snohomish and Pierce Counties was Rainier. (While not relevant to the decision herein, Stewart’s undisputed Declaration stated that it does contract with two other title agents in Pierce County but there is insufficient evidence to conclude that any Stewart policies were sold through these agents during the pertinent period.) Therefore, Rainier only represented Stewart in these counties, and Stewart sold its policies only through its direct offices and through Rainier in these counties [Declaration of Pillette; Stewart Letter dated November 1, 2011.] This Agreement was entered into, and the activities of Rainier acting as an agent on behalf of Stewart, were done for the mutual benefit of both Stewart and Rainier.

7. In King, Snohomish and Pierce Counties, Rainier, as a title agent acting on behalf of only Stewart, is the interface between Stewart and potential buyers of Stewart policies. In its attempt to sell Stewart title policies, Rainier is involved from initial solicitation (to both potential consumers and third parties who can guide potential consumers to purchase Stewart title policies) to sale of the Stewart title policies. To the mutual benefit of both Stewart and Rainier, Rainier conducts the following activities involved in the sales of Stewart title policies:

- Advertises and markets Stewart's policies to the public;
- Explains Stewart's policies to consumers and advises them as to what these policies cover and do not cover;
- Answers any other questions consumers may have about Stewart's policies;
- Quotes the costs for Stewart's policies to consumers (in accordance with rates which Stewart as the title insurer is required to have filed with the OIC prior to use);
- Collects the proper premium funds from the consumer purchasing Stewart's policies;
- Perhaps researches and prepares the actual policies for issuance by Stewart to the consumer; and
- Fills in the appropriate information on title policy, binder, commitment and endorsement forms specifically furnished to Rainier by Stewart for this purpose.

While Stewart and Rainier seem to loosely refer to the term "issue" as meaning preparing and delivering the title policy to the consumer, in fact the title policy is only issued by Stewart. The policy is not actually "issued" by Rainier. The two parties to the title insurance contract are Stewart and the covered person(s). Stewart's agent, Rainier, is not a party to the insurance contract: should there be a covered impediment in the title to the subject property in a real estate transaction, it is the insurer, Stewart (not Rainier) which is responsible to provide the defense and/or other coverage promised in the title policy to the named covered persons (i.e., the purchasers of land and/or lender) who are the other party to the title contract. In order to be effective, the policy must bear the signatures of authorized officers of Stewart (which may be preprinted on the forms Stewart provides to Rainier) which binds Stewart to the title insurance contract. (In Stewart's discretion, the policy may require a "countersignature" of another individual, e.g., an officer of Rainier, in order to become effective, but it is Stewart who as the issuer – i.e., the title insurer, and one of the two parties to the insurance contract – is required to execute the policy. While Stewart's agent, Rainier, on Stewart's behalf, might actually stamp the policy with Stewart's signature as the title insurer issuing the Stewart policy, and might take other actions to prepare, collect premium funds for, and deliver the policy, Stewart's agent, Rainier, is still neither a party to the contract nor a principal. Stewart's agent, Rainier, is authorized to conduct these activities only because Stewart has appointed Rainier to act on Stewart's behalf as a title agent.

8. It is undisputed by the parties, and Rainier has admitted [OIC Motion, Ex. 2], that between on or about March 20, 2009 and July 1, 2010, Rainier published material on its website, www.rainiertitle.com. After a review of this published material, it is here found that this material constituted representations about a product or any person who sells or otherwise makes available such a product when the representation invites, or otherwise solicits a person to inquire about or purchase such a product. While the advertising did not mention Stewart specifically,

the advertising was part of Rainier's larger goal of selling, soliciting or negotiating title insurance policies as it was authorized to do under RCW 48.17.010(15).¹ For example, the subject advertising stated that Rainier was "honored to be selected as the preferred provider of title and escrow services by Nest Financial,", and because Rainier was only appointed to sell Stewart title policies and not those of any other title insurer (and indeed as above it is agreed that 100% of the policies Rainier sold during this period were Stewart's policies), any advertising for Rainier's services was, in effect, Rainier's solicitation for Stewart's title insurance policies. [Additionally, it was undisputed that Rainier's escrow services during the period were never performed in a transaction without also an accompanying Stewart policy.] While Stewart's arguments have been carefully considered, it cannot be found that Rainier was only advertising for its own escrow or other non-title services; Rainier was also advertising for the sale of Stewart policies. Rather, for the above reasons, in the advertising activities which are the subject of the OIC's disciplinary action herein, it is here found that Rainier, as a duly appointed title insurance agent acting on behalf of Stewart, was advertising for the sale of Stewart's title insurance policies.

9. It is undisputed that Rainier published the subject advertising with and on behalf of Nest Financial, LLC, a mortgage broker. Contrary to Stewart's argument that Nest Financial, LLC, was not in a position to create title insurance business for Rainier and Stewart, the weight of the evidence is that in its activities as a mortgage broker Nest Financial, LLC, is indeed in a position to create title insurance business for both 1) Rainier, as the agent for Stewart, who is soliciting for the sale of Stewart's title insurance policies, and 2) Stewart, which is the issuer and underwriter of Stewart title policies.

10. At the request of both the OIC and Stewart, the undersigned waited to consider her decision and enter a final order in this matter until 1) the Washington State Supreme Court ("Supreme Court") had heard and decided *Chicago Title Insurance Company v. Washington State Office of the Insurance Commissioner*, No. 87215-5 ("*Chicago Title*"); and 2) the parties were allowed to submit briefs, responses and reply briefs after entry of the Supreme Court's decision in *Chicago Title* regarding whether or not the facts in this matter and in *Chicago Title* are sufficiently different to dictate a different decision than that reached by the Supreme Court in *Chicago Title*. For this reason, after the Supreme Court entered its decision in *Chicago Title* on August 1, 2013, Stewart filed its Stewart Title Guaranty Company's Supplemental Memorandum Regarding the Supreme Court's Decision, and the OIC filed its OIC Response to Stewart Title's Supplemental Memorandum. Thereafter, Stewart filed its Reply Regarding the Supreme Court's Decision. The undersigned has now considered those post-hearing briefs, including case law and other authorities cited therein, and the entire hearing file and - although this consideration includes to some extent an evaluation of facts as well - has included her consideration of the impact of the Supreme Court's decision in *Chicago Title* in the Conclusions of Law section below.

¹ RCW 48.17.010 was subsequently amended in 2010 and the relevant provision is now found in RCW 48.17.010(16).

CONCLUSIONS OF LAW

Based upon the above Findings of Facts, it is hereby concluded,

1. Pursuant to Title 48 RCW, the OIC is authorized to regulate the business of insurance and enforce the insurance laws of Washington State in order to protect the public. Further, pursuant to Title 48 RCW and particularly 48.04 RCW, the OIC has jurisdiction over this matter, and has properly delegated to the undersigned the responsibility to conduct these proceedings and to enter the final decision herein.

2. At all times pertinent hereto, Stewart was properly authorized by the OIC, under Title 48 RCW, to transact title insurance business as a foreign title insurer in Washington State. Further, Stewart, as an authorized insurer, is subject to Title 48 RCW, the Insurance Code of Washington, and Chapter 284 WAC, the regulations implementing the Insurance Code.

3. Prior to December 17, 2008, Rainier properly applied to the OIC for, and the OIC granted, a license to Rainier to act as a title insurance agent in Washington as required by and under the terms and conditions of RCW 48.17.170. Further, on or about December 17, 2008, as permitted by RCW 48.17.160, Stewart properly requested, and the OIC approved, Stewart's appointment of Rainier to act as a title insurance agent on Stewart's behalf under the terms and conditions of RCW 48.17.160.

4. RCW 48.29.210 provides:

(1) a title insurer, title insurance agent, ... shall not, directly or indirectly, give any fee, kickback, or other thing of value to any person as an inducement ... for placing business, referring business, or causing title insurance business to be given to either the title insurer, or title insurance agent, or both.

(2) A title insurer, title insurance agent, ... shall not, directly or indirectly, give anything of value to any person in a position to refer or influence the referral of title insurance business to either the title insurance company or title insurance agent, or both, ... except as permitted under rules adopted by the commissioner.

In implementation of this statute, the OIC adopted WAC 284-29-200 through -265. While just seven sections of Chapter 284-29 WAC are devoted to other aspects of title insurance business, a full 14 sections of this title are devoted to implementation of RCW 48.29.210. WAC 284-29-200, which sets forth standards for acceptable giving of things of value by a title insurer or agent to any person in a position to refer or influence the referral of title business to the title insurer, provides, in pertinent part:

RCW 48.29.210 is the rule governing the giving of things of value in the title insurance business. As specifically relevant herein, WAC 284-29-215(2) provides that: *(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* [Emphasis added.]

- For purposes of WAC 284-29-215(2), 284-29-205(13) defines "title company" as *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 and is hereby concluded that both Stewart and Rainier are "title companies" within the meaning of WAC 284-29-215(2). It is also undisputed that "advertising" is one activity involved in "solicitation" as it has been broadly defined by the Supreme Court and longstanding case law.
- For purposes of WAC 284-29-215(2), WAC 284-29-205 defines "producer of title insurance business" and "producer" as specifically including "mortgage loan brokers" [incorporated by reference to RCW 48.29.010(3)(e)] *and any person in a position to refer or influence the referral of title business to the title company*. As found above, Nest Financial, LLC is a mortgage broker, and therefore comes within the definition of "producer" and "producer of title insurance business" within the meaning of WAC 284-29-215(2). Further, it is undisputed that Rainier and Nest Financial, LLC, conducted this advertising together. Therefore, their activities constituted "advertising ... with a producer," within the meaning of WAC 284-29-215(2).
- For purposes of WAC 284-29-215(2), WAC 284-29-205(1) defines "advertising" as *a representation about any product, service, ... or any person who makes, ... sells, or otherwise makes available such a product, ... when the representation: ... (c) Invites, advises, recommends, or otherwise solicits a person to participate in, inquire about, purchase, ... such a product,* As found above, the material which Rainier and Nest Financial, LLC published on Rainier's website constituted advertising by a title company for and with a producer of title business. As above, while the advertisement may not specifically identify Stewart, during all pertinent times Rainier was only authorized to sell - and only sold - Stewart's title policies. Therefore, it is hereby concluded that the subject material published by Rainier with Nest Financial, LLC, on Rainier's website constituted "advertising" on behalf of Stewart within the meaning of WAC 284-29-215(2).

Therefore, it is hereby concluded, and Rainier has admitted, that the subject advertisement published by Rainier and Nest Financial, LLC, from on or about March 20, 2009 until on or about July 1, 2010, constituted *advertising by a title company with a producer of title business*, in violation of WAC 284-29-215(2). [OIC's Motion, Ex. 2.]

Statutory Argument re Stewart's vicarious liability for acts of its agent.

5. The OIC argues that because Rainier was a duly authorized title insurance agent of Stewart, authorized under RCW 48.17.010(16) *to sell, solicit, or negotiate insurance on behalf of the title insurance company* [Stewart], Stewart is liable for Rainier's above stated violations of WAC 284-29-215(2) in its advertising for Stewart's title policies. The OIC asserts that it is the terms of the Insurance Code itself, and not just under the common law of principal-agent, which determines the rights and responsibilities of principal and agent in the insurance context, citing relevant cases which hold that the principal insurer is bound by the acts of its duly appointed agents because, they maintain, the Insurance Code expressly provides who shall be the insurers

and who shall be the agents, and was written to clearly define those activities which the appointed agent can perform in acting on behalf of its appointing insurer.

6. In opposition to the OIC, however, Stewart argues that there is no statutory authority which allows the OIC to hold the title insurer liable for the “independent acts” of an agent – that by merely appointing a title insurance agent the title insurer does not automatically become responsible for every regulatory violation of that agent. [Stewart’s Cross-Motion for Summary Judgment, pgs. 11-13; Stewart’s Reply, pgs. 3-4.] Further, Stewart argues, the statute does not make the underwriter *per se* liable for the regulatory violations of its agent, that liability can arise only through a consideration of common law agency principles: if an agent’s acts are within the scope of its agency with its principal, Stewart argues, the principal may be liable for the agent’s violations but if the agent’s actions are outside the scope of the agency then the principal has no vicarious liability.

7. Stewart points out, correctly, that at the time the violations of WAC 284-29-215(2) occurred in *Chicago Title*, RCW 48.17.010 read as follows:

“Agent” means any person appointed by an insurer to solicit applications for insurance on its behalf. ...” [Emphasis added.]

Stewart further points out, correctly, that by the time the violations of WAC 284-29-215(2) occurred in this case, RCW 48.17.010 had been amended (the relevant portion being RCW 48.17.010 (15)) to read:

(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. [Emphasis added.]

Just as here, *Chicago Title* involved a private Agreement between a title insurer (Chicago) and its appointed title agent; involved Chicago’s agent’s marketing activities which were determined to be a violation of the illegal inducement laws; and the title insurer arguing that its private Agreement with its agent rendered it, Chicago, not liable for its agent’s violations because Chicago did not give its agent the authority to “market” Chicago’s policies. Here, however, Stewart argues that the Washington Supreme Court’s decision in *Chicago Title* is not binding because, under RCW 48.17.010 before it was amended, a title agent’s authority to “*solicit*” by definition included the authority to “market,” particularly where, as in *Chicago*, Chicago’s agent was its exclusive agent and Chicago did not market directly itself and therefore Chicago did not compete with its agent (in other words, if Chicago’s agent did not “market” for Chicago’s policies then no policies would be sold). Here, Stewart argues, because the RCW 48.17.010 was amended to define title insurance agents as entities licensed by the OIC and appointed by a title insurer to *sell, solicit, or negotiate insurance on behalf of the title insurance company*, Stewart could pick and choose whether to authorize its agent to “*solicit*” and/or to “*negotiate*” and/or to “*sell*.” Stewart argues that it chose – in its private Agreement with Rainier – to only authorize Rainier to “*sell*” its policies and not to “*solicit*” or “*negotiate*” its policies (and gave up control over Rainier’s advertising for Stewart’s policies). [Stewart’s Motion, pgs. 13-16.] Therefore,

Stewart argues, what Rainier was doing when it committed the subject violations was “soliciting” (which as discussed in Conclusion of Law No. 4 above includes marketing) which was outside the scope of its agency (as defined in its private Agreement with Rainier) and so Stewart is not liable for Rainier’s violations. (While not directly relevant herein, in the private Agreement Stewart also limits its control over many of Rainier’s other activities in soliciting and selling Stewart’s policies; under this same theory, Stewart argues that it is also not liable for Rainier’s acts in these areas either.) Stewart argues that, as to all activities relative to Stewart’s title business aside from “selling” Rainier was acting as an “*independent, policy-issuing agent*” (which has no definition or license in the Insurance Code) for which Stewart was not responsible to the regulator. Presumably, under this same theory Rainier would not be responsible to the OIC for Rainier’s violations of any other laws - although acting on behalf of Stewart, and acting for the mutual benefit of both Rainier and Stewart - so long as they did not pertain to what Stewart’s private Agreement might define as “selling.” Presumably also, under this same theory, Stewart would argue that it is not responsible to innocent consumers or other third parties for activities of Rainier which it chose to define as being outside strictly “selling.”

8. As the OIC points out and has been found in Finding of Fact No. 4 above, there is insufficient proof that Stewart only authorized Rainier to “sell” Stewart’s policies and did not authorize Stewart to “solicit” or “negotiate” these policies. However, whether or not Stewart only gave Rainier the authority, in its private Agreement, to “sell” title policies on Stewart’s behalf does not affect Stewart’s liability to the OIC for the acts of its agent: when the Legislature amended RCW 48.17 in 2007 (effective July 1, 2009) it deleted some portions of that statute and added many portions. One section which was affected was, as above, RCW 48.17.010, which changed the definition of a title insurance agent from one who is *appointed by an insurer to solicit applications for insurance on its behalf* (and effectuate insurance contracts and collect premiums if authorized to do so) to one who is *appointed by an authorized title insurance company to sell, solicit, or negotiate insurance on behalf of the title insurance company...* For Stewart to prevail in its argument, one must conclude, as Stewart argues, that this amendment was intended to allow insurers to pick and choose as to what activities it will allow its agents to perform: is the agent only authorized to solicit? Only authorized to negotiate? Only authorized to sell? Solicit and negotiate but not sell? Sell and solicit but not negotiate? Sell and negotiate but not solicit? Then once the insurer has decided which of these activities to authorize its agent to perform, said authorization must be included in a private agreement between the insurer and the agent. After consideration of this amendment and Stewart’s argument, it cannot be concluded that the Legislature intended this to be the result. This amendment, found in Chapter 117, Laws of 2007, seems to be a large, perhaps wholesale adoption of some uniform possibly national association of insurance commissioners proposed statute which primarily concerns changing the name of “insurance agents” to “insurance producers” for all insurance agents except title insurance agents, and then changing the term “insurance agents” to “insurance producers” throughout that portion of the Insurance Code where the term “insurance agent” had previously been used along with addressing licensing procedure, and other matters. Nothing appears in the legislative history to show that the Legislature meant this change to be of any legal consequence at all. It cannot be concluded that the Legislature intended this to allow title insurers to privately pick and choose as to which of these three fairly indistinguishable, and certainly overlapping, activities they authorize their agents to perform, with the unfair result this would create. As the OIC argues (and it is noted that the OIC was a sponsor of this amendment

and due weight was given to the OIC's interpretation of this amendment) the term "solicit" was changed to "solicit, negotiate or sell" only clarified the component parts of what an insurance transaction had already generally consisted. [OIC's Response to Stewart's Supplemental Memorandum.] Finally, as the OIC argues, the attempt by Stewart to break down and carve off the scope of an appointment of a title insurance agent between "soliciting," "negotiating" and "selling" makes no sense in light of the entirety of the Supreme Court's opinion: the ability to "sell" insurance without the concurrent ability to "solicit," as broadly defined by the Court would be meaningless, would render enforcement nearly impossible and would cause harm to unsuspecting consumers and other third parties who are unaware of such technical ploys by both the title insurer and title agent, who are both – in the end – benefiting from the title insurance transaction.

Common Law Argument re Stewart's vicarious liability for acts of its agent.

9. In addition, and more importantly herein, the Supreme Court in *Chicago Title* summarized its ruling in the first paragraph of its decision as follows:

Land Title [Chicago's appointed agent] violated the anti-inducement laws [as here, RCW 48.29.210 and regulations]. We hold that CTIC [Chicago] is responsible for Land Title's regulatory violations, pursuant to statutory and common-law theories of agency. When the statute forbids the insurer or its agent from certain conduct, it means that the insurer may not do indirectly – through its agent – what it may not do directly. [Emphasis added.]

Thus, the Supreme Court specifically held that the title insurer was liable for the regulatory violations of its appointed title agent using both the statutory analysis discussed above and the common law theory of liability, reaffirming the applicability and result of both theories throughout its decision:

[Chicago's statutory argument] overlooks the fact that solicitation is inherently part of Land Title's authority to sell title insurance. In any event, CTIC's argument founders on our decision in Pagni, where we held that "an insurance company is bound by all acts, contracts, or representations of its agent, whether general or special, which are within the scope of his real or apparent authority, notwithstanding they are in violation of private instructions or limitations upon his authority, of which the person dealing with him, acting in good faith, has neither actual nor constructive knowledge". Pagni v. N.Y. Life Ins. Co., 173 Wash. 322, 349-50, 23 P.2d 6 (1933) (emphasis added) (quoting 32 C.J. Sec. 140, at 1063).

The Supreme Court affirms its opinion that common law principals would render a title insurer liable for acts of its agent, independent of a statute:

But even without the statute, CTIC would be vicariously liable at common law. When CTIC gave Land Title the authority to sell its insurance, CTIC also gave

Land Title implied authority to perform other acts necessary to the sale of insurance and to act in accordance with industry norms. Solicitation was necessary to effectuate Land title's authority to sell CTIC insurance under the Agreement, and violating the anti-inducement provisions was customary in the title insurance industry.

The Supreme Court reaffirms its above opinion many times throughout its decision. Here, on pg. 14, it states:

Independent of the statute [i.e. RCW 48.17.010], Land Title had the authority to solicit insurance for CTIC and to bind CTIC by its unlawful solicitations. This court has recognized that a principal's grant of authority may come with implied authority to perform other acts that are necessary steps to achieving the principal's objective or that are customary for agents performing the work. Citing its own holdings, the Supreme Court notes: We have held that a real estate agent "employed for the sole purpose of procuring a purchase for real property ..." nevertheless had the authority to exhibit the property and make representations about its area and boundary lines, because negotiation would be impossible otherwise. ... "Authority to perform particular services for principal carries with it the implied authority to perform the usual and necessary acts essential to carry out the authorized services....actual authority to perform certain services on a principal's behalf results in implied authority to perform the usual and necessary acts associated with the authorized services."

10. In addition, the Supreme Court cites *Third Restatements of Agency (Second)* and *(Third)* as support for that portion of its Decision based upon application of common law principles:

The Second Restatement defines "inherent agency power," which arises not from the principal's authorization to perform the acts at issue, nor from apparent authority or estoppel, "but solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent. Restatement (Second of agency Sec. 8A (1958). ... [it] would be unfair for an enterprise to have the benefit of the work of its agents without making it responsible to some extent for their excesses and failures to act carefully. Id. cmt. b. As the Second Restatement goes on to explain,

[a] general agent for a disclosed ... principal subjects his principal to liability for acts done on his account which usually accompany or are incidental to transactions which the agent is authorized to conduct if, although they are forbidden by the principal, the other party reasonably believes that the agent is authorized to do them and has no notice that he is not so authorized.

11. Therefore, the Supreme Court concludes,

Land Title is authorized to solicit for CTIC under both statute and common law.

No significant factual differences between *Chicago Title* and this case.

12. The Supreme Court opinion in *Chicago Title* contains sufficient similar facts and reasoning to support its application to this case. The few facts that differ in this case do not justify a decision different than that reached by the Supreme Court in *Chicago Title*. The fact that Stewart's direct operations theoretically competed with Rainier is irrelevant to whether Stewart is vicariously liable for the violations of its appointed title agent. Nor is it important that, as such, Stewart was kept from Rainier's marketing secrets even if this had been found to be the case. That Rainier provided the advertisement and link for free is also irrelevant: the problematic value was to Nest Financial and need not have been a cost to Rainier. Nor does the number of violations, nor the length of the agency relationship between the title insurer and agent make any legal difference between the decision in *Chicago Title* and this case. Nor indeed does the fact that in *Chicago Title*, its agent was an exclusive agent for Chicago: while it was found in this case that Stewart's agent was also an exclusive agent for Stewart by virtue of the fact that it was actually only appointed to act as an agent for Stewart and in that respect was quite similar to the relationship between Chicago and Land Title, even if Rainier represented other title insurers this fact cannot be presumed to alter the application of statutory and common law principals in determining Stewart's vicarious liability for Rainier's acts. As to Stewart's argument that in its private Agreement it gave up its right to control Rainier, again the Supreme Court's decision in *Chicago Title* governs:

Having found statutory and implied authority, we need not reach the alternative test of whether CTIC had the right to control Land Title.

13. While Stewart's arguments have been carefully made and presented, and the undersigned has carefully considered these arguments, it is not reasonable that Stewart can appoint Rainier to represent it as its duly appointed title agent under RCW 48.17.010(15), but then - in a private Agreement between Stewart and Rainier - privately refuse to authorize Rainier to do anything but "sell" Stewart's policies on Stewart's behalf, transferring all control over solicitation and negotiation and presumably all other activities to Rainier as an "*independent policy-issuing agent*" to the effect that Stewart is no longer liable to the OIC for violations of Rainier committed in the conduct of any activity that is not "selling." Pursuant to well established case law cited by the OIC which dates back to the adoption of the Insurance Code in 1911, given the authority given to title insurance agents who are appointed by title insurance companies under the Insurance Code; and, in addition, under common law principal-agent theory, Stewart cannot shield itself from liability to the OIC for its agent's advertising violations by privately transferring control and responsibility for advertising for Stewart policies to its title agent in a private Agreement between the two of them.

14. Based upon careful review and consideration of the written and oral arguments of the parties including the recent decision of the Washington State Supreme Court in *Chicago Title* cited and discussed at length above, all other case law and other authorities cited in the pleadings of the parties, all exhibits admitted during the hearing, and the entire hearing file, for the above reasons, it is hereby concluded that Stewart Guaranty Title Association is liable to the OIC for

the regulatory violations of RCW 48.29.210 and WAC 284-29-200 committed by its duly appointed title insurance agent, Rainier Title Company, LLC.

15. It is further concluded that it is reasonable that a \$10,000 fine pursuant to RCW 48.05.485 should be imposed on Stewart for Rainier's violation of RCW 48.29.210 and WAC 284-29-200, the illegal inducement statute and regulation. This fine is consistent with applicable rules governing penalties for these types of violations.

ORDER

On the basis of the foregoing Findings of Facts and Conclusions of Law,

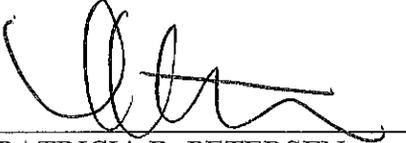
IT IS HEREBY ORDERED that Stewart Title Guaranty Company, an authorized title insurance company, which has duly appointed Rainier Title Company, LLC, to act on Stewart's behalf as its licensed title insurance agent as contemplated by RCW 48.17.010 and 48.17.160, is liable to the OIC for the regulatory violation committed by Rainier Title Company, LLC, in the course of Rainier Title Company, LLC's marketing activities conducted on behalf of Stewart Title Guaranty Company;

IT IS FURTHER ORDERED that in its advertising and marketing activities on behalf of Stewart Title Guaranty Company during the period from on or about March 20, 2009 to July 1, 2010, Rainier Title, LLC, advertised with a producer of title business and in so doing violated RCW 48.29.210 and WAC 284-29-200, the illegal inducement statute and regulation, and that Stewart Title Guaranty Company is liable for those violations;

IT IS FURTHER ORDERED that a fine is imposed on Stewart Title Guaranty Company in the amount of \$10,000 pursuant to RCW 48.05.185 for the violation of RCW 48.29.210 and WAC 284-29-200, the illegal inducement statute and regulation, committed by its duly appointed title insurance agent Rainier Title, LLC;

IT IS FURTHER ORDERED that said fine shall be paid within 10 business days of the date of this Order to the Office of the Insurance Commissioner, by mailing payment to P.O. Box 40255, Olympia, Washington 98504-0255, or delivering to 5000 Capitol Boulevard, Tumwater, Washington 98501. Should it become necessary to take further action to collect this fine from Stewart Title Guaranty Company, the Insurance Commissioner may seek enforcement of this Order from the Thurston County Superior Court pursuant to RCW 48.02.080.

ENTERED AT TUMWATER, WASHINGTON, this 13th day of December, 2013, pursuant to Title 48 RCW and specifically RCW 48.04 and Title 34 RCW and regulations applicable thereto.



PATRICIA D. PETERSEN
Chief Presiding Officer

Pursuant to RCW 34.05.461(3), the parties are advised that they may seek reconsideration of this order by filing a request for reconsideration under RCW 34.05.470 with the undersigned within 10 days of the date of service (date of mailing) of this order. Further, the parties are advised that, pursuant to RCW 34.05.514 and 34.05.542, this order may be appealed to Superior Court by, within 30 days after date of service (date of mailing) of this order, 1) filing a petition in the Superior Court, at the petitioner's option, for (a) Thurston County or (b) the county of the petitioner's residence or principal place of business; and 2) delivery of a copy of the petition to the Office of the Insurance Commissioner; and 3) depositing copies of the petition upon all other parties of record and the Office of the Attorney General.

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, James T. Odiome, Esq., William R. Michels, Marcia Stickler, Esq., and AnnaLisa Gellermann, Esq.

DATED this 16th day of December, 2013.



KELLY A. CAIRNS