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Hearings Unit, OIC
Patricia D. Petersen
Chief Hearing Officer

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STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE OFFICE OF INSURANCE COMMISSIONER

In Re:

CHICAGO TITLE INSURANCE COMPANY,

An authorized insurer

Docket No. 2008-INS-0002
OIC No. D07-308

CHICAGO TITLE INSURANCE
COMPANY'S RESPONSE TO OIC'S
BRIEF IN SUPPORT OF REVIEW OF
INITIAL ORDER

I. INTRODUCTION

A state agency may impose liability on one party for the actions of another only when it is authorized by law to do so. The Office of the Insurance Commissioner ("OIC") lacks the authority under any applicable rule or statute or under the common law to impute liability to Chicago Title Insurance Company ("CTIC") for the actions of Land Title Company of Kitsap County, Inc. ("Land Title"), an independent title company. Administrative Law Judge Cindy Burdue properly recognized this in her Initial Order Granting Summary Judgment ("ALJ Order"), in which she held "[t]he OIC does not have authority to impute bad acts of a title policy 'issuing agent' to a title insurer where no provision exists for this in the law." ALJ Order at 14.

In its Brief in Support of Review of Initial Order ("Petition"), the OIC challenges the ALJ Order and takes the position that an underwriter has blanket liable for misconduct of an underwritten title company ("UTC"), such as Land Title, simply by virtue of its appointment of the UTC as an

1 “agent” under RCW 48.17.010. It contends that the absence of any statute, regulation, or common
2 law agency principal that expands the scope of the agency to impose vicarious liability is irrelevant.
3 The OIC claims this authority by virtue of its status as the insurance industry regulator. The OIC
4 repudiates its obligation under the Administrative Procedures Act to promulgate a rule on vicarious
5 liability even though it seeks to subject CTIC to administrative sanctions and alter its right to the
6 benefit of its contractual agreement with Land Title.¹ Under the OIC’s rationale, common law
7 principles that relate to the scope of agency are a nullity and no set of facts could ever exist that
8 would place the conduct of a UTC outside of the scope of its agency. Such a broad interpretation of
9 the OIC’s powers as a regulator would effectively nullifies any basis for judicial review and is not
10 supported by law.

11 The ALJ Order recognized that RCW 48.17.010 does “not specifically define the ‘agency
12 relationship’ or the parties rights or responsibilities vis-à-vis each other.” ALJ Order at 11. The
13 ALJ Order properly granted summary judgment to CTIC because the OIC has failed to establish that
14 CTIC controlled the marketing actions of Land Title as required for liability under common law
15 principles. Accordingly, CTIC respectfully requests that the ALJ Order be affirmed as a final order.

16 II. STATEMENT OF UNCONTROVERTED² FACTS

17 A. The Relationship Between CTIC and Land Title Is Limited to That of Title Insurance 18 Underwriter and Underwritten Title Company.

19 CTIC is a Missouri corporation engaged in the business of title insurance nationally.
20 Declaration of Brad London (“London Decl.”), ¶ 2.³ In certain counties in Washington State, CTIC

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22 ¹ Administrative Procedures Act, RCW 34.05.010(16)(a) and (c).

23 ² The OIC offers no evidence to controvert the facts set forth in the sworn declarations of D. Gene
24 Kennedy, Don Randolph, Brad London, or Madeline Barewald. “Bare assertions that a genuine
25 material issue exists . . . will not defeat a summary judgment motion in the absence of actual
evidence.” *Mike M. Johnson, Inc., v. County of Spokane*, 150 Wn.2d 375, 386 n.4, 78 P.3d 161,
(2003). The record is now closed and the discovery period has long-since ended.

26 ³ The declarations cited to herein were filed on September 9, 2008, in support of CTIC’s Motion for
Summary Judgment, and are part of the record on review.

1 maintains direct operations; that is, it maintains offices, employs personnel, owns or has access to a
2 title plant, and provides typical title and escrow services. In these counties, CTIC employs personnel
3 to perform all of its business activities including marketing CTIC's escrow and title products to
4 customers in those counties. *Id.*, ¶ 4. CTIC does not conduct any marketing or sales efforts in
5 counties, such as Kitsap, in which CTIC does not maintain or subscribe to a title plant and does not
6 have direct operations. *Id.*

7 In the state of Washington there are a number of independent title companies that provide
8 title insurance, most often in markets in which national title companies do not have direct operations.
9 These independent title companies are commonly known as "independent agents" or "underwritten
10 title companies" ("UTCs"). Declaration of Don Randolph ("Randolph Decl."), ¶ 2. In the counties
11 of their operations, UTCs conduct the same type of business that CTIC conducts where it has direct
12 operations, that is, UTCs maintain offices, employ personnel, own or have access to a title plant, and
13 provide typical title and escrow services. In the counties where they operate, UTCs such as Land
14 Title employ personnel to perform all of its business activities including marketing its escrow and
15 title products to customers. Because UTCs generally lack the capital required to meet the financial
16 responsibility requirements of RCW 48.29.020(3), UTCs contract with larger companies, like CTIC,
17 to provide underwriting services for policies issued by the UTC. *Id.*, ¶ 3.

18 CTIC does not play a role in the title search conducted by the UTC; the UTC prepares its
19 own commitments for title insurance. *Id.* Simply put, the UTCs market their own services, which
20 on the title side include conducting title searches, issuing preliminary commitments for title
21 insurance, addressing exceptions to title identified in the preliminary commitment, and issuing title
22 policies. CTIC does nothing more than underwrite risk. *Id.* When a UTC issues a policy, CTIC
23 only receives the following information from the UTC: (1) the policy number; (2) the UTC's
24 internal file number; (3) the effective date of the policy; (4) the type of policy (included in the policy
25 number); (5) the premium paid; and (6) the amount of liability. *Id.*, ¶ 6. Unless an issue arises,

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1 CTIC never receives a copy of the preliminary commitment, title policy, or any documents
2 associated with the closing of the transaction. *Id.* Likewise, CTIC plays no role in the marketing
3 strategies and expenditures of the UTCs with which it has underwriting agreements. *Id.*, ¶ 5.

4 Land Title is such a UTC operating in Kitsap County, Washington. Declaration of D. Gene
5 Kennedy (“Kennedy Decl.”), ¶ 2. Land Title has no corporate affiliation with CTIC, other than the
6 fact that another of the numerous subsidiaries of CTIC’s parent, Fidelity National Financial Inc.,
7 owns a minority interest in the shares of Land Title stock.⁴ Land Title owns and operates its own
8 title plant in Kitsap County. *Id.*, ¶ 3.

9 **B. The Agreement Between CTIC and Land Title Provides Land Title with Limited
10 Authority to Accept and Process Title Insurance Applications on Behalf of CTIC.**

11 The relationship between CTIC and Land Title is governed by a written contract, the Issuing
12 Agency Agreement (“Agreement”). Randolph Decl., ¶ 7, Exhibit A. Under the Agreement, Land
13 Title’s authority on behalf of CTIC is limited to accepting and processing applications for title
14 insurance in accordance with prudent underwriting practices and issuing title insurance policies
15 underwritten by CTIC, on forms provided by CTIC, on Kitsap County property. Agreement, ¶¶ 3, 4.
16 Land Title is authorized to determine the insurability of title based on its own examinations of public
17 records and other prudent investigations. *Id.*, ¶ 4. Except for the express acts that Land Title is
18 authorized to do for CTIC, the Agreement specifically provides:

19 Issuing Agent shall not be deemed or construed to be authorized to do any other act for
20 principal not expressly authorized herein.

21 Agreement, ¶ 3.

22 Land Title has no authority to market or advertise on behalf of CTIC; to the contrary,
23 paragraph 6, “Prohibited Acts of Issuing Agents,” prohibits Land Title from using the name of CTIC

24 ⁴ Even if CTIC *itself* were a shareholder of Land Title, that fact would be irrelevant to the inquiry
25 before the Court. A corporation is a legal entity separate and distinct from its shareholders, even
26 when there is a sole shareholder, and barring exceptional circumstances where grounds for piercing
the corporate veil are present, a shareholder has no liability for the obligations of a corporation.
Truckweld Equip. Co., Inc. v. Olson, 26 Wn. App. 638, 644, 618 P.2d 1017 (1980).

1 in any of its advertising or printing, other than to indicate its authority to issue policies underwritten
2 by CTIC. *Id.*, ¶ 6.

3 In practice, Land Title does not mention CTIC at all in its marketing materials, samples of
4 which are attached to the Kennedy Decl. as Exhibits A-E. It is worth noting that there are a number
5 of reasons for a UTC such as Land Title to maintain a corporate identity distinct from the
6 underwriter. One reason is that a UTC may have more than one underwriter.⁵ Similarly, an
7 underwriter may have an agreement with more than one UTC in the same market; CTIC expressly
8 retained the right to contract to provide underwriting services to more than one UTC in the Kitsap
9 County. Randolph Decl., Ex. A at ¶ 1. Furthermore, a separate corporate identity makes it possible
10 for Land Title to change underwriters with minimal impact on its market position.⁶

11 CTIC does not pay Land Title for services or pay Land Title's expenses. Randolph Decl., ¶
12 8; Kennedy Decl., ¶ 8. Land Title's Agreement with CTIC also does not address aspects of Land
13 Title's business other than underwriting, although escrow services are a substantial portion of Land
14 Title's revenue. *See* Kennedy Decl., ¶ 5. CTIC does not play any role in or exercise any control
15 over Land Title's business operations, marketing practices, finances, or expenditures. *Id.* Simply
16 put, CTIC's role is to underwrite the risk of title policies issued by Land Title, in exchange for an
17 underwriting fee that is 12% of the premium charged by Land Title to its customer.

18 **C. Despite This Limited Relationship, the OIC Improperly Seeks to Discipline CTIC for**
19 **the Actions of Land Title.**

20 Commencing in May of 2007, the OIC conducted an investigation of Land Title. Notice of
21 Hearing, filed herein, at ¶ 2.2. The OIC never even contacted CTIC during the course of the Land

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23 ⁵ Indeed, according to the testimony of its President, Land Title also has a underwriting agreement
24 with Old Republic Insurance Company as well as with CTIC. Kennedy Decl., ¶ 4. The OIC
25 contends the Old Republic agreement has not been properly filed with the OIC (OIC's Response to
26 Motion for Summary Judgment, n.18), but it does not dispute that a title agent can contract with
more than one underwriter.

⁶The CTIC/Land Title Agreement is terminable at will annually by either party. Randolph Decl., Ex.
A at ¶ 2.

1 Title Investigation. London Decl., ¶ 5. Nevertheless, the OIC requested that CTIC sign a Consent
2 Order Levying Fine, pursuant to which CTIC was asked, without the participation or joinder of Land
3 Title, to: (1) stipulate that Land Title's conduct violated the Inducement Regulation; (2) agree to pay
4 a fine of \$114,500 based on Land Title's alleged violations; (3) enter into a Compliance Plan that
5 required specific tracking of expenditures, semi-annual internal audits and related reporting and
6 corrective actions; and (4) represent that CTIC title has "the authority to comply fully with the terms
7 and conditions of the [Compliance] Plan." CTIC's Agreement with Land Title does not give CTIC
8 the right to stipulate that Land Title conduct violates the law or to require that Land Title perform the
9 obligations of the proposed Compliance Plan. *See* Agreement. CTIC declined to enter into the
10 proposed Consent Order. London Decl., ¶ 6.

11 In January of 2008, the OIC commenced disciplinary proceedings against CTIC for alleged
12 violations of WAC 284-30-800 ("Inducement Regulation") by Land Title. The Notice of Hearing
13 does not allege that CTIC itself directly violated the Inducement Regulation.

14 On April 1, 2008, the ALJ bifurcated the issues in this case. Phase I involves "the
15 preliminary issue of the legal responsibility of Respondent for the actions of Land Title Company of
16 Kitsap County." First Pre-Hearing Order at 1. Depending on the outcome of Phase I, the ALJ will
17 decide in Phase II "whether the expenditures of the Kitsap County company violate the law." *Id.*
18 The deadline for completion of discovery regarding Phase I was August 29, 2008, and the deadline
19 for all motions relating to the issues in Phase I was September 10, 2008. Stipulation and Order to
20 Amend First Pre-Hearing Order at 1.

21 On September 10, 2008, CTIC filed a motion for summary judgment; the OIC did not move
22 or cross move for judgment in its favor. Following a hearing on CTIC's motion, Judge Burdue
23 entered the ALJ Order granting CTIC summary judgment, in which she ruled that, as a matter of
24 law, the OIC cannot impose liability on underwriters for their UTC's violations of the Inducement
25 Regulation.

1 There is no question that the [Insurance] Code and regulations amply authorize
2 the OIC to take action against a title insurer directly for *its own* violations, or
3 directly against the title company for *its* violations. CTIC readily concede this to
4 be the law. Absent in the Insurance Code and regulations cited by OIC is the
5 authority for the OIC to hold the insurer liable for the illegal acts of another
6 company, with whom it contracted for limited purposes, specifically to underwrite
7 title policies. The “broad authority” of the OIC stops short of being quite that
8 broad; it must have an underpinning of law. I cannot find authority for the OIC’s
9 actions in the “penumbra” of the Insurance Code . . .

6 ALJ Order at 14-15 (emphasis in original).

7 On November 19, 2008, the OIC filed its Petition, seeking reversal of the ALJ Order.
8 Although the OIC never moved for summary judgment and CTIC had no opportunity to submit
9 evidence or argument in opposition to such relief, the OIC asks this tribunal to grant summary
10 judgment in its favor.

11 III. AUTHORITY AND ARGUMENT

12 A. While *de novo* Review Is Proper, the OIC Is Not Entitled to Summary Judgment.

13 The reviewing reviews the ALJ’s order *de novo* but may not disregard the findings and
14 conclusions of the ALJ in a way that is arbitrary and capricious. *Towle v. Wash. State Dep’t of Fish*
15 *& Wildlife*, 94 Wn. App. 196, 209, 971 P.2d 591 (1999). Because the ALJ decided this matter on
16 CTIC’s motion for summary judgment by CTIC, the reviewing officer should review the ALJ’s
17 order from that posture. The OIC should not be allowed to deprive CTIC of a hearing by seeking
18 relief in this tribunal that it did not seek below.

19 The OIC has failed to provide any basis on which it would be entitled to entry of an order
20 “agreeing that a title insurer is responsible for the unfair and illegal sales practices of its appointed
21 agents.” See Petition at 1. At most, the proper procedure is to remand for a fact-finding hearing.
22 See *Alpine Lakes Prot. Soc’y v. Wash. State Dep’t of Natural Res.*, 102 Wn. App. 1, 17, 979 P.2d
23 929 (2000) (remanding for a hearing on the merits after reversal of summary judgment because
24 issues of fact remain). Reversal and remand is not needed here because there is no genuine dispute
25 as to any material facts.

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4 **B. The ALJ Correctly Determined That the OIC Lacks the Authority to Impose Vicarious**
5 **Liability on CTIC.**

6 **1. The OIC Cites No Rule or Statute Authorizing Imputation of Liability to CTIC.**

7 There is no statute or regulation that provides that an underwriter is civilly or criminally
8 liable for a UTC's violations of the Inducement Regulation.⁷ Nothing in RCW 48.17.010 or RCW
9 48.17.270(1) allows the OIC to penalize CTIC for violations of the Inducement Regulation that it did
10 not commit. RCW 48.17.010⁸ provides a generic definition of an agent for purposes of the
11 Insurance Code but does not define the scope of an agency relationship or address vicarious liability.
12 Similarly, RCW 48.17.270(1)⁹ presumes the existence of an agency relationship, but does not define
13 its scope or the authority of the OIC. As a matter of law, simply labeling a party an agent is not
14 sufficient to create vicarious liability. *See, e.g., Kroshus v. Koury*, 30 Wn. App. 258, 263, 633 P.2d
15 909 (1981) (the label "agent" does not per se create vicarious liability); *see also Stephens v. Omni*
16 *Ins. Co.*, 138 Wn. App. 151, 183, 153 P. 3d 10 (2007), *review granted on other issues*, 180 P.3d
17 1291 (April 1, 2008) and discussed in section III.B.2, *infra*.

18 If the Legislature intended RCW 48.17.010 or RCW 48.17.270(1) to impose liability on the
19 principal for the acts of the agent, it would have explicitly so provided. The Legislature has

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21 ⁷ Moreover, such a regulation would be inconsistent with RCW 48.30.010, which only authorizes the
OIC to fine the "person violating" a regulation defining an unfair or deceptive act or practice.

22 ⁸ RCW 48.17.010 provides that "[a]gent" means any person appointed by an insurer to solicit
23 applications for insurance on its behalf. If authorized so to do, an agent may effectuate insurance
contracts. An agent may collect premiums on insurances so applied for or effectuated."

24 ⁹ RCW 48.17.270(1) provides that "[a] licensed agent may be licensed as a broker and be a broker as
25 to insurers for which the licensee is not then appointed as agent. A licensed broker may be licensed
26 as and be an agent as to insurers appointing such agent. The sole relationship between a broker and
an insurer as to which the licensee is appointed as an agent shall, as to transactions arising during the
existence of such agency appointment, be that of insurer and agent."

1 evidenced its ability to recognize and deal with this precise issue. *See* chapter 48.98 RCW, the
2 section of the Insurance Code titled the Managing General Agent Act. When an insurance company
3 appoints an agent as a managing general agent under chapter 48.98 RCW instead of as an
4 underwriting agent, then by statute “[t]he acts of the managing general agent are considered to be the
5 acts of the insurer on whose behalf it is acting.” RCW 48.98.025. There is no similar provision with
6 respect to limited agents such as Land Title. It is a basic maxim of statutory interpretation that
7 where the Legislature uses certain statutory language in one instance and different language in
8 another, there is a difference in legislative intent. *Spain v. Employment Sec. Dep’t*, 164 Wn.2d 252,
9 259, 185 P.3d 1188 (2008). Thus, the silence of RCW 48.17.010 and RCW 48.17.270(1) on the
10 issue of vicarious liability must be interpreted as a lack of intent by the Legislature for these
11 provisions to impose such liability.

12 In support of its position that CTIC has unlimited liability for the misdeeds of agents, the
13 OIC relies heavily on *Paulson v. W. Life Ins. Co.*, 636 P.2d 936 (Or. 1981), an Oregon case
14 interpreting an Oregon statute in the context of a group insurance policy. The *Paulson* opinion does
15 not address RCW 48.17.010 or RCW 48.17.270(1), and has absolutely no bearing on the issue of
16 CTIC’s liability for Land Title’s alleged violations of law. The issue in *Paulson* was whether an
17 employer was the statutory agent of an insurer of a group health insurance policy, such that the
18 insurer was bound by the employer’s representation to an employee that he could enroll in the health
19 plan after the enrollment period had ended. *Id.* at 938. The *Paulson* Court held that the employer in
20 that case was an agent for the purposes identified in ORS 744.165. *Id.* The matter currently before
21 this Court does not involve issues of whether CTIC could disavow representations made by Land
22 Title, rather it involves whether the OIC can impose fines on CTIC for the acts of Land Title. As
23 such, *Paulson* is entirely inapposite.

24 In the absence of a statute imposing vicarious liability on one entity for the conduct of
25 another, such liability can only be imposed based on a regulation duly promulgated under the
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1 Administrative Procedures Act (“APA”). As an agency of the State of Washington, the OIC must
2 adhere to the rule-making requirements of RCW 34.05.310 through RCW 34.05.395, which require,
3 among other things, publication of notice of a proposed rule in the State Register, public comment, a
4 public hearing, maintenance of a rule-making file, and an order adopting the rule which specifies the
5 purpose of the rule and the statutory authority. *J.E. Dunn Northwest, Inc. v. Dep’t of Labor &*
6 *Indus.*, 139 Wn. App. 35, 46, 156 P.3d 250 (2007) (“Agency rules must be promulgated pursuant to
7 the rule-making requirements of the APA”). The purpose of rule-making procedures is to ensure
8 that members of the public can participate meaningfully in the development of agency policies that
9 affect them. *Id.* (citing *Hillis v. Dep’t of Ecology*, 131 Wn.2d 373, 399, 932 P.2d 139 (1997)).

10 The OIC’s position that underwriters are subject to a penalty for violations of the Inducement
11 Regulation committed by UTCs certainly constitutes a rule that, under RCW 34.05.010(16)(a), must
12 be duly promulgated under the APA because it creates vicarious liability for underwriters,
13 punishable by a fine. Moreover, the OIC’s attempt to revoke the legal privilege of underwriters and
14 UTCs to allocate respective liabilities by written contract (*Ketcham v. King County Med. Serv.*
15 *Corp.*, 81 Wn.2d 565, 570, 502 P.2d 1197 (1973) (the freedom to contract is a fundamental
16 constitutional right)) can only be accomplished, per RCW 34.05.010(16)(c), via a duly promulgated
17 rule. Rather than promulgating a rule utilizing the procedure required by the APA (which would
18 have allowed meaningful participation by title underwriters), however, the OIC instead has created a
19 *de facto* rule, without following the requisite procedures and without consideration of input, by
20 commencing disciplinary actions and seeking fines against underwriters for the conduct of UTCs.
21 Such *de facto* rule-making is not permissible under Washington law and renders this action invalid.
22 *Failor’s Pharmacy v. Dep’t of Soc. & Health Svcs.*, 125 Wn.2d 488, 497, 886 P.2d 147 (1994) (“The
23 remedy for failure to comply with applicable APA rule-making procedures is invalidation of the
24 action.”).

25 Simply put, the OIC has failed to provide any statutory or regulatory authority for the
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1 proposition that the OIC may impose liability on CTIC for the actions of Land Title.

2 **2. The ALJ Correctly Found that Principles of Common Law Agency are Applicable, and**
3 **Dictate that CTIC Is Not Liable for the Alleged Conduct of Land Title.**

4 In the absence of any specific statutory or regulatory authority for the imposition of vicarious
5 liability, the ALJ correctly ruled that such liability can only be imposed based on common law
6 agency law principles. ALJ Order at 12. Washington law is definitive that a principal is only
7 subject to vicarious liability for the acts of an agent if the principal has the right to control the
8 actions that give rise to the liability. *Kroshus*, 30 Wn. App. at 263 (citing Restatement (Second) of
9 Agency, §250 (1958)) (the label “agent” does not *per se* create vicarious liability); *Stephens*, 138
10 Wn. App. at 183, *review granted on other issues*, 180 P.3d 1291 (April 1, 2008).¹⁰ Under these well
11 established common law principles CTIC is not liable for Land Title’s alleged violations of the
12 Inducement Regulation because it does not have the contractual right to control the marketing
13 practices of Land Title and does not, in practice, purport to control Land Title’s business practices
14 except in the area of underwriting.

15 In granting summary judgment, the ALJ correctly recognized the applicability of the *Omni*
16 decision to the matter before the Court. In that case, defendant Omni Insurance retained a collection
17 agency to pursue subrogation claims. *Id.* at 182. The collection agency allegedly engaged in
18 impermissible collection practices actionable under the Consumer Protection Act. *See id.* Like the
19 OIC, the plaintiffs asserted claims against Omni for the misconduct of the collection agency. *See id.*

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21 ¹⁰ The OIC misleadingly suggests that the *Omni* case, which is directly on point, “remains
22 unresolved” because it is on appeal to the Washington Supreme Court. Petition at 10. To the
23 contrary, the only issue on appeal in *Omni* relates to the plaintiff’s standing, and the issue of
24 vicarious liability has been resolved. *See* briefs filed in case no. 08-3668, Supreme Court of
25 Washington. In fact, *Omni* is not even a party to the appeal. *See* Docket, case no. 08-3668,
26 Supreme Court of Washington. Rule of Appellate Procedure 12.3 provides that “[a] majority of the
panel issuing an opinion will determine if it will be printed in the Washington Appellate Reports
pursuant to RCW 2.06.040 or be filed for public record only.” RCW 2.06.040 provides that “all
decisions of the court having precedential value shall be published as opinions of the court.” Thus,
since *Stephens v. Omni* is a published opinion, it has precedential value. Moreover, RAP 13.7(b)
limits the scope of review of a Court of Appeals decision to “the questions raised in the motion for
discretionary review.” The issue of vicarious liability was not raised on appeal in the *Stephens* case.

1 Like CTIC, Omni did not participate in the collection practices at issue. *See id.* The trial court
2 reserved the issue of damages but granted a partial summary judgment holding Omni liable for the
3 conduct of the collection agency. *Id.* at 183. The Court of Appeals reversed stating:

4 The right to control is indispensable to vicarious liability. . . . Because Stephens has not
5 shown that Omni controlled any aspects of the notices send by Credit, there is no basis upon
6 which to impose vicarious liability. We conclude the trial court error by granting summary
7 judgment to Stephens in this claim against Omni.

8 *Id.* (internal citations omitted).

9 In addition to the uncontroverted fact that CTIC does not have the right and does
10 not purport to control any aspects of Land Title's marketing practices, Land Title is not
11 even authorized to use CTIC's name in its advertising¹¹. The undisputed testimony of D.
12 Gene Kennedy, president of Land Title, is as follows:

13 6. Land Title employs sales personnel which market its services to potential
14 customers in Kitsap County.

15 7. In its marketing materials, Land title does not promote its relationship with
16 CTIC. In fact, it does not mention CTIC at all in its marketing materials, samples of which
17 are attached to the Kennedy Decl. as Exhibits A-E.

18 8. Land Title markets to promote its own business, not the business of CTIC.

19 9. CTIC does not pay Land Title for its services nor pay any of Land Title's
20 expenses. CTIC does not play any role in or exercise any control over Land Title's business
21 operations or finances. CTIC does not provide any advice to Land Title on compliance with
22 the Inducement Regulation. CTIC does not have any input in, or oversight of, Land Title's
23 marketing practices or procedures.

24 Kennedy Decl., ¶¶ 6-9. The evidence is uncontroverted that CTIC's sole role is to underwrite the
25 liability for policies issued by Land Title, in exchange for which it receives a payment equal to 12%
26 of the premium which Land Title charges for issuance of the policy. Accordingly, the ALJ was
correct in determining that, under established principles of common law, there is no basis to impose

¹¹ Agreement at ¶ 3 (Authority of Issuing Agent) and ¶ 6.G. (Prohibited Acts of Issuing Agents), Ex. A to Randolph Decl.

1 liability on CTIC for the actions of Land Title.

2 **C. The OIC's Arguments Regarding Imputation of Knowledge and Apparent**
3 **Authority are Irrelevant to the Issue of Whether CTIC Controlled Land**
4 **Title's Marketing Practices.**

5 As a fall back argument, the OIC renews its contention that liability can be
6 imposed under an assortment of inapplicable common law agency principles even without
7 statutory or regulatory authority for such liability. The OIC primarily argues that CTIC
8 should be held liable for Land Title's marketing practices because knowledge of those
9 practices should be imputed to CTIC. *See* Petition at 11-15. The ALJ correctly found the
10 principles of apparent authority and imputed knowledge inapplicable to this matter. *See*
11 ALJ Order at 10-11. This is not a case in which the OIC proposes to fine CTIC for
12 disavowing coverage under title insurance policies issued by Land Title when Land Title
13 had knowledge of facts that made the denial of coverage improper.

14 The OIC continues to rely on *American Fidelity & Casualty Co. v. Backstrom*, 47
15 Wn.2d 77, 287 P.2d 124 (1955), in which the Court considered the issue of when an
16 agent's *knowledge* can be imputed to a principal, not whether the principal controlled the
17 actions of the agent. In *Backstrom*, an insurer sought to deny coverage for an accident on
18 the basis that the named insured was not the true owner of the damaged equipment. *Id.* at
19 81. Because the insurer's agent knew the owner of the equipment, the Court imputed the
20 agent's knowledge to the insurer and estopped the insurer from denying coverage. *Id.*

21 The additional cases cited by the OIC regarding the imputation of knowledge
22 remain inapposite because they do not address the existence of an agency relationship or
23 the principal's right to control the actions of the purported agent. *See Miller v. United*
24 *Pac. Cas. Ins. Co.*, 187 Wash. 629, 638-39, 60 P.2d 714 (1936) (imputing agent's
25 knowledge that the insured owned the vehicle at issue to the insurer for coverage
26 purposes); *Turner v. American Casualty Company*, 69 Wash. 154, 160, 124 P. 486 (1912)

1 (imputing agent's knowledge of insured's medical condition to insurer for coverage
2 purposes); *see also Codd v. New York Underwriters Insurance Company*, 19 Wn.2d 671,
3 679, 144 P.2d 234 (1943) (holding that an individual was the agent of an insurance
4 company for the purposes of delivering an insurance policy where the jury was instructed
5 that he was acting as an agent for purposes of delivering the policy and the insurer did not
6 object to the jury instruction).

7 Similarly, the other cases relied on by the OIC address the issue of whether an
8 insurer is contractually bound by representations or omissions by its agents relied upon by
9 an insured, *not the issue of vicarious liability*. For example, in *Ellis v. William Penn Life*
10 *Assurance Co. of America*, 124 Wn.2d 1, 873 P.2d 1185 (1994), the Court considered the
11 issue of whether insurers that issued replacement life insurance could disavow coverage
12 when their agents, and the insurers themselves, failed to provide notices required by
13 regulation that would have alerted the insured to the terms of the replacement policies.¹²
14 The *Ellis* court held that the insurers were estopped from denying coverage because the
15 insurers' agents *and the insurers themselves* had violated the applicable regulations. *Id.* at
16 14. *Ellis* is entirely irrelevant to this case. It has nothing to do with vicarious liability of a
17 principal for the acts of an agent, but addresses the issue of whether an insurer can deny
18 coverage.

19 The OIC's reliance on *McCann v. Washington Public Power Supply System*, 60
20 Wn. App. 353, 803 P.2d 334 (1991) also is misplaced. *McCann*, like the *Paulson* case,
21 *supra*, addressed the issue of whether an employer/policyholder is an agent of the insurer
22 for the purposes of a group policy. *Id.* at 360. The court merely found a question of fact
23 regarding whether the employer was the insurer's agent for the purpose of collecting
24

25 ¹² The regulations expressly provided not only that the insurers were obligated to require their agents
26 to comply with certain notice requirements, but also that the insurers themselves were required to
comply with additional notice requirements. *Ellis*, 124 Wn.2d at 112-13.

1 premiums and made no findings of liability of the insurer for the acts of the employer. *Id.*
2 at 361. As such, it is irrelevant. Finally, in *Hall v. Union Central Life Insurance Co.*, 23
3 Wash. 610, 613, 63 P. 505 (1900), the Court held that an agent's statements relating to the
4 insured's payment of premiums should be imputed to the insurer because the collection of
5 premiums was "within the scope of his duties as an agent." Again, this holding has no
6 relevance.

7 These cases, and the law review article cited by the OIC¹³, simply do not address
8 the liability of an insured for the "misconduct" of its agents. Each of these cases and
9 articles addresses the issue of when an insurer is deemed to have knowledge of facts
10 known to its agent, or whether it has contractual liability for representations made by its
11 agent. The matter currently before this Court simply does not involve issues of whether
12 CTIC should be deemed to have knowledge of some fact known to Land Title, nor does it
13 involve issues of whether CTIC can disavow a contract negotiated by Land Title.

14 **D. The OIC Fails to Raise Any Issues of Material Fact Sufficient to Withstand**
15 **Summary Judgment.**

16 Failing to identify any other basis to hold CTIC liable for the actions of Land Title,
17 the OIC attempts to stretch CTIC's rights under the Agreement by equating CTIC's right
18 to review certain Land Title records and/or its right to require Land Title to conform with
19 its underwriting standards as sufficient to give rise to vicarious liability under the common
20 law, an argument that fails under established legal precedent. These selected provisions of
21 the contract fail to establish that CTIC controls Land Title's operations, let alone its
22 marketing practices. It is well-settled as a matter of law that "[c]ontrol is not established if
23 the asserted principal retains the right to supervise the asserted agent merely to determine

24
25 ¹³ The OIC quotes from an article written by Marin R. Scordato, *Evidentiary Surrogacy and Risk*
26 *Allocation: Understanding Imputed Knowledge and Notice in Modern Agency Law*, 10 Fordham J.
Corp. & Fin. L. 129 (2004).

1 if the agent performs in conformity with the contract. . . . [i]nstead, control establishes
2 agency only if the principal controls the manner of performance.” *Uni-Com Nw., Ltd. v.*
3 *Argus Publ’g Co.*, 47 Wn. App. 787, 796-97, 737 P.2d 304 (1987) (quoting *Bloedel*
4 *Timberlands Dev., Inc. v. Timber Indus., Inc.*, 28 Wn. App. 669, 674, 626 P.2d 30 (1981)).

5 The OIC contends that the “agency contract also required Chicago to provide Land
6 with any such written instructions as it deemed appropriate” (Petition at 15) although the
7 referenced contract provision actually states that CTIC will provide Land Title with “its
8 agency manual, underwriting manual, underwriting memos, and underwriting rules and
9 regulations which may now or hereafter be promulgated.”¹⁴ This is consistent with
10 paragraph 4(B) of the Agreement, which provides that Land Title is to “process
11 applications for title insurance . . . in full compliance with instructions, rules, and
12 regulations of [CTIC].” The fact that CTIC has the contractual right under the Agreement
13 to provide guidance to Land Title on underwriting standards has absolutely no bearing on
14 whether CTIC has the right to control Land Title’s marketing practices.¹⁵ The agreement
15 between Land Title and CTIC relates to underwriting, not to other aspects of Land Title’s
16 business, such as its practices in marketing its services. These provisions of the
17 Agreement make no reference to the Inducement Regulation and have absolutely nothing
18 to do with marketing. Accordingly, the OIC has failed to raise any issues of fact with
19 respect to CTIC’s control of Land Title’s marketing and CTIC is entitled to have the order
20 of summary judgment confirmed.

21 The OIC has failed to provide a single iota of evidence that CTIC controlled, or
22

23 ¹⁴ A copy of the Agreement is appended to the Declaration of Don Randolph as Exhibit A.

24 ¹⁵ It also bears noting that the interrogatory response referenced by the OIC (response to
25 interrogatory no. 28), attached to the Singer Decl. as Exhibit G does not indicate that CTIC never
26 provided Land Title with underwriting materials. The answer was specifically limited to memos,
manuals, and guidelines related to compliance with the Inducement Regulation.

1 had the right to control, Land Title's marketing activities and, thus, that such activities
2 were within the scope of any purported agency relationship. The evidence that CTIC has
3 no control over Land Title's marketing is uncontroverted.

4 IV. CONCLUSION

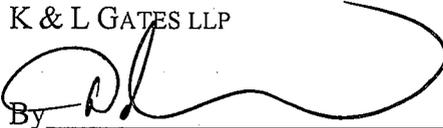
5 Contrary to the OIC's argument, CTIC is not attempting to "circumvent" regulation
6 by the OIC by "private agreement." Such an argument presumes that a regulation exists
7 that permits the OIC to fine one party for the misdeeds of another. None has been cited
8 and the ALJ correctly found that no such regulation exists. Obviously, if the OIC did
9 promulgate a regulation on this issue after compliance with APA procedures including
10 solicitation of comment, industry participants would be required to comply.

11 The OIC carries the burden to establish the existence of a relationship between
12 CTIC and Land Title sufficient to impose vicarious liability. *See Bergin v. Thomas*, 30
13 Wn. App. 967, 970, 638 P.2d 621 (1981). The OIC has failed to identify any statutory or
14 regulatory authority that supports its attempt to fine CTIC for actions of Land Title. In the
15 absence of this authority, the OIC also has failed to establish that CTIC controlled Land
16 Title's marketing practices such that CTIC may be held liable for those practices. Finally,
17 the OIC has failed to raise a single issue of fact regarding the existence of an agency
18 relationship between CTIC and Land Title sufficient to withstand summary judgment.

19 Accordingly, for the reasons stated herein, CTIC is entitled to summary judgment,
20 and respectfully requests that the Court affirm the ALJ Order.

21 DATED this 10th day of December, 2008.

22
23 K & L GATES LLP

24 

25 By _____
26 Kimberly W. Osenbaugh, WSBA # 5307
David C. Neu, WSBA #33143
Jessica A. Skelton, WSBA #36748
Attorneys for Chicago Title Insurance Company

925 4th Avenue, Suite 2900
Seattle, WA 98104-1158
Phone: (206) 623-7580
Fax: (206) 623-7022

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1 CERTIFICATE OF SERVICE

2 The undersigned declares under the penalty of perjury under the laws of the State of
3 Washington that I am now and at all times herein mentioned a citizen of the United States, a resident
4 of the State of Washington, over the age of eighteen years, not a party-to or interested-in the above-
entitled action, and competent to be a witness herein.

5 On the date below, I caused to be served:

6 Chicago Title Insurance Company's Response to OIC's Brief in Support of Review of Initial
Order.

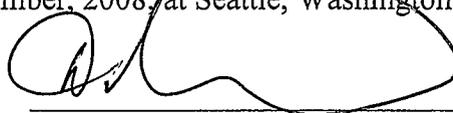
7 in the manner indicated:

8 Alan Michael Singer
9 Staff Attorney
10 Legal Affairs
11 Office of the Insurance Commissioner
12 5000 Capitol Boulevard
13 Tumwater, WA 98504
14 (X) Via U.S. Mail
15 (X) Via email (AlanS@OIC.WA.Gov)

16 Alan Michael Singer
17 Staff Attorney
18 Legal Affairs
19 Office of the Insurance Commissioner
20 PO Box 40255
21 Olympia, WA 98504-0255
22 (X) Via U.S. Mail

23 Hon. Patricia D. Petersen
24 Chief Hearing Officer
25 Office of the Insurance Commissioner of Washington
26 Insurance 5000 Building
5000 Capitol Boulevard
Tumwater, WA 98504
(X) Via email (WendyG@OIC.WA.GOV)
(X) Via U.S. Mail
(X) Via facsimile ((360) 664-2782)

EXECUTED this 10th day of December, 2008, at Seattle, Washington.



David C. Neu