

OCT 31 2008

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

INSURANCE COMMISSIONER
LEGAL AFFAIRS DIVISION

IN THE MATTER OF:

Chicago Title Insurance Company,
An Authorized Insurer,

Respondent.

Docket No. 2008-INS-0002

Infraction No. D07-308

**INITIAL ORDER GRANTING
SUMMARY JUDGMENT**

Telephonic Summary Judgment Hearing:

A telephonic hearing was held on October 8, 2008, before Cindy L. Burdue, Administrative Law Judge, for argument on the Respondent's Summary Judgment Motion.

Appearances by Telephone:

The Office of the Insurance Commissioner, represented by Alan Singer, Attorney at Law, Staff Attorney; and Chicago Title Insurance Company (Respondent), represented by Kimberly Osenbaugh, Attorney at Law, K&L Gates; with David Neu, Attorney at Law, K&L Gates.

Material Considered:

1. Motion for Summary Judgment of Respondent
2. Declaration of D. Gene Kennedy, with Exhibits A through E
3. Declaration of Don Randolph, with Exhibit A
4. Declaration of Brad London
5. Declaration of Madeline Barewald
6. Department's Memorandum in Opposition to Motion for Summary Judgment
7. Declaration of Carol Sureau
8. Declaration of James Thompkins, with Exhibit A, OIC Report
9. Declaration of Alan Singer with Exhibits A through P
10. Respondent's Reply Brief to Motion for Summary Judgment
11. Oral argument of both counsel
12. All orders and documents in the file, including:
 - A. Notice of Hearing, January 25, 2008
 - B. Amended Notice of Hearing March 27, 2008
 - C. Receipt of Notice of Hearing, January 28, 2008D.
 - D. Notice of Appearance for Respondent by Attorney Osenbaugh

- E. Request to Transfer to the Office of Administrative Hearings February 28, 2008
- F. Notice of Receipt of Transfer February 29, 2008
- G. Pre-Hearing conference notices and First Pre-Hearing Order April 1, 2009
(should state 2008, "2009" is a typographical error)

ISSUE PRESENTED:

Whether Respondent is entitled to summary judgment on the issue of its liability for the regulatory violations committed by its issuing agent, Land Title Company, under WAC 284-30-800 and/or RCW 48.30.150, because no genuine issue of material fact exists and, as a matter of law, Respondent is entitled to judgment in its favor?

UNDISPUTED FINDINGS OF FACT:

1. The Office of the Insurance Commissioner (OIC) alleges that the Respondent, Chicago Title Insurance Company (CTIC) is liable for violations of the inducement regulation, WAC 284-30-800, committed by Land Title Insurance Company (LT) with whom CTIC has an "Issuing Agency" contract. CTIC has been, for some years, the only company authorized by law to underwrite the title insurance policies issued by LT. (Decl. Singer, and Exhibits) Respondent CTIC is a Missouri Corporation and LT is a Washington corporation. (Decl. London) CTIC is paid a percentage of the total fee charged by LT for each title policy CTIC underwrites.
2. LT is a title and escrow company that does business in at least two Washington counties, Mason and Kitsap. It is not a party to this action. Rather, for LT's violations of the above-cited regulation limiting inducements, the OIC seeks to impose fines of \$155,000 on CTIC, based on the "Issuing Agent" contract; the relationship between the two companies; and the broad enforcement and regulatory authority of the OIC. For the purposes of *this motion only*, it is stipulated that LT did commit the alleged violations of the inducement regulation.
3. The stipulated violations of the inducement law by LT include "wining and dining" of real estate agents, builders, and mortgage lenders with meals, golf tournaments, advertising for one real estate agent; purchases at a Board of Realtors auction; and professional football championship game tickets, in amounts over the \$25.00 limit allowed by WAC 284-30-800. (Amended Notice of Hearing, March 27, 2008)
4. LT is known as an "underwritten title company," or "UTC." LT cannot issue title insurance policies on its own, without an underwriter like CTIC, who has the legal authority in Washington to underwrite the policies, as granted by the OIC. CTIC is required by law to "appoint" any UTC whose title policies it writes, and LT has been properly appointed by

CTIC with the OIC for that purpose. (Decl. Singer and Exhibit F)

5. CTIC also conducts its *own* insurance and escrow business in eight Washington counties, and maintains or subscribes to title plants in these counties as required by law. In these geographic areas, CTIC has its own employees and agents, and maintains its own branch offices. In the counties where it does direct business, CTIC conducts marketing to sell its services.

6. CTIC conducts no marketing activities in Kitsap and Mason counties, however. CTIC relies entirely on the efforts of LT to market the title insurance policies in these geographic areas. (Decl. London) LT is the only title company appointed by CTIC to sell its title insurance policies in Kitsap, Mason, Clallam, and Jefferson Counties. (Decl. Singer, Ex. E) However, LT operates and has offices only in Kitsap and Mason counties. (Decl. Kennedy)

7. A minority share of LT stock (45%) is owned by Security Union Title Insurance Company (Security Union), which is a subsidiary of Chicago Title and Trust Company (CT Trust). CT Trust is a subsidiary of Fidelity National Title Group, Inc., which is, in turn, a subsidiary of Fidelity National Financial, Inc. CTIC is also a subsidiary of CT Trust. Thus, LT and CTIC are each subsidiaries of or partly owned by separate companies who share the same parent company, Fidelity National Financial, Inc. (Decl. Barewald)

8. Between 33 and 44% of the board members of LT, since 2002, work or have worked for the shared parent company, Fidelity National Financial, Inc., or one of its subsidiaries. (Decl. Singer, Exhibits D, E) Other than the shared parent company identity, CTIC has no corporate affiliation with LT.

9. In Washington, there are a number of UTC's or "independent title companies" that provide title insurance, typically in counties where national companies do not sell this directly. (Decl. Randolph) CTIC contracts with eleven UTC's in Washington state, to underwrite the risk that the title search was not done properly by the UTC, and hence, CTIC assumes liability to the ultimate consumer for any loss caused by the bad title search. The UTC's involved own or subscribe to a title plant in the counties where they operate, by law.

10. CTIC has no involvement in the title search with these contracted UTC's, including LT. (Decl. Randolph) The UTC's, including LT, market their own services without the involvement or financial contribution of CTIC; conduct the title searches using their own title plant; issue preliminary commitments for title insurance; address exceptions to the title identified in the preliminary commitment; and issue the title policies, all without CTIC's participation. (Decl. Randolph)

11. CTIC receives specific information from LT when it is called upon to insure a title policy: a policy number; the UTC's internal file number; the effective date of the policy; the type of policy; the premium paid; and the amount of liability. (Decl. Randolph) Unless the need arises, CTIC does not receive a copy of the preliminary commitment or any of the documents associated with the closing. (Decl. Randolph) The only function CTIC undertakes with LT is to insure the risk of later-discovered title imperfections.

12. The "Issuing Agent" contract between CTIC and LT spells out specifically the relationship between the two companies. (Decl. Randolph, Ex. A) CTIC is the "principal" and LT is the "issuing agent," in the contract. The contract *requires* LT to use CTIC to underwrite its title insurance, although an addendum allows Old Republic Insurance to underwrite for LT as well. However, LT has used only CTIC for this function for some years, and Old Republic has never accomplished the legal requirements to be able to underwrite for LT. (Decl. Singer, and Ex. F) Pursuant to the contract, LT pays CTIC 12% of the fee charged for each title insurance policy written. (Decl. Randolph, Ex. A)

13. The Issuing Agent contract gives LT no authority to advertise or market for CTIC, and the contract specifically forbids LT from using CTIC's name in any advertising or printing, except to indicate that CTIC is the underwriter for the title insurance policies. (Decl. Randolph, Ex. A) LT employs its own sales personnel to market its services to potential customers in Kitsap County. (Decl. Kennedy) The marketing materials used by LT do not mention its relationship to CTIC. (Decl. Kennedy, Ex. A-E) However, the web site of LT does have a hyperlink to "National Website" which takes the user to CTIC's web site. (Decl. Singer, Ex. H) Otherwise, the LT website makes no mention of its underwriter or any connection to CTIC.

14. CTIC does not pay any of the business expenses of LT, nor pay for any of its services.

15. In the contract, CTIC retains the right to examine the records of LT "which relate to the title insurance business carried on by (LT) for (CTIC)," including accounts, books, ledgers, searches, abstracts, and other related records." (Decl. Randolph, Ex. A) The contract also requires that LT preserve for ten years the documents upon which "title assurances and underwriting decisions were made, including searches, worksheets, maps, and affidavits." (Decl. Randolph, Ex. A) Although permitted by the contract, CTIC has not reviewed any of the records of LT during the period at issue here.

16. LT is required by the contract to comply with all laws and regulations, and to notify CTIC of any alleged violations or complaints about LT's compliance with such laws and regulations. The OIC did not notify or include CTIC in its investigation of LT for the inducement violations at issue, but LT notified CTIC of the investigation and its results, as

called for in the contract.

17. In the contract, loss is allocated between the two companies, with CTIC liable to the customers of LT for any failures of the title search, and LT liable for everything else. (Decl. Randolph, Ex. A) The contract requires LT to indemnify CTIC against loss from LT's actions of fraud, conspiracy, or failure to comply with all Federal and State laws. (Decl. Randolph, Ex. A, §9(B)(8).

18. LT's authority under the contract is limited to accepting and processing applications for title insurance in accordance with prudent underwriting practices, and issuing the title insurance policies underwritten by CTIC. LT is required to use forms provided by CTIC for these functions.

19. The contract specifically provides that LT, "... shall not be deemed or construed to be authorized to do any other act for principal not expressly authorized herein." (Decl. Randolph, Ex. A)

20. CTIC has no right to control the actions of LT other than as specified in the contract, directly relating to LT's title search activity. Further, there is no evidence that CT *did* control the actions of LT, especially the marketing practices of LT. The President of LT denies that CT controlled or could control its actions in any area other than the issuing of title insurance.

21. The OIC has presented no evidence that CTIC pays for any of the expenses of LT, or is involved in its marketing or other business conduct. There is no evidence to counter the declarations offered by CTIC which show it does not have any control or right to control the operational conduct or decisions of LT.

22. Extensive discovery has been undertaken in this matter, with large numbers of interrogatories answered by CTIC. (See Exhibits, Decl. Singer) Further, the OIC has authority to demand records from CTIC and LT, so there should be no evidence exclusively in the hands of CTIC or LT, to which the OIC has not had full access. A pre-hearing conference was held in this matter March 31, 2008, with discovery on-going since that time. No motions have been made to compel discovery of documents or other evidence about the involvement of CTIC in the business of LT.

23. The uncontested evidence shows that CTIC has no control, input in, or oversight of LT's business or marketing practices or procedures. CTIC does not provide any advise to LT about compliance with the laws, including the inducement laws. (Decl. Kennedy)

24. LT does not market "on behalf" of CTIC, but only for itself. CTIC does not pay LT's

expenses, nor play any role or exercise any control over LT's business practices. CTIC does not provide any advice to LT regarding compliance with the inducement laws. CTIC has no oversight of any of the marketing practices or procedures of LT. (Decl. Kennedy)

25. In a typical year, about 28% of LT's revenue comes from the provision of escrow services, which are independent of its relationship with CTIC. LT keeps 100% of its earnings from escrow services. (Decl. Kennedy)

26. The OIC undertook a study of the title insurance business in Washington in 2006, and found widespread violations of the inducement laws by the major companies operating in Washington. CTIC was a violator, although the OIC's report notes that CTIC made "attempts" to comply with the law. (Decl. Tompkins, and Ex. A) The investigation and report focused on four major companies providing title insurance in Washington, including CTIC. LT was not one of the title companies investigated or mentioned in the report.

27. Because the violations of the inducement law were so widespread, the OIC opted not to take individual action against any of the offenders. Instead, it took remedial action, including the issuance of the report and a "Technical Assistance Advisory" on November 21, 2006. The Advisory was issued to all "Washington insurers and their title insurance agents." The stated purpose of the Advisory was to "clarify requirements for title insurers and their agents" of the requirements of the inducement and rebating laws. (Decl. Tompkins, Ex. B)

28. The Advisory does *not* state that the underwriting insurance companies (insurers) will be liable for the violations of separately owned and operated underwritten title companies (UTC's), by virtue of the contracts between the two companies for underwriting services by the underwriting insurance company. No mention is made of the UTC's, and the relationships between these underwritten title companies and the insurers, in the Advisory letter.

29. In 1989, the OIC also sent a letter to the CTIC in Tacoma, Washington, stating specifically that the letter was to be given to "each of your branch offices and to each of your agents." The letter further elaborated that, "Title insurers are liable for any activity conducted by their agents regarding this regulation whether the title insurers have knowledge of the activity or not." The regulation being referred to is the inducement regulation, limiting the amount that can be spent on "items of value" given to middle-persons such as builders and real estate agents/brokers, as inducements for their business. (Decl. Singer, Ex. M) This letter makes no mention of the UTC's that CTIC might be using for title business in Washington.

30. The OIC also addressed the Washington Land Title Association in September, 1989, about the on-going violations of the inducement laws, to put the title companies and agents present on notice that further violations would not be tolerated. (Decl. Singer, Ex. M) CTIC is not a member of that organization.

31. In August 2005, CTIC issued a letter to the OIC accepting liability up to \$200,000 for any "fraudulent or dishonest acts by LT," specifying this was to meet the requirements of RCW 48.29.155, and was limited, "only in connection with those escrows for which [LT] issues a title insurance commitment or policy of CTIC.." (Decl. Singer, Ex. I)

32. After the 2007 investigation of LT was completed, the OIC sent a proposed Consent Decree to CTIC to sign, agreeing that CTIC would pay a fine, and monitor and control the future behavior of LT in regard to the inducement regulation. Because CTIC and LT agree that CTIC has no control over LT's actions or business conduct, and never has had, CTIC declined to enter into the proposed Consent Decree, believing it would be legally unable to fulfill the terms of that agreement.

CONCLUSIONS OF LAW

Jurisdiction:

1. The Office of Administrative Hearings and the undersigned Administrative Law Judge have jurisdiction over the parties and subject matter herein pursuant to RCW 48.04.010(5), Chapter 34.05 RCW, and Chapter 34.12 RCW. The provisions of Chapter 48 RCW, the Insurance Code, are applicable here.

Summary Judgment Standard:

2. Summary judgment may be granted if the written record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as matter of law. WAC 10-08-135. The evidence presented, and all reasonable inferences from the facts, must be viewed in the light most favorable to the nonmoving party. *Herron v. King Broadcasting*, 112 Wn.2d 762, 776 P.2d 98 (1989). Where reasonable minds could reach but one conclusion from the admissible facts and evidence, summary judgment should be granted. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).

3. The initial burden of showing the absence of material fact rests with the moving party. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Only if the moving party meets this initial showing will the inquiry shift to the non-moving party. *Herron v. King Broadcasting*, 112 Wn.2d 762, 776 P.2d 98 (1989). In that case, the non-moving party must "counter with specific factual allegations revealing a genuine issue of fact. . ." *Int'l. Union of Bricklayers v. Jaska*, 752 F.2d 1401, 1405 (9th Cir. 1985).

4. The existence of a principal-agent relationship is a question of fact unless the facts are undisputed. *O'Brien v. Hades*, 122 Wn. App/ 279, 93 P.3d 930 (2004). Where there is no dispute as to the facts, and no genuine issue of material fact exists, the question of agency is a matter of law that may be decided on summary judgment. *Airborne Freight v. Str. Paul Marine Insurance Co.*, 491 F. Supp.2d 989 (W.D. WA 2007).

5. The burden of proving that an agency relationship exists falls on the party asserting that relationship. *Id.*

Insurance Code, Chapter 48 RCW:

6. Title 48 RCW constitutes the Insurance Code. Several definitions in the Code may be useful in the analysis which follows.

RCW 48.01.020 states, "All insurance and insurance transactions in this State, or affecting subjects located wholly or in part or to be performed within the state, and persons having to do therewith are governed by this code."

RCW 48.01.050 defines "insurer" as every person engaged in the business of making contracts of insurance. (Omitting exceptions that do not apply here)

RCW 48.17.010 defines "agent" as any person appointed by an insurer to solicit 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.

Chapter 48.29 RCW pertains specifically to title insurers. The provisions of this statute are not in controversy here.

RCW 48.11.100 defines title insurance. Title insurance is insurance of owners of property or other having an interest in real property, against lost by incumbrance or defective titles, or adverse claim to title, and associated services.

The Inducement statutes and regulation at issue:

7. RCW 48.30.150 is a statute prohibiting or limiting inducements paid or given for the purpose of soliciting insurance business, and it states:

No insurer, general agent, agent, broker, solicitor, or other person shall, as an inducement to insurance, or in connection with any insurance transaction,

provide in any policy for, or offer, or sell, buy, or offer or promise to buy or give, or promise, or allow to, or on behalf of, the insured or prospective insured in any manner whatsoever:

(1) Any shares of stock or other securities issued or at any time to be issued or in any interest therein or rights thereto; or

(2) Any special advisory board contract, or other contract, agreement, or understanding of any kind, offering, providing for, or promising any profits or special returns or special dividends; or

(3) Any prizes, goods, wares, or merchandise of an aggregate value in excess of twenty-five dollars.

This section shall not be deemed to prohibit the sale or purchase of securities as a condition to or in connection with surety insurance insuring the performance of an obligation as part of a plan of financing found by the commissioner to be designed and operated in good faith primarily for the purpose of such financing, nor shall it be deemed to prohibit the sale of redeemable securities of a registered investment company in the same transaction in which life insurance is sold.¹

8. The regulation at issue is WAC 284-30-800, which states, in part:

Unfair practices applicable to title insurers and their agents.

(1) RCW 48.30.130 and 48.30.150, pertaining to "rebating" and "illegal inducements," are applicable to title insurers and their agents. Because those statutes primarily affect inducements or gifts to an insured and an insured's employee or representative, they do not directly prevent similar conduct with respect to others who have considerable control or influence over the selection of the title insurer to be used in real estate transactions. . . .

(2) It is an unfair method of competition and an unfair and deceptive act or practice for a title insurer or its agent, directly or indirectly, to offer,

¹ RCW 48.29.210 is a similar statute, making reference directly to title insurers and title agents and their employees, representatives, or agents, and forbidding the giving of any direct or indirect kick backs, fees, or other thing of value as an inducement, payment or reward for title insurance business; the statute also prohibits these persons from giving such things of value to a "person in a position to refer or influence the referral of title insurance business to either the title company, title insurance agent, or both."

promise, allow, give, set off, or pay anything of value exceeding twenty-five dollars, calculated in the aggregate over a twelve-month period on a per person basis in the manner specified in RCW 48.30.140(4), to any person as an inducement, payment, or reward for placing or causing title insurance business to be given to the title insurer.

(3) Subsection (2) of this section specifically applies to and prohibits inducements, payments, and rewards to real estate agents and brokers, lawyers, mortgagees, mortgage loan brokers, financial institutions, escrow agents, persons who lend money for the purchase of real estate or interests therein, building contractors, real estate developers and subdividers, and any other person who is or may be in a position to influence the selection of a title insurer, except advertising agencies, broadcasters, or publishers, and their agents and distributors, and bona fide employees and agents of title insurers, for routine advertising or other legitimate services.

(4) This section does not affect the relationship of a title insurer to its agent with insureds, prospective insureds, their employees or others acting on their behalf. That relationship continues to be subject to the limitations and restrictions set forth in thestatutes, RCW 48.30.130 and 48.30.150.

The parties' positions:

9. The OIC urges that traditional principles of agency law do not apply in this case. Rather, the inducement statute and regulation, along with the broad regulatory powers of the OIC, are sufficient to authorize the OIC to hold CTIC liable for the illegal actions of LT. In the alternative, the OIC urges that CTIC can be held liable for the actions of its agent, LT, even applying traditional agency principles, on the theory of apparent authority. The issue whether CTIC had any "control" over LT is not relevant to the analysis, according to the OIC.

10. To the contrary, CTIC argues that traditional agency law principles apply, and that under these principles CTIC is not liable for the actions of LT. CTIC argues that the primary hallmark of an agency relationship is the principal's right to control the actions of the agent, and as that right is absent here, CTIC is not liable for the actions of LT. Those actions cannot be imputed, and CTIC is not "vicariously liable" for the illegal acts of LT, according to CTIC.

11. After careful review of the law and thorough review of the memoranda and Exhibits submitted by each party, I conclude that there is no genuine issue of material fact in dispute as to the parties' relationship or the parties' actions within that relationship, and as

a matter of law, CTIC is entitled to summary judgment. The OIC has not shown it has the legal authority to hold CTIC liable for the illegal conduct of LT, an underwritten title company agent which CTIC contracted with for the purpose of issuing title policies. Of note, the violation of any provision of the Insurance Code is a gross misdemeanor. RCW 48.01.080.

Principal-Agent Status between CTIC and LT, by statute and contract:

12. The entities' characterization of their relationship is not controlling as to the nature of their relationship as an agency. The fact of a contract between the entities which identifies these parties as "agent" and "principal" is not determinative of their status vis-a-vis each other. Even industry or popular usage does not determine that an "agency relationship" exists. See, Restatement of Law (Third) Agency §§1.01, 1.02 (2006).

13. In general, an "agent," under traditional agency principles, is a person authorized to act for another and under that party's control. The relationship may arise through employment, contract, or by apparent authority. It has long been the law that an agent can bind a principal while acting within the scope of the agency. See, Restatement (Third) Agency (2006).

14. Here, an agency relationship is suggested by the contract between CTIC and LT. These entities executed a contract which uses the term "Issuing Agent" for LT and "Principal" for CTIC, to describe their relationship to each other. The substance of that contract (as discussed below) creates the relationship if it exists, not the mere labels of "principal" and "agent."

15. LT is designated as an "agent" of CTIC under the Insurance Code. RCW 48.17.010 defines "agent" as:

"Agent" means any person² appointed by an insurer to solicit 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.

LT is a "person," as is CTIC, under the Insurance Code. (See FN 1)

16. The Insurance Code, however, does not specifically define the "agency relationship" or the parties' rights or responsibilities vis-a-vis each other. That is left to the parties to determine, to the extent their agreement is not in conflict with the Insurance Code or the

² "Person" is defined as any individual, company, insurer, association, organization, . . . partnership, business trust, or corporation. RCW 48.01.070.

OIC's regulations.

17. The Legislature could have included in the Insurance Code a clear description of the agency relationship, setting forth the rights and obligations of the principal and agent as between title insurer and title company. The Code is reasonably more concerned with third parties (the public) than the principals' and agents' rights and obligations to each other. As neither the OIC nor CTIC has identified a statute or regulation that clearly defines the relationship between the principal (CTIC) and agent (LT), the traditional agency law principles apply.

CTIC's lack of control in the relationship defeats the "agency relationship:"

18. The relationship between CTIC and LT, to meet the definition of an "agency" relationship in the common law, and as adopted by Washington courts, must have several elements. The Restatement of Law (Third) Agency, §1.01 (2006), defines agency as a relationship in this way:

Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents to act.

19. That definition is not in conflict with the definition of "agent" in the Insurance Code. The Restatement and Washington law on the subject go further than the Code in setting out the elements of an agency relationship.

20. In *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 153 P.3d 10 (2007), the court stated that "right to control [by the principal over the agent] is indispensable to vicarious liability." (Citations omitted). In *Omni*, the issue was whether an insurance company, Omni, could be held liable for the illegal acts of its agent, a collection company hired by Omni, for violations of the Washington Consumer Protection Act. Omni took no part in the collection practices at issue and had no right to control the methods or means used by its agent to collect monies for Omni on subrogated claims.

21. The *Omni* court refused to impute the agent's bad acts in violation of the Consumer Protection Act to the principal, on the basis that the principal had nothing whatever to do with the collection company's business practices or behavior. Nor did the court impose any "obligation" on the principal to monitor or know the behavior of the agent vis-a-vis the Consumer Protection Act, based on the public interest or the contract between the agent and principal.

22. *Omni* is squarely on point here. Certainly, the State's Consumer Protection Act is equally as important as the Insurance Code in terms of protecting the public interest. The Legislative statement of purpose for the Consumer Protection Act is a strongly stated public interest ideal, as is the Legislative purpose of the Insurance Code:³

The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition. . . . To this end this act shall be liberally construed that its beneficial purposes may be served.

RCW 19.86.920; See also, *Hangman Ridge*, 105 Wn.2d at 778, 719 P.2d 531 (1986).

23. Despite the strong public-interest of the Consumer Protection law, and the regulatory nature of that Act, the *Omni* court would not impute the illegal acts of the agent to the principal where the principal had no right to control the means and methods of agent's business practices.

24. The principle of agency law which was applied in *Omni* applies equally in this matter. CTIC had no right to control, and did not in fact control, any of the actions of LT in conducting marketing of title insurance. Whether CTIC benefitted from the bad acts at issue is not the question, and does not change the application of the general legal principles.

25. In the contract, CTIC manifested an assent to have LT act as its agent for the purpose of writing the title insurance policies and binding CTIC to the risk of a bad title search. LT likewise manifested its assent, via the contract, to act on behalf of CTIC in issuing the title insurance policies. Thus, CTIC and LT entered into a traditional agency relationship, which specifically limited the control by the principal to those items specifically set out in the contract. No specific authority was granted for CTIC to control the general business of LT, including how it conducted its marketing.

26. The agency relationship created is therefore not "universal," but is for limited purposes, as specified in the contract. The terms of the contract are not in dispute and the contract speaks for itself. The parties to the contract, LT and CTIC, have submitted undisputed evidence to show how they proceeded, in fact, under that contract.

³ Cf. RCW 48.01.030: "**Public Interest:** The business of insurance is one affected by the public interest, requiring all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. . . ."

27. Of note, there is no evidence that CTIC *knew* of the misbehavior by LT. That issue is not in dispute, as the OIC has not brought forth any evidence that shows this to be an issue in dispute. The undisputed facts are that CTIC had no participation in, or information about, the marketing or business dealings of LT which would have informed it that LT was violating the inducement law. CTIC did not participate in the marketing or other business dealings of LT, and had only limited rights to do so, under the contract.

28. In sum, the agency relationship is defeated by the fact that CTIC did not have the right to control the marketing actions or business procedures of LT, and therefore, the OIC cannot impute the illegal acts of LT to CTIC.

CTIC is not obligated by law to monitor its UTC agent's compliance with law:

29. There is nothing in the contract which obligates CTIC to monitor the behavior of LT at risk of having LT's illegal actions imputed to CTIC. Neither has there been any showing in the law of such a requirement.

30. Whether CTIC *could* have reviewed LT's financial records under the contract is not the point: the provision allowing such review was not interpreted by either of the parties to the contract to *obligate* CTIC to monitor how LT spent its monies, or whether it violated the law by spending too much for inducements.

The 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:

31. The OIC attempts to show that its authority for *this specific action* against CTIC is within the "broad authority" the Commissioner has under the Code. The "broad authority," while clearly very broad, must still be exercised within the parameters of the Insurance Code or the OIC's regulations.

32. The cases cited by the OIC indicate that the courts give deference to the OIC's interpretation of the Code when a provision of that Code or an OIC regulation is at issue. Here, there is no provision of the Code or regulation which directly addresses the issue, and none which directly gives the OIC authority to hold a title insurer liable for the illegal acts of UTC agents.

33. There is no question that the Code and regulations amply authorize the OIC to take action against a title insurer directly for *its own* violations, or directly against the title company for *its* violations. CTIC readily concedes this to be the law. Absent in the Insurance Code and regulations cited by OIC is the authority for OIC to hold the insurer liable for the illegal acts of another company, with whom it contracted for limited purposes,

specifically to underwrite title policies. The "broad authority" of the OIC stops short of being quite that broad; it must have an underpinning of law. I cannot find authority for the OIC's actions in the "penumbra" of the Insurance Code, although this what the OIC seems to urge.

34. I understand the OIC's policy arguments. While these are attractive from a public policy standpoint and would be expeditious, these arguments cannot legally prevail. The OIC, despite its broad regulatory authority, must have some statutory or *specific* regulatory authority to take action against an insurer under the Code. Advisory letters and other communications with the insurer, some 20 years ago, cannot substitute for the necessary statutory or *specific* regulatory authority required for the OIC's current actions. The 2006 Advisory letter, the 2006 OIC report, and the 10 to 20 year old communications to the insurer are not law.

35. Whether, as a policy matter, CTIC *should* have more control over the acts of the UTC's with whom it contracts, or should be *obligated* by law to undertake a more active role in monitoring its agents for compliance with the inducement laws, is not the issue. Such responsibility or obligation on the principal is not the status of the law.

36. Accordingly, no genuine issue of material fact exists as to the relationship between CTIC and LT, and the actions of the parties within that relationship. Based on the findings and legal analysis above, the illegal acts of LT cannot be imputed to CTIC.

37. Summary judgment is granted to CTIC on the issue of imputed liability for the illegal acts of LT in violating the inducement statute and regulation.

ORDER

IT IS HEREBY ORDERED Respondent's Motion for Summary judgment is **GRANTED** on the issue whether it can be held vicariously liable for the illegal acts of the underwritten title company with whom it contracts.

Dated and Mailed this 30th day of October, 2008, at Olympia, Washington.



Cindy L. Burdue
Administrative Law Judge
P.O. Box 9046
Olympia, WA 98507
1-800-843-7712; (360) 753-7328

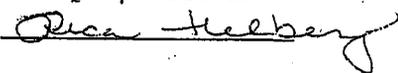
REVIEW RIGHTS

Pursuant to RCW 34.05.464 and WAC 10-08-211, any party to an adjudicative proceeding may file a Petition for Review of an Initial Order. The Petition for Review shall be filed with the agency head within **twenty (20) days** of the date of service of the Initial Order. Copies of the Petition must be served upon all other parties or their representatives at the time the Petition for Review is filed. The Petition for Review must specify the portions of the Initial Order to which exception is taken and must refer to the evidence of record which is relied upon to support the petition.

Any party may file a Reply to a Petition for Review. The Reply shall be filed with the office where the Petition for Review was filed within ten days of the date of service of the Petition for Review and copies of the Reply shall be served upon all other parties or their representatives at the time the Reply is filed.

A Petition for Review or Reply filed at the address of the Office of Administrative Hearings shall be deemed service upon the agency head. The Petition and Reply shall be forwarded to the Insurance Commissioner to be consolidated with the hearing file.

Certificate of Service

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein. 

Chicago Title Ins. Co.
c/o Kimberly Osenbaugh, Atty.
K&L Gates
925 4th Ave. Ste. 2900
Seattle, WA 98104-1158

Mr. Alan Singer, Attorney
Legal Affairs Division
Office of the Insurance Commissioner
PO Box 40255
Olympia, WA 98504-0255

Ms. Patricia Peterson
Chief Hearing Officer
Office of the Insurance Commissioner
PO Box 40255
Olympia, WA 98504-0255