FILED

STATE OF WASHINGTON
BEFORE THE OFFICE OF THE INSURANCE COMMISSIONER

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In the Matter of:	Docket No. 11-0106
STEWART TITLE GUARANTY COMPANY,	STEWART TITLE GUARANTY COMPANY'S SUPPLEMENTAL MEMORANDUM REGARDING THE SUPREME COURT'S DECISION
An Authorized Title Insurer.	

Hearings Unit, OIC
Received
Chief Hearing Officer

A. OVERVIEW

The hearing on this matter took place on November 15, 2011. On February 29, 2012, before Your Honor ruled, the Court of Appeals, Division II, held that a title insurance underwriter was not vicariously liable for the regulatory misdeeds of an independent underwritten title company ("UTC"). *Chicago Title Ins. Co. v. Washington State Office of the Insurance Commissioner,* 166 Wn. App. 844 (2012). Your Honor requested input as to the effect of that opinion. In response, Stewart Title Guaranty Company ("Stewart Title") submitted a Supplemental Memorandum explaining why its case was ***stronger*** than Chicago Title's case.

Unlike Chicago Title, Stewart Title conducts business, through its own offices and under its own name, in the same counties where Rainier Title conducts business. In short, Stewart Title and Rainier Title compete. Chicago Title's UTC Land Title, unlike Rainier Title, was Chicago Title's exclusive agent. Chicago Title and Land Title did not compete. As we argued in our Supplemental Memorandum, this distinction would only have strengthened the underwriter's position in the then-pending litigation. Stewart Title's Suppl. Mem. at 4-6.

On August 1, 2013, the Washington Supreme Court reversed Division II in *Chicago Title Ins. Co. v. Washington State Office of the Insurance Commissioner,* 2013 Wash. LEXIS 615 ("Supreme Court Case"). Crucial to its decision was the very fact that differentiates that case from ours. What tipped the decision in the Supreme Court Case

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was that Chicago Title only did business through its UTC, Land Title, in the relevant counties. This fact is absent here. Thus, our case is materially stronger than the Supreme Court Case.

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In our Supplemental Memorandum, we also noted that the amendment to RCW 48.17.010, which became effective after Land Title's activities but before Rainier Title posted the link in question, made no difference to the Court of Appeals. That Court determined that the original statute did not answer the vicarious liability question. Using that Court's reasoning, the amendment would have been equally unhelpful. The Court of Appeals' opinion turned on its common law analysis.

The Supreme Court, however, concluded that the original statute was dispositive. That statute may be fatal as to Land Title's alleged "wining and dining" of producers. The amendment, however, suggests a different outcome here, where the alleged misconduct is an isolated internet posting that could not have resulted in any business for Rainier Title, and where there was no requirement to issue a Stewart Title policy with every escrow transaction.

B. THE SUPREME COURT'S COMMON LAW AGENCY ANALYSIS DEPENDED ON FACTS NOT PRESENT HERE.

The Supreme Court held that Land Title was "implicitly authorized to solicit applications for insurance as a necessary act in executing its authority to issue and effectuate insurance for [Chicago Title]." Supreme Court Case at 18. In drawing this conclusion, the Court reasoned: "[Chicago Title] carried out no direct operations in those counties where Land Title was employed to sell its insurance. If [Chicago Title] was not advertising in those areas, and Land Title could not advertise for title insurance, then no one would purchase [Chicago Title] insurance from Land Title." *Id.*

There is no such implied authority in our case. Stewart Title has direct operations that compete with Rainier Title. If no one purchased Stewart Title policies from Rainier Title, Stewart Title would continue to sell policies through its direct operations, from which it receives the entire premium. The logic supporting a finding of "implicit authorization" in the Supreme Court Case is not present here.

The Supreme Court also held that Land Title was Chicago Title's common law general agent with implied agency power to bind Chicago Title by its unlawful solicitations. The Court identified several facts, none of which are present here, that supported that holding:

- "Land Title and [Chicago Title] were involved in a long-standing relationship; the [agency] Agreement had been in force since 1992." Supreme Court Case at 19. However, the agency agreement between Stewart Title and Rainier Title had been in effect for less than one year when the alleged violation began.

- "Their relationship was exclusive." *Id.* However, the relationship between Rainier Title and Stewart Title was not exclusive.

- "[T]he insurer conducted no operations in those counties where Land Title sold [Chicago Title] insurance policies." *Id.* However, Stewart Title directly sold policies in those counties, directly competing with Rainier Title. Stewart Title takes full regulatory responsibility for the marketing actions of its direct operations, over which it has full control. But it has no control over competing UTCs such as Rainier Title. Bickel and Pillette Testimony.

- "Land Title created business for [Chicago Title] every time it did business with *anyone* ... . Land Title's escrow services were sold only in conjunction with [Chicago Title] title insurance [policies]. Thus, every one of Land Title's customers ultimately walked away with a [Chicago Title] title insurance policy ... ." *Id.* (emphasis in original). However, not every escrow transaction or title service performed by Rainier Title resulted in a sale for Stewart Title. Bickel and Pillette Testimony, Bickel Decl., ¶ 9.

- "As far as these four counties [Kitsap, Clallam, Jefferson, and Mason] were concerned, Land Title was an integrated part of [Chicago Title's] operations." Supreme Court Case at 20. Rainier Title's operations were never an "integrated part" of Stewart Title's operations in King, Snohomish, Pierce, and Kitsap counties, where Stewart Title had also directly operated long before it established a relationship with Rainier Title. Dwight Bickel explained that because they are competitors, Rainier Title would not give Stewart Title access to important aspects of its operation.

Unlike the facts in the Supreme Court Case, the facts here do not support the conclusion that Rainier Title was Stewart Title's "general agent with implied agency powers" to market on behalf of Stewart Title.

C. THE SUPREME COURT CASE INVOLVED VIOLATIONS SUBSTANTIALLY DIFFERENT THAN THE SINGLE VIOLATION HERE.

Front and center in the Supreme Court Case were the results of the OIC's investigation. It concluded that "wining and dining" industry middlemen to gain referrals had been "widespread and pervasive." *See* Supreme Court Case at 4-6. Chicago Title agreed that Land Title had repeatedly violated the anti-inducement laws by spending thousands of dollars for the benefit of middlemen. The OIC approached Chicago Title with a consent order which, among other things, would have required Chicago Title to track expenditures of, and perform semi-annual audits of, Land Title. *Id.* at 7.

These were illegal inducements that OIC claimed Chicago Title "would have discovered" if it had inspected Land Title's records. *Id.* at 11. The Supreme Court concluded that because Chicago Title was aware of the pervasiveness of unlawful inducements in the industry, it "should have foreseen Land Title's unlawful inducements." *Id.* at 20. As support for its decision, the Supreme Court cited the lack of evidence that Chicago Title exercised its right to examine Land Title's records or to "remind Land Title of its obligation to obey the anti-inducement laws." *Id.* at 21.

Our case is very different. The single alleged violation here bears no similarity to the repeated violations at issue in the Supreme Court Case. The only violation here is the single instance of posting a link on Rainier Title's website. There is no cost associated with such a posting. ***No amount of examining Rainier Title's books and records would have revealed any "marketing expense" for this posting.***

Nor was Rainier Title's conduct the type of flagrant violation that concerned the OIC when it launched its investigation. Dwight Bickel, Rainier Title's former corporate counsel, stated in his declaration and in live testimony that he did not believe the posting was "advertising" as defined in the regulation. Moreover, he did not believe that Nest Financial was a "producer," since it, as a short-sale specialist, became involved in the transaction after: (a) the purchase and sale agreement was signed; and (b) the title company was already selected. Thus, Nest Financial was not in a position to refer any business to Rainier Title.

The OIC and ultimately Your Honor disagreed with Mr. Bickel. But his position was reasonable. Moreover, Your Honor's October 24, 2011 Order recognized Stewart Title's argument that "Nest Financial was perhaps in this situation not in a position to generate title insurance business for Rainier (and Stewart)." Order at 4.

Stewart Title was not in a position to police Rainier Title's misinterpretation of the regulation. No amount of reminding Rainier Title of its "obligation to obey the anti-inducement laws" would have avoided this violation, since Rainier Title in good faith believed it was obeying the law. No amount of inspecting or auditing Rainier Title's books or accounts would have revealed the expense associated with this posting, since there was no expense. This was not a violation that Stewart Title could have "foreseen."

The OIC recognized this fact. It contacted and followed up with ***Rainier Title,*** not Stewart Title, when it discovered the webpage containing the posting. The OIC did not contact Stewart Title to advise that Stewart Title may be violating the rule through

its agent's webpage, or tell Stewart Title that the webpage needed to be removed. This is understandable. Contacting Stewart Title would not have been an efficient means of enforcing the rule because Stewart Title was in no position to monitor compliance.

Rainier Title, not Stewart Title, explained why it believed the webpage did not violate the Rule. Rainier Title took down the website with no input from Stewart Title, over a month before the OIC first contacted Stewart Title. Thomas Decl., ¶ 3; Bickel Decl., ¶ 10. Additionally, Rainier Title unilaterally paid the OIC-imposed fine; Stewart Title was never consulted. Bickel Decl., ¶ 14; Pillette Decl., ¶ 10.

In the Supreme Court Case, the violations appeared flagrant and were arguably detectable through audits of Land Title's expenditures. In our case, however, the alleged violation was minor, subtle, and not easily detectable. Our case is not the Supreme Court Case.

D. THE SUPREME COURT'S STATUTORY ANALYSIS DOES NOT APPLY TO STEWART TITLE IN LIGHT OF THE AMENDMENT TO RCW 48.14.010.

The Appellate Court disagreed with the OIC's broad statutory conclusion that the insurance statute makes a title insurer vicariously liable for its UTC's misdeeds. It held that the legislature did not intend to establish the scope of agency merely by defining the term "agent," and that the scope must be determined under a common-law analysis. We argued, in our Supplemental Memorandum, that even though the agency definition had been amended, that amendment would not have altered the Appellate Court's decision that the scope of agency should be determined under common law.

The Supreme Court, however, believed that the not-yet-amended statute was critical. Former RCW 48.17.010 defined an agent as "any person appointed by an insurer to solicit applications for insurance on its behalf." Supreme Court Case at 12. The Court held under "the plain language of the statute, that a duly appointed agent is ***necessarily*** authorized to solicit insurance for its appointing insurer." *Id.* (emphasis in

original). In other words, under the old statute, if an agent was authorized, then it was authorized to solicit. The Court reasoned that: (a) under that old statute an agent "necessarily" solicits; and (b) solicitation necessarily involves marketing; thus (c) ***an underwriter necessarily authorizes the agent to market on its behalf when it makes the appointment.*** The Supreme Court Case made clear that it was interpreting the ***former*** statute, not the statute applicable here. *See* Supreme Court Case at 12, n.7.

The statute was amended effective June 12, 2008, before Stewart Title appointed Rainier Title as its UTC in December 2008, and before the violation alleged here occurred. The current statutory definition of a "title insurance agent," applicable here, is a "business entity ... appointed by an authorized title insurance company to sell, solicit, or negotiate insurance on behalf of the title insurance company." RCW 48.17.010(16) (emphasis added). No longer can it be reasoned that the plain language of the statute ***necessarily*** authorizes a title insurance agent to "solicit" for the insurer. An agent is now one who is authorized to sell ***or*** solicit ***or*** negotiate. The Supreme Court did not consider appointment of an agent who is authorized to "sell" but who is not authorized to "solicit."

Stewart Title authorized Rainier Title to issue (*i.e.*, "sell") its policies. That is it. It did not authorize Rainier Title to "solicit" those policies, and nothing in the agreement between the parties suggests soliciting authority. Unlike the relationship between Chicago Title and Land Title, there was no requirement that Rainier Title issue a policy with every escrow transaction it performed, nor did it. Rainier Title's advertising was for ***Rainier Title,*** which provided escrow services that did not always result in a sale of a policy underwritten by Stewart Title. Bickel and Pillette Testimony, Bickel Decl., ¶ 9. "Selling," unlike "solicitation," does not necessarily involve "marketing." The Supreme Court's logic does not apply to the amended statute that must be applied to the facts of this case.

E. CONCLUSION

For all the reasons stated above, and for the reasons set forth in prior briefings and at hearing, Stewart Title respectfully requests that the matter against it be dismissed.

DATED: September 4, 2013.

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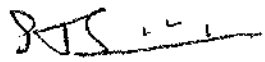

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on September 4, 2013, I caused a copy of this document to be filed and served as follows:

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