Hon. Cindy L. Burdue
Hearing date and time: October 8, 2008 at 9:45 am
WITH ORAL ARGUMENT

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

In the Matter of, **CHICAGO TITLE INSURANCE COMPANY,** An authorized insurer	Docket No. 2008-INS-0002 **DECLARATION OF ALAN M. SINGER**

Alan M. Singer, under penalty of perjury of the laws of the State of Washington, declare as follows:

1. I am a Staff Attorney in the Legal Affairs Division of the Washington State Office of Insurance Commissioner ("OIC"). I am over the age of eighteen years old and I am competent to testify. I make this Declaration based upon my personal knowledge.

2. Attached hereto as **Exhibit A** is a true and correct copy of the *OIC Printout of Authorized Companies* for Chicago Title Insurance Company. It was printed on September 19, 2008.

3. Attached hereto as **Exhibit B** is a true and correct copy of the *Washington Secretary of State Corporation printout* for Land Title Company of Kitsap County. . It was printed on September 22, 2008.

4. Attached hereto as **Exhibit C** is a true and correct copy of the *OIC Company Appointment List* for Chicago Title Insurance Company. It was printed April 18, 2008.

5. Attached hereto as **Exhibit D** is a true and correct copy of *Chicago Title's answers to OIC's First Interrogatories and Requests for Production.*

6. Attached hereto as **Exhibit E** is a true and correct copy of *Chicago Title's answers to OIC's Second Interrogatories and Requests for Production.*

7. Attached hereto as **Exhibit F** is a true and correct copy of the *OIC Licensee Profile and Licensee Details*, printed April 18, 2008. According to this OIC record, Land Title has been appointed by Security Union, but that appointment was simultaneously cancelled on the same day in 1994. Thus, OIC's records show that Land Title has only been legally authorized to issue one insurer's title insurance: Chicago Title's. I am unaware of any OIC records that show that Old Republic National Title Insurance Company ("Old Republic") or any other insurer ever appointed Land Title pursuant to RCW 48.17.160.

8. Attached hereto as **Exhibit G** is a true and correct copy of the *Chicago Title / Land Title issuing agency agreement.*

9. Attached hereto as **Exhibit H** are true and correct copies of *Land Title's website printout and Chicago Title's website, as follows.* This consists of three pages. The first shows Land Title's website home page, which contains a hypertext link, "National Website." The second page shows that when the mouse arrow clicks in this link, it links to http://www.ctic.com/, which is Chicago Title's website. The third page is the Chicago Title website home page that appears when you click on the Land Title webpage's "National Website" link.

10. Attached hereto as **Exhibit I** is a true and correct copy of the l*etter from Chicago Title to OIC,* dated August 23, 2005.

11. Attached hereto as **Exhibit J** is a true and correct copy of the OIC's *May 15, 2007 letter to Land Title.*

12. Attached hereto as **Exhibit K** is a true and correct copy of the *May 22, 2007 e-mail from Fidelity National employee (and Land Title board member), Chet Hodgson to Chicago Title's Kevin Chiarello.*

13. Attached hereto as **Exhibit L** is a true and correct copy of the *September 14, 2007 letter to Chicago Title enclosing OIC Proposed Consent Order D07-308.*

14. Attached hereto as **Exhibit M** is a true and correct copy of the *Letter from OIC to David R. Porter et al.*, dated November 1, 1989 (emphasis added). This letter was located on the Washington Land Title Association ("WLTA") website: http://www.wltaonline.org/download/State%20Laws,%20Regulations,%20and%20Commissioner%20Opinions/1989%20OIC-%20Interpretation%20of%20Inducement%20Regulations.pdf.

15. Attached hereto as **Exhibit N** is a true and correct copy of the *Letter from OIC to Commonwealth*, dated January 12, 1993 (emphasis added). This letter was located on the WLTA website: http://www.wltaonline.org/download/State%20Laws,%20Regulations,%20and%20Commissioner%20Opinions/1993%20OIC-%20Providing%20to%20Employees%20Customers%20Assist.pdf.

16. Attached hereto as **Exhibit O** is a true and correct copy of the law review article, Deborah A. DeMott, *Article: When Is a Principal Charged With An Agent's Knowledge*?, 13 Duke J. Comp. & Int'l L. 291 (2003).

17. Attached hereto as **Exhibit P** is a true and correct copy of the law review article, Marin R. Scordato, *Article: Evidentiary Surrogacy And Risk Allocation: Understanding Imputed Knowledge And Notice In Modern Agency Law*, 10 Fordham J. Corp. & Fin. L. 129 (2004).

SIGNED this 24th day of September, 2008.

Alan M. Singer

EXHIBIT "A"

Authorized Insurance Companies

Company Name : Submit Reset

Company Name : CHICAGO TITLE INSURANCE COMPANY
WAOIC : 258
Admitted Date : 03/18/1977
NAIC Code : 50229
Phone : 904-854-8100
Mailing Address : 601 Riverside Ave
Jacksonville, FL 32204
Registered Address : 2201 Farnam St
Omaha, NE 68102
Company Type : Stock
Insurance Line(s) : Title

To view all companies enter '*'
Partial name of a company will be accepted.

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EXHIBIT "B"

Washington Secretary of State SAM REED

Enter Keywords Search

Corporations Division

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Corporations Division - Registration Data Search

Neither the State of Washington nor any agency, officer, or employee of the State of Washington warrants the accuracy, reliability, or timeliness of any information in the Public Access System and shall not be liable for any losses caused by such reliance on the accuracy, reliability, or timeliness of such information. While every effort is made to ensure the accuracy of this information, portions may be incorrect or not current. Any person or entity who relies on information obtained from the System does so at his or her own risk.

LAND TITLE COMPANY OF KITSAP COUNTY

UBI Number	181011497
Category	REG
Profit/Nonprofit	Profit
Active/Inactive	Active
State Of Incorporation	WA
Date of Incorporation	07/06/1967
Expiration Date	07/31/2009
Dissolution Date	
Registered Agent Information	
Agent Name	D GENE KENNEDY
Address	9657 LEVIN RD NW
City	SILVERDALE
State	WA
ZIP	98383
Special Address Information	
Address	
City	
State	
Zip	

Governing Persons

Title	Name	Address
Vice President	GREEN , STEVE	9657 LEVIN RD NW SILVERDALE , WA
Director	LEACH , FRANK	9657 LEVIN RD NW SILVERDALE , WA
President	KENNEDY , D	9657 LEVIN RD NW SILVERDALE , WA
Director	YOO , LINDA	9657 LEVIN RD NW SILVERDALE , WA
Director	RYAN , DANIEL	9657 LEVIN RD NW SILVERDALE , WA
Vice President	COLLUM , TERRI	9657 LEVIN RD NW SILVERDALE , WA
Secretary	PETERSEN , LINDA	9657 LEVIN RD NW SILVERDALE , WA
Chairman	SEVERNS , ROBERT	9657 LEVIN RD NW SILVERDALE , WA

Director	SMITH , RANDY	9657 LEVIN RD NW SILVERDALE , WA
Director	ARNOLD , TIM	9657 LEVIN RD NW SILVERDALE , WA
Director	HAWRYLUK , VAL	9657 LEVIN RD NW SILVERDALE , WA
Director	LONDON , BRADLEY	9657 LEVIN RD NW SILVERDALE , WA

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Phone Numbers | Privacy Policy | Accessibility

EXHIBIT "C"

WASHINGTON INSURANCE LICENSING INFORMATION SYSTEM

COMPANY APPOINTMENT LIST

4/18/2008

CHICAGO TITLE INSURANCE COMPANY

COMPANY NUMBER : 258

DATE AUTHORIZED : 03/18/1977

MAILING ADDRESS
601 RIVERSIDE AVE
JACKSONVILLE FL 32204

Insurance Lines	Status
Title	Active

COMPANY APPT. EXPIRY DATE : 03/18/2009

NAME	WAOIC #	APPT. LINES	Eff DATE	EXP. DATE	CAN. DATE
BUSINESS ENTITY APPOINTMENTS					
ALLIANCE TITLE & ESCROW CORPORATION 725 6TH ST CLARKSTON WA 99403	131780	Title	05/22/1997	03/18/2009	
AMERITITLE INC 101 W FIFTH AVE POB 617 ELLENSBURG WA 98926	137771	Title	09/01/1998	03/18/2009	
CHICAGO TITLE COMPANY OF WASHINGTON 770 NE MIDWAY BLVD POB 1050 OAK HARBOR WA 98277	19852	Title	01/29/1992	03/18/2009	
COAST TITLE & ESCROW INC 522 W WISHKAH POB 287 ABERDEEN WA 98520	8492	Title	06/12/2007	03/18/2009	
FIDELITY TITLE COMPANY POB 1682 YAKIMA WA 98907	13067	Title	03/26/1981	03/18/2009	
LAND TITLE COMPANY OF KITSAP COUNTY INC POB 2737 SILVERDALE WA 98383	23081	Title	03/05/1993	03/18/2009	
LAND TITLE COMPANY OF KITSAP COUNTY INC POB 327 SHELTON WA 98584	23082	Title	03/05/1993	03/18/2009	

NAME	WAOIC #	APPT. LINES	Eff DATE	EXP. DATE	CAN. DATE
BUSINESS ENTITY APPOINTMENTS					
LAND TITLE OF WALLA WALLA COUNTY INC 33 E MAIN ST WALLA WALLA WA 99362	69280	Title	04/30/2004	03/18/2009	
LSI TITLE AGENCY INC 2550 N REDHILL AVE SANTA ANA CA 92705	237228	Title	01/31/2005	03/18/2009	
SKAMANIA COUNTY TITLE COMPANY 41 RUSSELL ST PO BOX 277 STEVENSON WA 98648	113040	Title	05/14/2007	03/18/2009	
SPOKANE COUNTY TITLE COMPANY 1010 N NORMANDIE STE 100 SPOKANE WA 99201	37472	Title	06/27/2007	03/18/2009	
TITLE GUARANTY COMPANY OF LEWIS COUNTY POB 1304 CHEHALIS WA 98532	39725	Title	06/12/2007	03/18/2009	

EXHIBIT "D"

DAVID C. NEU
JUN 05 2008
RECEIVED

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE INSURANCE COMMISSIONER

In The Matter of: CHICAGO TITLE INSURANCE COMPANY, Respondent.	Docket No. 2008-INS-0002 OIC No. D07-308 **OIC'S FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO CHICAGO TITLE INSURANCE COMPANY** **AND ANSWERS AND RESPONSES THERETO**

TO: Kimberly W. Osenbaugh
KIRKPATRICK & LOCKHART PRESTON GATES ELLIS LLP
925 Fourth Avenue, Suite 2900
Seattle, Washington 98104-1158

Definitions and Procedures

A. Procedures: Please complete the answers within the space provided, and, if needed, add additional pages. Within the time the Washington Civil Rules for Superior Court permit, return one copy to the office of the undersigned together with copies of documents requested.

B. Scope of Answers: By any use of the pronoun "you" and "your," it is intended that the answers are to include all information known to you, to your agents and attorney, and to your attorney's agents and investigators, accountants, appraisers, and employees. "You" and "your" include Chicago Title Insurance Company and Land Title Company of Kitsap County, Inc.

C. Document: As used herein, the word "document" shall mean the original and any copy, regardless of origin or location, of any book, pamphlet, periodical, letter, memorandum, telegram, report, record, study, handwritten note, map, drawing, working paper, chart, paper, graph, index, tape, data sheet or data processing card, or any other written, recorded transcribed, punched, taped, filmed, or graphic matter, written, recorded, transcribed, punched, taped, filmed, or graphic matter, however produced or reproduced, to which you have or have had access.

D. Continuing in Nature: The interrogatories shall be deemed to be continuing. In the event that you or your attorney discover additional information that is responsive to any of them, upon receipt of the information, you are to promptly provide supplemental information or change your answers accordingly. If additional information is discovered between the time of making these answers and the time of hearing, these interrogatories are directed to that information. If such information is not furnished, the undersigned will move, at the time of hearing, to exclude from evidence any information requested and not furnished.

E. Numbers: All interrogatories and requests shall be numbered consecutively. The requests will be specifically identified.

F. Identify or Identity:

1. Person: As used herein, "identify" or "identity" used in reference to an individual person means to state his or her full present address, telephone number, present or last position or business position, and business affiliation at the time in question.

2. Document: "Identify" or "identity" when used in reference to a document means to state the date and author, type of document identifying it), and its present location or custodian. If any such document was, but is no longer in your possession or subject to your control, state what disposition was made of it.

3. Account: "Identify" or "identity" when used in reference to an account means to state the name, address and telephone number of the institution, person, or other entity holding, associated with, or creating the account, type of account, the date of the account's creation, the identity of the person or persons authorized to access, use, or control funds in the account, and the account's location or custodian. If any such account was, but is no longer in existence, state what disposition was made of it.

DATED this 27th day of March, 2008.

Marcia G. Stickler
Legal Affairs Division
Office of Insurance Commissioner

/
/
/
/

DECLARATION OF MAILING
I declare under penalty of perjury under the laws of the State of Washington that On the date listed below I mailed or caused delivery of a true copy of this document to

DATED this _____ day of

_____

at Olympia, Washington.
Signed: _____

General Objections

OBJECTIONS TO INSTRUCTIONS AND DEFINITIONS

Chicago Title Insurance Company ("CTIC") offers the following objections to the OIC's Definitions and Procedures:

1. CTIC objects to the OIC's instructions that its interrogatories and requests for production are continuing in nature and that CTIC is required to supplement its answers and/or its production as imposing obligations beyond the requirements placed on CTIC under the Washington Rules of Civil Procedure. CTIC will supplement its responses as required under Washington Rule of Civil Procedure 26(e).

2. These discovery requests define "you" and "your," to include CTIC and Land Title Company of Kitsap County, Inc. ("Land Title"). Land Title is a separate corporation and not a party to this action and its internal records are not within the control of CTIC. Accordingly, CTIC objects to this request and will produce only those responsive, non-privileged documents that are within the care, custody and control of CTIC.

3. CTIC objects to the extent that any of these interrogatories and requests for production ask for information or documents protected by the attorney client privilege or are attorney work product.

4. The Scheduling Order in this case makes clear that this proceeding has been bifurcated into two phases, the first phase ("Phase I") is limited to the issue of CTIC's legal liability for the actions of Land Title. If the case is not resolved in Phase I, there is a second phase ("Phase II") to address the issue of whether Land Title's expenditures constitute a violation of OIC rules. Phase I and Phase II have separate discovery periods and discovery deadlines. CTIC objects to these requests to the extent they seek information related to issues relatted to Phase II.

5. CTIC objects to these interrogatories and requests for production to the extent to which they request information not in the care, custody and control of CTIC such as documents in the possession of CTIC's independent agents.

INTERROGATORIES

INTERROGATORY NO. 1: Please identify all corporate connections between Chicago Title, Land Title Company of Kitsap County, Inc., ("Land Title") and Fidelity National Financial from 2006 to the present, including ownership interests and governance.

ANSWER:

Security Union Title Insurance Company is a wholly-owned subsidiary of Chicago Title and Trust Company ("Chicago Title Trust"), an Illinois corporation. CTIC, a Missouri corporation, is also a wholly-owned subsidiary of Chicago Title Trust. Chicago Title Trust is a subsidiary of Fidelity National Financial, Inc., a holding company incorporated in the State of Delaware.

As of April 18, 2008, Security Union Title Insurance Company owns 28,330 shares in Land Title Company of Kitsap County, Inc. While there are some fluctuation, this currently represents about 45% of the issued shares in Land Title Company of Kitsap County, Inc.

As a shareholder, Security Union Title Insurance Company receives dividends and financial reports from Land Title Company of Kitsap County, Inc. and votes its shares as authorized.

INTERROGATORY NO. 2: Please describe the residential refinance escrow discount advertised in the attached flyer from Land Title's Belfair and Shelton escrow offices. Please list the undiscounted rates.

ANSWER:

CTIC objects to this interrogatory as it requests information outside of the care, custody and control of CTIC. CTIC has no information related to escrow discounts offered by Land Title.

INTERROGATORY NO. 3: Please explain how Land Title arrived at a price of $2.50 per "zone" for flyer deliveries in Kitsap County. Explain how this price covered your costs to provide the service or was the fair market value of the service.

ANSWER:

CTIC objects to this interrogatory as it requests information outside of the care, custody and control of CTIC. CTIC has no information related to escrow discounts offered by Land Title, other than the written explanation provided to the OIC by Land Title, which was, in turn, provided to CTIC's counsel by the OIC.

INTERROGATORY NO. 4: In a memorandum to Linda Peterson from Steve dated June 21,2007, it was stated that it is Land Title's policy to provide assistance at broker's open houses by its sales personnel. The OIC asked Land Title in a letter dated July 23, 2007, to explain exactly what assistance was rendered. Land Title did not respond to that inquiry. Please explain what involvement Land Title staff had with brokers' open houses between December 2006 and April 2007, and list each open house and Land Title staff involved.

ANSWER:

CTIC objects to this interrogatory as it requests information outside of the care, custody and control of CTIC. CTIC has no information related to the involvement of Land Title staff with broker's open houses.

INTERROGATORY NO. 5: Please explain how Land Title arrived at a monthly payment of $68.00 for a portion of an advertisement for Patrice Diehl in Homes & Land Magazine. Specifically, please provide your measurements and calculations used to arrive at an appropriate payment for the portion of the ads that contained your logo and contact information compared with the $875 cost for each of the ads.

ANSWER:

CTIC objects to this interrogatory as it requests information outside of the care, custody and control of CTIC. CTIC has no information related to the advertisement in question, other than the written explanation provided to the OIC by Land Title, which was, in turn, provided to CTIC's counsel by the OIC.

REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 1: Please produce true and correct copies of all documents related to Land Title's RealQuest subscription between January 2006 and April 2007. Please include the contract or agreement, monthly invoices, and all other internal and third-party documents relating to how and under what conditions your customers were given IDS, passwords, etc., to access RealQuest.

RESPONSE:

CTIC objects to this request for production as it requests documents outside of the care, custody and control of CTIC. CTIC has no documents related to the request, other than the documents provided to the OIC by Land Title, which were, in turn, provided to CTIC's counsel by the OIC.

REQUEST FOR PRODUCTION NO. 2: Please produce true and correct copies of all records related to Land Title's provision of courier services by Nicole Burlingame and Jessica Bowen, including payroll information for each of them, mileage allowances, gasoline expenses, delivery routes, etc. If these records were compiled monthly, please submit the monthly reports from January 2006 through March 2007.

RESPONSE:

CTIC objects to this request for production as it requests documents outside of the care, custody and control of CTIC. CTIC has no documents related to the request, other than the documents provided to the OIC by Land Title, which were, in turn, provided to CTIC's counsel by the OIC.

REQUEST FOR PRODUCTION NO. 3: Please produce a true and correct copy of the Poulsbo Chamber of Commerce newsletter and e-mail you stated were issued, or other documentary evidence demonstrating that rather than the "customer appreciation party" reflected in your expense reports, Land Title actually sponsored a Chamber After Hours party at your escrow office on December 7, 2006.

RESPONSE:

CTIC objects to this request for production as it requests documents outside of the care, custody and control of CTIC. CTIC has no documents related to the request, other than the documents provided to the OIC by Land Title, which were, in turn, provided to CTIC's counsel by the OIC.

As to objections:

Dated this 5th day of June, 2008.

KIRKPATRICK & LOCKHART PRESTON GATES ELLIS LLP

By _____
Kimberly W. Osenbaugh
DAVID C. New, WSBA 33143

VERIFICATION

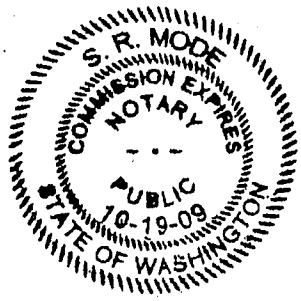
STATE OF _____)
) ss.
COUNTY OF _____)

BRADLEY J. London, as Vice President of Chicago Title Insurance Company, being first duly sworn, on oath deposes and says: That I have made the foregoing answers to interrogatories and responses to requests for production, know the contents thereof, and believe the same to be true and complete.

_____

SUBSCRIBED AND SWORN TO before me this 2nd day of June, 2008.

_____



(Signature of Notary)
S R Mode
(Print or stamp name of Notary)
NOTARY PUBLIC in and for the
State of Washington,
Residing at Vancouver.
My Appointment Expires: 10.19.09

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury according to the laws of the State of Washington that I am now, and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of 18 years, not a party to or interested in the above-entitled matter, and competent to be a witness herein.

On the date given below, I caused to be served by depositing into the United State mail, first-class postage prepaid, the foregoing FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO CHICAGO TITLE INSURANCE COMPANY AND ANSWERS AND RESPONSES THERETO on the following party:

Marcia G. Stickler
Legal Affairs Division
Office of the Insurance Commissioner
P.O. Box 40255
Olympia, WA 98504-0255

SIGNED at Seattle, Washington this _____ day of _____, 2008.

_____
Karly Stevens

K:\2047571\00120\20771_KWO\20771P23G6

EXHIBIT "E"

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I caused to be deposited in the United States mail a properly stamped and addressed envelope containing a copy of this document addressed to Kim Osenbaugh.

Dated July __, 2008, at Tumwater, Washington

RECEIVED

AUG 19 2008

INSURANCE COMMISSIONER
LEGAL AFFAIRS DIVISION

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

In Re the Matter of

CHICAGO TITLE INSURANCE COMPANY,

An authorized insurer.

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

CHICAGO TITLE INSURANCE COMPANY'S SUPPLEMENTARY ANSWERS AND RESPONSES TO SECOND INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO CHICAGO TITLE INSURANCE COMPANY

DEFINITIONS AND PROCEDURES

A. Procedures: Please complete the answers and responses within the space provided, and, if needed, add additional pages. Within the time permitted under the Washington Civil Rules for Superior Court of the State of Washington, as adopted by the Administrative Procedures Act, return one copy to the office of the undersigned together with copies of documents requested.

B. Scope of Answers and Responses: "You" and "your" include but are not limited to Chicago Title Insurance Company ("Chicago Title"). By any use of the pronoun "you" and "your," it is intended that your answers and responses are to include all information known to you, to your appointed agents (which agents include without limitation Land Title Company of Kitsap County, Inc., hereinafter "Land Title"), to your authorized representatives, to your attorney, and to your attorney's agents and investigators, accountants, appraisers, and employees.

C. Document: As used herein, the word "document" shall mean the original and any copy, regardless of origin or location, of any book, pamphlet, periodical, letter, memorandum, telegram, report, record, study, handwritten note, map, drawing, picture, photograph, other visual depiction, working paper, chart, paper, graph, index, tape, data sheet or data processing card, or any other written, recorded transcribed, punched, taped, filmed, or graphic matter, however produced or reproduced, to which you have or have had access.

D. Continuing in Nature: These interrogatories and requests for production shall be deemed to be continuing. In the event that you or your attorney discovers any additional

information that is responsive to any of them, upon receipt of the information, you are to promptly provide supplemental information or change your answers and responses accordingly. If additional information is discovered between the time of making these answers and the time of hearing, these interrogatories and requests for production are directed to that information. If such information is not furnished, the undersigned will move, at the time of hearing, to exclude from evidence any information requested and not furnished, and for such other relief as may be appropriate.

E. Numbers: All interrogatories and requests for production shall be numbered consecutively and specifically identified.

F. Identify or Identity:

1. Person: As used herein, "identify" or "identity" used in reference to an individual person means to state his or her full name, present address, telephone number, present or last known position or business affiliation, position, and business affiliation at the time in question. "Person" is defined at RCW 48.01.070 of Washington's Insurance Code.

2. Document: "Identify" or "identity" when used in reference to a document means to state the date and author, type of document (e.g., identifying it), and its present location or custodian. If any such document was, but is no longer in your possession or subject to your control, state what disposition was made of the document.

All interrogatories and requests for production shall be numbered consecutively and specifically identified.

DATED this ____ day of July, 2008.

_____
Alan Michael Singer
Staff Attorney
Legal Affairs Division
Office of the Insurance Commissioner

General Objections

OBJECTIONS TO INSTRUCTIONS AND DEFINITIONS

Chicago Title Insurance Company ("CTIC") offers the following objections to the OIC's Definitions and Procedures:

1. CTIC objects to the OIC's instructions that its interrogatories and requests for production are continuing in nature and that CTIC is required to supplement its answers and/or its production as imposing obligations beyond the requirements placed on CTIC under the Washington Rules of Civil Procedure. CTIC will supplement its responses as required under Washington Rule of Civil Procedure 26(e).

2. These discovery requests define "you" and "your," to include CTIC's appointed agents "including without limitation Land Title of Kitsap County, Inc." CTIC objects to the characterization of Land Title of Kitsap County, Inc. ("Land Title") as its appointed agent. Land Title is a separate corporation and not a party to this action and its internal records are not within the control of CTIC. CTIC denies that Land Title is its agent except for a limited purpose. Accordingly, CTIC objects to this request and will produce only those responsive, non-privileged documents that are within the care, custody and control of CTIC.

3. CTIC objects to the extent that any of these interrogatories and requests for production ask for information or documents protected by the attorney client privilege or are attorney work product.

4. The Scheduling Order in this case makes clear that this proceeding has been bifurcated into two phases, the first phase ("Phase I") is limited to the issue of CTIC's legal liability for the actions of Land Title. If the case is not resolved in Phase I, there is a second phase ("Phase II") to address the issue of whether Land Title's expenditures constitute a violation of OIC rules. Phase I and Phase II have separate discovery periods and discovery deadlines. CTIC objects to these requests to the extent they seek information related to Phase II issues.

5. CTIC objects to these interrogatories and requests for production to the extent to which they request information not in the care, custody and control of CTIC such as documents in the possession of underwritten title companies that contract with CTIC for underwriting services.

6. CTIC objects to these interrogatories and requests for production to the extent they request information from prior to December, 2006.

INTERROGATORIES

INTERROGATORY NO.1. Please identify each person Chicago Title appointed as an agent in this state.

ANSWER:

Objection. This interrogatory is vague, overly-broad, and not relevant to determination of whether CTIC is liable for the actions of Land Title. Objection is also asserted to the extent this interrogatory seeks legal conclusions and case theory. Without waiving the above general and specific objections, CTIC answers Interrogatory No. 1 as follows:

Concurrently with these answers, CTIC will produce copies of all limited agency agreements it has with certain underwritten title companies ("UTCs") in Washington, pursuant to which such UTCs, such as Land Title, are authorized to issue title insurance policies underwritten by CTIC.

CTIC supplements its answer as follows:

The Documents in the bates number range of CTIC 000100-000104 contain a list of companies with whom CTIC has entered into limited agency agreements (those with the designation "CTIC" listed in the Underwriter column). Copies of the agreements were produces as bates nos. CTIC 000001-000098. The parties to these agreements include Alliance Title and Escrow (Asotin); Amerititle (Kittitas); Amerititle (Klickitat); Fidelity Title Company (Yakima); Land Title Company of Kitsap County (Kitsap); Land Title Company of Mason County (Mason); Land Title Company of Walla Walla County, Inc. (Walla Walla); Pacific Northwest Title Company of Spokane (Spokane); Skamania Title Company (Skamania); Spokane County Title Company (Spokane); Title Guaranty Company of Lewis County (Lewis);

INTERROGATORY NO. 2. Please identify each individual and each business or other entity that solicits Chicago Title's insurance in the Washington counties of Kitsap, Clallam, Jefferson, and/or Mason, and each's WAOIC number.

ANSWER:

Objection. This interrogatory is vague, overly-broad, harassing, and not relevant to determination of whether CTIC is liable for the actions of Land Title. Without waiving the above general and specific objections, CTIC answers Interrogatory No. 2 as follows:

As set forth in CTIC's answer to Interrogatory No. 1, CTIC has produced all agency agreements with UTCs in Washington, with whom CTIC has an agreement to underwrite title policies issued by the UTC. To the extent such UTCs have "WAOIC numbers," such numbers are known to the OIC. UTCs do no solicit business on behalf of CTIC, but rather solicit business on their own behalf.

CTIC supplements its answer as follows:

CTIC has no employees that solicit business on its behalf in Kitsap, Clallam, Jefferson, and/or Mason Counties. As set forth in answer to Interrogatory No. 1, CTIC is a party to limited agency agreements with UTCs that operate in Kitsap, Clallam, Jefferson and/or Mason Counties – specifically Land Title of Kitsap County, Inc. and Land Title Company of Mason County. CTIC reiterates that UTCs solicit business on their own behalf, not on behalf of CTIC.

INTERROGATORY NO. 3. Please identify each Washington Chicago Title agent for whom Chicago Title made any guarantee or agreement to accept any financial responsibility for any fraudulent or dishonest acts of such agent's employees, officers, or owners, and identify and describe each such guarantee or agreement made.

ANSWER:

Objection. This interrogatory is vague and not relevant to determination of whether CTIC is liable for the actions of Land Title. To the extent this interrogatory seeks information on agreements or guarantees outside of the State of Washington, it is overbroad, unduly burdensome, and nor relevant. Without waiving the above general and specific objections, CTIC answers Interrogatory No. 3 as follows:

The OIC has in its possession evidence of financial responsibility as required under RCW 48.29.155, and, accordingly, has knowledge of all such agreements made by CTIC.

CTIC supplements its answer as follows:

As required under RCW 48.29.155, CTIC has accepted financial responsibility for certain fraudulent or dishonest acts committed by all of the UTCs identified in answer to Interrogatory No. 1. A copy of CTIC's guarantee with respect to Land Title has been produces under bates no. CTIC 000335.

INTERROGATORY NO. 4. Did Chicago Title provide the Insurance Commissioner with notice that it had appointed Land Title as an agent for Chicago Title? Unless your answer is an unqualified "yes," please set forth the basis for your answer.

ANSWER:

Objection. This interrogatory is not relevant to determination of whether CTIC is liable for the actions of Land Title. Without waiving the above general and specific objections, CTIC answers Interrogatory No. 4 as follows:

The information responsive to this Interrogatory is known to the OIC.

CTIC supplements its answer as follows:

Yes. A copy of the appointment certificate has been produced as bates no. 000336.

INTERROGATORY NO. 5. Is Land Title an agent for Chicago Title? Unless your answer is an unqualified "yes," please set forth the basis for your answer.

ANSWER:

Objection. This interrogatory is vague. Objection is also asserted to the extent this interrogatory seeks work product, legal conclusions, and case theory. Without waiving the above general and specific objections, CTIC answers Interrogatory No. 5 as follows:

Land Title is an agent of CTIC only within the limited scope set forth in the Issuing Agency Agreement between CTIC and Land Title dated May 1, 1992. It is not an agent for any purpose other than issuance of policies underwritten by CTIC.

Land Title has it own title plant, solicits business on its own behalf and contracts with CTIC, and others, as an authorized underwriter under Washington law, to underwrite risks less a contractually agreed deductible dollar amount. Under Washington law, a title company such as Land Title is not an "agent" within the meaning of RCW 48.17.010. *See, e.g., Fidelity Title Company v. Dep't of Revenue*, 49 Wn. App. 662, 669-70, 745 P.2d 530 (1987).

INTERROGATORY NO. 6. Please identify each Washington authorized title insurer (i.e., each title insurer that has been issued a Certificate of Authority by the Washington Office of the Insurance Commissioner) for which Land Title solicits or has solicited title insurance, from 1992 to the present.

ANSWER:

CTIC objects to this interrogatory as it requests information outside of the care, custody and control of CTIC.

CTIC supplements its answer as follows:

CTIC believes that Land Title is authorized to issue title insurance policies underwritten by Old Republic Title Insurance Company.

INTERROGATORY NO. 7. Please identify all payments and other forms of expenditures Chicago Title, Chicago Title and Trust Company, Fidelity National Financial, or Security Union Title Insurance Company (or any person affiliated with any of these entities) made to Land Title from 2005 to the present, including a brief description of the payment amount or expenditure value, the person or entity making the payment or expenditure, and the purpose and reasons for each such payment or expenditure made.

ANSWER:

CTIC objects to this interrogatory as vague, overly-broad, unduly burdensome, harassing, and not relevant to determination of whether CTIC is liable for the actions of Land Title. CTIC further objects to this interrogatory as requesting information not in the custody and control of CTIC. Without waiving the above general and specific objections, CTIC answers Interrogatory No. 7 as follows:

From 2005 to the present, CTIC did not pay any expenses of Land Title, nor did CTIC reimburse Land Title for any operational expenses. If a CTIC office performed escrow services on a transaction involving property located in Kitsap County, it is possible that title services were performed by Land Title. In such instances, CTIC would remit the title premium and other title charges to Land Title. Because such remittances would only be reflected in the individual escrow files located at the branch offices, it would not be possible for CTIC to account for such payments without conducting a file-by-file review of tens of thousands of escrow files.

INTERROGATORY NO. 8. Please identify all payments and other forms of expenditures Chicago Title, Chicago Title and Trust Company, Fidelity National Financial, or Security Union Title Insurance Company (or any person affiliated with any of these entities) received from Land Title from 2005 to the present, including a brief description of the payment amount or expenditure value, the person or entity making the payment or expenditure, and the purpose and reasons for each such payment or expenditure made.

ANSWER:

CTIC objects to this interrogatory as vague, overly-broad, unduly burdensome, harassing, and not relevant to determination of whether CTIC is liable for the actions of Land Title. CTIC further objects to this interrogatory as requesting information not in the custody and control of CTIC. Without waiving the above general and specific objections, CTIC answers Interrogatory No. 8 as follows:

Provided herewith is an accounting of payments made by Land Title to CTIC from 2005 to the present.

CTIC supplements its answer as follows:

CTIC has produced documents reflecting all payments or expenditures made by Land Title to CTIC, bates nos. CTIC 000250-000333.

INTERROGATORY NO. 9. Does Chicago Title, Chicago Title and Trust Company, Fidelity National Financial, or Security Union Title Insurance Company pay money to lease and/or maintain the Land Title set of tract indexes (also known as 'title plant')? Unless your answer is an unqualified "yes," please set forth the basis for your answer.

ANSWER:

Without waiving the above general objections, CTIC answers Interrogatory No. 9 as follows:

CTIC pains no money to lease or maintain Land Title's title plant.

INTERROGATORY NO. 10. Please identify, by year, the amounts of payments (if any) made to lease and/or maintain the Land Title set of tract indexes (also known as 'title plant') from 1992 to the present, and identify the person or entity making the payments.

ANSWER:

See answer to Interrogatory No. 9.

INTERROGATORY NO. 11. Please identify all Land Title board members and all Land Title officers which board members or officers from 1992 to the present who have ever had any corporate or other connection with or financial interest in Chicago Title, Chicago Title and Trust Company, Fidelity National Financial, or Security Union Title Insurance Company.

ANSWER:

CTIC objects to this interrogatory as vague, overly-broad, requesting information not in the custody and control of CTIC, seeking information related to persons not a party to this proceeding, and not relevant to determination of whether CTIC is liable for the actions of Land Title. Without waiving the above general and specific objections, CTIC answers Interrogatory No. 8 as follows:

CTIC records reflect that Linda Yoo and William Massey were elected to the Board of Directors in 2000. It appears that in 2001, Jeff Knudson and Chet Hodgson were elected to the Board. As of 2002, the Board consisted of Gene Kennedy, Jeff Knudson, Chet Hodgson, Linda Yoo, Tim Arnold, Jerry Reid, Bob Stewart, Randy Smith, and Frank Leach Of these members, Jeff Knudson, Chet Hodgson, and Linda Yoo worked for Fidelity National Financial or subsidiaries. As of July, 2005, the Board consisted of Gene Kennedy, Tim Arnold, Linda Yoo, Chet Hodgson, Jeff Knudson, Frank Leach, and Randy Smith. Chet Hodgson, and Linda Yoo worked for Fidelity National Financial or subsidiaries. Currently, Brad London, Linda Yoo, and Robert Severns are Board members who are also employees of Fidelity National Financial or subsidiaries.

INTERROGATORY NO. 12. Please identify the number of Land Title shares, the value of such shares (both fair market and diluted) and the percentage of such shares owned by Chicago Title, Chicago Title and Trust Company, Fidelity National Financial, and/or Security Union Title Insurance Company from 1992 to the present.

ANSWER:

CTIC objects to this interrogatory as not relevant to determination of whether CTIC is liable for the actions of Land Title. CTIC further objects to this interrogatory as requesting information not in the custody and control of CTIC. The number of Land Title shares held by any entity other than CTIC is irrelevant to the question of whether Land Title is an agent of CTIC. In April, 1988, Security Union held 21,830 shares of Land Title stock. In 1999, Security Union acquired 6500 additional shares of Land Title stock, for a total of 28,330. While there are some fluctuation, this currently represents about 45% of the issued shares in Land Title Company of Kitsap County, Inc. CTIC is unaware of the value of the stock, as Land Title stock is not publicly traded.

CTIC supplements its answer as follows:

CTIC is not a shareholder of Land Title. CTIC believes that neither Fidelity National Financial nor Chicago Title and Trust are shareholders of Land Title.

INTERROGATORY NO. 13 . Please identify and describe all advertising, marketing, and other such efforts and activities undertaken by Chicago Title, Chicago Title and Trust Company, Fidelity National Financial, or Security Union Title Insurance Company for the purpose of bringing about Washington title insurance business. Please identify and describe each such effort, your reasons for believing they may bring about Washington title insurance business, and the persons with knowledge of such activities and efforts.

ANSWER:

CTIC objects to this interrogatory as vague, overly-broad, unduly burdensome, calling for information not within the custody or control of CTIC, not relevant to determination of whether CTIC is liable for the actions of Land Title, and designed solely to harass CTIC.

CTIC supplements its answer as follows:

CTIC does not conduct any advertising or marketing in Mason, Kitsap, Clallam, or Jefferson Counties. CTIC believes that Fidelity National Financial, Chicago Title and Trust Company, and/or Security Union Title Insurance Company do not advertise or engage in marketing on CTIC's behalf in Mason, Kitsap, Clallam, or Jefferson Counties.

INTERROGATORY NO. 14. Please identify and describe all advertising, marketing, and other such efforts and activities undertaken to bring about Chicago Title insurance business in Washington, both generally in the state and also more particularly in the counties serviced by Land Title. Please identify the persons with knowledge of such activities and efforts.

ANSWER:

CTIC objects to this interrogatory as vague, overly-broad, unduly burdensome, calling for information not within the custody or control of CTIC, not relevant to determination of whether CTIC is liable for the actions of Land Title, and designed solely to harass CTIC.

CTIC supplements its answer as follows:

See answer to Interrogatory No. 13.

INTERROGATORY NO. 15. Do you contend that the insurance you transact in this state need not meet the standards and requirements of Title 48 of the Revised Code of Washington? Unless your answer is an unqualified "no," please set forth the basis for your answer.

ANSWER:

CTIC objects to this interrogatory as vague and not relevant to determination of whether CTIC is liable for the actions of Land Title. Objection is also asserted to the extent this interrogatory seeks work product, legal conclusions, and case theory. Without waiving the above general and specific objections, CTIC answers Interrogatory No. 15 as follows:

CTIC concurs that Title 48 of the Revised Code of Washington regulates insurance and insurance transactions in the State of Washington.

INTERROGATORY NO. 16. Do you contend that the insurance you transact in this state need not fully comply with, and qualify according to the provisions of Title 48 of the Revised Code of Washington? Unless your answer is an unqualified "no," please set forth the basis for your answer.

ANSWER:

See answer to Interrogatory No. 15.

INTERROGATORY NO. 17. Do you keep track or record of the lender, the mortgage broker, the real estate broker, agent and/or company representing the seller and the buyer, and any other person to whom Chicago Title's insurance was solicited? Unless your answer is an unqualified "no," for each Chicago Title policy of title insurance issued by Land Title in insurance transactions from 2003 through the present, please identify the lender, the mortgage broker, the real estate broker, agent and/or company representing the seller and the buyer, and any other person to whom Chicago Title's insurance was solicited.

ANSWER:

CTIC objects to this interrogatory as not relevant to determination of whether CTIC is liable for the actions of Land Title and designed solely to harass CTIC. Without waiving the above general and specific objections, CTIC answers Interrogatory No. 17 as follows:

CTIC does not possess such information with respect to title insurance policies issued by Land Title.

CTIC supplements its answer as follows:

No.

INTERROGATORY NO. 18. Please identify all actions taken by Chicago Title from 1990 to the present to ensure that the title insurance business and transactions conducted in the Washington counties of Kitsap, Clallam, Jefferson and/or Mason comply with RCW 48.30.140, RCW 48.30.150, and WAC 284-30-800 regarding the giving of inducements, payments, or rewards exceeding twenty-five dollars ($25) in value, per person per year, to real estate agents and brokers, mortgage loan brokers or lenders, builders, or other persons. As part of your answer, please identify the persons with knowledge of such actions.

ANSWER:

CTIC objects to this interrogatory as vague, overly-broad, not relevant to determination of whether CTIC is liable for the actions of Land Title, and designed to solely harass CTIC. Without waiving the above general and specific objections, CTIC answers Interrogatory No. 18 as follows:

CTIC does not provide training or guidance to Land Title related to its compliance with RCW 48.30.140, RCW 48.30.150, and WAC 284-30-800, nor does it have the right under its agreement with Land Title to monitor such compliance. Under the agreement, Land Title is responsible for complying with all federal and state statutes, rules and regulations.

CTIC supplements its answer as follows:

CTIC took no actions from 1990 to the present to insure that independent companies, including UTCs such as Land Title, comply with RCW 48.30.140, RCW 48.30.150, and WAC 284-30-800. UTCs are responsible for their own compliance.

INTERROGATORY NO. 19. Please identify all actions taken by Chicago Title in response to the information contained in the Commissioner's October 2006 investigation report (*see* http://www.insurance.wa.gov/publications/news/Investigation_Title_Insurance.pdf) and September 2007 task force report (*see* http://www.insurance.wa.gov/publications/news/2140-Report.pdf) to ensure that the title insurance business and transactions conducted in the Washington counties of Kitsap, Clallam, Jefferson and/or Mason comply with RCW 48.30.140, RCW 48.30.150, and WAC 284-30-800 regarding the giving of inducements, payments, or rewards exceeding twenty-five dollars ($25) in value, per person per year, to real estate agents and brokers, mortgage loan brokers or lenders, builders, or other persons. As part of your answer, please identify the persons with knowledge of such actions.

ANSWER:

CTIC objects to this interrogatory as vague, overly-broad, not relevant to determination of whether CTIC is liable for the actions of Land Title, and designed to solely harass CTIC. Without waiving the above general and specific objections, CTIC answers Interrogatory No. 19 as follows:

See answer to Interrogatory No. 18. The Commissioner's October 2006 investigation report was public information, and Land Title appears to have been well-aware of it based on communications between Land Title and the OIC, produced by the OIC to CTIC.

CTIC supplements its answer as follows:

As set forth in CTIC's answer to Interrogatory No. 18, CTIC took no action, with respect to Land Title, in response to the OIC's October, 2006, report.

INTERROGATORY NO. 20. As to any documents pertaining to RCW 48.30.140, RCW 48.30.150, WAC 284-30-800 or to the topic of giving of inducements, payments, or rewards exceeding twenty-five dollars ($25) in value, per person per year, to real estate agents and brokers, mortgage loan brokers or lenders, builders, or other persons, please identify each such document to or from the Insurance Commissioner of the State of Washington that you read, received, or reviewed.

ANSWER:

CTIC objects to this interrogatory as vague, overly-broad, not relevant to determination of whether CTIC is liable for the actions of Land Title, and designed to solely harass CTIC.

CTIC supplements its answer as follows:

CTIC is aware that the OIC has sent advisory letters to various title insurance companies and the Washington Land Title Association over the years regarding RCW 48.30.140, RCW 48.30.150, WAC 284-30-800. CTIC cannot provide a specific list of all such documents that one of its many employees may have seen over the years.

INTERROGATORY NO. 21. Please state all factual and legal bases for your assertions, as contained in paragraphs 3.1 through 3.3 of your Response to the OIC's Notice of Hearing, (a) that the OIC lacks the authority to impose a fine against Chicago Title in addition to or in lieu of the suspension, revocation, or refusal of its Certificate of Authority in this matter and (b) that various provisions of WAC 284-30-800 are not applicable to Chicago Title in this matter. In your answer, please identify any laws, principles, rules, and/or regulations promulgated by the OIC or any other state agency that you contend bear in any way on your assertions.

ANSWER:

Objection. This interrogatory is vague. Objection is also asserted to the extent this interrogatory seeks work product, legal conclusions, and case theory. Without waiving the above general and specific objections, CTIC answers Interrogatory No. 21 as follows:

See Section 4 of Response by Chicago Title Insurance Company to Notice of Hearing, filed herein.

CTIC supplements its answer as follows:

The OIC identifies RCW 48.05.185 as the statutory basis for seeking a fine against CTIC in the amount of $145,000. RCW 48.05.185 authorizes the OIC to "levy a fine upon [an] insurer in an amount not less than two hundred fifty dollars and not more than ten thousand dollars" only "in addition to or in lieu of the suspension, revocation, or refusal to renew any certificate of authority." RCW 48.05.185. The OIC has not initiated proceedings to suspend or revoke CTIC's certificate of authority, nor has it refused to renew the certificate. Accordingly, RCW 48.05.185 does not apply to this proceeding. Additionally, RCW 48.05.185 does not provide for the stacking of multiple fines. RCW 48.05.185 clearly limits the OIC's authority to impose a fine to "not more than ten thousand dollars." RCW 48.30.010(5), which the OIC does not cite, is the statutory provision that authorizes fines for "unfair or deceptive acts or practices" pursuant to regulations promulgated by the OIC such as WAC 284-30-800. It authorizes fines for violations occurring after issuance of a cease and desist order, and it authorizes a per violation fine "not to exceed two hundred and fifty dollars for each violation . . . ." The OIC has not issued a cease and desist order to CTIC, nor to Land Title. Accordingly, the OIC lacks the authority to impose a fine against any party with respect to the alleged violations at issue

INTERROGATORY NO. 22. Please identify each Washington professional or trade organization (including any title-related groups and state land title associations) of which Chicago Title or its agents are members or affiliates.

ANSWER:

CTIC objects to this interrogatory as not relevant to determination of whether CTIC is liable for the actions of Land Title, and seeks information on UTCs that is not within the care, custody, or control of CTIC. Without waiving the above general and specific objections, CTIC answers Interrogatory No. 22 as follows:

CTIC is a member of the Washington Land Title Association.

INTERROGATORY NO. 23. Identify each Chicago Title officer, director, managing agent, employee, or other person who Chicago Title consents to present testimony on its behalf as to the matters known or reasonably available to Chicago Title regarding any of the following, or any combination of the following: (a) all actions taken by Chicago Title to ensure Chicago Title and its agents were at all times complying with RCW 48.30.140, RCW 48.30.150, and WAC 284-30-800 regarding the giving of inducements, payments, or rewards exceeding twenty-five dollars ($25) in value, per person per year, to real estate agents and brokers, mortgage loan brokers or lenders, builders, or other persons, or (b) any of the allegations outlined in either the OIC Notice of Hearing in this matter or the OIC Amended Notice of Hearing in this matter, or (c) all title insurance solicitation undertaken by Chicago Title in Washington state.

ANSWER:

CTIC will provide witness information in accordance with the Stipulation and Order to Amend First Pre-Hearing Order, entered herein on May 16, 2008.

INTERROGATORY NO. 24. Please identify all persons and all entities that have an ownership interest in Chicago Title, Chicago Title and Trust Company, Fidelity National Financial, and/or Security Union Title Insurance Company.

ANSWER:

CTIC objects to this interrogatory as not relevant to determination of whether CTIC is liable for the actions of Land Title and seeks information from and about entities which are not parties to this proceeding. Without waiving the above general and specific objections, CTIC answers Interrogatory No. 24 as follows:

CTIC is a wholly-owned subsidiary of Chicago Title and Trust Company ("CTT"), an Illinois corporation. CTT is a wholly-owned subsidiary of Fidelity National Title Group, Inc. ("FNTG"). FNTG is a wholly-owned subsidiary of Fidelity National Financial, Inc.

INTERROGATORY NO. 25. Has Chicago Title or Land Title been identified in or been the subject of any civil actions or regulatory or administrative proceedings relating to inducements, unfair trade practices, RCW 48.30.140, RCW 48.30.150, or WAC 284-30-800? Unless your answer is an unqualified "no," please identify each such action or proceeding.

ANSWER:

CTIC objects to this interrogatory as vague, overly-broad, calling for information not within the custody or control of CTIC, not relevant to determination of whether CTIC is liable for the actions of Land Title, and designed to solely harass CTIC. CTIC has been named as a party in literally dozens of individual cases in Washington in its role as title insurer, escrow agent or trustee. Without a search of the files of each such lawsuit, it is impossible for CTIC to ascertain whether such individual lawsuits, which are based primarily on issues unrelated to RCW 48.30.140, RCW 48.30.150, or WAC 284-30-800, contain, among the myriad of potential issues, allegations that CTIC paid an inducement to a middleman or engaged in an unfair trade practice. CTIC further objects to the scope of this interrogatory as it is not limited in time, nor limited to unfair trade practices that have any relevance to this matter. Without waiving the above general and specific objections, CTIC answers Interrogatory No. 25 as follows:

a. civil actions –Accordingly, CTIC is limiting its answer to putative class action lawsuits, filed against it from 2006 to the present, involving allegations of violations of RCW 48.30.140, RCW 48.30.150, or WAC 284-30-800.

A. ***Blaylock v. First American Title Insurance Co., et. al.*** **, W.D. Wa. Case No. 06-01667 (filed Nov. 22, 2006).**

B. ***Lubic v. Fidelity National Financial, Inc, et. al.*, W.D. Wa. Case No. 08-00401 (filed March 10, 2008).**

C. ***Sorensen v. Fidelity National Financial, Inc, et. al.*, W.D. Wa. Case No. 08-00412 (filed March 11, 2008).**

b. administrative proceedings – as the agency charged with regulating the title insurance industry, the OIC is aware of any regulatory or administrative proceedings it has commenced responsive to this Interrogatory.

INTERROGATORY NO. 26. Please identify and describe in detail the legal or other relationship between Land Title and each of the following: Chicago Title, Chicago Title and Trust Company, Fidelity National Financial, and Security Union Title Insurance Company. In your answer, please identify and describe the history and duration of each such relationship and identify any documents (such as contracts or agreements) related to that relationship since the relationship's inception.

ANSWER:

CTIC objects to this interrogatory as vague, overly-broad, calling for information not within the custody or control of CTIC, not relevant to determination of whether CTIC is liable for the actions of Land Title, designed to solely harass CTIC, and seeks information from and about entities which are not parties to this proceeding. Without waiving the above general and specific objections, CTIC answers Interrogatory No. 26 as follows:

See answer to Interrogatory No. 24.

CTIC supplements its answer as follows:

CTIC is a wholly-owned subsidiary of Chicago Title and Trust Company ("CTT"), an Illinois corporation. CTT is a wholly-owned subsidiary of Fidelity National Title Group, Inc. ("FNTG"). FNTG is a wholly-owned subsidiary of Fidelity National Financial, Inc. As set forth in CTIC's answer to Interrogatory No. 1, CTIC and Land Title are parties to an agreement pursuant to which Land Title is authorized to issue title insurance policies underwritten by CTIC.

INTERROGATORY NO. 27. Please identify the date and manner which Chicago Title or any of its agents learned of the title insurance investigation conducted by the Insurance Commissioner's Office during calendar year 2007 as alluded to in the Notice of Hearing.

ANSWER:

CTIC objects to this interrogatory as not relevant to determination of whether CTIC is liable for the actions of Land Title. Without waiving the above general and specific objections, CTIC answers Interrogatory No. 27 as follows:

CTIC did not receive notification of the investigation from the OIC. It was verbally advised of the investigation by Land Title at an unspecified date. CTIC does not have information as to when Land Title learned of the OIC's investigation of its practices.

INTERROGATORY NO. 28. Please identify and describe any and all manuals, memos, instructions, rules, regulations, and other such documents Chicago Title, Chicago Title and Trust Company, Fidelity National Financial, and/or Security Union Title Insurance Company has/have given to Land Title since the appointment of Land Title as Chicago Title's agent. In your answer, please specifically identify and describe each such manual, memo, instruction, rule, regulation, and other such document that relates in any way to unfair trade practices, RCW 48.30.140, RCW 48.30.150, or WAC 284-30-800 regarding the giving of inducements, payments, or rewards exceeding twenty-five dollars ($25) in value, per person per year, to real estate agents and brokers, mortgage loan brokers or lenders, builders, or other persons.

ANSWER:

CTIC objects to this interrogatory as vague, overly-broad, calling for information not in the custody or control of CTIC, not relevant to determination of whether CTIC is liable for the actions of Land Title, and designed to solely harass CTIC. CTIC further objects to the scope of this interrogatory as it is not limited to the parties to this action, and not limited to communications related to matters at issue in this proceeding. Accordingly, CTIC limits is answer to this interrogatory to manuals, memos, instructions, rules, regulations, and other documents given by CTIC to Land Title related to RCW 48.30.140, RCW 48.30.150, or WAC 284-30-800 Without waiving the above general and specific objections, CTIC answers Interrogatory No. 28 as follows:

There are none.

INTERROGATORY NO. 29. Please identify and describe every examination that Chicago Title, Chicago Title and Trust Company, Fidelity National Financial, and/or Security Union Title Insurance Company conducted of Land Title's accounts, books, ledgers, and other records. In your answer, please specifically indicate the results of each such examination, particularly with

regard to the giving of inducements, payments, or rewards exceeding twenty-five dollars ($25) in value, per person per year, to real estate agents and brokers, mortgage loan brokers or lenders, builders, or other persons.

ANSWER:

CTIC objects to this interrogatory as vague, overly-broad, calling for information not in the custody or control of CTIC, not relevant to determination of whether CTIC is liable for the actions of Land Title, and designed to solely harass CTIC. CTIC further objects to the scope of this interrogatory as it is not limited to the parties to this action, not limited in time, and not limited to examinations related to matters at issue in this proceeding. Without waiving the above general and specific objections, CTIC answers Interrogatory No. 29 as follows:

CTIC conducts limited audits of Land Title escrow practices once every two to three years. CTIC occassionally audits Land Title's title practices. CTIC's last audit of Land Title's title practices occurred in March, 2003. None of CTIC's audits examine Land Title's marketing practices, or its giving of inducements, payments, or rewards

INTERROGATORY NO. 30. Please fully identify each individual you intend to call as an expert witness in Phase I of this matter, and for each such witness, please state the individual's area of expertise and expert qualifications.

ANSWER:

CTIC has not currently identified any expert witnesses it intends to call in Phase I of this matter.

INTERROGATORY NO. 31. As to each expert identified in your answer to the foregoing Interrogatory, please summarize the opinion or opinions such expert is expected to express and state the grounds for each such opinion.

ANSWER:

See answer to Interrogatory No. 30.

INTERROGATORY NO. 32. Please identify each person you reserve the right to call as a witness in Phase I of this matter.

ANSWER:

Objection is asserted to the extent this interrogatory seeks work product. Without waiving the above general and specific objections, CTIC answers Interrogatory No. 32 as follows:

CTIC will provide witness information in accordance with the Stipulation and Order to Amend First Pre-Hearing Order, entered herein on May 16, 2008.

INTERROGATORY NO. 33. Please identify all documents and other physical evidence you reserve the right to offer into evidence in Phase I of this matter.

ANSWER:

Objection is asserted to the extent this interrogatory seeks work product. Without waiving the above general and specific objections, CTIC answers Interrogatory No. 33 as follows:

CTIC will provide exhibit lists in accordance with the Stipulation and Order to Amend First Pre-Hearing Order, entered herein on May 16, 2008.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1. Please produce a copy of (a) all written agreements between Land Title and any of the following: Chicago Title, Chicago Title and Trust Company, Fidelity National Financial, and/or Security Union Title Insurance Company, and (b) all documents modifying, amending, not extending, or revoking any of the agreements referenced in subpart (a) of this Request for Production.

RESPONSE:

Objection. This request for production is vague, overly-broad, seeks documents not relevant to determination of whether CTIC is liable for the actions of Land Title, and seeks documents not in the care, custody, or control of CTIC. Without waiving the above general and specific objections, CTIC responds to Request for Production No. 1 as follows:

CTIC will produce copies of the limited agency agreements it has with Land Title.

CTIC supplements its answer as follows:

The agreement is produced under bates nos. CTIC 000001-000005.

REQUEST FOR PRODUCTION NO. 2. Please produce a copy of all guarantees and agreements responsive to Interrogatory No. 3.

RESPONSE:

Objection. This request for production is vague, not relevant to determination of whether CTIC is liable for the actions of Land Title, and designed to harass CTIC. Without waiving the above general and specific objections, CTIC responds to Request for Production No. 2 as follows:

The OIC has in its possession evidence of financial responsibility as required under RCW 48.29.155. A copy of the guarantee letter sent to the OIC by CTIC, with respect to Land Title, will be produced.

CTIC supplements its answer as follows:

CTIC's guaranty with respect to Land Title is produced under bates nos. CTIC 000335.

REQUEST FOR PRODUCTION NO. 3. Please produce a copy of any documents showing the payments made as referred to in Interrogatory No. 7, No. 8, and 10.

RESPONSE:

Objection. This request for production is vague, seeks information not in the care, custody, or control of CTIC, not relevant to determination of whether CTIC is liable for the actions of Land Title, and designed to harass CTIC. Without waiving the above general and specific objections, CTIC responds to Request for Production No. 3 as follows:

CTIC will produce copies of Monthly Statements of Accounts, reflecting payments made by Land Title to CTIC from 2005 to the present.

CTIC supplements its answer as follows:

The documents are produced under bates nos. CTIC 000250-000333.

REQUEST FOR PRODUCTION NO. 4. Please produce a copy of any documents relating to the efforts and activities referred to in Interrogatory No. 13 and No. 14.

RESPONSE:

CTIC objects to this request for production as vague, overly-broad, unduly burdensome, calling for information not within the custody or control of CTIC, not relevant to determination of whether CTIC is liable for the actions of Land Title, and designed solely to harass CTIC.

CTIC supplements its answer as follows:

Because CTIC does not directly market in Mason, Klickitat, Jefferson, and Clallam Counties, no such documents exist.

REQUEST FOR PRODUCTION NO. 5. Please produce a copy of any documents responsive to or relating to Interrogatory No. 17.

RESPONSE:

CTIC objects to this request for production as vague and overly-broad. Without waiving the above general and specific objections, CTIC responds to Request for Production No. 5 as follows:

No such documents exist.

REQUEST FOR PRODUCTION NO. 6. Please produce a copy of any documents relating to the actions referred to in Interrogatory No. 18 and No. 19.

RESPONSE:

CTIC objects to this request for production as vague and overly-broad. Without waiving the above general and specific objections, CTIC responds to Request for Production No. 6 as follows:

No such documents exist.

REQUEST FOR PRODUCTION NO. 7. Please produce a copy of any documents responsive to or relating to Interrogatory No. 20.

RESPONSE:

CTIC objects to this request for production as vague, overly-broad, not relevant to determination of whether CTIC is liable for the actions of Land Title, and designed to solely harass CTIC.

CTIC supplements its answer as follows:

CTIC is aware that the OIC has sent advisory letters to various title insurance companies and the Washington Land Title Association over the years regarding RCW 48.30.140, RCW 48.30.150, WAC 284-30-800. CTIC does not keep track of, nor maintain copies of documents that one of its many employees may have seen over the years.

REQUEST FOR PRODUCTION NO. 8: Please produce a copy of any documents responsive to or relating to Interrogatory No. 26.

RESPONSE:

CTIC objects to this request for production as vague, overly-broad, calling for information not within the custody or control of CTIC, not relevant to determination of whether CTIC is liable for the actions of Land Title, designed to solely harass CTIC, and seeks information from and about entities which are not parties to this proceeding.

CTIC supplements its answer as follows:

CTIC has provided a copy of its agreement with Land Title, and its guarantee of liability. Bates nos. CTIC 000335 and CTIC 000001-000005.

REQUEST FOR PRODUCTION NO. 9. Please produce a copy of any documents responsive to or relating to Interrogatory No. 28.

RESPONSE:

CTIC objects to this request for production as vague, overly-broad, calling for information not within the custody or control of CTIC, not relevant to determination of whether CTIC is liable for the actions of Land Title, designed to solely harass CTIC, and seeks information from and about entities which are not parties to this proceeding. Accordingly, CTIC limits is answer to this request for production to manuals, memos, instructions, rules, regulations, and other documents given by CTIC to Land Title related to RCW 48.30.140, RCW 48.30.150, or WAC 284-30-800 Without waiving the above general and specific objections, CTIC responds to Request for Production No. 9 as follows:

There are none.

REQUEST FOR PRODUCTION NO. 10. Please produce a copy of any documents responsive to or relating to Interrogatory No. 29.

RESPONSE:

CTIC objects to this request for production as vague, overly-broad, and not relevant to determination of whether CTIC is liable for the actions of Land Title. CTIC further objects to the scope of this request for production as it is not limited to the parties to this action, not limited in time, and not limited to examinations related to matters at issue in this proceeding. Without waiving the above general and specific objections, CTIC responds to Request for Production No. 10 as follows:

CTIC will produce copies of audit reports related to audits of Land Title's escrow practices, conducted by CTIC from 2005 to the present.

CTIC supplements its answer as follows:

CTIC has produced the audit report under bates nos. CTIC 000242-000249.

REQUEST FOR PRODUCTION NO. 11. Please produce a copy of any documents responsive to or relating to Interrogatory No. 33.

RESPONSE:

CTIC will provide exhibits in accordance with the Stipulation and Order to Amend First Pre-Hearing Order, entered herein on May 16, 2008.

REQUEST FOR PRODUCTION NO. 12. Please produce all correspondence and other documents, including electronic communications and e-mail, concerning any aspect of this pending matter or any of the allegations outlined in the OIC Notice of Hearing or OIC Amended Notice of Hearing in this matter, that were exchanged by or between Land Title and any of the following: Chicago Title, Chicago Title and Trust Company, Fidelity National Financial, and/or Security Union Title Insurance Company.

RESPONSE:

CTIC will produce responsive documents in its care, custody, and control.

CTIC supplements its answer as follows:

CTIC has produced the requested documents under bates nos. CTIC 000103-000241.

REQUEST FOR PRODUCTION NO. 13. With regard to any documents that you sent to the Insurance Commissioner of the State of Washington and that pertain to RCW 48.30.140, RCW 48.30.150, WAC 284-30-800 or to the topic of giving of inducements, payments, or rewards exceeding twenty-five dollars ($25) in value, per person per year, to real estate agents and brokers, mortgage loan brokers or lenders, builders, or other persons, please produce true and correct copies of all such documents.

RESPONSE:

CTIC objects to this request for production as vague, overly-broad, not limited in time or scope, not relevant to determination of whether CTIC is liable for the actions of Land Title, designed to solely harass CTIC, and seeks documents already in the possession of the OIC.

REQUEST FOR PRODUCTION NO. 14. Please produce a copy of all balance sheets, profit and loss statements, and other related documents produced by Land Title.

RESPONSE:

CTIC objects to this request for production as vague, overly-broad, not limited in time or scope, not relevant to determination of whether CTIC is liable for the actions of Land Title, and requesting documents not within the care, custody, or control of CTIC.

CTIC supplements its answer as follows:

CTIC will produce annual reports provide to it by Land Title to the extent such documents are in its custody and control, To date, CTIC has located no such documents.

As to objections, if any:

Dated this 15th day of August, 2008.

K&L GATES LLP

By _____
David C. Neu WSBA No. 33143

STATE OF Oregon)
) ss.
COUNTY OF Clackamas)

Bradley J. Londo, being first duly sworn in the manner prescribed in RCW 5.28 *et seq*, on oath deposes and says: That I am an authorized speaking agent for Chicago Title Insurance Company, that I have made the foregoing answers to interrogatories and responses to requests for production, know the contents thereof, and believe same to be true and complete and made within the scope of my speaking agent authority.

_____ (Signed)

BRADLEY J. Londo (Printed Name)

V.P. & Regional Mgr. (Title)

SUBSCRIBED AND SWORN TO before me this 14th day of August, 2008.

OFFICIAL SEAL
APRIL S. ENGEL
NOTARY PUBLIC-OREGON
COMMISSION NO. 391603
MY COMMISSION EXPIRES APRIL 10, 2009

_____
(Signature of Notary)
April S. Engel
(Print or stamp name of Notary)
NOTARY PUBLIC in and for the State of Oregon
Residing at Canby, OR
My Appointment Expires: April 10, 2009

EXHIBIT "F"

LICENSEE PROFILE

Business Entity Information

Name: LAND TITLE COMPANY OF KITSAP COUNTY INC

FEIN: 91-0825837 Org. Structure: Corporation

Licensee Information

CIC/PIC #: LANDTCK2013A WAOIC #: 23081 Formed Date: 10/14/1968

NPN: Resident: (•) Yes ( ) No Discp.Block

Documents Online Documents

Disciplinary Block

DON # Action Date Block

Comments

Action By

Doing Business As

Mailing Address

Contact Name

Street 1: POB 2737

Street 2

City: SILVERDALE Country: United States

State / Province: Washington Zip: 98383

Phone # Extension Fax

E-mail

Business Address

Street 1: POB 2737

Street 2

City: SILVERDALE Country: United States

State / Province: Washington Zip: 98383

Phone # Extension Fax

E-mail

Licenses

LICENSE DETAILS

License Information

License Type	Title	Status	Active	Cancel Date	
Effective Date	10/14/1968	Expiry Date	06/01/2008	Formed Date	10/14/1968

Show Pending

Full Lines

Lines	Effective Date	Cancel Date	
Title	10/14/1968		

Appointment List

Company Name	Company #	Appointment Date	Appointment Type	Expiry Date	Lines	Cancel Date
CHICAGO TITLE INSURANCE COM...	258	03/05/1993	Regular Appointment	03/18/2009	Lines	
SECURITY UNION TITLE INSURA...	1187	10/14/1968	Regular Appointment	01/01/1994	Lines	01/01/1994

Bond Information

Company #	Bond #	Bond Amount	Effective Date	Cancel Date
	WAOIC258	200000.00	08/24/2005	

Link Payment

EXHIBIT "G"

ISSUING AGENCY AGREEMENT

CHICAGO TITLE INSURANCE COMPANY, a Missouri corporation,

hereinafter referred to as "Principal" and

LAND TITLE COMPANY OF KITSAP COUNTY, INC.

hereinafter referred to as "Issuing Agent", in consideration of the mutual promises made herein, hereby agree as follows:

1. Appointment of Issuing Agent. Principal hereby appoints Issuing Agent to issue its title assurances in the following County or Counties: KITSAP, CLALLAM, JEFFERSON and MASON, State of WASHINGTON, with the right of Principal to appoint other issuing agents in the same or other Counties in said state.

2. Term of Agreement. This Agreement is made for a term of 1 year from ~~February~~ May 1, 1992 which shall be the effective date hereof, and shall be automatically extended at each expiration date unless either party gives written notice to the other party of its election not to extend at least 90 days prior to the end of said original term or any additional term.

3. Authority of Issuing Agent. Issuing Agent, by its employees and/or officers as denoted in this Agreement or any amendment thereto, (hereinafter "Authorized Signatories"), shall have authority on behalf of Principal to sign, countersign and issue Principal's title assurances on forms supplied and approved by Principal and only on real property located in the County or Counties listed above, and in such other Counties as may be designated in writing by Principal, as long as said "Authorized Signatories" remain employed by Issuing Agent and, where necessary, properly licensed during the period of time that this Agreement remains in full force and effect. Issuing Agent shall not be deemed or construed to be authorized to do any other act for principal not expressly authorized herein.

4. Acts of Issuing Agent. Issuing Agent shall:

A. Issue only title assurances of Principal, and of no other title insurance company;

B. Receive and process applications for title assurances:
   (1) In accordance with usual customary practices and procedures and prudent underwriting priciples; and
   (2) In full compliance with instructions, rules and regulations of Principal given to Issuing Agent.

C. Base determination of the insurability of any title so insured upon:
   (1) An examination of an abstract or chain of title, showing all relevant and necessary public record matters, prepared by (a) Issuing Agent, (b) a qualified attorney retained by Issuing Agent, or (c) any other qualified abstractor appointed by Issuing Agent whose work is accepted by prudent local examiners, or
   (2) An examination from Issuing Agent's title plant, supplemented to the extent necessary by an abstract meeting the requirements set forth in Paragraph (1) above, or a search of the relevant public records; and
   (3) Such further prudent off record investigation as may be required by the coverage of the title assurances being issued.

D. During the term of this Agreement, and for a period of no less than ten (10) years thereafter Issuing Agent, its heirs, successors and assigns shall preserve for examination by Principal all files and supporting documents on which title assurances and underwriting decisions were made including, but not limited to, searches, work sheets, maps, and affidavits.

E. (1) Pay Principal 12 % of the gross premiums. Regarding any title assurance order which involves reinsurance or coinsurance, then, pay Principal the amounts, as provided in paragraph 5. Below. Issuing Agent shall forward said payments to Principal at its Home Office on such dates as may be established by Principal, along with full and complete copies of all premium bearing title assurances issued during said period.
   In the event there is an underpayment by reason of Issuing Agent's miscalculation of the amounts owed Principal, Issuing Agent shall pay the shortage with the next month's submission. In the event of an overpayment, Principal shall issue a credit to Issuing Agent which shall be applied to the next monthly payment due to Principal.
   (2) On all title orders in excess of One Million Dollars ($1,000,000.00) referred to Issuing Agent by Principal the percentage of the premiums to be submitted to Principal shall be negotiated when such order is placed, when authorized by law.
   (3) Forward to Principal all deposits, securities or Letters of Credit over the aggregate amounts of Ten Thousand Dollars ($10,000.00) which were taken as security for the performance of an indemnity agreement.

F. Comply with all federal and state, municipal ordinances, statutes, rules and regulations.

G. Conduct all its business in a safe and prudent manner.

H. Safely keep the forms referred to in Paragraph 3, above, in its exclusive possession and be liable to Principal for all loss or damage suffered by principal by reason of wrongful or negligent use of such forms.

I. Return all obsolete forms to Principal on demand.

J. Segregate and safely keep in a separately designated account all monies entrusted to Issuing Agent by Principal and others, including, but not limited to, fiduciary funds, indemnity deposits and Principals share of all premiums due hereunder.
   Said funds shall be used for no other purpose than for which entrusted to Issuing Agent. With respect to said funds, Issuing Agent shall perform and carry out all instructions given to Issuing Agent which relate to the issuance of Principal's title assurances or to the liability of Principal thereunder.

K. Promptly forward to Principal:
   (1) All documents received by Issuing Agent in which Principal is a party to any administrative or judicial proceeding; and
   (2) All written complaints or inquires involving title assurances made to or by any insurance department or regulatory agency.

L. Upon request of Principal, establish a loss reserve account for claims arising out of the issuance of Principal's title assurances, or any other acts of Issuing Agent, for which Issuing Agent may be liable, and in such amounts as Principal would normally establish for its own claims. Within ten (10) days of demand by Principal, Issuing Agent hereby agrees to forward any such loss reserve funds to Principal.

M. Forward annually to Principal a copy of Issuing Agent's balance sheet and profit and loss statement.

N. Maintain at its own expense:
(1) Blanket Fidelity Bond in the principal sum of at least $ 250,000 in a form and issued by a company acceptable to Principal;
(2) Issuing Agent's error and omissions liability insurance in the principal sum of at least $ 00,00 in a form and issued by a company acceptable to Principal, with a deductible of no more than $ 00.00; and
(3) Issuing Agent shall annually furnish Principal with true copies together with current premium receipts for said bonds and insurance.

O. Upon request of Principal, Issuing Agent agrees to notify its fidelity bond or errors and omissions insurance carrier of any claim for which Issuing Agent may be liable to Principal.

P. Become and remain a member in good standing of the State Land Title Association in any state where the Issuing Agent conducts business, or in the event that Issuing Agent is an attorney, Issuing Agent shall remain a member in good standing with the Bar Association of any state where the Issuing Agent conducts its principal place of business.

5. Reinsurance/Co-Insurance:

(A.) Issuing Agent shall be responsible for reinsurance or coinsurance fees on any title assurance:
1. Over Twenty Million Dollars or such other amounts as may be determined from time to time by Principal, or
2. Such lesser limits as may be set by customer.

(B.) Compensation to Principal shall be computed on the basis of the net amount of gross premium after deducting the cost of such reinsurance or coinsurance.

(C.) Principal expressly reserve the right to select any and all reinsurers and co-insurers unless the customer requires otherwise in writing.

6. Prohibited Acts of Issuing Agent. Issuing Agent shall not, without prior written consent of Principal:

A. Accept service of process on behalf of Principal, unless required by law, in which event Issuing Agent shall promptly forward all documents served on Issuing Agent to Principal.

B. Incur debts in the name of Principal.

C. Issue:
(1) Any title assurance in a liability amount in excess of ~~$200,000.00~~ $500,000.00 or
(2) Any title assurance in a liability amount in excess of $200,000.00 where coverage is to be afforded on a risk basis with respect to lien, for services, labor or materials; or
(3) Any title assurance, regardless of liability amount, where a known dispute as to title exists, or extra hazardous risks are involved and where such dispute or risks are not to be excepted. However, Principal will consider approving the issuance of a title assurance without such exception or with affirmative coverage upon receipt of all relevant information, supporting documents, and a statement of the question or risk involved. In lieu of prior written approval, Principal agrees to consider oral approval if it deems the risk acceptable, subject to Issuing Agent thereafter submitting the information as set forth above, and thereafter secure written confirmation of such oral approval.

D. Alter any title assurance form furnished by Principal.

E. Issue any title assurance for an amount less than the market value of the real property, or the estate or interest insured, or for less than the amount of the indebtedness in the case of a lender's policy.

F. Issue any title assurances affecting oil, gas, mineral or other hydro-carbon or thermal interest, separate and apart from the Fee or Leasehold estate in the land.

G. Use the name of the Principal in any advertising or printing other than to indicate the Issuing Agent is a policy issuing agent of the Principal.

H. Charge a premium other than one approved by the Principal, exclusive of any special work charges.

7. Additional Premium. Only Principal shall be entitled to any additional premium charged by either Principal or Issuing Agent for Extra Hazardous Risks.

8. Acts of Principal. Principal shall:

A. Furnish to Issuing Agent, without cost, the then currently approved forms of title assurances which Issuing Agent is authorized to issue hereunder.

B. Decide all questions of risk submitted by Issuing Agent.

C. Secure reinsurance and co-insurance when necessary.

D. Appoint in writing validating officers to countersign Principal's forms issued by Issuing Agent.

E. Provide Issuing Agent with its Agency manual, underwriting manual, underwriting memos, and underwriting rules and regulations which may now or hereinafter be promulgated.

9. Allocation of Losses. Principal and Issuing Agent shall be responsible for and promptly pay losses as follows:

A. Principal shall be responsible for loss, cost or damage, including attorney's fees, caused by:
(1) All off record matters, provided insurability is determined in compliance with paragraph 4.C., above.
(2) A proposed Extra Hazardous Risk submitted to Principal and the assumption of the risk has been approved on the basis of all available facts submitted and representations made by Issuing Agent, provided Issuing Agent accurately submits all available information relevant to said risk.

B. Issuing Agent shall be responsible to Principal for all loss, cost or damage, including attorney's fees, caused by:
(1) Failure of Issuing Agent to comply with the terms and conditions of this Agreement or with the rules, regulations or instructions given to Issuing Agent by Principal.
(2) The issuance of title assurances which contain errors or omissions, caused by Issuing Agent's abstracting, examination of title, including but not limited to examination of surveys, or failure of any title assurance to accurately reflect the correct description of the real property involved or record title thereto, so long as said error in description is discoverable by an accurate search of the public records.
(3) The issuance of title assurances which contain errors or omissions, that were disclosed by the application, the examiner's report, or which were known to Issuing Agent, or in the exercise of due diligence should have been known to Issuing Agent.
(4) A title assurance insuring a mechanic's lien risk within Issuing Agent's authority, or an extra hazardous risk not approved in writing by Principal.
(5) The escrow or closing operations of Issuing Agent, including but not limited to the preparation of documents, deeds and other conveyancing instruments, or any loss under an Insured Closing Letter, issued by Principal on behalf of Issuing Agent.
(6) Fraud, dishonesty or defalcation committed by Issuing Agent, or its employee(s), officer(s), director(s) or agent(s).
(7) Any act, or failure to act, of Issuing Agent, or its employee(s), officer(s), or attorney(s) which results in Principal being liable for bad faith, unfair claim practice or punitive damages.
(8) Allegations, against either Principal or Issuing Agent, by reason of the activities of the Issuing Agent, its agents, servants and employees, of fraud, conspiracy, or failure to comply with any Federal or State Law or regulation, including securities laws.

C. Recovery of loss under a claim will first be applied to Principal's loss, then the balance, if any, to Issuing Agent's loss.

10. Claims.
   A. Issuing Agent shall notify Principal in writing of any claim or threatened claim under any title assurance issued hereunder within thirty-five (35) calendar days from first notice, except claims Issuing Agent is fully liable for and pays within thirty (30) calendar days.
   B. Issuing Agent agrees that Principal shall be fully authorized and empowered in its absolute discretion, to defend, settle, compromise or dispose of any claim for which any party to this Agreement may be liable. Unless specifically authorized in writing, Issuing Agent shall have no right to defend, deny, settle, compromise or dispose of any claim against Principal. Issuing Agent agrees to cooperate with Principal in the handling of any claim made under or in connection with any title assurance issued hereunder, and to assist in the settlement or disposition of any such claim whenever requested by Principal, all at no charge or cost to Principal. Regarding any claim or threatened claim, Issuing Agent agrees to keep Principal fully advised and promptly forward to Principal all relevant communications, reports, statements, pleadings and other writings or instruments. Issuing Agent shall remit to Principal, within ten (10) days after demand, any funds required to settle, compromise or satisfy any claim for which the Issuing Agent is responsible hereunder.
   C. Issuing Agent shall keep a record of all claims showing the disposition of each claim, which shall be made available to Principal upon its request.
   D. Notice required in this paragraph will be given to Chicago Title Insurance Company, Claims Department, 111 West Washington Street, Chicago, Illinois 60602 or such other place as Principal may designate in writing.

11. Right of Examination. During the term of this Agreement, and any extensions thereof, and also including the times contemplated in paragraphs 4.D and 19., herein, Issuing Agent agrees that at any reasonable time or times, it will permit examination by Principal of all accounts, books, ledgers, searches, abstracts and other records which relate to the title insurance business carried on by Issuing Agent for the Principal.

12. Assignment.
   A. Except as hereinafter provided, neither Issuing Agent nor Principal shall have any right to assign this Agreement without the written consent of the other party. No such written consent shall be required in the event that Principal shall change its name, or shall merge or consolidate with one or more title insurance underwriter(s) or with any other party with or without change of name, and in such event this Agreement shall continue in effect between Issuing Agent and the successor of Principal.
   B. Any other assignment or attempted assigment of this Agreement, in whole or in part, whether such assignment be by operation of law, voluntary or involuntary, shall automatically cause a termination of the agency created by this Agreement unless there shall be a written consent or ratification to such assignment. An assignment by operation of law shall include either of the parties filing a petition in bankruptcy or insolvency or for reorganization under the bankruptcy laws of the United States, or the insolvency laws of any state, or voluntarily taking advantage of any such law, or act by answer or otherwise, or shall be dissolved or shall make an assignment for the benefit of the creditors; or, if involuntary proceedings are instituted against either party under any such bankruptcy law or insolvency act, or for the dissolution of the legal entity; or if a receiver or trustee shall be appointed for all or a portion of the property of either party.
   C. This Agreement may be terminated, at the sole option of Principal, upon ten (10) days written notice, in the event that the Issuing Agent is a corporation and there is a change in the controlling interest in said corporation. A change in the controlling interest shall be deemed to occur when an owner of more than fifty percent (50%) of the capital stock of said corporation ceases to own more than fifty percent (50%) of said stock, or a sale of substantially all of Issuing Agent's assets.

13. Termination by Change of Circumstance. If the current annual tax, gross premium tax or State Income Tax rate shall be increased, or should a tax or assessment in addition, substitution, or in lieu thereof be imposed on principal, either by constitutional amendment, legislative act or otherwise, and should said tax or assessment be higher than the tax as presently paid by Principal, Issuing Agent and Principal shall in good faith renegotiate the percentage of the gross premiums paid to Principal hereunder as an underwriting fee. In the event that the parties cannot after good faith negotiations come to any agreement, then the Principal shall have the option to terminate this Agreement by giving ninety (90) days written notice to Issuing Agent.

14. Default.
   A. Should either party fail to observe the terms of this Agreement or in any manner fail, refuse or neglect to perform its obligations in accordance with the terms of this Agreement, this Agreement may be terminated, at the option of the party not in default, upon ten (10) days written notice.
   B. Upon termination or cancellation of this Agreement, Issuing Agent shall promptly furnish to Principal, a complete accounting of any and all unpaid premiums owing either of the parties hereto and return to Principal all files relating to premium-bearing title assurance forms issued or about to be issued on behalf of Principal, all unused forms, blanks and supplies and all manuals and memos furnished by Principal to Issuing Agent.
   C. A failure of any party to declare a termination of this Agreement by reason of default, or a failure of either party to take action under this Agreement for a default of any of the provisions hereof, shall not be construed to be a waiver of such default or any subsequent default of the same, or other provisions hereunder, and either party may at any time assert its right to terminate and act upon any such default.
   D. In the event that a shortage in the accounts described in paragraph 4.J., hereof is hereafter revealed or, there is an occurrence contemplated by paragraph 9.B.(5) hereof, then, Principal may cancel and terminate this Agreement immediately upon written notice to the Issuing Agent, and further, Principal may declare immediately due any debts or accounts, together with interest, owed by Issuing Agent to Principal. Principal shall have a lien on all property of the Issuing Agent as security for the repayment to Principal of any such debt or accounts or any losses, or claims Principal may be subjected to by reason of the Issuing Agent's inability or refusal to account for any funds entrusted to him, and on demand by Principal, Issuing Agent shall forthwith make good any shortages of funds or convey to Principal, or its nominee, as security therefor, all property of Issuing Agent, and Principal shall be entitled to immediate possession of any and all such property, including, without limiting the generality of the foregoing, any title plant in which the Issuing Agent may have an interest or right of possession, whether by reason of stock ownership or otherwise.
   E. Any right of termination set out in this Agreement shall be in addition to any remedy provided by law.

15. Termination Upon Excess of Loss. In the event Principal sustains a loss or losses during any given twelve (12) month period which exceed the amount of premium income paid by Issuing Agent to Principal during said twelve (12) month period, Principal shall have the right, at its option, to terminate this Agreement on sixty (60) days written notice to Issuing Agent.

16. Attorney's Fee. If either party shall institute an action against the other party for breach of this Agreement, the unsuccessful party shall pay court costs and reasonable attorney's fees to the successful party.

17. Unenforceable Provisions. If any one or more of the terms of this Agreement shall to any extent be adjudged invalid, unenforceable, void or voidable for any reason, each and all of the remaining terms of the Agreement shall not be affected thereby and shall be valid and enforceable to the full extent permitted by law.

18. **Successors.** This agreement is binding upon and shall inure to the benefit of the parties hereto, their permitted successors, personal representatives, heirs and assigns, subject to the provisions of Paragraph 12 above.

19. **Surviving Obligation.** In the event this Agreement is terminated pursuant to any of the terms hereof, or by mutual agreement of the parties hereto, the obligations to make any payments, provide notification as to claims and to provide access to records and files shall continue beyond the date of termination of this Agreement.

20. **Headings.** The subject headings of the paragraphs and subparagraphs of this Agreement are included for the purposes of convenience only, and shall not affect the construction or interpretation of any of its provisions.

21. **Notices.** All notices permitted or required to be given under this Agreement, except for notices of claim covered in paragraph 10, shall be in writing and may be personally delivered to the offices of the parties hereto or mailed to the offices of the parties hereto by Registered United States Mail or by Certified United States Mail, postage prepaid, return receipt requested, addressed as shown below. The effective date of notice shall be three (3) business days after personal delivery or receipt of notice by mail. Said notices shall be addressed as follows.

To Principal:

CHICAGO TITLE INSURANCE COMPANY
111 West Washington Street
Chicago, Illinois 60602
Attention: The President

To Issuing Agent:

LAND TITLE COMPANY OF KITSAP COUNTY INC
400 Warren Avenue
Bremerton, WA 98310

Either party may by written notice to the other, as aforesaid, change the address to which notices are to be sent.

22. **Definition of Terms.** The following terms when used in this Agreement are defined as follows:

A. **Loss.** As used herein, loss shall mean sums paid, or to be paid, in cash or otherwise, to settle or compromise all claims under any of Principal's title assurance(s) issued by Issuing Agent. Loss shall include, but not be limited to, expenses, costs and attorneys fees actually paid or incurred in connection with the investigation, negotiation, litigation or settlement of such claim or obligation which ultimately requires payment of any sum by Principal. Loss, as defined herein, shall be reduced by the value of any recoveries realized.

B. **Off Record Matters.** Off Record Matters shall mean those items which could not be ascertained from a diligent search and examination of the public records or from information contained in the Issuing Agent's file. Included herein are the identity, competency and powers of the parties to the transactions reflected in the chain of title, including forgery of record documents and fraud in the execution of such record documents. Specifically excluded from the term "Off Record matters" are allegations against either Principal or Issuing Agent, derived from the activities of the Issuing Agent, its escrow, trustee and fiduciary services, if any, its servants and employees, including but not be limited to, fraud, conspiracy, or the failure to comply with any Federal or State law or regulation, including securities laws.

C. **Premium.** Premium shall mean the amount payable or paid in accordance with Principal's schedule of rates in effect or as otherwise approved by Principal in writing for the issuance of title assurance.

D. **Risks.** Risks shall mean those items insured against as stated on the face page of Principal's title assurance form.

E. **Extra Hazardous Risks.** Extra Hazardous Risks as used herein shall mean all title and off record risks, other than those defined in Paragraph 22B above which results in a liability not normally assumed in policies, and includes those extra hazardous risks which may now or hereafter be identified in Principal's agency manual.

F. **Title Assurances.** Title assurances shall mean commitments, binders, guarantees, indorsements and title insurance policies of Principal.

G. **Default.** The failure to observe any terms of this agreement shall constitute a default.

IN WITNESS WHEREOF, the parties have executed this Agreement the .....20th..... day of ...April..... 1992

Principal:

CHICAGO TITLE INSURANCE COMPANY

By: [signature] VP

By: [signature] VP
Authorized Officer

This Agreement is not binding upon Principal until countersigned by an authorized officer.

Issuing Agent:

LAND TITLE COMPANY OF KITSAP COUNTY

By: [signature] Sec/KEO

By: [signature] Sec/Treas.

Authorized Signatories on "Title Assurances"

.....

.....

.....

ADDENDUM "A"
to
ISSUING AGENCY AGREEMENT
DATED MAY , 1992
between
CHICAGO TITLE INSURANCE COMPANY, A Missouri Corporation
and
LAND TITLE COMPANY OF KITSAP COUNTY INC.
a Washington Corporation

1. Paragraph 4 (A) is amended by adding the following language:

Principal hereby grants the right to issue assurances of other qualified Title Insurance Companies which orders are either referred or in cases where principal declines to underwrite a specific transaction.

2. Notwithstanding the privisions of Paragraph 9b (2 and 3) issuing agent's loss cap shall be limited to the first $5,000 (five thousand dollars) per loss.

3. Except as amended here, all the terms and conditions of the Issuing Agency Agreement, Addendum "A", First and Second Amendments to Issuing Agency Agreement, shall be and remain the same as set forth therein.

Dated: May 1, 1992

LAND TITLE COMPANY
OF KITSAP COUNTY INC.,
a Washington Corporation

By: _____

By: _____

CHICAGO TITLE INSURANCE COMPANY
a Missouri Corporation

By: _____

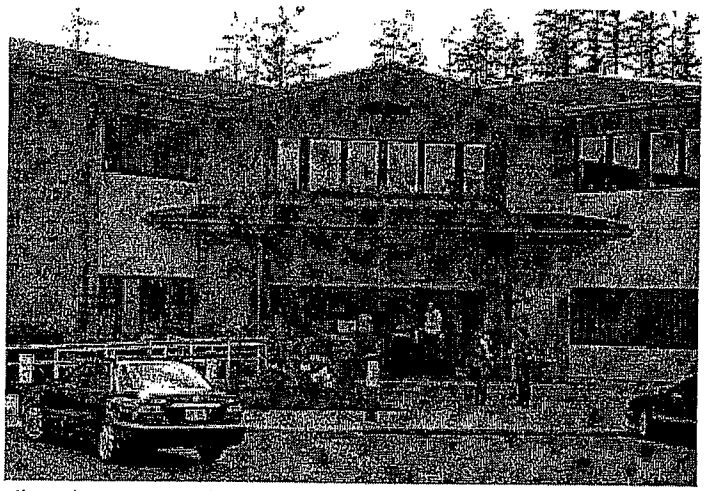
By: _____

EXHIBIT "H"

LAND TITLE COMPANY

LEADERSHIP • TRUST • COMMITMENT

Welcome to Your Title Insurance and Escrow Solution for Kitsap County and the Olympic Peninsula



Land Title Company opened its doors near downtown Bremerton in 1968. From its inception, our mission has been to provide the Olympic Peninsula consistent, courteous, knowledgeable service with the care and integrity each of our customers deserves.

Today, the three-story Land Title Professional Building on Levin Road at Clear Creek in Silverdale houses Kitsap County **title services**, **escrow services**, and **corporate headquarters**. **Mason County title services** are located in the heart of Shelton, on Railroad Avenue. Additional escrow offices are located in **Poulsbo**, **Port Orchard**, **Shelton**, and **Belfair**.

Please visit the **Title/Escrow Information** section of our website for information both homeowners and homebuyers can use to make their title and escrow transactions go smoothly. In the **Agents/Lenders** section you will find information for Real Estate and Mortgage professionals. Our **Company** info section provides a history of our company, and access to our shareholders and employees areas.

Click to Download

Kitsap County Title & Escrow Rate Schedule • **Mason County Title & Escrow Rate Schedule**

Lastly, please feel free to **contact** any of our offices for your title insurance and escrow needs.

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360.698.9432 / 800.950.4321
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LAND TITLE COMPANY

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Welcome to Your Title Insurance and Escrow Solution for Kitsap County and the Olympic Peninsula

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Click to Download
Kitsap County Title & Escrow Rate Schedule • **Mason County Title & Escrow Rate Schedule**

Lastly, please feel free to **contact** any of our offices for your title insurance and escrow needs.

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Date Last Modified: 8/29/08

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INSURANCE COMPANY

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NEWS & LINKS

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Chicago Title & Trust Company Celebrates Its 160th Year

Anniversary Video: Chicago Title Celebrates 160 Years in Business *(Requires Flash)*

Multi-State Captive Reinsurance Settlement

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All Counties
State:
All States
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RATE CALCULATOR

We're providing a new service to customers to get an idea of possible transaction costs.

Click here for details

Welcome

Chicago Title Insurance Company

Throughout the years, Chicago Title Insurance Company has grown in stature with a solid reputation for integrity and standing the test of time. In 1920 the scope of the Company's business extended beyond Cook County, Illinois where it started in 1847. In the late 1940s, Chicago Title moved to 111 W. Washington Street and continued developing and expanding its extensive statewide organization.

In the 1950s Chicago Title reached beyond its state borders to increase its title insurance business. It was then, Chicago Title Insurance Company, as we know it today, was developed as a wholly owned subsidiary of Chicago Title and Trust Company.

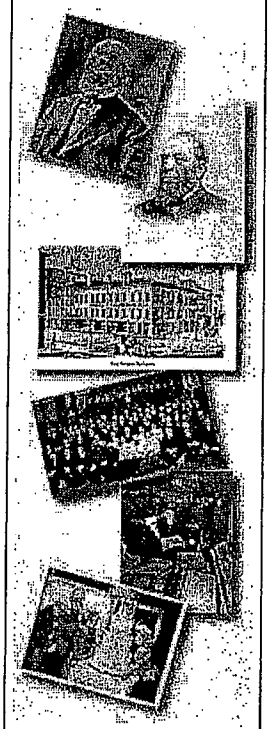
In March 2000, Chicago Title Insurance Company merged with FNF to become the largest title company in the nation. Much has changed in 150-plus years, but the fundamental principles upon which the Company was founded are steadfast. They are outstanding customer service, untarnished reputation for integrity and a rock solid, enduring identity that is synonymous with the necessary expertise to insure your most prized asset: your home.

160 Years & Beyond

Chicago Title and Trust Co. dates back more than 160 years through the succession of several firms and corporations that were engaged in the abstract and title business in Cook County, Illinois.

More...

BUILDING FOR OVER 160 YEARS
EST. 1847



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Privacy | Webmaster

EXHIBIT "I"

23081

Chicago Title Insurance Company
601 Riverside Avenue
Jacksonville FL 32204

RECEIVED
AUG 24 2005
INSURANCE COMMISSIONER
COMPANY SUPERVISION

Via Federal Express

August 23, 2005

Mr. Michael Kreidler
Commissioner of Insurance
5000 Capitol Boulevard
Tumwater WA 98501

Re: Guarantee of Land Title Company of Kitsap County, Inc.

Gentlemen:

Pursuant to RCW 48.29.155, Chicago Title Insurance Company (the "Company") accepts financial responsibility, up to the aggregate amount of $200,000.00, for any fraudulent or dishonest acts committed by any one or more of the employees, officers, or owners of Land Title Company of Kitsap County, Inc. (the "Title Agent"), a properly appointed agent of the Company. The Company provides such guarantee only in connection with those escrows for which Title Agent issues a title insurance commitment or policy of the Company.

This guarantee incorporates by reference all of the requirements, provisions, and terms of RCW 48.29.155, as though fully set forth herein.

This guarantee is effective until revoked in writing by an authorized representative of the Company.

Very truly yours,

Erika Meinhardt
Executive Vice President

EXHIBIT "J"

MIKE KREIDLER
STATE INSURANCE COMMISSIONER

STATE OF WASHINGTON

Phone: (360) 725-7000
www.insurance.wa.gov

OFFICE OF
INSURANCE COMMISSIONER

Legal Affairs Division

May 15, 2007

Land Title Company
9657 Levin Road NW suite 300
Silverdale, WA 98383
(360) 698-9432

re: Demand for documents

To Whom It May Concern:

As you may be aware, The Office of the Insurance Commissioner has been conducting an investigation into the rebating and inducements practices in the Title Insurance industry in the State of Washington. A special report regarding the initial phase of the investigation was published and released on October 31, 2006 detailing the results of that investigation. Further, a Technical Assistance Advisory (TAA) was published on November 21, 2006 to clarify any outstanding issues.

As part of this ongoing inquiry, we are requesting business information from you. This request is under the authority of the Revised Code of Washington (RCW) Title 48.02.060. The following documents pertaining to discounts offered on title insurance and escrow services are requested and shall include:

> All contracts or agreements with builders involving title insurance or escrow services, letters of intent, company policies, price lists, flyers, marketing materials, disclosure forms, written or electronic communications with builders, contractors or any such entity receiving discounts, and a list of persons or companies receiving such discounts.

In addition, the following information pertaining to affiliated business arrangements or joint ventures with realtors, lenders, builders, or other producers of title insurance and escrow services is requested and shall include:

> Contracts or similar documents that identify or otherwise describe the organization and function of any and all affiliated business arrangements or joint ventures between or among your company and realtors, builders, and/or lenders.

This should include articles of incorporation, partnership agreements, and/or other documentation of affiliation or ownership interest. If your company has not entered into any such affiliated business arrangements, please so state

The time period for which this information is requested shall be from and including **December 1, 2006** through and including **March 30, 2007.** This information shall be submitted to the Office of the Insurance Commissioner within 15 business days. If you have any questions, please contact Bruce Roberts, Senior Investigator, at (360) 725-7045.

Sincerely,

Marcia Stickler
Staff Attorney
Legal Affairs

Please refer any questions to:

Bruce D Roberts
Senior Investigator, Legal Affairs
Office of the Insurance Commissioner
Insurance 5000 Building
P.O. Box 40255
Olympia, WA 98504-0255
360.725.7045 fax 360.586.0152
BruceR@oic.wa.gov

EXHIBIT "K"

From: Collins, Charisse [IMCEAEX-_O=FNFINC_OU=CORE_CN=RECIPIENTS_CN=COLLINSC-1@fnf.com] on behalf of Hodgson, Chet [IMCEAEX-_O=FNFINC_OU=CORE_CN=RECIPIENTS_CN=HODGSONC@fnf.com]

Sent: Tuesday, May 22, 2007 10:04 AM

To: Chiarello, Kevin (EXTERNAL)

Subject: Land Title of Kitsap County

Attachments: Regional_0521165829_001.pdf

I am forwarding you copies of the letters Gene Kennedy received from the OIC and also a copy of his reply. If you need anything else or have any questions don't hesitate to contact me.

Chet

THIS E-MAIL AND ITS ATTACHMENTS ARE INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY WHO IS THE INTENDED RECIPIENT AND MAY CONCERN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE OR ANY TYPE OF USE UNDER APPLICABLE LAW. IF THE READER OF THIS E-MAIL IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT OR REPRESENTATIVE RESPONSIBLE FOR DELIVERING THE E-MAIL TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION, COPYING OR OTHER USE OF THIS E-MAIL IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS E-MAIL IN ERROR, PLEASE REPLY IMMEDIATELY TO THE SENDER

EXHIBIT "L"

MIKE KREIDLER
STATE INSURANCE COMMISSIONER

STATE OF WASHINGTON

Phone: (360) 725-7000
www.insurance.wa.gov

OFFICE OF
INSURANCE COMMISSIONER

September 14, 2007

Tommye M. Frost, Sr. Vice President & Chief Regulatory Counsel
Fidelity National Title Group, Inc.
601 Riverside Avenue
Jacksonville, Florida 32204

RE: Chicago Title Insurance Company
Proposed Consent Order No. D07-308

Dear Ms. Frost:

Enclosed are two originals of Washington State Office of Insurance Commissioner's Consent Order Levying a Fine. This order will result in your company being required to pay a fine in lieu of other action relative to its certificate of authority.

Please sign and return both of the original orders. Upon receipt, the orders will be signed by me, entered with our office, and one of the executed originals will be returned to you for your records. You will then have 30 days in which to pay the fine. If you wish to include payment with the orders, please address your correspondence to the attention of Hoang Thoong, Fiscal Technician, Operations Division, Office of the Insurance Commissioner, PO Box 40255, Olympia, Washington 98504-0255, or our physical location of 5000 Capitol Blvd., Tumwater, WA 98501. Otherwise, please send your correspondence to my attention.

If we have not received the signed documents by October 8, 2007, this offer will be withdrawn, and we will proceed with formal action relative to your certificate of authority.

Should you have any questions regarding this matter, please feel free to contact me at (360) 725-7048.

Sincerely,

Marcia G. Stickler, Staff Attorney
Legal Affairs Division

Enclosures

Cc: Kevin R. Chiarello, Senior Vice-President

EXHIBIT "M"

RICHARD G. (DICK) MARQUARDT
STATE INSURANCE COMMISSIONER

DAVID H. ROGERS
CHIEF DEPUTY

STATE OF WASHINGTON

OFFICE OF
INSURANCE COMMISSIONER

REPLY TO:
OLYMPIA OFFICE
INSURANCE BUILDING
OLYMPIA, WASHINGTON 98504-0321
753-7300, AREA CODE 206

November 1, 1989

Joseph J. Zelazny, III, President
Commonwealth Title Insurance Company
1120 Pacific Avenue
Tacoma, WA 98402

Re: Illegal Inducement Regulation, WAC 284-30-800

Dear Mr. Zelanzy:

A copy of this letter must be given to each of your branch offices and to each of your agents. It should also be given to all producers of title business (real estate agents and real estate brokers, for example) who approach you to give them anything of value including meals and entertainment, seminars, free or discounted services of any kind, etc.

On September 22, 1989 the insurance commissioner called a meeting of the Washington Land Title Association. The purpose of this meeting was to announce that there were continuing to be substantial violations of the illegal inducement regulation, WAC 284-30-800 (copy attached), even though this regulation has been effective since June 17, 1988. The information provided to the title insurers and agents at this meeting was that the regulation would henceforth be strictly enforced and no further violations would be tolerated.

The consequences of violation of this regulation are revocation or suspension of the title insurer's certificate of authority to conduct title insurance business in Washington and revocation or suspension of the title insurance agent's license to conduct title insurance business in Washington. The insurance commissioner may, in addition to or instead of revocation or suspension, levy fines on the violating entity which may be in excess of $10,000 per occurrence.

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. As of this writing, the first fine, in the amount of $20,000, is in the process of being levied against a title insurer.

In addition to my continuing work in handling substantive title insurance cases, in August of this year Commissioner Marquardt assigned to me the responsibility of enforcing this illegal inducement regulation. You and your agents are charged with knowledge of the regulation and with conducting yourselves in accordance with the regulation. If and when you have questions regarding your own compliance with the regulation, please consult your legal counsel and/or top management first. If he or she cannot answer the question,

then he or she is encouraged to submit the question in writing to me at the above address. If you have information about activities conducted by other title insurers or agents, after having the situation reviewed by your legal counsel and/or top management, please submit your concern in writing to me.

The insurance commissioner has proposed and appointed a committee to serve as advisors to him on this and other title insurance matters. The committee has recently been requested to consider the subject of advertising as it relates to the regulation and report back to the insurance commissioner.

Most questions concerning gift giving as an inducement to title insurance can be answered by you after a careful reading of the regulation. However, several issues were raised during the September 22 meeting which I believe need to be clarified. The clarification comes, of course, from an interpretation of the wording and intent of the regulation. These issues are as follows:

GENERAL STATEMENT OF APPLICABILITY: Pursuant to Section (2) of the regulation, title insurers and their agents are prohibited from giving anything of value (this means anything: material items, money, discounted services, meals and entertainment, etc.) either directly or indirectly, to any person (not just title producers) as an inducement, payment or reward for causing title insurance to be placed in excess of $12 per individual producer per calendar year.

The worst abuse we have seen in this area - both before and since the effective date of the regulation - are the giving of things of value to real estate agents and brokers. These individuals, who always fall within the definition of "producer of title business," oftentimes actually approach the title insurance company or its agent and ask for gifts or other things of value; e.g., asking the title insurer to host a Christmas party, provide free or discounted full property profiles or preliminary title reports, etc.

$12 PER INDIVIDUAL PRODUCER PER CALENDAR YEAR: As is stated in Bulletin No. 88-5, you must keep records of what specific producers received what things of value and ascertain that he or she does not receive more than $12 in the aggregate per calendar year. This requires, for example, that you keep a list of attendees at a dinner you may host and verification of the total amount you paid for the dinner, divide the total cost by the number of attendees and assign the individual cost to that individual producer. The records on each individual producer must be kept, adding to it each thing of value given in order to make certain that that individual producer does not receive more than $12 in the aggregate in that calendar year for all gifts or services combined. As stated in Bulletin No. 88-5, if requested by the insurance commissioner you have the burden of showing that no more than a cumulative $12 value is given to each recipient in any calendar year.

EDUCATIONAL SEMINARS: As stated in Bulletin No. 88-5, educational seminars strictly related to title insurance and educational materials strictly related to the subject of the seminar are permissable and are not subject to the $12 limit if materials or speakers are provided to all customers and others on a similar basis. The seminar may not be attributed to anyone other than the title insurer or agent, however. Further, the provision of refreshments or other things of value given during the seminar are subject to the $12 limit.

CHARITABLE CONTRIBUTIONS: Charitable contributions may not be given if based upon a donation per title order received. Lump sum contributions are a civic activity and are not an illegal inducement, even though you may give notice to producers or the public that you made the contribution. Contributions must be given in your own name.

PROPERTY PROFILES: Property profiles may only be given to producers if only one copy of the last conveyance (e.g., Deed of Trust, Real Estate Contract, etc.) is given. The insurance commissioner deems this one copy of that single document to be insignificant. Any further information or items - e.g., folders, information about tax assessments, mortgages or other liens, etc. - are subject to the $12 aggregate limit. Discounted services and items given to consumers who are insureds or prospective insureds are subject to the $5 per year aggregate limitation set forth in our general insurance rebating statute.

SELF-PAID SERVICES: Recipients of services and things of value - e.g., full property profiles - are certainly still able to pay title insurers and agents full (not discounted) prices for the services and goods. This, of course, is not subject to the $12 limit as there would be no gift at all.

We expect that a careful and reasonable reading of the regulation and the Bulletin, together with the information above, will answer your questions. Thank you for your attention to this regulation.

Very truly yours,

DICK MARQUARDT
Insurance Commissioner

PATRICIA D. PETERSEN
Deputy Insurance Commissioner

WAC 284-30-800 UNFAIR PRACTICES APPLICABLE TO TITLE INSURERS AND THEIR AGENTS. (1) RCW 48.30.140 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. As a result, insureds do not always have free choice or unbiased recommendations as to the title insurer selected. To prevent unfair methods of competition and unfair or deceptive acts or practices, this rule is adopted.

(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, promise, allow, give, set off, or pay anything of value exceeding twelve 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.

$25.00

(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 and 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 the rebating and illegal inducement statutes, RCW 48.30.140 and 48.30.150, which continue to limit gifts, payments and other inducements to a five dollar maximum, per person, per year.

EXHIBIT "N"

RICHARD G. (DICK) MARQUARDT
STATE INSURANCE COMMISSIONER

DAVID H. RODGERS
CHIEF DEPUTY

STATE OF WASHINGTON

OFFICE OF
INSURANCE COMMISSIONER

OLYMPIA OFFICE:
INSURANCE BUILDING
P.O. BOX 40255
OLYMPIA, WA 98504-0255
Phone: (206) 753-7300

January 12, 1993

Joseph J. Zelazny
President
Commonwealth Title Insurance Company
1120 Pacific Avenue
P.O. Box 1495
Tacoma, WA 98401

Re: Illegal Inducements and Rebates
Providing employee to "clear title"

Dear Mr. Zelazny:

We have been informed that the following practice may either be occurring or starting to occur:

> A title insurance company (or title agent) is furnishing an employee of the title company (or agent) to a lender to go to that lender's office to "clear title" on orders of the lender which were placed with the employee's title company (or agent). This employee of the title company (or agent) is being provided to the lender at no charge.

This practice is a violation of RCW 48.30.140, RCW 48.30.150 and WAC 284-30-800 and must cease immediately.

The insurance companies are responsible for the acts of their agents and shall have the responsibility of informing all of their agents as to the contents of this letter.

Sincerely,

DICK MARQUARDT
Insurance Commissioner

James E. Tompkins
Regulations Analyst

EXHIBIT "O"

13 Duke J. Comp. & Int'l L. 291, *

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Duke Journal of Comparative & International Law

Summer, 2003

13 Duke J. Comp. & Int'l L. 291

LENGTH: 9771 words

ARTICLE: WHEN IS A PRINCIPAL CHARGED WITH AN AGENT'S KNOWLEDGE?

NAME: Deborah A. DeMott*

BIO: * David F. Cavers Professor of Law, Duke University. Since late 1995, I have been the Reporter for Restatement Third, Agency. Statements made in this essay do not represent the position of the American Law Institute, under whose sponsorship Restatements are prepared. For helpful comments on an earlier draft of this essay, I thank Francis Reynolds, Martin Stone, and Peter Watts. My scholarly work was greatly enriched over the years by my colleague Professor Herbert Bernstein, who was unmatched in the enthusiasm and insight he brought to conversations about the law (and much else).

SUMMARY:
... Within the common law of agency, rules of imputation govern when a principal is deemed to know facts that are known by an agent. ... If Isabella's knowledge were imputed downward to Bernard, Bernard would be subject to liability to Junius. ... However, does the unidimensional quality of imputation also provide a defense to the principal? May Isabella argue that she is not subject to liability to Junius for fraud because her agent in the transaction, Bernard, did not know that his statement to Junius was false? If so, principals would systematically find it attractive to shelter their agents from facts most likely to be material to the transactions in which any particular agent may be engaged. ... Bernard's failure to disclose the lien to Isabella is a consequence of a third party's inducement to Bernard to breach the duty he owes Isabella and not a consequence of the incentives and instructions implicit in the relationship between Isabella and Bernard. However, Bernard's knowledge may be imputed to Isabella when Bernard's actions have the effect of defrauding a third party who reasonably believes Bernard to be authorized, as when Bernard induces Junius to buy Isabella's painting by misrepresenting it to be a Vermeer. ...

TEXT:
[*291]

I. INTRODUCTION

Within the common law of agency, rules of imputation govern when a principal is deemed to know facts that are known by an agent. The common law defines agency as a consensual and fiduciary relationship in which one person's actions have power to affect the legal relations of another person; an agent acts on behalf of a principal and is subject to the principal's control.n1 Imputation comes into play in determining a principal's legal rights and obligations as between the principal and third parties with whom the agent deals on the principal's behalf, when knowing a fact is relevant to legal relations. Imputation has been characterized as a disorderly doctrine that is difficult to rationalize and to justify or explain in any satisfying or comprehensive way. n2 The doctrine presents challenges because it applies broadly and to widely ranging circumstances. Imputation also requires a counter-intuitive willingness to assume that one person's knowledge, without more, is known by another person. These difficulties are worth confronting, though, because imputation is central to the bases on which agency ascribes responsibility for one person's actions to another person and thus to agency doctrine as a whole.

[*292] This essay begins by exploring the basics of how imputation doctrine operates, including the circumstances under which an agent is treated as knowing a fact. Although the primary focus is on cases from the United States, contrasting English cases are discussed at points. The essay next evaluates competing justifications for imputation. It argues that the traditional justifications for imputation, though helpful, are incomplete and ultimately unsatisfactory because they fail to account for well-settled aspects of imputation doctrine and its consequences. The essay then advances alternate justifications that achieve a closer correspondence between imputation and other agency doctrines. In particular,

imputation recognizes that the relationship between principal and agent may create incentives for an agent to be reticent in transmitting information to the principal when the agent believes the principal may prefer not to know the information.

Imputation may seem a counterintuitive or primitive legal doctrine or practice. It's natural to think that what one person knows becomes known by others only as a result of some intermediate process of communication or learning. Likewise, we don't assume that what one person knows, another person also knows simply because of the relationship between them. We naturally assume that the contents of a person's mind are just that - tied to or embedded in that person's conscious and unconscious mental states and not automatically within the mind of another person. Thus, imputation may seem to require some suspension of ordinary assumptions about how human cognition in fact works.

Imputing one person's knowledge to another could be characterized as a quintessential legal fiction. It is a representative instance in which the law for some reason deems something to be true that is not in another respect.n3 Moreover, basic aspects of the common law of agency could be characterized as fiction piled upon fiction. For example, like much else in the law, agency includes within its cast of characters actors who are not natural persons, such as nation-states and corporations. Treating nations and corporations as legally consequential persons necessitates doctrines - like imputation and other agency-law doctrines - that explain how such persons may take action in the [*293] physical world with legal consequences.n4 Thus, one fiction - corporate personality - may necessitate another fiction - imputation.

As it happens, many legal fictions are unproblematic because they are not deceptive. This is because some consequences of legal doctrine, like corporate personality, may have originated as fictions but now fool no one because their operation is so widely known.n5 Imputation, likewise, is not likely to fool people into thinking that a principal in fact knows what an agent knows because the doctrine is so well-established that people recognize it for what it is, a mechanism with which the law ascribes responsibility.

II. TWO BASIC ILLUSTRATIONS

As a general matter, imputation charges a principal with the legal consequences of knowledge of a fact known by an agent when knowledge of the fact is material to the agent's duties to the principal and to the principal's legal relations with third parties.n6 The doctrine is applicable in a diverse range of circumstances, given the variety of situations in which knowledge of a fact is relevant to a person's legal rights and duties. For example, knowing a fact may make an actor's conduct [*294] tortious or may establish a defense to liability. A person may own property subject to another person's interest in the property if the owner acquires the property with knowledge of the other person's interest. Moreover, having knowledge of a fact may determine whether a person has asserted legal rights in a timely fashion.

Before examining exceptions and variations, it is helpful to see how the basic principle of imputation applies to two concrete and typical sets of facts. First, suppose Isabella, an art collector, wishes to acquire property on which to build a museum to house her collection. She retains Bernard as her agent for this purpose. Bernard locates a suitable property and negotiates a purchase price and other terms with Henry, the owner of the property. Prior to closing, Bernard learns that the property is subject to an unrecorded lien in favor of Maisie. Bernard does not tell Isabella about Maisie's lien and purchases the property for Isabella. If Isabella herself knew about Maisie's lien, she would hold the property subject to it. If Bernard's knowledge of the lien is imputed to Isabella, she holds the property subject to Maisie's lien as if she had actual personal knowledge of it.n7

Notice the practical consequences of imputing Bernard's knowledge to Isabella. Imputation determines the parties against whom a third party may assert claims, as well as the remedies available. Imputation gives Maisie a claim against property that Isabella owns as a consequence of her transaction with Henry. Unless Bernard's knowledge is imputed to Isabella, Maisie is left without a claim against the property; indeed, unless Isabella is charged with Bernard's knowledge, Maisie may be left with no remedy at all. Maisie was not a party to the transaction between Isabella and Henry, and she has no relationship with Bernard on the basis of which she might establish that Bernard owed her a duty to protect her interests. Leaving Maisie in a remediless predicament could be justified, of course, on the basis that her lien was unrecorded. Relying on that justification to leave Maisie without a remedy would leave the nagging question why Isabella would acquire the property subject to Maisie's lien if she had personal knowledge of it. If the fact that the lien is unrecorded does not vitiate [*295] its effect if Isabella personally knows about it, it's hard to see why the same fact is relevant if only Bernard knows about Maisie's lien.

Second, and redeploying some of the same parties, suppose Isabella retains Bernard as her agent to deal in paintings. Bernard sells a painting owned by Isabella to Junius, representing that it is a Vermeer. Bernard knows that this statement is not true because he knows that the painting is a skillfully-executed nineteenth-century forgery. Bernard

does not share this information with Isabella or with Junius, both of whom believe the painting to be a Vermeer. If Bernard has defrauded Junius, it is because he has made a false statement of a material fact, knowing it to be false, and Junius has acted reasonably in relying on it. If Bernard's knowledge of the falsity of his statement is imputed to Isabella, she, like Bernard, is subject to liability to Junius for fraud.n8

In this illustration as in the first, imputation is relevant to determining the parties against whom a third party may have claims and the remedies that may be available. The actor's state of mind is an element of the tort of fraud; imputing Bernard's knowledge of the falsity of his statement to Isabella underlies Isabella's vicarious liability for Bernard's tortious misstatement to Junius. However, in contrast to the first illustration, Junius is not without a remedy if Bernard's knowledge is not imputed to Isabella because Junius may sue Bernard for damages. Imputing Bernard's knowledge to Isabella adds Isabella as a prospective - and possibly more solvent - defendant. Moreover, against Isabella, Junius may seek rescission of the transaction by offering to return the painting in exchange for the purchase price. Rescission would not be available against Bernard because, acting only as Isabella's agent, he was not a party to the transaction and does not possess the sale proceeds.n9 Alternatively, suppose Bernard did not [*296] know that his representation about the painting was false and that he made the representation negligently or even innocently. Bernard's representation, attributed to Isabella as his principal, provides Junius with a basis on which to seek damages from Isabella for his loss or to seek rescission of the purchase.n10

Imputation also lurks in the legal background if we focus solely on the contract-law analysis of this transaction and its consequences. Junius might argue that Bernard's statement about the painting constituted an express warranty because it was an affirmation of fact relating to the painting that became part of the bargain between Isabella and Junius.n11 The fact that the painting is a forgery would breach the warranty and subject Isabella to liability to Junius for breach of contract. Bernard would not be subject to liability because he was not a party to the contract. n12 Junius's remedies for breach of warranty do not depend on whether he can show that Bernard knew that his statement about the painting was false when he made it, which may make the breach of warranty theory attractive. If Junius takes this route, his claim for breach of warranty would reach only Isabella and the remedies for breach of warranty would not include exemplary or punitive damages that may be available in an action for fraud. n13

[*297] Isabella might resist Junius's argument that Bernard's statement constituted a warranty on the basis that she did not intend to make any warranty about the painting. Additionally, she might argue that Bernard's statement exceeded his authority to act on her behalf because she authorized him only to sell the painting, not to make factual affirmations about it on her behalf. Isabella's line of defense is likely to fail. If Bernard had authority to sell the painting for Isabella, she is charged with the legal consequences of representations that Bernard makes that are incidental to the sale, so long as Junius had no reason to doubt the truth of Bernard's statement.n14 Likewise, it is not a defense to Isabella if she can establish that, while she authorized Bernard to make factual affirmations about the painting, his authority encompassed only true affirmations. n15 Having deployed Bernard as her representative for purposes of selling the painting, Isabella becomes subject to the legal consequences of the means Bernard uses.

The basic illustrations both involve typical transactions and legal consequences stemming from imputation. Additionally, both involve a kind of fact that is typical in cases involving imputation. This is a fact, known by an agent, that most principals would prefer not to be true or, if true, a fact that many principals would prefer not to know. Isabella would prefer that it not be so that Maisie holds an unrecorded lien against property that Isabella purchases and, if it were so that Maisie holds such a lien, Isabella would prefer not to know about the lien. Less typically, imputation may benefit a principal. For example, material facts known to an agent may establish that the agent acted reasonably when the law requires reasonable action. Imputing notice of those facts to the principal benefits the principal.n16 Most imputation [*298] cases, though, involve facts that will not be beneficial to the principal's legal position if the principal is charged with an agent's knowledge of them.

The basic illustrations are also typical because the facts known to an agent are relevant to the values to be exchanged in the two transactions. Often the facts that an agent knows are relevant to the price and terms around which parties structure a transaction, or, more precisely, would structure the transaction if the facts were known to them. In the second illustration, Junius will pay less for the painting if he knows that it is a well-executed forgery and he will pay more if he believes it to be a Vermeer. If Isabella is shielded from the legal consequences of Bernard's knowledge, her dealings with Junius will not reflect material facts relevant to the painting's value and their transaction will be mispriced. Similarly, in the first illustration, Maisie's lien is relevant to the price that a buyer will pay for Henry's property and to the terms that an informed buyer will demand.

Although Bernard did not do so, an agent may disclose the existence of bad facts like these to the principal. An agent ordinarily has a duty to disclose material facts to the principal on whose behalf the agent acts.n17 Other ramifications of the duty of disclosure are discussed below, but notice as an initial matter that a basic consequence of imputation is to charge a principal with notice of facts whether or not an agent has fulfilled the agent's duty of disclosure or has breached the duty.

Why might Bernard breach his duty of disclosure? An agent's breach of duty subjects the agent to liability to the principal for loss the principal suffers as a result of the agent's breach.n18 An agent may breach the duty of disclosure because the agent does not understand the significance of the facts in question. However, as the illustrations [*299] are structured, this is not likely to be a plausible explanation for Bernard's failure to make disclosure to Isabella. Bernard might fail to make disclosure to Isabella when he fears that Isabella will not proceed with the transactions with Henry and Junius if she knows what Bernard knows. If Bernard's claim to compensation depends on completing a transaction, his desire to be paid may supersede his compliance with duties he owes his principal, Isabella, as well as duties he owes to other parties, including Junius, the purchaser of the painting. Bernard may place a higher value on the prospect of immediate payment for his services than he does on the more remote prospect that Isabella or Junius will sue him. He would be especially likely to do so if he believes that Junius and Isabella (and Maisie for that matter) are unlikely to discover that they have been injured or that they are unlikely to assert their rights promptly or effectively.

Imputation also recognizes the possibility that a principal might have instructed an agent not to disclose bad facts to the principal by explicitly or implicitly making it clear to the agent that the principal would prefer not to know. Thus, if Bernard reasonably understands that Isabella wishes not to know about forgeries and unrecorded liens, his failure to tell her may not breach his duty to her. Isabella might indicate that she prefers not to be burdened with this knowledge if she, too, places a high value on the immediate benefits that she believes will flow from the transaction relative to the prospect that Junius and Maisie will discover their injuries promptly. The likelihood that some agents act as they do because they reasonably understand that the principal so wishes helps explain the infrequency with which principals bring actions against agents when what appears to be a breach of duty by the agent has resulted in loss for the principal.n19 To be sure, other factors also help explain the infrequency with which principals seek indemnity from agents, but the implicit terms of [*300] understanding as between agent and principal may inhibit the principal's willingness to move against the agent.

However, from the standpoint of Maisie and Junius, it is not a source of comfort that Isabella and Bernard may have reached a private understanding that restricts what Bernard tells Isabella. Charging Isabella with the legal consequences of Bernard's knowledge does not require that Maisie or Junius prove the actual facts of any private understanding that Isabella and Bernard may have had. Imputation, that is, does not turn on whether a third party can establish explicit collusion between a principal and an agent or an implicit understanding that the agent will shield the principal from knowledge of bad facts. It would often be difficult for a third party to establish the facts of the operative understanding between a principal and an agent, especially when neither has reason to betray the other. It is also possible that an agent may withhold information from a principal because the agent misunderstands the principal's wishes. Imputation makes it unnecessary for a third party to establish that the principal directed or authorized the agent to withhold material information.

III. WHEN DOES AN AGENT KNOW A FACT?

It is possible to draw many shadings of degree within the concept of knowledge.n20 The most basic distinction for our present purposes is between (1) a fact that a person knows or has reason to know on the basis of an inference reasonably to be drawn from facts known; and (2) a fact that a person should know because the person would know the fact if the person discharged a duty owed to another person. To illustrate this distinction, consider a variation on the first illustration. Suppose that Henry, who owns the property that Isabella purchases, retains Dora to represent him in selling the property. As it happens, Dora resides in the same neighborhood and knows that, periodically, high winds whip through it and damage structures. Even if Dora claims to lack actual knowledge that Henry's property is also susceptible [*301] to wind damage, Dora has reason to know this fact.n21 Likewise, suppose Dora inspects a building on Henry's property and notices small piles of sawdust around the building's foundation. Dora knows - either as a consequence of her training as a real estate agent or though her experience as a property owner or otherwise - that the sawdust is indicative of termite infestation. However, not wanting to delay the transaction, Dora does not check further. Dora has reason to know of the strong likelihood that the building is to some degree infested by termites because she has "received sufficient information to awaken inquiry." n22

In both cases, Henry is charged with reason to know the facts that Dora has reason to know, even though Dora claims that she lacked actual knowledge of any termite infestation or adverse wind conditions that afflicted Henry's property. As a consequence, Henry may be subject to liability to Isabella, who purchased Henry's property. Restricting imputation to facts of which an agent has actual knowledge would make it attractive for agents to ignore or turn a blind eye to facts that the agent would prefer not to know, often because the agent believes that the principal would prefer not to know the facts. A phrase in English cases, "blind-eye knowledge,"n23 nicely captures scenarios in which a person knows enough of the facts to know that further inquiry may lead conclusively to bad news.

In contrast, suppose Dora makes no investigation at all of the condition of Henry's property. Dora thus lacks knowledge of the indicia of termite infestation. This may be a fact that Dora "should know" because she has a duty to Henry to inspect the property. Dora may also have a duty, as may Henry, that is owed to anyone who purchases [*302] the property, to inspect the property and disclose the findings of the inspection. Dora's failure to inspect the property thus may breach a duty she owes to Isabella, the purchaser of the property, and may also breach a duty she owes to Henry. Like a cascading line of dominoes, Dora's breach of duty will cause Henry to breach any duty he owes to Isabella to inspect the property prior to selling it if Henry relies solely on Dora to do the inspection. Henry may thus be subject to liability to Isabella.

This result does not turn on imputation, in this instance imputation of knowledge of a fact that Dora neither knows nor has reason to know but "should know" to fulfill her duty. Henry would be subject to liability to Isabella if Henry owes Isabella a duty and Henry has delegated performance of the duty to Dora, who did not fulfill the duty.n24

An additional question is whether an agent should be deemed to know what the principal knows - whether imputation, in other words, operates only unidirectionally, upward from agent to principal, or downward as well, from principal to agent. Suppose Isabella knows that the painting she sells to Junius as a Vermeer is a nineteenth-century forgery but also knows that Bernard (and Junius) do not know this and believe the painting to be genuine. Bernard sells the painting on Isabella's behalf to Junius. Is Bernard subject to liability to Junius? Recall that when it is Bernard who knows that the painting is a forgery, Isabella is charged with Bernard's knowledge and is subject to liability to Junius for fraud, as is Bernard. If Isabella's knowledge were imputed downward to Bernard, Bernard would be subject to liability to Junius.

Cases with facts comparable to this hypothetical do not impute a principal's knowledge downward to the agent.n25 This limit on imputation protects an agent from the legal consequences of facts that only the principal knows or has reason to know. Otherwise, an agent would risk liability whenever the principal, for whatever reason, has more information than does the agent about a transaction executed [*303] by the agent. However, does the unidimensional quality of imputation also provide a defense to the principal? May Isabella argue that she is not subject to liability to Junius for fraud because her agent in the transaction, Bernard, did not know that his statement to Junius was false? If so, principals would systematically find it attractive to shelter their agents from facts most likely to be material to the transactions in which any particular agent may be engaged. The cases foreclose this possibility. Isabella may be subject to liability to Junius if she withholds material information from Bernard, knowing that he will misstate material facts to Junius or another third party as a result.n26 However, Isabella's liability does not turn on imputing her knowledge to Bernard or imputing notice to her of a fact that Bernard does not know. The basis for Isabella's liability is that she has used Bernard, an innocent instrumentality, to mislead Junius. n27 Isabella's use of Bernard, who says what Isabella predicts he will say to Junius but does not know that what he says is false, is comparable to Isabella presenting Junius with a published catalog that Isabella knows attributes the painting to Vermeer, when the author of the catalog, like Bernard, did not know the true story.

[*304]

IV. THE PROVENANCE OF AGENTS<CSQ> KNOWLEDGE

Agents, like all persons, acquire knowledge through many different means and in many settings. In particular, an agent may learn a fact when the agent is acting on behalf of another principal or is acting solely on the agent's own behalf. The question is whether knowledge that an agent acquires apart from an agency relationship should be imputed to the principal. For example, suppose Bernard knows about Maisie's lien on Henry's property because he learned about it in an earlier transaction in which he represented another principal. If he remembers the lien when he acquires the property for Isabella, is his knowledge imputed to Isabella? She might well argue that Bernard, although acting as her agent in acquiring Henry's property, was not acting as her agent when he learned about Maisie's lien. Or suppose Bernard learns

about Maisie's lien, or learns that the purported Vermeer is a forgery, at a dinner party with friends. Should Isabella be charged with knowledge Bernard acquires when he is not working for any principal?

On this point, English cases give weight to the provenance of an agent's knowledge.n28 In the most memorable case, Societe General v. Tramways Union Co., Ltd., a company's secretary learned that shares in the company were subject to an equitable charge when, on the day of a relative's funeral, he learned of the charge at a family session where the solicitor for the relative's executor read out the decedent's will and an agreement creating the charge to those assembled. n29 The court held that notice of the charge should not be imputed to the company because "the secretary was in no way representing the company at the funeral; no notice was given to him as the agent of the company, nor did he acquire any knowledge of the defendant's security whilst transacting the company's business, or in any way for or on behalf of the company." n30

In contrast, for the most part, U.S. cases focus on whether an agent's knowledge is material to the agent's duties to the principal but not on the circumstances under which the agent acquired the information, unless the agent learned the knowledge under circumstances creating a duty of confidentiality to another party.n31 For example, a [*305] lawyer's knowledge is not imputed to a client when communicating the knowledge would breach the lawyer's duty to another client.n32 Unless an agent is bound by a duty of confidentiality to another person, and unless agent and principal have agreed otherwise, the agent's duty to the principal encompasses transmitting all material information known by the agent, regardless of its origin. n33 Thus, Bernard's duty to Isabella requires disclosure of Maisie's lien, regardless of the circumstances under which Bernard learned about it, assuming the absence of agreement between Isabella and Bernard that he will spare her such unpleasantries. Dora has a duty to tell Henry about the perilous wind conditions that may afflict Henry's property, although Dora learned about the high winds as a consequence of living in the same neighborhood where Henry's property is situated.

Likewise, on the facts of Societe General, the duty of disclosure owed to the company by its secretary would encompass the secretary's knowledge of the charge on shares issued by the company if material to the company and the secretary's position within it. It would be beside the point that the secretary learned about the charge at a family funeral. He attended the funeral as a member of the family, and not as a representative of the company, as the court observed. However, "the mind of the agent cannot be divided into compartments."n34 To be sure, agency law could so compartmentalize an [*306] agent's mind, but the consequence would be an implausible fiction. Principals often choose their agents on the basis of an agent's prior experiences and life apart from work. A principal may well choose an agent on the basis of the prospective agent's prior work, education, and life experience more generally, precisely because they contribute skills and knowledge that the agent may bring to bear on work for the principal. Moreover, it's likely that an agent will attempt to transmit information to the principal, regardless of its provenance, when the agent believes that the principal wishes to be told.

Thus, under U.S. law, more of an agent's knowledge is imputed to the principal than under English law, suggesting that under U.S. law an agent's duties appear to reach more pervasively into prior or private dimensions of the agent's life. However, it is open to question whether a contemporary English court, in contrast to the 1884 Societe General court, would so broadly foreclose imputation on the basis of the circumstances under which the agent acquired knowledge material to the agent's duties. Suppose the question arises as a consequence of a representation made on the principal's behalf to induce another party to enter into a transaction with it, and not, as in Societe General, when the question is the validity or priority of rights that may be asserted against property. For example, suppose that the company that issued the shares entered into a financing transaction with a third party and, as part of that transaction, warranted that it knew of no equitable liens upon its shares. If as a consequence of the statement the company is subject to liability for fraud to the third party, the breadth of Societe General's emphasis on the provenance of the agent's knowledge has been undercut.

As it happens, English cases impose liability on principals when it is very unlikely that the agent has transmitted relevant information to the principal. In a 1912 case, Lloyd v. Grace, Smith & Co.,n35 the House of Lords held that a principal was liable for its agent's fraud when the agent fraudulently induced a client to convey her investment assets to him. n36 Although the agent disposed of the assets for his own benefit, having engineered the entire transaction for his own gain, the principal was liable even though it neither knew about nor benefited from its agent's fraud because the fraud occurred in the [*307] course of the agency.n37 From the standpoint of the client who dealt with the firm through its agent, the transaction appeared to be within the scope of those the agent had authority to conduct for the firm; that the agent acted for "private motives" in contrast to the interests of the firm should not defeat the firm's liability. n38 Curiously, the nature of the agent's "private motives" in Lloyd v. Grace Smith make it even less likely that the

agent will reveal material information to the principal than the extramural circumstances under which the company secretary learned about the charge in Societe General.

V. LAPSED MEMORY

A separate dimension of knowledge is the phenomenon of forgetting; agents who are individuals may forget what they once knew. This may be due to the passage of time or because the agent acquired the knowledge in question in a superficial manner that was not conducive to long-term retention in the agent's memory. For example, suppose Bernard represents many principals in transactions comparable to the transaction through which he learned about Maisie's lien on Henry's property. Bernard's knowledge of the lien may prove ephemeral if he acquires it through one of a series of routine transactions.n39 Moreover, before Bernard represents Isabella, he owes her no duty to retain facts in his memory.

Thus, a principal is not deemed to know a fact that an agent once knew but has forgotten by the time the agent acts on the principal's behalf.n40 One possible difficulty with this limit on imputation is that [*308] instances of claimed forgetfulness on the part of agents tend to involve knowledge that, if imputed to a principal, would have an adverse effect on the principal's legal relations with third parties. It may be difficult for a third party to show that an agent in fact remembered the information, just as it may be difficult for a third party to show that an agent duly transmitted material information to the principal. Some cases address this problem with a presumption that information an agent has recently acquired is known by the agent when the agent acts on behalf of the principal.n41 Other cases explicitly allocate to the third party the burden of showing that the agent knew the information at the time of acting on the principal's behalf. n42 The first approach is preferable. It can be attractive to forget "bad facts," or to claim to have forgotten them, once the consequences after-the-fact of knowledge become evident.

VI. WHEN AN AGENT ACTS ADVERSELY TO A PRINCIPAL

A long standing-exception to imputation protects a principal from an agent's knowledge when the agent acted adversely to the principal in the transaction or other matter. However, the U.S. cases charge the principal with the adversely-acting agent's knowledge when the principal retains a benefit from the agent's actions, knowing the circumstances of the agent's conduct. The principal is also [*309] charged with an adversely-acting agent's knowledge when imputation protects the interests of a third party who reasonably believed the agent to be authorized and who did not know or have reason to know that the agent acted adversely to the principal.n43

This exception is tied to the underlying point that a principal is not charged with an agent's knowledge when doing so would defeat claims that the principal may assert against the agent.n44 Imputation is not available as a mechanism through which an agent may defeat claims that a principal would have against the agent. Likewise, a principal is not charged with an agent's knowledge when the agent has dealt with the principal, and not with a third party on the principal's behalf. n45 The "adverse interest" exception defeats imputation in a narrow range of cases involving third-party claims arising out of conduct by an agent that is so wholly antagonistic to the principal's interests that the relationship between principal and agent could be viewed as severed. n46 In contrast, simply the fact that the agent acts with conflicted [*310] motives or interests does not trigger the adverse-interest exception to imputation.n47

It is possible to tie the scope of this exception to agency doctrine more generally by focusing on the control that a principal has in a relationship of agency. When an agent's knowledge is not imputed to a principal due to the adverse-interest exception, the agent's conduct tends to be explicable by factors outside the control and incentive structures that the principal has created. Thus, in the earlier illustrations, Bernard's knowledge of Maisie's lien is imputed to Isabella although Bernard's reason for failing to tell Isabella about the lien is his fear that, if he does, he will lose his commission because Isabella will refuse to purchase the property from Henry.n48 Bernard has still accomplished Isabella's objective, acquiring property for her museum, albeit under circumstances that Isabella may well have reason to regret. Moreover, Bernard's reticence is a predictable consequence of the incentive structure created by his agreement with Isabella, which makes his commission dependent on consummating a transaction.

In contrast, suppose Bernard's reticence occurs because Henry bribes him not to reveal the fact of Maisie's lien to Isabella.n49 Isabella is not charged with Bernard's knowledge. Bernard's failure to disclose the lien to Isabella is a consequence of a third party's inducement to Bernard to breach the duty he owes Isabella and not a consequence of the incentives and instructions implicit in the relationship between Isabella and Bernard. n50 However, Bernard's knowledge may be imputed to Isabella when Bernard's actions have the effect of defrauding a third party who reasonably believes Bernard to be authorized, as when Bernard induces Junius to buy Isabella's painting by misrepresenting it to be a Ver-

meer. It is not a defense to Isabella that Bernard [*311] made the misrepresentation with motives antagonistic to her interests, perhaps because Bernard has formed an alliance with the forger that will reward Bernard, separate from his relationship with Isabella as her agent.n51 Independently, Isabella will be charged with Bernard's knowledge if she retains the benefit of his conduct, knowing the facts. n52

One might wonder why an agent's knowledge should be imputed to a principal when the question surfaces in an action brought by a third party alleging fraud but not when a third party challenges the circumstances under which a principal acquired property from someone else. When the agent has acquired the knowledge extramurally or prior to the agency relationship, most U.S. cases - unlike English precedents - do not draw this distinction, as discussed above.n53 The question is whether this distinction is any more compelling when the agent acts adversely to the principal. If an agent acts adversely to a principal when the agent represents the principal in conducting a transaction with a third party that defrauds the third party, the agent's fraud is imputed to the principal on the basis that the principal chose to conduct the transaction with the agent as a representative and manifested to the third party that the agent had authority. This outcome sacrifices the innocent principal in the interest of protecting the third party with whom the agent dealt on the principal's behalf. However, the principal chose to deal through an agent, chose the agent, and led the third party to believe that the agent had authority. The third party's injury stems from an interaction with an agent apparently conducted on behalf of the principal. In contrast, when the plaintiff is not a third party with whom the agent has transacted on the principal's behalf, the plaintiff's injury or grievance is not linked to such an interaction. The agent's adverse interest places the agent beyond the consequences fairly to be ascribed to the position of control over the agent.

VII. TRADITIONAL JUSTIFICATIONS FOR IMPUTATION

Conventionally, imputation is justified on two bases that differ in intellectual style as well as implications. First, it is said that imputation [*312] can be justified on the basis of an identity that is assumed to exist between principal and agent; a principal is charged with an agent's knowledge because principal and agent should be treated as sharing the same legal identity or personality.n54 A pragmatic supplement to the formal argument from identity is that a principal should not, by using an agent, be advantaged in position compared with the consequences for the principal had the principal acted personally rather than through an agent. n55 Grounding agency doctrines on an identity between principal and agent had an influential scholarly proponent, Oliver Wendell Holmes, Jr. n56 Second, imputation is justified on the basis that if an agent knows a fact and is under a duty to relay it to the [*313] principal, it can be assumed that the agent has fulfilled that duty.n57 Characterizing this presumption as the basis for imputation also had a prominent champion, Joseph Story. n58

Both justifications have strengths. It is appealing to base imputation on an identification between principal and agent because an agent's actions bind the principal - are treated as the acts of the principal - when the agent acts with actual or apparent authority. A principal's agents link the principal to the external world though the facts they learn about it, as well as through their actions. However, this justification has significant limits. It does not reflect the fact that principal and agent retain separate legal personalities. Each owes duties to the other and to third parties with whom the agent interacts on the principal's behalf.

Additionally, less than all of an agent's knowledge is imputed to the principal. As explained above, a principal is not charged with the knowledge of an agent who acts adversely to the principal, nor with [*314] the knowledge of an agent who owes another party a duty of confidentiality. That there are limits on the scope of imputation is inconsistent with treating identification between principal and agent as the underlying justification for imputation. A further inconsistency is that imputation is not a two-way doctrine because notice of facts known to a principal is not imputed to the agent. If, for example, Isabella knows that the painting in the second illustration is a forgery but Bernard does not know this, Isabella's knowledge is not imputed to Bernard. The one-way direction of imputation is not consistent with identification between principal and agent.

To be sure, a more nuanced account of identity can overcome some of these objections. Some forms of identity involve constitutive relationships between parts and a whole. By way of analogy, a basketball team scores whenever one of its members makes a basket, but we wouldn't say that whenever the team scores, any particular member does. Thus, the one-way direction of imputation isn't fatal to grounding imputation in an identification between principal and agent. Moreover, to say that there is an identity does not necessitate that the identity hold true for all purposes and all circumstances; after all, the agency relationship between Bernard and Isabella is itself limited in scope. The adverse-interest exception to imputation could then be rationalized as applying to situations in which an identity between principal and agent does not hold.

However, even with this modification, positing an identification between principal and agent does not quite capture the distinction drawn by the cases between situations in which an agent deals with the third party whose legal relations are at issue, as opposed to situations in which there is no such dealing. When Bernard sells the forged painting to Junius, having allied his interests with those of the forger, as between Junius and Isabella, Isabella is charged with Bernard's knowledge of the forgery. When Bernard buys property from Henry knowing of Maisie's unrecorded lien but does not tell Isabella about the lien because Henry bribes him to remain silent, as between Maisie and Isabella, Isabella is not charged with Bernard's knowledge of the lien. Perhaps for the purposes that imputation serves, the identification between Bernard and Isabella is inseverable when Bernard reasonably appears to the third party with whom he deals, and whose legal relations with Isabella are at issue, to be dealing on Isabella's behalf. This explanation looks beyond the postulate of identification to its purpose in a given context.

[*315] Most contemporary cases, in contrast, tie imputation to the duties an agent owes a principal, stressing the agent's duty to transmit material facts to the principal. The chief attraction of this justification is that it is reasonable to believe that, in most cases, agents fulfill this duty, and often have done so even when in retrospect principal or agent claims otherwise. It is also reasonable to assume that it will be difficult in many instances for a third party to prove that an agent transmitted material information to the principal. However, justifying imputation on the basis of an agent's duty to a principal does not match well with significant aspects of well-settled doctrine. It is not a defense to a principal that an agent breached the agent's duty to transmit relevant information, even when the principal can establish that the agent withheld the information. Moreover, the U.S. cases charge a principal with an agent's material information whether or not the agent owed the principal a duty when the agent acquired the information.

Most tellingly, a principal is charged with an agent's knowledge of material facts even when the agent's failure to transmit the facts to the principal is consistent with instructions that the principal has given the agent. That is, if a fact is material to a principal's legal relations with a third party, the principal cannot defeat imputation on the basis that the agent complied with the principal's instructions in withholding the fact from the principal. Thus, an agent's duty to a principal does not fully explain why the agent's knowledge is imputed to the principal.

VIII. ALTERNATIVE JUSTIFICATIONS

It is more promising to treat imputation as a recognition of the fact that, when an agent interacts with third parties on behalf of a principal, the internal relationship between principal and agent shapes many dimensions of the agent's interaction with the third party. A principal has the power to select its agents and, in various ways, to exercise control over them. A principal's position enables the principal to furnish agents with instructions and incentives with the objective of guiding their conduct. This includes prescribing routines for how agents should handle information, as well as determining how best to reward agents who transmit material information.

As noted above, in most cases involving imputation, what is known to the agent is not favorable to the principal's legal position vis-a-vis a third party if the principal also knows the fact. Imputation responds to the evident temptation for agents to be reticent in sharing [*316] "bad facts" with their principals. An agent may be reticent about such a fact for many reasons, including the agent's belief that the principal would prefer not to know the fact. An agent's relationship with the principal provides many channels for the principal so to inform the agent, both explicitly and implicitly. Additionally, by setting an incentive structure for an agent, the principal may make it more likely that the agent will not reveal "bad facts" to the principal, as when the agent fears the principal will not conclude a transaction if the principal knows the facts and the agent's right to compensation depends on whether a transaction is consummated.

It is also possible that a principal may find it tempting to either embrace or disavow an agent, depending on how the agent's interaction with a third party actually turns out. For example, as the seller of a painting purported to be a Vermeer, Isabella will benefit if Junius does not learn that painting is a forgery, whether or not Isabella actually knows or suspects the truth. She may anticipate that benefit in how she deals with Bernard as her agent, for example by failing to encourage Bernard to be candid with prospective purchasers and by rewarding Bernard on the basis of the amount of sale proceeds he generates. Isabella and Bernard may also benefit if Junius's discovery of the truth is delayed. If (and when) Junius learns about the forgery, Isabella would, of course, prefer to distance herself from Bernard and the guilty knowledge that only he demonstrably has.

Imputation has the effect of denying principals an opportunity to deal with third parties on the basis that "heads I win, tails you lose," as determined by a principal after-the-fact of transactions entered into by an agent. This is consistent with a broad theme in agency doctrine. Across the board, agency doctrine tends to cut off a principal's ability to look after-the-fact at the consequences of an agent's interaction with a third party and determine then whether to be

bound by what the agent has done. If Bernard buys a painting for Isabella, and he had actual or apparent authority to do so, Isabella cannot later avoid the purchase on the basis that Bernard made a poor choice. Agency doctrine forecloses Isabella's ability to argue that Bernard's power to bind her encompassed only those contracts that she, after the fact, finds advantageous. Isabella may argue that she extended authority to Bernard on such limited terms, but if she led third parties with whom Bernard dealt to believe that he acted with unqualified authority, Isabella will be bound on the basis of Bernard's apparent authority.

[*317] In contrast, in the narrow run of cases in which an agent's knowledge is not imputed to the principal on the basis that the agent acted adversely to the principal, the risk of explicit or implicit collusion between agent and principal is missing. Likewise missing is any opportunity for the principal to speculate at the third party's expense. The agent's actions place the agent outside the control structures put in place by the principal, just as an agent is outside them when the agent deals with the principal as an adverse party.

Imputation may also be justified on the basis of its impact on behavior. It creates strong incentives for principals to select, train, and monitor agents carefully, and to design effective systems for handling and reporting information. Imputation also reduces a principal's incentives to deploy agents as shields against the legal consequences of information that a principal would prefer not to know. This is so because, from a principal's standpoint, it is preferable that an agent transmit "bad facts" so that the principal may determine how to react, as opposed to proceeding with a transaction in the absence of actual knowledge. Actually knowing the facts, a principal might decide to exit from a transaction, might negotiate for a different price, or might otherwise negotiate different terms. Imputation treats a principal as if the principal knew what the agent knew; if in fact the agent did not disclose material facts to the principal, the transaction might well be on terms that an informed principal would not have chosen, taking into account the legal consequences that follow from imputation.

The invariant quality of imputation may lead to results that seem unfair to a principal who has taken all reasonable measures - or even adopted measures beyond those most principals would adopt - in selecting and monitoring its agents. But this quality makes imputation doctrine simpler to apply than more nuanced fault-based alternatives would prove in practice. Its invariant quality is also consistent with basing imputation to some extent or in some fashion on an identification between agent and principal. That is, if for some purposes the agent is deemed to be the principal, it is hard to justify a lessening in the consequences of that identity when it is present.

Although the illustrations in this Essay have focused on simple relationships among agents and principals who are individual people, the justifications advanced for imputation have equal if not heightened validity when a principal is an organization. Imputing its agents' knowledge of material facts to an organization reduces the temptation for those who control the organization to structure it so that knowledge of bad facts is isolated to agents who are not otherwise [*318] implicated in the organization's dealings with a third party.n59 Like the Circumlocution Office in Little Dorrit, n60 the result could be a repository for an organization's "bad facts" that would serve to deflect the organization's accountability to those with whom its other agents deal. n61

IX. CONCLUSION

Agency has not enjoyed much fashion within the legal academy in recent years. Many factors no doubt contribute to its unfashionable status, including its decline as a freestanding subject for law school instruction.n62 Agency is also not much of a focus for specialization [*319] within the legal profession; although its doctrinal tenets reach broadly, agency is not likely to fill the plate of a lawyer's work however much agency doctrines may matter on particular points. That agency does not parallel specialization within the legal profession may also help explain its low visibility within the academy.

Many doctrines within agency also have qualities that place them out of sync with developments in other areas of the law and legal theory. Basic agency doctrines are not fault-based; the legal consequences of an agent's actions are attributable to a principal even when the principal was without fault in selecting or monitoring the agent. Basic agency doctrines also operate on an all-or-nothing basis; either the legal consequences of an agent's actions are attributable to the principal, or they are not. If an agent acts with actual or apparent authority on behalf of a principal, the principal is bound by what the agent did, even when the principal did not realize any benefit as a result. Thus, agency doctrines may strike some as unduly severe and unmodulated by concern for the specifics of individual cases. Some may be troubled by the conclusion that an agent may have acted "on behalf of" a principal when, in fact, the principal did not benefit as a consequence of the agent's actions.

Imputation, as examined in this essay, is representative of agency doctrines more generally. An agent's knowledge of material facts is, subject to a few exceptions, imputed to the principal even when, in demonstrable fact, the principal was blameless. This is so even when the principal is an organization including constituents who are blameless and who were not in a position to control the agent. A principal may not defeat imputation of an agent's knowledge on the basis that by withholding information, the agent breached a duty owed to the principal or, in some other respect, did not benefit the principal.

However unfashionable its intellectual style, imputation is crucial to the legal accountability of organizations and of principals more generally. Imputation reflects the insight that how an agent handles information often reflects the agent's understanding with the principal and the agent's expectations about whether the principal wishes the agent to be forthcoming or reticent when the agent knows information material to the principal's legal relations. Systematically, an agent may err on the side of reticence when it would be detrimental [*320] to the principal to learn what the agent knows. If a principal can evade the legal consequences associated with knowledge, the principal can interact with third parties through agents in a manner that is calibrated to distance itself from knowledge of facts that the principal would prefer not to know. This increases the risk that a principal will evade the consequences of its agents' actions by assessing whether they are advantageous or not for the principal, after-the-fact of action taken by agents. Imputation guards against this risk.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDuties & LiabilitiesKnowledge & NoticeAgent KnowledgeBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesKnowledge & NoticeExceptionsCriminal Law & ProcedureDefensesGeneral Overview

FOOTNOTES:

n1. Formally defined, "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 so to act." Restatement (Third) of Agency 1.01 (Tentative Draft No. 2, 2001).

n2. See F.M.B. Reynolds, Bowstead and Reynolds on Agency 441 (17th ed. 2001).

n3. On legal fictions generally, see Lon L. Fuller, Legal Fictions (1967); Note, Lessons from Abroad: Mathematical, Poetic, and Literary Fictions in the Law, *115 Harv. L. Rev. 2228 (2002).*

n4. Ascribing legal personality to corporations and other legal entities is problematic if an individual human being is treated as the paradigmatic legal subject, as opposed to one instance of a legal subject. See Nicola Lacey, "Philosophical Foundations of the Common Law': Social not Metaphysical, in Oxford Essays in Jurisprudence 17, 25 (4th ser., Jeremy Horder ed., 2000). Professor Lacey suggests recognizing that, whether a person is an individual or a corporation, "legal personality is not straightforwardly descriptive: rather, it makes reference to the conditions under which it is true to say that some social phenomenon - human, corporate, or other - may be held liable in law." Id. at 26. Consistent with this insight, not all human beings have capacity to do all legally consequential acts. For example, minors lack capacity in many instances to enter into binding contracts. Within agency, capacity to do an act through an agent is a function of the principal's capacity. See Restatement (Third) of Agency 3.04(1) (Tentative Draft No. 2, 2001) (stating that an agent may act when the principal "would have capacity if acting in person at the time the agent takes action"). A person's power to act as an agent may exceed the person's capacity to be bound as a principal. See id. 3.05 cmt. b ("The capacity to do a legally consequential act by means of an agent is coextensive with the principal's capacity to do the act in person.").

n5. See Fuller supra note 3, at 19:

Probably the maxim "qui facit per alium, facit per se" was originally a fiction because it was understood as an invitation to the reader to pretend that the act in question had actually been done by the principal in person. But the statement has been so often repeated that it now conveys its meaning (that the principal is legally bound by the acts of the agent) directly; the pretense that formerly intervened between the statement and this meaning has been dropped out as a superfluous and wasteful intellectual operation. The death of a fiction may indeed be characterized as a result of the operation of the law of economy in the field of mental processes.

(emphasis added).

n6. See Restatement (Third) of Agency 5.03 (Tentative Draft No. 3, 2002) (imputing to the principal material facts "an agent knows or has reason to know").

n7. For a recent example, see *Gregg v. Cloney (In re Marriage of James & Dana Cloney), 110 Cal. Rptr. 2d 615, 623 (Cal. Ct. App. 2001)* (holding that an agent's knowledge of specific information material to his duties "that could have a substantial adverse effect on the principal" will be imputed to the principal; thus, the court imputed the agent's knowledge of a vendor's use of alternate names to the purchaser of a property). See generally *Restatement (Second) of Agency 274* (1958) ("The knowledge of an agent who acquires property for his principal affects the interests of his principal ... to the same extent as if the principal had acquired it with the same knowledge.").

n8. See, e.g., *Dyke v. Peck, 719 N.Y.S.2d 391, 394 (N.Y. App. Div. 2001)* (imputing to a seller a material misrepresentation made by his agent to a buyer of real estate and holding that the buyer's reliance was not reasonable under the circumstances).

n9. This point has ramifications that are beyond the scope of this essay. Consider the structure of agency relationships in typical sales transactions in residential real estate. If a property-owner consents, the agent with whom the property is listed may offer other real-estate brokers a share of any sales commission if a prospect to whom they show the property purchases it. The common-law rule in most states characterizes a "showing broker" as the seller's subagent, that is, an agent to whom the listing agent delegated performance. See *Stortroen v. Beneficial Fin. Co., 736 P.2d 391, 396 (Colo. 1987)* (citing cases). If the showing broker defrauds the purchaser, remedies available to the purchaser include rescission. Id. (quoting Molly Moore Romero, Theories of Real Estate Broker Liability: Arizona's Emerging Malpractice Doctrine, *20 Ariz. L. Rev. 767, 773 n.33 (1978)).* On the other hand, if a showing broker is characterized as the purchaser's agent, rescission will not be an available remedy if the showing broker defrauds the purchaser. See id. (holding that where "there is no agency relationship between the seller and the selling broker, but [there is an] agency relationship ... between the buyer and the selling broker, the remedy of rescission is no longer available to the buyer because the ratification doctrine would not be applicable" (quoting Romero, supra at 773 n.33)).

n10. On liability for negligent and innocent misrepresentations, see *Restatement (Second) of Torts 552B*, 552C (1976).

n11. Under U.C.C. 2-313(a) (2002), a seller of goods creates an express warranty through "any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain ... ." The express warranty so created is that "the goods shall conform to the affirmation or promise." Id. An express warranty may be created although the seller does not use such words as "warrant" or "guarantee"; but an affirmation that goes only to "the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." Id. 2-313(2).

n12. See *Restatement (Second) of Agency 320* (stating that a person who makes or purports to make a contract on behalf of a disclosed principal is not a party to the contract). An agent for a disclosed principal is not liable for nonperformance of a contract that the agent makes on behalf of the principal. Id. 328.

n13. Depending on when Junius learns the truth, he may reject the painting when delivery is tendered, SeeU.C.C. 2-601, if he can do so within a "reasonable time" following tender of actual delivery, Id.2-602(1). A buyer may rightfully reject goods that fail in any respect to conform to the contract. Id. 2-601. If Junius learns the truth after he has accepted the painting, he may revoke his acceptance "within a reasonable time after [he] discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects." Id. 2-608(2). A buyer may revoke acceptance when a nonconformity substantially impairs the value of goods to the buyer. Id. 2-608(1). If a buyer rightfully rejects goods or revokes acceptance of the goods, and the goods are unique, the buyer's remedies begin with the right to recover "so much of the price as has been paid" plus damages for incidental and consequential loss. Id. 2-711(1), 2-712(2). If Junius does not reject the painting or revoke acceptance, his remedy is damages for the difference between the value of the painting as warranted and the value of the painting he accepted, plus any incidental or consequential damages. Id. 2-714(2).

n14. See*Restatement (Second) of Agency 162* (stating that a principal's accountability under this section does not extend to statements an agent makes about his own authority).

n15. See id. 162 cmt. b:

The authorization of the agent to make true statements concerning the subject matter of a contract does not authorize him to make those which he knows or should know are untrue. If the agent is authorized to make representations concerning a certain matter, however, the principal is responsible for them if untrue statements are made.

n16. SeeRestatement (Third) of Agency 5.03 cmt. c(ii) (Tentative Draft No. 4, 2003) (noting that such imputed reasonable behavior affects the principal's underlying tort liability). Imputation may also have the consequence of creating a defense against a fraud claim. Suppose that Bernard acts as Junius's agent, that Bernard knows that the purported Vermeer is a forgery, and that neither Isabella nor Junius know this. Imputing Bernard's knowledge to Junius would defeat Junius's claim against Isabella and would leave Bernard as the sole defendant that Junius may pursue. See, e.g., *Jay Group, Inc. v. Glasgow, 534 S.E.2d 233, 236-37* (N.C. App.), appeal denied, *546 S.E.2d 100, 100 (N.C. 2000)* (imputing to an acquiring corporation its officers' knowledge that trademarks of the acquired corporation could not be registered and rejecting the acquiring corporation's fraud claim based on failure to disclose).

n17. See *Restatement (Second) of Agency 381*:

Unless otherwise agreed, an agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have and which can be communicated without violating a superior duty to a third person.

n18. See id. 401 (subjecting an agent to liability "for loss caused to the principal by any breach of duty").

n19. In particular, when an agent is an employee and the loss is a consequence of inadvertent error, a principal may be concerned about the impact on work-force morale. One line of attack on an employer's right of indemnity against an employee is that no employee expressly or impliedly undertakes to be infallible. See *Rom-*

ford Ice & Cold Storage Co. v. Lister, [1956] 2 Q.B. 180, 187 (Eng. C.A.) (Denning, L.J., dissenting) ("No man, if asked, would give a warranty to his employer that he would at all times, without exception, come up to the standard of the reasonable man of the law who, so far as I know, when he is driving, never makes a slip or a mistake."). In the same case, the House of Lords unanimously held that an employee owes a contractual duty of care to the employer and that breach of the duty gives rise to a claim for damages by the employer. See Lister v. Romford Ice & Cold Storage Co., 1957 A.C. 555, 556 (1956) (holding a truck driver liable to his employer for damages caused by breaching his duty of care). For a critique of the implied contract theory, see generally Roscoe T. Steffen, The Employer's "Indemnity" Action, *25 U. Chi. L. Rev. 465 (1958).*

n20. An English court stated five possibilities:

(i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; (v) knowledge of circumstances which would put an honest and reasonable man on inquiry.

Baden v. Societe Generale, [1993] 1 W.L.R. 509, 575-76.

n21. For comparable facts, see *Carter v. Gugliuzzi, 716 A.2d 17, 20 (Vt. 1998)* (imputing to a brokerage house its agent's knowledge of a property's susceptibility to "frequent and severe winds").

n22. *Southport Little League v. Vaughn, 734 N.E.2d 261, 275 (Ind. Ct. App. 2000)* (citing *Travelers Ins. Co. v. Eviston, 37 N.E.2d 310, 316 (Ind. App. 1941)).*

n23. In the English cases, "blind-eye knowledge" refers to situations under policies of maritime insurance in which an insured or its agent suspects the existence of facts that mean that a ship is unseaworthy but consciously refrains from further inquiry. See *The Eurysthenes, 1977 Q.B. 49, 68 (1976)* (Denning, L.J.) (stating that blind-eye knowledge requires proof "that a reasonably prudent owner in [the owner's] place would have known the facts and have realized that the ship was not reasonably fit to be sent to sea"). To turn a blind eye to a situation does not always imply conduct that is morally dubious. Consider Horatio Nelson's naval victory over the French at the battle of Copenhagen in 1801. Lord Nelson's superiors hoisted signal flags directing him to retreat. However, "Nelson ... made a deliberate decision to place the telescope to his blind eye in order to avoid seeing what he knew he would see if he placed it to his good eye." *Manifest Shipping Co. v. Uni-Polaris Ins. Co., [2001] 2 W.L.R. 170, 208* (H.L.).

n24. See*Restatement (Second) of Agency 277* cmt. b (1958):

The principal is affected by information which the agent should have acquired if the principal has a contractual or other duty to third persons with respect to a matter entrusted to the agent. In such cases the principal is subject to liability for failing to act in the light of information which he should have acquired if he himself had done the work.

n25. See, e.g., *Ago v. Begg, Inc., 705 F. Supp. 613, 617-18 (D.D.C. 1988)* ("The law of agency ... sensibly does not hold agents responsible for knowledge known only by the principal." (citation omitted)), aff'd, *911 F.2d 819 (D.C. Cir. 1990).*

n26. See *Essex v. Getty Oil Co., 661 S.W.2d 544, 550-51 (Mo. Ct. App. 1983)* ("The fact that the person used as an agent to convey the representation is innocent does not relieve the party charged with fraud."); *Restatement (Second) of Agency 256* (assigning liability to a principal for failing to reveal material facts to an agent who, "because of his justifiable ignorance ... makes a material misstatement of facts").

n27. Some authorities treat downward imputation as a device to establish liability on the part of the principal, not the agent. For an early example, see Joseph Story, Commentaries on the Law of Agency as a Branch of Commercial and Maritime Jurisprudence, with Occasional Illustrations from the Civil and Foreign Law 140d (N. St. John Green ed., 8th ed. 1874):

notice of facts to the principal is ordinarily notice thereof to the agent; for it is the duty of the principal to communicate to his agent notice of the facts which come to his knowledge, touching the matter of the agency; and if the principal suffers any loss or injury by want of such notice, he suffers by his own fault; and if the other party is injured thereby, he ought to have correspondent redress. The law, therefore, imputes the knowledge of the principal to be the knowledge of the agent ... .

(footnote omitted).

In contemporary contexts defined by a regulatory statute, some courts have imputed notice of facts known by a principal downward to an agent when the principal has a duty to transmit all material facts to the agent and the statute's regulatory purpose would be undermined by limited disclosure to agents. This reasoning has been applied to the portion of the federal Fair Debt Collection Practices Act which prohibits communication by a debt collector to a consumer if the collector knows the consumer is represented by a lawyer. *15 U.S.C. 1692c*(a)(2) (2000). See *Powers v. Prof'l Credit Serv., Inc., 107 F. Supp. 2d 166, 169 (N.D.N.Y. 2000)* ("Knowledge can be imputed to the debt collector when the creditor [principal] has such knowledge and fails to convey it to its agent, the debt collector, at the time it seeks collection.").

n28. See Reynolds, supra note 2, at 442 n. 89 (referring to several common law decisions).

n29. *Societe General de Paris v. Tramways Union Co., Ltd., 1884 Q.B.D. 424.*

n30. *Id. at 450* (Lindley, L.J.).

n31. See, e.g., *Carter v. Gugliuzzi, 716 A.2d 17, 23 (Vt. 1998)* (affirming the conclusion that the agent's knowledge was imputable to his principal "regardless of [its] source"); Daniel S. Kleinberger, Guilty Knowledge, *22 Wm . Mitchell L. Rev. 953 (1996)* (describing as "without basis either in precedent or policy" a requirement that information imputed to a principal be acquired by the agent while acting within the scope of his employment); Warren A. Seavey, Notice Through an Agent, *65 U. Pa. L. Rev. 1, 14 (1916)* ("It is immaterial how or when the servant or agent acquires the information ... ."). Examples to the contrary include *R.B.Z. v. Warwick Dev. Co., 725 So.2d 261, 264 (Ala. 1998)* (declining to impute to a principal knowledge gained by an agent prior to and outside the scope of his agency); *Engen v. Mitch's Bar & Grill, No. C7-95-78, 1995 WL 387738, at 2* (Minn. Ct. App. July 3, 1995) (holding that the party seeking to impute the agent's knowledge to the principal must establish that the agent acquired the knowledge while acting within the course and scope of his employment).

n32. See *Restatement (Third) of Law Governing Lawyers 28(1)* (2000). See also *Reinninger v. Prestige Fabricators, 523 S.E.2d 720, 725-26 (N.C. Ct. App. 1999)* (holding that the knowledge of a company physician, who had an ethical duty to withhold confidential communications of employee-patients, is not imputed to the employer). This limit on an agent's duty of disclosure is recognized in Kelly v. Cooper, 1993 A.C. 205, 214 (P.C. 1992) (appeal taken from Berm.) ("It cannot be sensibly suggested that an estate agent is contractually bound to disclose to any one of his principals information which is confidential to another of his principals.").

n33. See *Restatement (Second) of Agency 381* (1958):

Unless otherwise agreed, an agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have and which can be communicated without violating a superior duty to a third person.

n34. Id. 276 cmt. a; see also Floyd R. Mechem, A Treatise on the Law of Agency 1391 (2d ed. 1914) (observing that the real justification for imputation is "found in the conviction that it cannot be tolerated that an agent shall act in a transaction, with his mind full of material knowledge respecting it, and yet the principal be wholly unaffected by that knowledge, merely because the agent happened to acquire it before the agency began").

n35. [1912] A.C. 716.

n36. Id.at 735-36.

n37. Id. at 732, 736-41.

n38. Id. at 740.

n39. E.g., *Constant v. Univ. of Rochester, 19 N.E. 631, 634 (N.Y. 1889).* Constant involved an attorney who had acted as an agent for the University of Rochester in recording a mortgage on a property to which it had acquired title at a foreclosure sale eleven months earlier. Id. The attorney had also acted as an agent for the plaintiff, who had a mortgage on property that was not recorded at the time of the foreclosure sale. Id. The court found that the facts tended strongly to show that the agent had no recollection at all of the prior mortgage because the agent did an "enormous amount of business" for the plaintiff "of this same general nature," the earlier mortgage preceded the later mortgage by a significant period of time, and the earlier mortgage instrument itself was stored in the agent's office with satisfied mortgages. Id.

n40. See, e.g., *Chicagoland Vending, Inc. v. Parkside Ctr., Ltd., 454 S.E.2d 456, 458 (Ga. Ct. App. 1995)* (holding that an agent's previously-acquired knowledge is imputed to a subsequent principal only when the agent has the information in mind in dealing for the subsequent principal, or when the agent acquired the information so recently as to warrant the assumption that the agent's mind still retained the information). A partnership is charged with the knowledge of a partner acting on a matter "acquired while a partner or then present to his mind" except in the case of a fraud on the partnership committed by or with consent of that partner. Unif. P'ship Act 12 (1914). A partner's knowledge is "effective immediately as knowledge by" the partnership except in the case of fraud on the partnership committed by or with consent of the partner. Id. 102(f) (1997).

n41. See, e.g., *Pee Dee State Bank v. Prosser, 367 S.E.2d 708, 714 (S.C. Ct. App. 1988):*

[As a general rule,] a principal is charged with the knowledge an agent acquired before the relationship only when the knowledge can reasonably be said to have been in the mind of the agent while acting for the principal or where he acquired it so recently as to raise the presumption he still retained it in his mind.

Overruled on other grounds by *United Carolina Bank v. Caroprop, Ltd., 446 S.E.2d 415, 417 (S.C. 1994).*

n42. See *Constant, 19 N.E. at 633* (holding that a principal would be charged with knowledge acquired by his agent in a prior transaction for another principal only "upon clear proof that the knowledge ... was present to [the agent's] mind at the very time of the transaction in question"); *First Palmetto Sav. Bank v. Patel, 543 S.E.2d 241, 243 (S.C. Ct. App. 2001)* (reiterating the same principle). In Constant, the agent acquired property for the principal by purchasing property at a mortgage foreclosure sale; in an earlier transaction, the agent represented the plaintiff who took an unrecorded (but prior) mortgage on the same property. *19 N.E. at 633.* The agent's duty to the second principal is a basis on which the court requires an affirmative showing of knowledge at the time of the foreclosure sale; if the agent at that time knew about the earlier recorded lien, the agent acted contrary to that principal's interests in acquiring the property. Id. This argument ignores the varied reasons why the agent might remember the earlier mortgage but neglect to tell the principal. Indeed, if the agent acted with present knowledge of the earlier mortgage, the agent's acquisition of the property is contrary to the interests of the second principal only if that principal is charged with the agent's knowledge.

n43. See *Restatement (Second) of Agency 282* (1958).

n44. See, e.g., *E. Trading Co. v. Refco, 229 F.3d 617, 624 (7th Cir. 2000)* (finding it illogical that the principal is responsible for all of the agent's actions); *Nerbonne, N.V. v. Lake Bryan Int'l Props., 685 So. 2d 1029, 1032 (Fla. Dist. Ct. App. 1997)* (same).

n45. Mechem, supra note 34, at 1403. The scope of the adverse interest exception has been vigorously litigated in cases involving claims made by or on behalf of corporations against providers of professional services when the provider of professional services did not detect fraud (or other breaches of duty) by the corporation's officers. If an officer's guilty knowledge is imputed to the corporation, the professional service provider may defend against a malpractice claim on the basis that the corporation did not rely on the service provider's opinion or audit. See, e.g., *Cenco, Inc. v. Seidman & Seidman, 686 F.2d 449, 453 (7th Cir. 1982)* (involving a case of massive fraud within the Cenco Corporation and implicating the failure of Cenco's auditors, Seidman & Seidman, to report such fraud). An imputation defense does not protect a service provider who is in cahoots with the officer. In many cases raising questions about imputation, the plaintiff is a corporation's receiver or trustee in bankruptcy. The common law of agency does not answer the question whether such plaintiffs are identically subject to defenses available against a corporate principal.

n46. English cases appear to give wider scope to the exception. See generally Peter Watts, Imputed Knowledge in Agency Law - Excising the Fraud Exception, *117 L.Q. Rev. 300 (2001).* In particular, the English cases define adverse interest more broadly and do not limit the applicability of the exception when the principal retains a benefit generated by the agent's conduct. See *id. at 330-31* (citing the benefit rule as an example of the "more constrained career" of the fraud exception in the United States).

In England, authority is not yet established for the distinction drawn in many cases in the United States between an agent's knowledge of a fact and whether an agent has received a notification from a third party. For support for the distinction see *El Ajou v. Dollar Land Holdings plc [1994] 2 All E.R. 685, 702-03.* Reynolds, supra note 2, at 438-39 ("A notification given to an agent is effective ... whether or not it is subsequently transmitted to the principal ... ."). A notification is

a manifestation that is made in the form required by agreement among parties or applicable law, or in a reasonable manner in the absence of any agreement or applicable law, with the intention of affecting the legal rights and duties of the notifier in relation to rights and duties of persons to whom the notification is given.

Restatement (Third) of Agency 5.01(1) (Tentative Draft No. 3, 2002). A notification given to an agent is effective against the principal if the agent had actual or apparent authority to receive the notification, unless the per-

son who receives the notification knows or has reason to know that the agent is acting adversely to the principal. Id. 5.02(1).

n47. See Mechem, supra note 34, at 1411 ("It is not enough to prevent the application of the general rule [of imputation] that an agent to whom notice comes which would otherwise be imputed, shall, however wickedly or fraudulently, fail to communicate it to his principal.").

n48. See *Restatement (Second) of Agency 282* illus. 4 (1958) (providing a similar example with alternative terms).

n49. See id. 282 illus. 5 (providing a similar example with alternative terms).

n50. If Maisie argues that Isabella should be charged with Bernard's knowledge because Isabella benefited from Bernard's action, Isabella may rely on the fact that, at the time of her purchase of the property from Henry, she paid value in good faith. See id. 282 cmt. j.

n51. See id. cmt. f ("[A] principal may be liable for the fraud of an agent who is acting entirely for his own purposes but who, to the defrauded party, is apparently acting for the principal.").

n52. See id. cmt. h ("This rule applies not only where the agent purports to act as agent in obtaining the benefit for his principal, but also where he commits a fraud independently.").

n53. See supra notes 28-38 and accompanying text.

n54. See, e.g., *Stump v. Ind. Equip. Co., 601 N.E.2d 398, 403 (Ind. Ct. App. 1992)* ("Imputed knowledge is a tenet of agency law, and is based on an underlying legal fiction of agency - the identity of principal and agent when the agent is engaged in the principal's business.").

n55. Watts, supra note 46, at 305 ("[A] perverse incentive to conduct business through agents rather than personally would be created were principals permitted to hide behind their agents' failures to communicate."). There are bases for this argument apart from an identification between agent and principal. For example, it is possible to focus on whether an act by the knowledgeable agent is a requisite to a tie, most typically a transaction, between the principal and the third party whose legal relations with the principal are at issue. See Peter Watts, The Company's Alter Ego-a Parvenu and Impostor in Private Law, N.Z. L. Rev. 137, 142-43 (2000).

n56. On identification as the underlying basis for agency doctrine, see Oliver Wendell Holmes, Jr., Agency I, *4 Harv. L. Rev. 345, 350 (1891)*. Holmes based his articles on lectures he gave on agency "at the Law School of Harvard College" and printed them without substantial revision several years later. See *id. at 345*. Holmes also discussed identification in The Common Law:

This notion of a fictitious unity of person has been pronounced a darkening of counsel in a recent useful work. But it receives the sanction of Sir Henry Maine, and I believe that it must stand as expressing an important aspect of the law, if, as I have tried to show, there is no adequate and complete explanation of the modern law, except by the survival in practice of rules which lost their true meaning when the objects of them ceased to be slaves. There is no trouble in understanding what is meant by saying that a slave has no legal standing, but is absorbed in the family which his master represents before the law.

Oliver Wendell Holmes, Jr., The Common Law 183 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881). Holmes's account does not address the duties an agent owes a principal.

As it happens, Holmes did not think agency had much intellectual substance as a body of doctrine. He characterized agency doctrine as the simple-minded result of combining the fiction of identity between principal and agent with common sense. Oliver Wendell Holmes, Jr., Agency II, *5 Harv. L. Rev. 1, 14 (1892).* Holmes closed this article with the pessimistic conclusion that it was not possible to resolve the outcomes of agency cases "into mere applications of general and accepted principles." See *id. at 23.* In contrast, the Reporter who completed the first and second Restatement of Agency began an article on the optimistic note that

I believe that Justice Holmes overestimates the effect of the fictions. On the contrary I believe that the results reached by the courts can be explained without using legal presumptions as axioms and that individual cases may be tested by the use of judicial sense (rather than common sense) and the needs of commerce. On the whole the interests concerned have been well protected ... .

Warren A. Seavey, The Rationale of Agency, *29 Yale L.J. 859, 859 (1920).*

n57. See, e.g., *Apollo Fuel Oil v. United States, 195 F.3d 74, 76-77 (2d Cir. 1999)* (applying the principle that, "in general, when an agent is employed to perform certain duties for his principal and acquires knowledge material to those duties, the agent's knowledge is imputed to the principal," in finding a strong inference that whoever introduced red-dyed diesel fuel into the tank of a truck did so to benefit the corporation by enabling it to evade an excise tax payable on clear fuel used for transportation); *Triple A Mgmt. Co. v. Frisone, 81 Cal. Rptr. 2d 669, 678-79 (Cal. Ct. App. 1999)* (acknowledging that the basis for imputing an agent's knowledge to the principal "is that the agent has a legal duty to disclose information obtained in the course of the agency and material to the subject matter of the agency, and the agent will be presumed to have fulfilled this duty").

n58. See Story, supra note 27, 140:

Notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from, or is at the time connected with, the subject-matter of his agency; for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal; and if he has not, still the principal, having intrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal; otherwise, the neglect of the agent, whether designed or undesigned, might operate most injuriously to the rights and interests of such party.

The first edition of Story's treatise was published in 1839.

Interestingly, the eighth edition of Story's treatise was revised by Nicholas St. John Green, an associate of Holmes's. See Louis Menand, The Metaphysical Club 201 (2001). Green, a law professor at Harvard like Holmes, was a critic of legal formalism and thought that all beliefs had a "purposive character - that knowledge is not a passive mirroring of the world, but an active means of making the world into the kind of world we want it to be." Id. at 223-25. In the Metaphysical Club, Holmes and Green joined conversational forces in the 1870s along pragmatist lines with William James, Chauncey Wright, C.S. Peirce, and others. See id. at 201-30.

Green left Harvard for Boston University, reportedly in disgust when legal formalism came to dominate the curriculum following the appointment of Christopher Columbus Langdell as Dean. Id. at 231. Nonetheless, Green's work on Story's treatise does not indicate any disagreement with the fiction of imputation, including downward imputation of a principal's knowledge to an agent. See Story, supra.

n59. In many organizations, "an almost natural screening of bad news takes place" to insulate those at the top from the actual knowledge to which law and society more broadly assign blame. Mark Bovens, The Quest for Responsibility: Accountability and Citizenship in Complex Organizations 79 (1998).

n60. Charles Dickens, Little Dorrit (Penguin Books 1998) (1857). As described in Chapter 10 (entitled "Containing the whole Science of Government"), the Circumlocution Office was the point of referral throughout the government when "whatever was required to be done, the Circumlocution Office was beforehand with all the public departments in the art of perceiving - HOW NOT TO DO IT." Id. at 110. The breadth of its influence was extensive:

Numbers of people were lost in the Circumlocution Office. Unfortunates with wrongs, or with projects for the general welfare ... who in slow lapse of time and agony had passed safely through other public departments ... got referred to the Circumlocution Office, and never reappeared in the light of day.

Id. at 112. When challenged, the Circumlocution Office could count on loyal Parliamentary defenders, with the result that "the Circumlocution Office was always voted immaculate, by an accommodating majority." Id.

n61. On the imputed collective knowledge of an organization, see *Gutter v. E.I. DuPont de Nemours, 124 F. Supp. 2d 1291, 1309 (S.D. Fla. 2000):*

Courts impose constructive knowledge upon a principal to avoid the injustice which would result if the principal could have an agent conduct business for him and at the same time shield himself from the consequences that would ensue from knowledge of conditions or notice of the rights and interests of others had the principal transacted his own business in person.

n62. Some of this decline is perhaps attributable to generational changes. Many law school curricula included a mandatory course in agency through the mid-to-late 1960s. However, as those who taught the subject retired from classroom service, the subject either lost its mandatory status, or those in the next generation assigned to teach it did not protest when curricular changes eliminated the agency course. For the history at Harvard Law School, see Louis Loss, Anecdotes of a Securities Lawyer 18-20 (1995). When Professor Loss joined the Harvard faculty in 1952, agency was a mandatory first-year course, taught in three or four sections by a cohort of eight professors that included Warren A. Seavey, the Reporter for the first and second Restatement of Agency. Id.at 18-19. Seavey retired from teaching the next year. Id.at 19. In the 1962-63 academic year, the faculty voted unanimously to abolish Agency as a separate course on the stated assumption that the material would be covered in other courses, such as Corporations. Id.at 20. Professor Loss reports that

none of us wanted to stand in the way of progress - although ... I am not at all sure that the various offerings that were invented to fill the Agency slot have in fact improved the teaching program in general. The difference is that several of us who had taught Agency under the private tutelage (at least in my case) of the great master voted for abolition with a tear rather than a cheer.

Id.

EXHIBIT "P"

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ARTICLE: EVIDENTIARY SURROGACY AND RISK ALLOCATION: UNDERSTANDING IMPUTED KNOWLEDGE AND NOTICE IN MODERN AGENCY LAW

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SUMMARY:
... Along with the powerful benefits available through agency, so too comes significant risk and exposure. ... In evaluating the status of the adverse agent exception to the imputed knowledge rule within the context of the risk allocation rationale, one should ask: As between the principal and the third party, who is best able to manage the risk of agent transmission failure caused by the agent's possession of interests in the transaction that are adverse to those of the principal? As in the case of transmission failure in the absence of agent adverse interests, the principal may effectively minimize transmission failure in adverse agent situations, even if she may not be able to completely eliminate it, by investing additional resources in more effective agent selection, monitoring, disciplining, termination, and redundant transmission procedures. ... Given the above considerations, one can conclude that the adverse agent exception to the imputed knowledge rule is not preferred by either the principal or the third party side of risk allocation analysis, and thus that the existence of the adverse agent exception to the imputed knowledge rule is not supported by the risk allocation rationale. ... There are two well-established exceptions to the imputed knowledge rule, one known as the confidential relationship exception and the other known as the adverse agent exception. ...

TEXT:
[*129]

There are powerful benefits available to a principal who enters into an agency relationship. The law allowing authorized agents to act as legal representatives of another permits the person on whose behalf the agent is acting to extend her legal personality beyond its natural limits and to do business on a scale far beyond her personal capacity. The law of agency also makes the world of purely legal persons, such as corporations and governments, possible.

Problems with agents acting on behalf of principals, especially corporate principals, have attracted serious and sustained attention in the last few years. Simply to say the names of Tyco, Enron, WorldCom, Arthur Andersen, and Waste Management now conjures up an image of agent misbehavior on a grand and costly scale. This recent history has served to focus popular and political attention on the possibilities for renewed reform of corporate governance and more aggressive regulation of the agents that serve corporations. Inevitably, such an effort must engage, and build upon, the most basic doctrines of agency law. Are such doctrines ready to provide the necessary support?

Along with the powerful benefits available through agency, so too comes significant risk and exposure. An agent may bind a principal to an unwanted contract with another. n1 The principal may be liable to third [*130] parties for torts inflicted upon them by the agent. n2 Also, a principal may be deemed to have legally received certain knowledge or notice that has, in fact, been received only by the agent. n3 This last possible consequence of an agency relationship resides at the very heart of agency law, and it is the focus of this article. n4

[*131] Generally known as the "imputed knowledge rule" this aspect of agency law legally charges the principal with information obtained by the agent within the scope of the agent's service for the principal. n5 The law will treat the

principal as having actually received the information in question, even if it is clear from the facts of the case that the agent failed [*132] to transmit the information to the principal, and therefore clear that the principal never actually possessed it. n6

For example, imagine an owner of an apartment building who has engaged a property manager to operate the leasing of the apartment units on her behalf. Standard leases for the units in the building provide to the tenant an opportunity to extend the current leasehold on the unit for an additional year with a rent increase of no more than 5% if the tenant formally notifies the landlord of her intention to extend the lease no later than two months prior to the end of the current lease term. A particular tenant delivers to the property manager the proper notification of her intent to extend her current lease before the deadline. The property manager carelessly loses the notification prior to making a record of its receipt and thus incorrectly informs the landlord that the unit is available for re-lease at a rent increase of more than 5%. When the landlord offers to the tenant a new lease at a rent increase of 10%, the tenant could effectively bind the landlord to the 5% limit promised by the prior lease, even if the landlord did not ever personally possess any knowledge of the tenant's exercise of the lease provision. This result would be the same no matter how blameless the landlord was in her failure to receive the tenant's prior notice.

This is the imputed knowledge rule in action. Receipt of the notice by the authorized agent results in the legal receipt by the principal, regardless of whether or not the principal actually received the notice from the agent. n7

There are two well recognized exceptions in agency law to the imputed knowledge rule. One is that a principal will not be imputed with knowledge possessed by an agent when the agent obtained the information from a third party to which the agent owes a duty of [*133] confidentiality. n8 For example, suppose that a certain physician works as an employee for a particular hospital. In the course of her work for the hospital, the physician sees an individual as a patient, examines the individual, and diagnoses him as suffering from a serious medical condition. Some time later, the same individual applies for and secures a job at the hospital and, in the process of completing employment and insurance application forms, fails to disclose the existence of the medical condition diagnosed by the physician. The group health insurance company for the hospital subsequently seeks to reject claims for coverage of treatment of the individual's (now employee's) medical condition on the grounds that the physician was aware of the existence of the individual's medical condition at the time of initial employment, and that therefore the hospital was legally aware of the condition pursuant to the imputed knowledge rule. If the insurance company can show that the hospital was legally in possession of the information, then it can argue that the hospital breached the conditions of insurance coverage by failing to disclose the existence of the condition to the insurance company at the time of the individual's initial employment. While otherwise sound, the insurance company's argument is not likely to prevail in this circumstance because the physician obtained the information in question within the scope of a legally confidential relationship or transaction with the individual, and thus the usual operation of the imputed knowledge rule is abated.

The second exception to the imputed knowledge rule applies when the agent, whose knowledge a third party is seeking to impute to the principal, has acted adversely to the principal during the transaction in [*134] question. n9 For example, imagine that in the course of a sales transaction, a car salesman working for a dealership learns from a potential customer that the customer must receive a certain minimum amount in trade for his current car in order to be willing to purchase a new car from the dealership through the salesman. Upon direct inspection, the salesman learns of defects in the customer's current car that would make it impossible to give the customer the minimum trade-in value that he seeks. Nevertheless, badly wanting the commission on the sale, the salesman prepares a report of the inspection as if the defects did not exist and credits the customer the desired amount of value in trade for his current car. When the dealership subsequently seeks a remedy against the customer for failing to fully disclose defects in the car of which the customer was aware at the time of the transaction as required by the sales contract, the customer is not likely to be able to employ the imputed knowledge rule to bind the dealership to the knowledge of the salesman regarding the condition of the car, because the agent, the salesman, was operating adversely to the interests of the principal, the dealership, in the transaction in question. This is an illustration of the so-called "adverse agent exception" to the imputed knowledge rule.

Munroe v. Harriman

Over the years, the adverse agent exception to the imputed knowledge rule has generated significant controversy and attendant litigation. One reasonably well known example of this litigation is the case of Munroe v. Harriman. n10 Decided by the United States Court of [*135] Appeals for the Second Circuit on August 10, 1936, n11 the case arose from a series of transactions among Charles Munroe, the plaintiff, Joseph Harriman, the defendant, and Harriman National Bank & Trust Company of The City of New York, a co-defendant. n12 As is indicated in its name, Joseph Harri-

man played a prominent role in the management and operation of the Harriman National Bank & Trust Company of The City of New York. The court finds that, "Harriman was president of the bank and dominated its other employees." n13

On June 14, 1932, Munroe lent to Harriman personally, and not to the bank, certain securities owned by Munroe. n14 Munroe's agreement to lend to Harriman the securities was obtained by fraud on the part of Harriman and it is undisputed by the parties that the fraud engaged in by Harriman provided Munroe with the legal basis for rescission of the transaction and return of the securities. n15 However, before Munroe could seek return of the securities from Harriman, Harriman had transferred possession of the securities to the bank so that they could serve as part of the collateral for a loan of $ 380,000 (subsequently increased to $ 394,000) from the bank to a corporation personally owned and controlled by Harriman (the M.H.O. Corporation, characterized by the court as, "one of his [Harriman's] dummy corporations."). n16 The loan to M.H.O. Corporation was approved by the loan committee of the bank and, "none of the officers or employees of the bank who took part in the making of the loan, other than Harriman, were aware that the pledged securities had been procured from Munroe by fraud." n17

So Munroe had a clear right to repossess the securities from Harriman, but Harriman no longer had possession of the securities. n18 The bank, which clearly had possession of the securities, had no direct participation in, nor knowledge of, the fraud that gave rise to Munroe's repossession right. n19 One obvious response by Munroe to this dilemma [*136] would be to argue that Harriman was acting as the agent of the bank when he engaged in the fraud, thus tainting the bank with Harriman's fraudulent acts. The court, however, rejected this approach, finding that, "Munroe did not deal with Harriman as an agent of the bank. Harriman's request was that the securities be lent to him personally, and so they were. ... Hence his fraudulent representations in procuring them cannot be attributed to the bank." n20

Another approach available to Munroe was to argue that while Harriman's fraudulent acts were not engaged in directly on behalf of the bank by Harriman, Harriman certainly had knowledge of his own fraudulent acts in obtaining the securities from Munroe at the time the securities were offered to the bank as collateral for the loan to M.H.O. Corporation. n21 Thus, applying the basic imputed knowledge rule, it could be said that the bank should be charged with the knowledge of its agent Harriman regarding the legally tainted source of the securities, and that Harriman clearly had this knowledge prior to the bank's receipt of the securities as collateral for the loan. n22 If this is the correct characterization of events, then the bank does not enjoy the status of a bona fide purchaser for value without knowledge at the time that it takes possession of the securities and Munroe's claim to possession is superior to that of the bank. n23

The bank's response to this line of attack by Munroe is an invocation of the adverse agent exception to the imputed knowledge rule, claiming that with respect to the use of the securities by Harriman as collateral for a loan from the bank to him, Harriman stood on the opposite side of the transaction from the bank and thus had interests with respect to the transaction that were in conflict, or adverse, to those of the bank. n24 Therefore, the bank argues, Harriman operated as an adverse agent when he provided the securities to the bank as collateral for the loan and, as a result, pursuant to the adverse agent exception to the imputed knowledge rule, Munroe may not subsequently impute Harriman's knowledge of the fraudulent origin of the securities to the bank. n25

[*137] The court in Munroe accepts this line of analysis, as far as it goes, but pushes further to try to determine from the evidence presented whether Harriman operated as the "sole representative" of the bank in accepting the tainted securities as collateral for the loan. n26 After reviewing the facts, the court concludes that:

[Harriman's] will alone caused the making of the loan and the acceptance of the collateral. Therefore he should be treated as the sole actor on behalf of the bank as fully as though he had physically placed the borrower's note and securities in the bank's vault and paid over the borrowed money without the knowledge of any other officer. n27

What difference does it make that Harriman is characterized as the "sole actor" on behalf of the bank in the making of the loan? All the difference, according to the court. It rules that, "In such [a] case, as already pointed out, the corporation can claim title only by virtue of the sole actor's act and must accept it burdened with his knowledge of the defect in title." n28 The court is not willing to allow the bank in this circumstance to both accept possession of the tainted securities solely as a result of Harriman's actions on its behalf and at the same time to disclaim the knowledge that Harriman possessed regarding the securities because he had interests in the transaction that were adverse to the bank. n29 In other words, the court in this case fashions an exception to the adverse agent exception to the imputed knowledge rule, holding that a principal will in fact have the knowledge possessed by even an adverse agent if it can be shown that the adverse agent was the sole actor or representative for the principal with respect to the transaction in question. n30

The Munroe case is not exceptional. One reason it probably appears in law school casebooks n31 is that it represents an embrace of a [*138] sole actor exception to the adverse agent exception to the imputed knowledge rule that is recognized by cases in a large number of U.S. jurisdictions. n32

Farr v. Newman

A second well-known case that is illustrative of another line of interesting analysis regarding the adverse agent exception to the imputed knowledge rule is Farr v. Newman. n33 This case involves a fairly simple real estate transaction and an all-too-common occurrence of a dual agency. n34 The plaintiff in the case, Franz Farr, sought to purchase a piece of real property from Newman for $ 3,000. n35 Both Farr and [*139] Newman executed a written memorandum recording the transaction. n36 The memorandum was not in a form that could have been recorded in the appropriate county office, and it in fact was not recorded. n37

Subsequent to the execution of the agreement with Farr, Newman learned of an opportunity to sell the same piece of property to another person, Elbert Hardy, for $ 4,000. n38 Newman apparently approached Farr and asked him to match the $ 4,000 offer and suggested that he would sell the property to Hardy if he failed to do so. n39 Farr refused to increase his price for the property and threatened to sue if Newman conveyed the property to anyone but him. n40 Undeterred, Newman took $ 4,000 in cash from Hardy and transferred ownership of the property to him, properly recording the conveyance. n41 Farr made good on his threat and filed suit against Newman and Hardy, seeking specific performance of the earlier agreement and a forced conveyance of the property from Hardy to him. n42

At this point, without more, Hardy would be in a strong position in the suit brought against him by Farr. Hardy paid cash to Newman for the property, he properly recorded his interest, and he had no reason to believe prior to the purchase that there existed any other colorable claim. n43 He could have been a classic bona fide purchaser for value without knowledge.

However, Hardy, presumably in an effort to save money and simplify the transaction, used for the property purchase the same attorney as did Newman, a lawyer named Cash. n44 It was to this attorney that Farr communicated his belief that his prior agreement with Newman was enforceable and delivered his threat to sue if the property were conveyed to anyone else. n45 Attorney Cash, apparently believing that the written memorandum executed by Farr and Newman was not legally [*140] enforceable, did not tell Hardy anything about it or about Farr's asserted prior claim to the property or threat to sue. n46

Now, with these additional facts, Farr is able to argue that while Hardy himself had no knowledge of Farr's prior claim to the property, attorney Cash certainly did. Thus, by invocation of the imputed knowledge rule, Farr could impute the attorney's knowledge, and the notice that Farr provided to him, directly to Hardy and thereby defeat Hardy's claim to have been a bona fide purchaser for value without actual notice of Farr's prior claim. As noted, under the imputed knowledge rule, Hardy would be charged with the notice delivered to attorney Cash even if Hardy could conclusively establish that Cash never actually passed that notice or knowledge on to him. n47

Hardy's response to Farr's use of the imputed knowledge rule was to point out that attorney Cash represented both himself and Newman in the sale of the property from Newman to Hardy, and that as a result Cash, as a classic dual agent, faced an inevitable conflict of interest as the agent for Hardy. n48 In fact, as the dissent in the case notes, "It would be hard to discover a clearer case of an attorney's representing interests which conflicted at the very point where one client was being lulled into security in the interest of the other client." n49 Thus, Hardy argues, as an agent possessing interests adverse to his, the adverse agent exception to the imputed knowledge rule should prevent Farr from imputing the knowledge and notice possessed by Cash to Hardy, thereby preserving Hardy's status as a bona fide purchaser for value without knowledge and maintaining the superiority of Hardy's claim to the property. n50

Again, just as in the Munroe case, traditional imputed knowledge rule doctrine stops here, accepting the validity of Hardy's analysis and awarding him the superior right to the property. n51 But again, just as in the Munroe case, the court does not stop here. n52 Without disputing that Cash was in fact an adverse agent to Hardy and that the adverse agent [*141] exception to the imputed knowledge rule works in the way that Hardy suggests, the court focuses on the fact that one of the primary functions of an attorney agent in a real estate transaction is to gather knowledge, and receive notice, of possible conflicting claims to the property. n53

The court writes, "[Hardy's] appointment of an attorney to represent him in the acquisition of this real property, and, incidentally, to receive notice of any outstanding equity, was also an invitation to the public to give such notice to the attorney." n54 A few sentences later the court states:

Nothing can alter the fact that the attorney was held out as a proper person to whom notice of outstanding equities was to be given, and that his receipt of such notice from plaintiff [Farr] was within his authority, both as actually conferred and as apparent to others. n55

The court seems bothered by a disposition of the case that would, in effect, permit a buyer to be represented by an attorney in a real estate transaction, an attorney among whose primary functions is the identification of possible conflicting claims to the land, and to allow that attorney to in fact be clearly notified of the existence of a prior conflicting claim, without there following the normal legal consequence to the buyer. n56 While avoiding this phrasing directly, the court seems to imply that there is at most something fraudulent, and at least something inherently unfair to third parties possessing conflicting claims, for the buyer to be able to hold out to them an agent who is especially authorized to collect such claims on behalf of the buyer, to have the third parties provide this agent with full notice, and then to have the usual consequence of that notice negated as a result of a feature of the relationship between the buyer and his agent. n57 Why should the third party necessarily suffer because the agent has interests adverse to the principal?

The court concludes:

A diversity of interest on the part of the agent is of no significance to [*142] third persons, such as plaintiff, unless it placed the agent's act beyond his authority. Nothing can alter the fact that the attorney was held out as a proper person to whom notice of outstanding equities was to be given, and that his receipt of such notice from plaintiff was within his authority, both as actually conferred and as apparent to others. ... Once the attorney received plaintiff's notification, as authorized by defendant, even a fraudulent or self-serving concealment of that fact from the defendant would no more extinguish plaintiff's protection than would a debtor's debt be revived where he had paid his creditor's authorized agent for collection, who thereafter embezzled the money collected [citations omitted]. n58

Thus, in the Farr case, Farr is determined to have the superior claim to that of Hardy. n59 Hardy is denied the status of a bona fide purchaser for value without knowledge because the knowledge of Farr's prior claim was possessed by Hardy's agent, attorney Cash, and that knowledge is legally imputed to Hardy despite the undisputed fact that Cash was a dual, and thus in this case an adverse, agent. n60 Hardy suffers the consequences of the notice given to his adverse agent, and never actually received by him, regardless of the existence of the adverse agent exception to the imputed knowledge rule. n61

One can think of the Farr case as representing an "agent for notice" exception to the adverse agent exception to the imputed knowledge rule, holding that the knowledge or notice of even an adverse agent will be imputed to the principal if one of the primary duties to be performed by the agent for the principal is the collection of just such knowledge or notice. Alternatively, the Farr case can be read as creating a "dual agent" exception to the adverse agent exception to the imputed knowledge rule, holding that notice to or knowledge of a dual agent is imputed to the principals regardless of the fact that the dual agent is adverse to them. n62 Either way, the Farr case, just like the Munroe case, [*143] clearly represents a significant exception to the adverse agent exception to the imputed knowledge rule.

Underlying Rationales

Munroe and Farr are not alone. They are not odd, isolated, carefully selected instances of courts finding a reason not to apply the adverse agent exception to the imputed knowledge rule in a straightforward manner. n63 This means that the imputed knowledge rule, accurately summarized, includes, at least, the basic rule itself, n64 the confidential agent exception to the rule, n65 the adverse agent exception to the rule, n66 and a list of specific, more or less ad hoc, exceptions to the adverse agent exception to the rule. n67 This is an unusually complicated [*144] and unwieldy structure for a doctrine of the common law, one of whose traditional characteristics is its relative elegance. n68 What could explain this phenomenon?

The unusual complexity and lack of elegance in the structure of the imputed knowledge rule can be traced to a deep, underlying tension between competing rationales supporting the rule itself. These independent rationales for the rule are in harmony supporting the existence of the imputed knowledge rule and the confidential relationship exception to the rule. They diverge markedly, however, with respect to the existence and nature of the adverse agent exception.

Why should there exist an imputed knowledge rule in agency law at all? Why should the law ever formally pretend that a principal has received knowledge or notice of a particular matter based only upon evidence that an agent of the principal has received it? Why not simply require the party seeking to charge the principal with the knowledge or notice to establish directly that the principal actually received it?

The Evidentiary Surrogacy Rationale

One possible, and entirely plausible, reason to impute knowledge to a principal without direct evidence thereof is that, in the face of evidentiary uncertainty, the assumption that the agent in fact passed relevant knowledge on to her principal gets it factually right more often than assuming that the agent failed to do so. n69 This could be called the [*145] evidentiary surrogacy rationale for the imputed knowledge rule.

From the perspective of the evidentiary surrogacy rationale, the imputed knowledge rule is necessary to resolve a factual dispute between the parties as to whether the principal actually possessed certain legally relevant knowledge or notice. Typically, the notice in question was to be provided by the third party and the principal's receipt is critical to the resolution of a legal dispute between the principal and the third party, such as whether the third party successfully has triggered an option offered by the principal or whether the principal has the status of a bona fide purchaser for value without knowledge. If both the principal and the third party agree that the notice was not successfully given, or if both agree that the principal actually received it, then there is no dispute between the parties on this point that requires resolution by the courts. However, if the parties are not in agreement, then the courts must decide the factual issue in one way or the other. Making this problem more difficult for courts is the likelihood that most, if not all, of the relevant evidence will come from the testimony of the two interested parties themselves.

This basic situation remains essentially the same when the principal is doing business with the third party through an authorized agent. The principal and the third party usually agree that the third party has provided the notice in question to the agent, but then disagree as to whether the agent successfully transmitted it to the principal. Again, the evidence relevant to resolving this issue comes largely from the testimony of the interested parties: the principal, the agent, and the third party. Given that the positions of the parties are in conflict, and that the relevant evidence comes from thoroughly self-interested sources, the litigation process is rarely of much value to the court in resolving the factual dispute. After all, the agent can be expected to feel significant pressure to confirm the assertion of the principal (who is, typically, the agent's employer or client) that he never actually received the third party's notice from the agent, especially if the lack of receipt is legally advantageous to the principal and the principal agrees to hold the agent harmless for the failure to provide him the notice.

[*146] What is the court to do in such circumstances? The answer is provided by the imputed knowledge rule. n70 Assuming that, in the normal course, an agent will dutifully pass along to the principal relevant notice or knowledge received from a third party, the imputed knowledge rule operates in the absence of, and as a surrogate for, credible direct evidence and puts into effect a conclusive presumption that the agent did in fact successfully transmit the knowledge or notice to the principal. n71 Like any assumption, the operation of the imputed knowledge rule will not always get it right, but so long as it is true that most agents will perform their duty to the principal adequately and convey to them important knowledge or notice that they receive, then the rule will get it right more often, and probably much more often, than would a rule that assumes the agent's breach of duty and failure to transmit. n72 Again, in the absence of credible conclusive evidence either way, the court is forced to, in effect, embrace one or the other of these factual assumptions in order to resolve the dispute between the parties.

The evidentiary surrogacy rationale not only supports the existence of the basic imputed knowledge rule, it also satisfactorily explains the existence of both the confidential relationship and the adverse agent exceptions to the rule. An easy assumption of agent transmission of knowledge or notice to the principal is not really tenable in circumstances in which the agent has acquired the knowledge from the [*147] third party within the context of a formally confidential relationship. n73 Now, unlike the usual case, the agent will most likely have to breach the confidence that he owes to the third party in order to convey such knowledge to the principal, and the agent may well be exposed to liability to the third party as a result. In such circumstances, it is not at all clear that most agents will in fact break the confidentiality owed to the third party and transmit the information to the principal, and the appropriate legal response to this altered probability of agent conveyance is the maintenance of a confidential relationship exception to the imputed knowledge rule. n74

Similarly, the likelihood of full and accurate agent transmission of knowledge or notice to the principal is greatly diminished in those situations in which the agent possesses interests that are adverse to, and thus in conflict with, those of the principal. n75 As Justice Van Voorhis puts it in his dissenting opinion in the case of Farr v. Newman,

... the basis on which the principal is charged with knowledge of the agent is that it is presumed that the latter will normally communicate the information to his principal in the course of the performance of his duties [citation omitted], but such an inference is not indulged where the agent or attorney is already employed by another party having an adverse interest respecting the transaction in question. n76

Thus the existence of the adverse agent exception to the imputed knowledge rule.

The Risk Allocation Rationale

While the evidentiary surrogacy rationale makes sense of the imputed knowledge rule and its confidential relationship and adverse agent exceptions, it does not support the result in either the case of [*148] Munroe v. Harriman n77 or Farr v. Newman, n78 nor does it make sense of the general principles which these cases represent. In Munroe, the fact that Harriman was undoubtedly an adverse agent to his principal, the bank, did not prevent the court from imputing to the bank knowledge possessed by Harriman. The court ignored the usual operation of the adverse agent exception to the imputed knowledge rule because Harriman was the sole actor in obtaining securities for the bank. n79 However, from an evidentiary surrogacy perspective, it is very hard to explain why Harriman, with interests in direct conflict with those of the bank, should be any more likely to divulge fully and accurately the knowledge that he possessed regarding his acquisition of the securities to the bank because he was, or was not, the sole actor for the bank in the transaction. n80 More generally, it is difficult to see why any agent who is adverse to the principal and motivated not to disclose fully, would have his incentives in this regard significantly altered in those circumstances in which he can be characterized as a sole actor agent. Thus, it is fair to conclude that the evidentiary surrogacy rationale for the imputed knowledge rule does not support the existence of a sole actor exception to the adverse agent exception to the rule.

In the case of Farr v. Newman, the court held that the adverse agent exception to the imputed knowledge rule should not apply because the attorney was an agent for notice, possessing a primary responsibility to collect exactly the kind of knowledge and notice that the third party wished to impute to the principal. n81 Again, however, the fundamental insight supporting the adverse agency exception from an evidentiary surrogacy rationale perspective, that an agent with significant interests in conflict with those of the principal can not be assumed to have engaged in full disclosure to the principal, remains valid regardless of whether the agent's basic duties included the collection of the knowledge or notice in question or not. In other words, the ability of the third party to characterize the adverse agent as an agent for notice appears to have little relevance to the question of how likely it is that the adverse agent will have in fact conveyed the relevant information to the principal. [*149] Thus, it is fair to conclude that the evidentiary surrogacy rationale also does not support the existence of an agent for notice exception to the adverse agent exception to the imputed knowledge rule.

While the evidentiary surrogacy rationale does an impressive job of supporting and explaining much of the imputed knowledge rule doctrine, there exists a very different, wholly independent line of analysis that also makes sense of much of the imputed knowledge rule jurisprudence. This second approach to explaining the imputed knowledge rule can be called the risk allocation rationale. n82

From the perspective of the risk allocation rationale, it does not matter whether the agent in fact transmitted any knowledge or notice that he received to the principal or not. As has been noted already, the court is unlikely to have before it objective, fully credible evidence with which to decide this factual issue. Moreover, even in cases in which it can be shown that the principal did not actually receive the knowledge or the notice from the agent, not all such situations should, in fairness, result in the principal's legal protection from that knowledge or notice. For instance, it is possible that the third party successfully provided the notice to the agent, and the agent took all reasonable means to convey the notice to the principal, but the principal was simply not available to receive it, and did not in fact receive it. In such a case, should the issue of the third party's effective exercise of an option that must be triggered by notice, or the status of the principal as a bona fide purchaser for value without knowledge, be resolved in favor of the principal because it is [*150] clear that the principal did not actually receive the relevant notice or knowledge?

The risk allocation rationale looks at situations involving agents gathering information and notice on behalf of principals and recognizes that there will inevitably exist some percentage of these situations in which the knowledge or notice will not reach the principal successfully. In some of these situations, the failure to transmit will clearly be the fault of the agent, in others clearly not, and in still others it will be difficult to tell. In some of these situations, the failure will clearly be the fault of the principal, in others clearly not, and in still others it will be difficult to tell. In some situations, both the principal and the agent may be at fault, or neither.

The risk allocation rationale is indifferent to whether the knowledge or notice was successfully transmitted to the principal or not, and if the information clearly was not transmitted, the risk allocation rationale is indifferent to the reason. n83 Instead, the risk allocation rationale looks at these situations and asks: As between the principal and the third party, who should appropriately bear the risk of knowledge or notice that has been received by the agent but not successfully transmitted to the principal? n84 Given that the principal is the one who generally selects and hires the agent, who monitors the agent's activity and compensates him, who has the power to terminate the agency and on whom the agent may depend for future references and referrals, it is, in general, the principal who is in the best position to manage the risk of a possible failed transmission. n85

Again, if the law were to allocate to the principal the risk of failed [*151] agent transmission of knowledge or notice, principals in general could respond to this burden by more carefully selecting their agents, more closely monitoring them, more vigorously disciplining them, more vigilantly crafting procedures for the receipt of information from agents and more diligently establishing procedural redundancies for important transmissions. n86 On the other hand, if the law were to allocate to the third party the risk of failed agent transmission to the principal, then the most likely response by third parties would be either to bypass notice to the agent and provide it directly to the principal, or to provide required notice routinely to both the agent and the principal. n87 Both strategies threaten to undermine the powerful efficiency available through the use of agents that agency law is in part intended to create and support. Pretty clearly, as between the principal and the third party, the principal is the least cost avoider of failed transmission of knowledge or notice between the agent and the principal.

Therefore, from this perspective, the basic imputed knowledge rule makes sense as an appropriate allocation to the principal of the risk of failure of transmission of knowledge or notice from the agent to the principal. This allocation, and thus the basic rule, makes sense regardless of whether the transmission from agent to principal was completed successfully or not. If the transmission failed, the basic rule makes sense whether that failure was the fault of the principal, the agent, both or neither.

Can the risk allocation rationale for the imputed knowledge rule accommodate the confidential relationship exception to the rule? Probably not on its own terms. That is to say that the fact that the agent has acquired the knowledge or notice at issue from a third party within the context of a legally confidential relationship, by itself, most likely does not change the presumption that as between the principal and the [*152] third party, the principal is the preferred manager of the risk of transmission failure.

However, it may be the case that in certain circumstances, allocation of the risk of transmission failure to the preferred party is not the preeminent goal of the law. Occasionally, the goal of optimal risk allocation may conflict with other important social policies. One such policy could be the maintenance and support of legally confidential relationships.

If the imputed knowledge rule did not have a confidential relationship exception, then agents, like doctors and attorneys, who obtain knowledge that is relevant and valuable to their principal within the context of a confidential communication with a third party would be caught in a difficult dilemma. n88 Either they would convey the information to their principal and violate the confidentiality owed to the third party or they would honor the confidentiality and deprive the principal of important knowledge which the principal will nevertheless be legally deemed to possess. Principals anticipating such a situation could be expected to try to avoid having knowledge imputed to them which they did not in fact receive by exerting considerable pressure on these agents to breach their confidentiality and communicate the information they have received from the third party to the principal. n89

It seems clear that an imputed knowledge rule without a confidential agent exception would work against, and thus to some degree compromise, the social benefits that are sought by the creation and maintenance of legally confidential relationships. Thus, while the risk allocation rationale may not directly support a confidential relationship exception to the imputed knowledge rule, it can be said that the existence of the exception is consistent with the rationale to the extent that it demonstrates a social choice to prefer the goals of confidentiality over optimal risk allocation when the two come into conflict.

It can be argued further that the existence of the confidential relationship exception to the imputed knowledge rule is not deeply destructive of the optimal risk allocation sought by the basic rule for at [*153] least two reasons. First, the number of instances in which agents obtain information of legal significance to their principal from third parties while in a legally confidential relationship with those third parties can be expected to be quite small. n90 Certainly they can be expected to represent a very small percentage of all situations in which an agent obtains knowledge or notice that is legally significant to the principal and to which the imputed knowledge rule might apply.

Second, the confidential relationship exception applies to situations in which the third party can reasonably determine in advance that the exception will be in effect. n91 This can be called the quality of self-identification. The creation and operation of any exception to the imputed knowledge rule will, in effect, reverse the normal allocation of risk created by the rule and encourage the third party rather than the principal to insure that the legally relevant knowledge or notice is actually received by the principal. n92 Given this, it is important that the third party be reasonably able to identify those situations to which an exception is likely to apply and special precautionary measures are necessary. In the absence of reasonably certain self-identification, third parties could be expected to insure against the possibility of the exception applying by engaging in precautionary measures in a wide range of circumstances. To the extent that the primary precautionary measure available to third parties in the imputed knowledge rule context is direct communication to the principal, either bypassing or duplicating communications with the agent, and thus eroding the usual efficiency of agency, a broader than necessary range of precautionary behavior should [*154] not be encouraged. n93 Thus it is important from a risk allocation perspective that any exception to the basic imputed knowledge rule be reasonably self-identifying to the third party.

Generally, given the relative rarity of such relationships, third parties will know in advance whether they are in a legally confidential relationship with an agent of the principal when they are conveying legally significant knowledge or notice to the agent. n94 They can then, in those circumstances, take special precautions to communicate the knowledge or notice directly to the principal. While such precautions generally work against the usual efficiency of agency, one can take comfort in the case of the confidential relationship exception that such precautions will be encouraged in only a small percentage of cases. Thus, it can be said that the confidential relationship exception to the imputed knowledge rule is at least understandable within, and to that extent consistent with, the risk allocation rationale for the imputed knowledge rule.

This same claim cannot be made with any confidence regarding the adverse agent exception to the imputed knowledge rule. As noted earlier, there are a large number of possible reasons why an agent might fail to successfully transmit relevant information to her principal, ranging from a conscious choice on the part of the agent, to a variety of combinations of carelessness by the agent and the principal, to pure accident. n95 Except in a very limited set of such circumstances, the fundamental logic of the risk allocation rationale supports the application of the basic imputed knowledge rule, and not the adverse agent exception.

In evaluating the status of the adverse agent exception to the imputed knowledge rule within the context of the risk allocation rationale, one should ask: As between the principal and the third party, who is best able to manage the risk of agent transmission failure caused by the agent's possession of interests in the transaction that are adverse to those of the principal? As in the case of transmission failure in the absence of agent adverse interests, the principal may effectively minimize transmission failure in adverse agent situations, even if she may not be able to completely eliminate it, by investing additional [*155] resources in more effective agent selection, monitoring, disciplining, termination, and redundant transmission procedures. In other words, the principal would seem to enjoy essentially the same panoply of precautionary options with respect to the existence of an adverse agent, or transmission failure by an adverse agent, as she does in the case of transmission failure for any other reason. Thus, from the principal side of the risk allocation analysis, there exists no compelling reason to shift the risk of transmission failure away from the principal in those situations in which the agent possesses interests that are adverse to those of the principal.

The third party's primary precautionary option in circumstances of a suspected adverse agent is the communication of the relevant information directly to the principal, just as it is in situations in which no adverse agent interests are involved. However, unlike those situations to which the confidential relationship exception will apply, it is not likely that the third party will know in advance, or at all, that the agent with whom she is dealing possesses interests that are adverse to those of the principal. Such circumstances lack the quality of self-identification from the third party's point of view. The inability of third parties to identify reliably in advance circumstances to which the adverse agent exception is likely to apply will cause third parties to avoid communication to the principal through the agent, or to duplicate it, in a far broader range of circumstances than is actually necessary or desirable. Such an overbroad pattern of precautionary

investment is an inevitable consequence of the lack of third party self-identification in the operation of the adverse agent exception and it encourages a wasteful expenditure of resources by third parties.

Given the above considerations, one can conclude that the adverse agent exception to the imputed knowledge rule is not preferred by either the principal or the third party side of risk allocation analysis, and thus that the existence of the adverse agent exception to the imputed knowledge rule is not supported by the risk allocation rationale. Stated slightly differently, one can conclude that from a risk allocation perspective, the possibility of an adverse agent failing to transmit successfully to the principal important knowledge or notice is a problem far better managed by the principal than by the third party. As a result, the law in this area should not create or maintain a general exception to the imputed knowledge rule, which in effect allocates the risk of agent [*156] failure to the third party, that applies to situations in which the agent possesses interests in the transaction that are adverse to those of the principal.

Once one clarifies that the risk allocation rationale for the imputed knowledge rule does not support a general adverse agent exception, then the existence of a variety of exceptions to the adverse agent exception becomes understandable. Courts, or majorities on courts, that understand the imputed knowledge rule from a risk allocation perspective, appear to be seeking some plausible rationale in adverse agent cases to justify not applying the established exception. Here it is the sole actor exception to the adverse agent exception. There it is the agent for notice exception. These exceptions to the adverse agent exception are so appealing because they lead to a result in the case, the application of the basic imputed knowledge rule unmodified by the adverse agent exception, that makes fundamental sense from the risk allocation rationale perspective.

One can sense this underlying dynamic in the decision of the court in the Munroe v. Harriman case:

But to explain the [imputed knowledge rule] cases in terms of presumptions is not a rational analysis. The presumption of communication is a pure fiction, contrary to the fact, for it is only when the agent has failed to communicate his knowledge that any occasion arises for imputing it to the principal. The rational explanation of the Distilled Spirits case is that common justice requires that one who puts forward an agent to do his business should not escape the consequences of notice to, or knowledge of, his agent. n96

Similarly, the tension that exists between the evidentiary surrogacy rationale and the risk allocation rationale regarding the adverse agent exception to the imputed knowledge rule is evident in the byplay between the majority and the dissenting opinions in the case of Farr v. Newman. The dissent believes that:

The reason for [the adverse agent exception to the imputed knowledge rule] ... is manifestly that the basis on which the principal is charged with knowledge of the agent is that it is presumed that the latter will normally communicate the information [*157] to his principal in the course of the performance of his duties [citation omitted], but such an inference is not indulged where the agent or attorney is already employed by another party having an adverse interest respecting the transaction in question. n97

The majority, in contrast, believes that:

The mere fact that the attorney acted for both parties in the real estate transfer, with defendant Hardy's knowledge, cannot insulate defendant from his agent's knowledge to the detriment of the otherwise superior right of a third party. ... the presumption sometimes relied upon to support imputation, i.e., that an agent will communicate to his principal all relevant matters, has no place in this situation. If, under the substantive rules of equity and agency, actual knowledge by the principal is unnecessary, the presumption of communication becomes irrelevant. ... It may thus be seen that the question in this case is not an evidentiary one of presumptions or inferences; it is one of substantive law. If the agent was authorized to receive notice, and did receive it within the scope of his authority, that act as such binds the principal as does any act performed within an agent's authority [citations omitted]. n98

Looking Into The Future

There may be reason to hope for greater coherence and predictability in imputed knowledge rule jurisprudence in the future. Such hope comes in the form of the American Law Institute's current draft of Restatement (Third) of Agency.

In 1923, acting upon the December 1914 recommendation of the American Association of Law Schools, the American Law Institute (ALI) was founded. n99 The new organization brought together the preeminent members of the legal community to meet the need for "a permanent organization for the improvement of the law." n100 In 1933, the ALI published the Restatement of Agency, closely following the 1932 [*158] publication of the Restatement of Contracts, making it the second Restatement of the Law to be published by this eminent group of scholars. n101 The first two restatements of agency were stewarded through the process of being drafted, accepted and published by two of the foremost authorities on agency law. The Restatement was brought to fruition by Floyd R. Mechem and the Restatement (Second) was shepherded through by Warren A. Seavey. n102 In 2000, under the direction of Deborah A. DeMott, the new reporter of the Restatement of Agency, the ALI first discussed the first two chapters of the Restatement (Third) of Agency. n103 From there, the Restatement (Third) of Agency has been undergoing an entire redraft up to the present time. n104

The relevant provisions of Restatement (Third) of Agency are sections 5.03 and 5.04. n105 Section 5.03 reads, "Notice of a fact that an agent knows or has reason to know is imputed to a principal if knowledge of the fact is material to the agent's duties to the principal and to the principal's legal relations with third parties. Notice is not so imputed if the agent acts adversely to the principal as stated in 5.04 or is subject to a duty not to disclose the fact to the principal." n106 This is a more or less straight-forward articulation of the classic imputed knowledge rule. It begins with the basic doctrine, imputing to the principal information received by the agent within the scope of the agency. n107 It then sets forth the two traditional exceptions: the adverse agent exception and the confidential relationship exception. n108

[*159] So far, the Restatement (Third) of Agency is a standard codification of the traditional doctrine and does not seem to offer much promise of improvement. Optimism dims further upon a first reading of section 5.04, which states:

5.04 An Agent Who Acts Adversely to a Principal

(1) Notice is not imputed to a principal of a fact that an agent knows or has reason to know if the agent acts adversely to the principal in the transaction or matter without the principal's knowledge, unless

(a) the agent deals with a third party who does not know or have reason to know that the agent acts adversely to the principal and who reasonably believes the agent to be authorized so to deal; or

(b) the principal knowingly retains a benefit from action taken by the agent that the principal would not otherwise have received.

(2) For purposes of this Chapter, an agent acts adversely to a principal if the agent acts in the transaction or matter without any intention of benefiting the principal by the action taken. n109

This section sets forth the adverse agent exception to the imputed [*160] knowledge rule, and identifies two exceptions to the exception, just as the doctrine has been traditionally understood. n110 Structurally, the Restatement Third appears on first glance to faithfully codify the imputed knowledge rule, and the multiple exceptions and myriad exceptions to the adverse agent exception, that are symptomatic of the unresolved policy tension that plagues the doctrine. n111

A source of optimism emerges, however, upon closer examination. The comments to section 5.03 clearly endorse the risk allocation rationale for the imputed knowledge rule. n112 They state:

Imputation creates incentives for a principal to choose agents carefully and to use care in delegating functions to them. Additionally, imputation encourages a principal to develop effective routines for the transmission of material facts, while discouraging practices that isolate the principal from facts known to an agent. ... Imputation thus recognizes the efficiencies to be achieved in many situations when parties communicate through agents instead of through direct principal-to-principal communication. n113

In contrast, the evidentiary surrogacy rationale receives only a passing mention, and that less in the context of justifying the imputed knowledge rule as an attempt to embrace the most accurate factual assumption available than as part of a much vaguer collection of "pragmatic considerations." n114

Since the Restatement grounds the imputed knowledge rule squarely in the theoretical justification of the risk allocation rationale, why does it then also include an adverse agent exception to the rule? As discussed herein, the risk allocation rationale simply does not support a general adverse agent exception to the rule. One possible explanation is that the existence of an adverse agent exception is manifestly clear in the current case law and the Restatement, operating in its role as a codification project, could simply not ignore it. Current imputed knowledge rule jurisprudence is profoundly conflicted, and any attempt to describe it accurately cannot help but display some of these same [*161] features.

Assuming the need to recognize formally the existence of an adverse agent exception, one must give great credit to the Restatement's efforts to harmonize the exception with a risk allocation rationale for the basic rule. This work takes place in section 5.04. n115 The work begins at the end of the section, in paragraph (2), where the Restatement defines an adverse agent as one who, "... acts in the transaction or matter without any intention of benefiting the principal by the action taken." n116 This is a remarkably narrow definition of an adverse agent for purposes of the rule. According to this definition, the agent in question must not just possess interests in the transaction that are in conflict with those of the principal, which is the traditional approach, but must have so completely abandoned his efforts on behalf of the principal that the agent acts without any intention of benefiting the principal at all. n117

Such a definition of adverse agent would exclude from the operation of the adverse agent exception a wide range of cases that conventionally have been thought to come clearly within its purview. For example, it is not at all clear that the agent in Munroe n118 could be characterized successfully as an adverse agent under this definition. After all, Harriman, the agent in Munroe, might well have been argued to be involved in bringing profitable loan business to the bank, or, at the least, to be concerned with securing the loan with the fraudulently obtained securities for the bank's benefit, even though it was also the case that the loan was being made to him. The comments to section 5.04 make it clear that divided loyalty alone is not enough: "An agent is not acting adversely if the agent acts with mixed motives, intending to achieve a benefit for the principal as well as for the agent's own self or for a third party." n119 Perhaps in reaction to the apparent narrowness of [*162] the resulting definition, the commentary does go on to then reassure that, "An agent may act adversely toward a principal through conduct less grievous than looting or embezzlement," n120 though, the implication seems to be, it will take conduct fairly close to criminal for the agent to achieve technically adverse status. n121

Similarly, pursuant to the definition in section 5.04, the attorney double agent in Farr n122 is most likely not an adverse agent whose possession of relevant information is subject to the exception. The attorney in Farr ran into difficulty not because he acted without any intention of benefiting either principal, but because he too aggressively sought a way of consummating the transaction that both principals desired. n123 Indeed, the commentary to section 5.04 makes it clear that the fact that the attorney in that case was representing parties on opposite sides of the transaction does not, by itself, make him technically adverse to either one:

An agent who acts as a dual agent ... may not always act adversely as to both or either of the agent's principals for purposes of subsection (1). This is because whether an agent acts adversely under subsection (2) turns solely on the subjective determination of whether the agent acted with no intention of benefiting the principal. n124

This very narrow definition of adverse agent in paragraph (2) of section 5.04 severely narrows the scope and practical application of the adverse agent exception to the imputed knowledge rule, and is thus much more in harmony with the risk allocation rationale for the rule. If this is not enough, however, section 5.04 contains three additional limitations on

the operation of the adverse agent exception. n125 The first, contained in paragraph (1), is the requirement that the principal have no [*163] knowledge of the agent's adverse actions in order for the adverse agent exception to apply. n126 The second, set forth in paragraph (1)(a), prevents the application of the adverse agent exception against a third party who was unaware that the agent was acting adversely to the principal. n127 The third, contained in paragraph (1)(b), denies the use of the adverse agent exception to a principal, even if all of the other requirements of 5.04 are satisfied, if, "the principal knowingly retains a benefit from action taken by the agent that the principal would not otherwise have received." n128

Section 5.04 therefore defines an adverse agent exception to the imputed knowledge rule in a manner that requires for its successful application that:

1) the agent to have acted in the matter in question without any intention of benefiting the principal;

2) the principal to have been without any knowledge of the agent's actions in this regard;

3) the third party to have been aware of the agent's adverse status with respect to the principal; and

4) the principal not to have retained a benefit from the actions of the agent. n129

Taken together, these requirements define an extremely narrow version of the adverse agent exception to the imputed knowledge rule that can be said to be as close to consistent with the risk allocation rationale as is possible while still retaining an adverse agent exception. If jurisdictions will in the future follow the lead of Restatement (Third) of Agency in this regard, it will go a very long way toward making the imputed knowledge rule more coherent and more predictable, and thus more valuable.

[*164]

Conclusion

The imputed knowledge rule is currently characterized by complexity and contradiction. The basic rule imputes to a principal knowledge or notice received by an agent within the scope of the agent's authority. n130 The principal is deemed to have received the information in question even in the absence of any evidence that the agent successfully transmitted it to the principal.

There are two well-established exceptions to the imputed knowledge rule, one known as the confidential relationship exception and the other known as the adverse agent exception. n131 The first applies to situations in which the agent has obtained the information in question from a third party in the context of a legally confidential relationship with that third party. n132 The second comes into play when the agent possesses interests in the transaction that are adverse to those of the principal. n133 Both operate, when successfully invoked, to prevent relevant information received by the agent from being automatically imputed to the principal, thus requiring the third party in such cases to directly establish the principal's receipt of the relevant knowledge or notice.

A significant number of cases exist that have created, in effect, a variety of exceptions to the adverse agent exception to the imputed knowledge rule. n134 These cases identify discrete reasons for legally imputing to a principal information received from an adverse agent, despite the situation being one in which the adverse agent exception would normally apply. The existence of these multiple exceptions to an [*165] exception to the basic rule push the doctrine to a level of unusual complexity for a long-standing part of the common law, and thus create inevitable uncertainty in its application.

The above analysis suggests that the current complexity and uncertainty surrounding the imputed knowledge rule is explained by the existence of a fundamental tension residing at the heart of the doctrine. This tension is created by the influence of competing conceptions of the rule's basic purpose. From one perspective, here called the evidentiary surrogacy rationale, the imputed knowledge rule is designed to provide the most empirically plausible answer to the question of whether the principal actually received the information in question from the agent when no objective credible evidence exists to directly resolve the issue. n135 The evidentiary surrogacy rationale supports the existence of the basic imputed knowledge rule. It also supports the existence of both the confidential relationship exception and the adverse agent exception. It does not, however, support the various exceptions to the adverse agent exception that have been carved out by various courts.

The competing understanding of the imputed knowledge rule, here called the risk allocation rationale, views the imputed knowledge rule as a mechanism for allocating between the principal and the third party the risk of a failure of information transmission from the agent to the principal. n136 Like the evidentiary surrogacy rationale, the risk allocation rationale supports the existence of the basic imputed knowledge rule and the confidential relationship exception to the rule. In sharp contrast to the evidentiary surrogacy rationale, however, the risk allocation rationale does not support the existence of the adverse agent exception to the rule, except in a very limited set of circumstances. Therefore, the risk allocation rationale inevitably serves as support for the identification and creation of most any exception to the adverse agent exception.

An evidentiary surrogacy perspective on imputed knowledge in agency would generate an imputed knowledge rule and both a confidential relationship exception and an adverse agent exception. A [*166] risk allocation perspective would generate the basic rule and a confidential relationship exception, but not a general adverse agent exception. The current rule, in which both rationales intermingle and mix, is doctrinally faithful to neither. As a result, the current version of the rule is not fully coherent, unnecessarily complex, and unpredictable in its application. Significant hope for improvement is promised by the upcoming Restatement (Third) of Agency that appears to embrace the risk allocation rationale and the doctrinal structure that logically follows.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesKnowledge & NoticeAgent KnowledgeBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesKnowledge & NoticeExceptions

FOOTNOTES:

n1. *Restatement (Second) of Agency 8A*, 8A cmt. a (1958); *Fedders Corp. v. Taylor, 473 F. Supp. 961 (D. Minn. 1979); Lee v. YES of Russellville, Inc., 784 So. 2d 1022 (Ala. 2000); Reuter v. Middlebrook, 131 N.W.2d 817 (Iowa 1964); Hooper v. Merchants' Bank & Trust Co., 130 S.E. 49 (N.C. 1925); Texas Conservative Oil Co. v. Jolly, 149 S.W.2d 265 (Tex. Civ. App. El Paso 1941);* See William A. Gregory, The Law of Agency and Partnership 57 (3d ed. 2001).

n2. *Restatement (Second) of Agency 219* (1958); *Gleason v. Seaboard Air Line Ry. Co., 278 U.S. 349 (1929); United Mine Workers of America v. Patton, 211 F.2d 742 (4th Cir. 1954); Scott v. Ross, 140 F.3d 1275 (9th Cir. 1998)* (applying Washington law); *Girard v. Trade Prof'l, Inc., 13 Fed. Appx. 865 (10th Cir. 2001)* (applying Kansas law); *Ex parte Wild Wild West Social Club, Inc., 2001 WL 700606 (Ala. 2001); St. Joseph's Reg'l Health Ctr. v. Munos, 934 S.W.2d 192 (Ark. 1996); Otis Elevator Co. v. First Nat'l Bank of San Francisco, 124 P. 704 (Cal. 1912); Dis. of Columbia v. Hampton, 666 A.2d 30 (D.C. 1995); Woods v. Cole, 693 N.E.2d 333 (Ill. 1998); Oliphant v. Town of Lake Providence, 192 So. 95 (La. 1939); DiCentes v. Michaud, 719 A.2d 509 (Me. 1998); Shafer v. Bull, 194 A.2d 788 (Md. 1963); Semrad v. Edina Realty, Inc., 493 N.W.2d 528 (Minn. 1992); McHaffie By and Through McHaffie v. Bunch, 891 S.W.2d 822 (Mo. 1995); H-D Irrigating, Inc. v. Kimble Props., Inc., 301 Mont. 34 (2000); Ashby v. First Data Res., Inc., 497 N.W.2d 330 (Neb. 1993); Wright v. State, 778 A.2d 443 (N.J. 2001); Nowack v. Metro. St. Ry. Co., 60 N.E. 32 (1901); W.R. Grace & Co. v. Strickland, 124 S.E. 856 (N.C. 1924); Doan ex rel. Doan v. City of Bismarck, 632 N.W.2d 815 (N.D. 2001); Dorsey v. Morris, 611 N.E.2d 509 (Ohio 1992)* (holding that the agent's action was not within the scope of the agent's employment); *State ex rel. Oklahoma Bar Ass'n v. Taylor, 4 P.3d 1242 (Okla. 2000); Travelers Cas. & Sur. Co. v. Castegnaro, 772 A.2d 456 (Pa. 2001); Baptist Mem'l Hosp. Sys. v. Sampson, 969 S.W.2d 945 (Tex. 1998),* reh'g of cause overruled, (July 3, 1998); *Jones v. Mut. Creamery Co., 17 P.2d 256 (Utah 1932); Courtless v. Jolliffe, 507 S.E.2d 136 (W. Va. 1998); Hamilton v. Natrona County Educ. Ass'n, 901 P.2d 381 (Wyo. 1995).*

n3. *Restatement (Second) of Agency 268*, 272, 278 (1958); William A. Gregory, The Law of Agency and Partnership 57, 59 (3d ed. 2001); *Anderson v. Walthal, 468 So. 2d 291, 294 (Fla. Dist. Ct. App. 1985)* ("it is equally settled that knowledge of, or notice to, an agent is imputed to the principal when it is received by the agent while acting within the course and scope of employment ..."); *Ouachita Equip. Rental Co. v. Trainer, 408*

So. 2d 930, 935 (La. Ct. App. 1981) ("The knowledge of the agent is imputed to the principal even if the agent neglects to specifically convey that information to the principal.").

n4. See Deborah A. DeMott, When Is A Principal Charged With An Agent's Knowledge?, *13 Duke J. Comp. & Int'l L. 291, 291 (2003)* ("Imputation is central to the bases on which agency ascribes responsibility for one person's actions to another person and thus to agency doctrine as a whole.").

n5. *Curtis, Collins & Holbrook Co. v. U.S., 262 U.S. 215 (1923); Apollo Fuel Oil v. U.S., 195 F.3d 74 (2d Cir. 1999); Martin Marietta Corp. v. Gould, Inc., 70 F.3d 768 (4th Cir. 1995)* (applying Maryland law); *Metro. Wholesale Supply, Inc. v. M/V Royal Rainbow, 12 F.3d 58 (5th Cir. 1994)* (applying Louisiana law); *Aetna Cas. and Sur. Co. v. Leahey Const. Co., 219 F.3d 519 (6th Cir. 2000)* (applying Ohio law); *Employers Ins. of Wausau v. Banco De Seguros Del Estado, 199 F.3d 937 (7th Cir. 1999)*, reh'g and reh'g en banc denied, (Jan. 19, 2000) and cert. denied, *530 U.S. 1215 (2000)* (applying Wisconsin law); *Tonelli v. U.S., 60 F.3d 492 (8th Cir. 1995); Morrow Crane Co. v. Affiliated FM Ins. Co., 885 F.2d 612 (9th Cir. 1989); Cronin v. Washington Nat. Ins. Co., 980 F.2d 663 (11th Cir. 1993)* (applying Massachusetts law); *Pfenninger v. Hunterdon Central Regional High School, 770 A.2d 1126 (N.J. 2001); Morgan v. Jackson, 63 So. 2d 597 (Ala. 1953); Manley v. Ticor Title Ins. Co. of California, 816 P.2d 225 (Ariz. 1991); Standard Motors Fin. Co. v. Mitchell Auto Co., 293 S.W. 1026 (Ark. 1927); Clark Equip. Co. v. Wheat, 92 Cal. App. 3d 503 (Cal. 1st Dist. 1979); Reardon v. Mut. Life Ins. Co. of N.Y., 86 A.2d 570 (Conn. 1952); Ruotal Corp., N. W., Inc. v. Ottati, 391 So. 2d 308 (Fla. Dist. Ct. App. 4th Dist. 1980); Chicagoland Vending, Inc. v. Parkside Center, Ltd., 454 S.E.2d 456 (Ga. 1995); U.S. Cold Storage Co. v. Central Mfg. Dist. Bank, 175 N.E. 825 (Ill. 1931); Wyckoff v. A & J Home Benev. Ass'n of Creston, Iowa, 119 N.W.2d 126 (Iowa 1962); United Fuel Gas Co. v. Jude, 355 S.W.2d 664 (Ky. 1962); Weingart v. Delgado, 16 So. 2d 254 (La. 1943); Tracey v. Standard Acc. Ins. Co., 109 A. 490 (Me. 1920); Duckworth v. Bernstein, 466 A.2d 517 (Md. 1983); Miller v. Mooney, 725 N.E.2d 545 (Mass. 2000); Pearson v. Sullivan, 176 N.W. 597 (Mich. 1920); Packard Mfg. Co. v. Indiana Lumbermens Mut. Ins. Co., 203 S.W.2d 415 (Mo. 1947);* Kaeding v. W.R. Grace & Co. - *Conn., 961 P.2d 1256 (Mont. 1998); Selig v. Wunderlich Contracting Co., 69 N.W.2d 861 (Neb. 1955); Taylor v. Metro. Life Ins. Co., 214 A.2d 109 (N.H. 1965); Ford v. Grand Union Co., 197 N.E. 266 (N.Y. 1935); Am. Export & Inland Coal Corp. v. Matthew Addy Co., 147 N.E. 89 (Ohio 1925); Aetna Cas. & Sur. Co. of Hartford, Conn. v. Local Bldg. & Loan Ass'n, 19 P.2d 612 (Okla. 1933); State Farm Fire & Cas. Co. v. Sevier, 537 P.2d 88 (Or. 1975); Hicks v. Am. Natural Gas Co., 57 A. 55 (Pa. 1904); De Ford v. Nat'l Life & Acc. Ins. Co., 185 S.W.2d 617 (Tenn. 1945); Preston Farm & Ranch Supply, Inc. v. Bio-Zyme Enterprises, 625 S.W.2d 295 (Tex. 1981); Macris v. Sculptured Software, Inc., 24 P.3d 984 (Utah 2001); Agency of Natural Resources v. Towns, 724 A.2d 1022 (Vt. 1998); Boice v. Fin. & Guar. Corp., 102 S.E. 591 (Va. 1920); Bollong v. Corman, 217 P. 27 (Wash. 1923); Fritsch v. St. Croix Cent. School Dist., 515 N.W.2d 328 (Wis. Ct. App. 1994).*

n6. *New York Marine & Gen. Ins. Co. v. Tradeline (L.L.C.), 266 F.3d 112 (2d Cir. 2001)* (applying New York law); *Columbia Pictures Corp. v. De Toth, 197 P.2d 580 (Cal. 1948); Farnsworth v. Hazelett, 199 N.W. 410 (Iowa 1924); New England Trust Co. v. Bright, 174 N.E. 469 (Mass. 1931); Westinghouse Electric & Mfg. Co. v. Hubert, 141 N.W. 600 (Mich. 1913); Cox v. Pearce, 20 N.E. 566 (N.Y. 1889); Gibson Oil Co. v. Hayes Equip. Mfg. Co., 1933 OK 142; Hurst Boillin Co. v. Jones, 279 S.W. 392 (Tenn. 1926); Agency of Natural Res. v. Towns, 724 A.2d 1022 (Vt. 1998).*

n7. William A. Gregory, The Law of Agency and Partnership 59 (3d ed. 2001) (citing *Thomason v. Miller, 555 S.W.2d 685 (Mo. App. 1977)); Restatement (Second) of Agency 268*, 272 (1958).

n8. William A. Gregory, The Law of Agency and *Partnership 62* (3d ed. 2001); *Restatement (Second) of Agency 281* (1958); *TTT Stevedores of Texas, Inc. v. M/V Jagat Vijeta, 696 F.2d 1135 (5th Cir. 1983); Imperial Fin. Corp. v. Fin. Factors, Ltd., 490 P.2d 662 (Haw. 1971); Farnsworth v. Hazelett, 199 N.W. 410 (Iowa 1924); Puffer v. Badley, 181 P. 1 (Or. 1919); Melms v. Pabst Brewing Co., 66 N.W. 518 (Wis. 1896).* See *Citizens Nat'l Bank v. Lineberger, 45 F.2d 522, 531 (4th Cir. 1930)* ("The bank is not chargeable with the knowledge which the attorney acquired in the transaction of the business of his clients."); See generally *Florence v. Carr, 148 So. 148 (Ala. 1933); Rushville Nat'l Bank v. State Life Ins. Co., 1 N.E.2d 445, 450 (Ind. 1936)* ("Knowledge upon the part of its agent and examining officer cannot be imputed to the company ...").

n9. William A. Gregory, The Law of Agency and Partnership 59 (3d ed. 2001); *Restatement (Second) of Agency 268*, 271, 282 (1958); *Evanston Bank v. Conticommodity Servs., Inc., 623 F.Supp. 1014, 1036 (N.D. Ill. 1985)* ("However, knowledge is normally not imputed when an agent is acting adversely to the principal and for his own or another's benefit. Since the agent then has a motive for concealing the information, one can no longer assume that he will fulfill his duty to speak."); *In re Investors Funding Corp. of N.Y. Sec. Litigation, 523 F.Supp 533, 541 (S.D.N.Y. 1980)* ("However, when an agent is acting adversely to the interest of the principal, his knowledge and conduct are not imputed to the principal."); *Duckworth v. Bernstein, 466 A.2d 517, 523 (Md. 1983)* ("Where an agent acquires knowledge in the course of his agency, and has no personal interest in the transaction adverse to the interest of the principal, the agent's knowledge is ascribed to the principal.").

n10. *85 F.2d 493 (2d Cir. 1936).*

n11. *Id. at 493.*

n12. *Id. at 494-95.*

n13. *Id. at 494.*

n14. Id.

n15. Id.

n16. Id.

n17. Id.

n18. Id.

n19. Id.

n20. Id.

n21. See *id. at 494-95.*

n22. Id.

n23. Id.

n24. *Id. at 495-96.*

n25. *Id. at 495.*

n26. *Id. at 496.*

n27. *Id. at 496.*

n28. Id.

n29. See id.

n30. See id.

n31. See, e.g., William A. Gregory, The Law of Agency and *Partnership 62*, n.18 (3d ed. 2001); Warren A. Seavey, Studies in Agency 179 (1949); Warren A. Seavey, Handbook of the Law of Agency 177 (1964).

n32. *Curtis, Collins & Holbrook Co. v. U.S., 262 U.S. 215 (1923); Stone & Webster Eng. Corp. v. Hamilton Nat'l. Bank, 199 F.2d 127 (6th Cir. 1952); Connecticut Fire Ins. Co. v. Commercial Nat'l. Bank, 87 F.2d 968 (5th Cir. 1937); Maryland Cas. Co. v. Queenan, 89 F.2d 155 (10th Cir. 1937); Queenan v. Mays, 90 F.2d 525 (10th Cir. 1937); Skud v. Tillinghast, 195 F. 1, 7 (6th Cir. 1912)* and cases cited therein; *Kean v. Nat'l. City Bank, 294 F. 214, 224 (6th Cir. 1923); Wasmann v. City Nat'l. Bank, 52 F.2d 705 (6th Cir. 1931); Schneider v. Thompson, 58 F.2d 94, 97 (8th Cir. 1932); Anderson v. Missouri State Life Ins. Co., 69 F.2d 794 (6th Cir. 1934); Nissen v. Nissen Trampoline Co., 39 N.W.2d 92 (Iowa 1949); Nat'l Turners Bldg. & Loan Ass'n v. Schreitmueller, 285 N.W. 497 (Mich. 1939); Blumberg v. Taggart, 5 N.W.2d 388 (Minn. 1942); Newco Land Co. v. Martin, 213 S.W.2d 504 (Mo. 1948); Aetna Cas. & Sur. Co. of Hartford, Conn. v. Local Bldg. & Loan Ass'n, 19 P.2d 612 (Okla. 1933); State ex rel. Clarke v. Ripley Sav. Bank & Trust Co., 160 S.W.2d 189 (Tenn. 1941); Puget Sound Nat'l. Bank v. St. Paul Fire and Marine Ins. Co., 645 P.2d 1122 (Wash. Ct. App. 1982); Knobley Mountain Orchard Co. v. People's Bank, 129 S.E. 474 (W. Va. 1925); State v. Candler, 728 S.W.2d 756, 759 (Tenn. Crim. App. 1986); Martin v. First Nat'l. Bank, 51 F.2d 840 (D. Minn. 1931); Irving Trust Co. v. State Bankers' Financial Corp., 40 F.2d 88 (S.D.N.Y. 1930); First Nat'l. Bank v. Blake, 60 F. 78 (C.C.D.Or. 1894); Tatum v. Commercial Bank & Trust Co., 69 So. 508 (Ala. 1915); First Nat'l. Bank v. Town of New Milford, 36 Conn. 93, 101 (1869); Founche v. Merchants' Nat'l. Bank, 36 S.E. 256 (Ga. 1900); Taylor v. Felder, 59 S.E. 844 (Ga. Ct. App. 1907); Newell v. Hadley, 92 N.E. 507 (Mass. 1910); Tremont Trust Co. v. Noyes, 141 N.E. 93, 98 (Mass. 1923); Holden v. New York & Erie Bank, 72 N.Y. 286 (1878); Farmers' & Traders' Bank v. Kimball Co., 47 N.W. 402 (S.D. 1890); Black Hills Nat'l. Bank v. Kellogg, 56 N.W. 1071 (S.D. 1893); Barry v. Hensley, 98 S.W. 2d 102 (Tenn. 1936); Vogel v. Zipp, 90 S.W. 2d 668 (Tex. Civ. App. 1936).* See also, Warren A. Seavey, Notice Through an Agent, *65 U. Pa. L. Rev. 1, 16-20 (1916).*

n33. *199 N.E.2d 369 (N.Y. 1964).*

n34. See id.

n35. *Id. at 370-71.*

n36. Id.

n37. *Id. at 371, 374.*

n38. *Id. at 374.*

n39. Id.

n40. Id.

n41. Id.

n42. See id.

n43. *Id. at 371, 374.*

n44. *Id. at 374.*

n45. *Id. at 371.*

n46. Id.

n47. *Restatement (Second) of Agency 268(1)* (1958); William A. Gregory, The Law of Agency and Partnership 59 (3d. 2001).

n48. *Farr, 199 N.E.2d at 371-72.*

n49. *Id. at 375* (Van Voorhis, J., dissenting).

n50. *Id. at 371.*

n51. See *id. at 371-73.*

n52. *Munroe v. Harriman, 85 F.2d 493, 496 (2d Cir. 1936); Farr, 199 N.E.2d at 372-73.*

n53. *Farr, 199 N.E.2d at 372-73.*

n54. *Id. at 371.*

n55. *Id. at 373.*

n56. See generally *id. at 372-73.*

n57. See generally *id. at 372-73.*

n58. *Id. at 372-73.*

n59. *Id. at 373.*

n60. Id.

n61. Id.

n62. *Astor v. Wells, 17 U.S. 466 (1819); Brown v. Jefferson County Nat'l Bank, 9 F. 258 (C.C.N.Y. 1881); Mittendorf v. J. R. Williston & Beane, Inc. 372 F. Supp. 821 (S.D.N.Y. 1974); Carter v. Town of Ottawa, 24 F. 546 (N.D. Ill. 1885); Emmons v. Ingebretson, 279 F. Supp. 558 (N.D. Iowa 1968); Manley v. Ticor Title Ins. Co. of CA., 816 P.2d 225 (Ariz. 1991); McHugh v. Duane, 53 A.2d 282 (D.C. 1947); Carlton v. Moultrie Banking Co., 152 S.E. 215 (Ga. 1930); Taylor v. Felder, 59 S.E. 844 (Ga. Ct. App. 1907); Herron v. Interstate Life & Accident Co., 190 S.E. 631 (Ga. Ct. App. 1937); Haas v. Sternbach, 41 N.E. 51 (Ill. 1894); J. & G. Lippman v. Rice Millers' Distrib. Co., 100 So. 685 (La. 1924); Meier v. Goebel-Reid Grocery Co., 20 S.W.2d 605 (Mo. Ct. App. 1929); Barth v. Haase, 139 S.W.2d 1058 (Mo. Ct. App. 1940); Losey v. Simpson, 11 N.J. Eq. 246 (N.J. Ch. 1856); Turner v. Kuehnle, 64 A. 478 (N.J. Ch. 1906); Glen Oaks Club v. Glen Oaks Holding Co., 86 N.Y.S.2d 568 (N.Y. Sup. Ct. 1948),* aff'd *88 N.Y.S.2d 257 (N.Y. App. Div. 1949); Cmty. Sav. & Loan Ass'n. v. Lubbock Sav. & Loan Ass'n., 509 S.W.2d 448 (Tex. Civ. App. 1974); Foster v. Blake Heights Corp., 530 P.2d 815 (Utah 1974); Melms v. Pabst Brewing Co., 66 N.W. 518 (Wis. 1896); Ross v. Northrup, King & Co., 144 N.W. 1124 (Wis. 1914); Johnson v. Blumer, 197 N.W. 340 (Wis. 1924).*

n63. See, e.g., *Dillon v. Berg, 326 F. Supp. 1214, 1224 (D. Del. 1971); Ctr. v. Hampton Affiliates, Inc., 66 N.Y.2d 782, 799-800 (1985); Blumberg v. Taggart, 5 N.W.2d 388, 393-95 (Minn. 1942); Willcox v. Goess, 92 F.2d 8, 10-11 (2d Cir. 1937); Eitel v. Schmidlapp, 459 F.2d 609, 615-16 (4th Cir. 1972); Matanuska Valley Bank v. Arnold, 223 F.2d 778, 781-82 (9th Cir. 1955).* See also the cases cited supra notes 9, 32 and 62.

n64. *Restatement (Second) of Agency 268* (1958).

n65. *Restatement (Second) of Agency 281* (1958).

n66. *Restatement (Second) of Agency 279*, 282 (1958).

n67. See William A. Gregory, The Law of Agency and Partnership 59, *62*, *64* (2001); see also 3 AM JUR 2d. AGENCY 280, 2 (2004)

The rule that the knowledge of an agent acting adversely to the principal will not be imputed to the latter may also not apply if the failure of the agent to act upon or to reveal the information results in a violation of a contractual or relational duty of the principal to a person harmed thereby (citing *State Farm Fire & Cas. Co. v. Sevier, 537 P.2d 88 (Ore. 1975)* and *City of Fort Worth v. Pippen, 439 S.W.2d 660 (Tex. 1969)).*

n68. See DeMott, supra note 5, at 291 ("Imputation has been characterized as a disorderly doctrine that is difficult to rationalize and to justify or explain in any satisfying way.") (citing F.M.B. Reynolds, Bowstead and Reynolds on Agency 441 (17th ed. 2001); see also Peter Watts, Imputed Knowledge in Agency Law - Excising The Fraud Exception, 117 L.Q.R. 300 (2001)

There are some areas of the law of agency that remain seriously disordered. The case law on imputed knowledge is undoubtedly one of them. It has become almost customary for judges to recite Palles C.B.'s statement in Taylor v. Yorkshire Insurance Co., "But when a question of notice, or knowledge, arises, we find ourselves overwhelmed in a sea of authorities, not altogether reconcilable with each other... (quoting Taylor v. Yorkshire Insurance Co., 2 *I.R. 1, 21 (1913)).*

n69. See Restatement (Third) of Agency 5.03 cmt. b (Tentative Draft No. 3, 2002); see also Restatement (Third) of Agency 5.03 cmt. b (Tentative Draft No. 4, 2003)

Pragmatic considerations also justify charging a principal with notice of facts that an agent knows ... Most agents most of the time fulfill their duties, including the duty to disclose material facts to the principal or to co-agents designated by the principal. If both agent and principal deny that an agent transmitted knowledge of a particular fact, a third party may confront difficulties in proving otherwise.

n70. *Restatement (Second) of Agency 268* (1958).

n71. See *Apollo Fuel Oil v. United States, 195 F.3d 74, 76-77 (2d Cir. 1999); Triple A Mgmt. Co. v. Frisone, 81 Cal. Rptr. 2d 669, 678-79 (Cal. Ct. App. 1999).* See also Daniel S. Kleinberger, Guilty Knowledge, *22 Wm. Mitchell L. Rev. 953, 971 n.100 (1996).* The evidentiary surrogacy rationale has also been used to rationalize the operation of the imputed knowledge rule in English law. See Peter Watts, Imputed Knowledge In Agency Law - Excising The Fraud Exception, 117 L.Q.R. 300, 307 (2001)

According to the doctrine of Equity, a purchaser has constructive notice of that which his solicitor, in the transaction of the purchase, knows with respect to the existence of the rights which other persons have in the property... . It is a moot question upon what principle this doctrine rests. It has been held by some that it rests on this: that the probability is so strong that the solicitor would tell his client what he knows himself, that it amounts to an irresistible presumption that he did tell him; and so you must presume actual knowledge on the part of the client (quoting *Boursot v. Savage, L.R. 2 Eq. 134, 142 (1866)).*

n72. See generally Restatement (Third) of Agency 5.03 cmt. b (Tentative Draft No. 4, 2003).

n73. See Restatement (Third) of Agency 5.03 cmts. b and e (Tentative Draft No. 4, 2003).

n74. *Restatement (Second) of Agency 281* (1958).

n75. See Restatement (Third) of Agency 5.04 cmts. b and c (Tentative Draft No. 4, 2003); see also Restatement (Third) of Agency 5.04 cmts. b and c (Tentative Draft No. 3, 2002).

n76. *Farr v. Newman, 199 N.E.2d 369, 374 (N.Y. 1964)* (dissenting opinion of Van Voorhis, J., dissenting).

n77. *85 F.2d 493 (2d Cir. 1936).*

n78. *199 N.E.2d 369 (N.Y. 1964).*

n79. See *Munroe, 85 F.2d at 496-97.*

n80. See generally *Munroe, 85 F.2d 493.*

n81. *Farr, 199 N.E.2d at 372-73.*

n82. See *Restatement (Second) of Agency 8A* cmt. a (1958) ("The rules designed to promote the interests of these enterprises are necessarily accompanied by rules to police them. It is inevitable that in doing their work, either through negligence or excess of zeal, agents will harm third persons or will deal with them in unauthorized ways. It would be unfair for an enterprise to have the benefit of the work of its agents without making it responsible to some extent for their excesses and failures to act carefully. The answer of the common law has been the creation of special agency powers or, to phrase it otherwise, the imposition of liability upon the principal because of unauthorized or negligent acts of his servants and other agents. These powers or liabilities are created by the courts primarily for the protection of third persons, either those who are harmed by the agent or those who deal with the agent. In the long run, however, they inure to the benefit of the business world and hence to the advantage of employers as a class, the members of which are plaintiffs as well as defendants in actions brought upon unauthorized transactions conducted by agents." Emphasis added.)

n83. Restatement (Third) of Agency 5.03 cmt. b (Tentative Draft No. 4, 2003) ("An agent also has a duty, unless otherwise agreed, to use reasonable effort to transmit material facts to the principal or to co-agents designated by the principal. A principal's right to control an agent engables the principal to consider whether and how best to monitor agents to ensure compliance with these duties. A principal may not rebut the imputation of an agent's notice of a fact by establishing that the agent kept silent.").

n84. Id.

n85. Restatement (Third) of Agency 5.03 cmt. b (Tentative Draft No. 4, 2003) ("Imputation creates incentives for a principal to choose agents carefully and to use care in delegating functions to them. Additionally, imputation encourages a principal to develop effective procedures for the transmission of material facts, while discouraging practices that isolate the principal from facts known to the agent. This serves the function of assuring the reasonable expectations of third parties who deal with a principal through an agent designated by the principal.").

n86. Restatement (Third) of Agency 5.03 cmt. b (Tentative Draft No. 4, 2003); *Duckworth v. Bernstein, 466 A.2d 517, 523* (Md. App., 1983) ("It is the principal who has selected the agent, and if he has chosen unwisely, it is he who should bear the burden, and not a third party who has dealt with the agent to the third party's detriment.").

n87. Restatement (Third) of Agency 5.03 cmt. b (Tentative Draft No. 4, 2003) ("Imputation also supports the efficiencies to be achieved in many situations when parties communicate through agents instead of through direct principal-to-principal communication.").

n88. *Restatement (Second) of Agency 281*, 281 cmt. a, 281 cmt. b (1958).

n89. Restatement (Third) of Agency 5.03 cmt. b (Tentative Draft No. 4, 2003) ("Imputation reduces the risk that a principal may deploy agents as a shield against the legal consequences of facts the principal would prefer not to know.").

n90. *Restatement (Second) of Agency 281* cmt. a (1958) ("The rule stated in this section applies most frequently where an attorney at law receives information from a client under such circumstances that he has a duty not to reveal it without the client's permission... . The rule also applies to confidences given to physicians in jurisdictions in which physicians are privileged or required not to reveal confidences, and to other situations in which one has a duty to a third person which creates in him a privilege not to reveal or a privilege of his own by virtue of which he can act irrespective of the information.").

n91. See *Restatement (Second) of Agency 281* cmt. a (1958); Confidential relationships are entered into voluntarily. See e.g. Model Rules of Prof'l Conduct R. 1.2 (2003) (On formation of the attorney client relationship.); *Restatement (Third) of Trusts 10*-16 (2003) (Creation of a trust relationship through the trust instrument).

n92. See supra note 86.

n93. See *Restatement (Second) of Agency 281* cmt. a (1958).

n94. See supra note 91.

n95. See supra notes 82-83 and accompanying text.

n96. *Munroe v. Harrison, 85 F.2d 493, 495 (2d Cir. 1936).*

n97. *Farr v. Newman, 199 N.E.2d 369, 374 (N.Y. 1964).*

n98. *Farr, 199 N.E.2d at 371-72.*

n99. John P. Frank, The American Law Institute: 1923-1998, in The American Law Institute Seventy-fifth Anniversary: 1923-1998 3, 8 (1998).

n100. Id. at 3, 8-9 (citing statement of Elihu Root).

n101. Restatement (Third) of Agency ix (Tentative Draft No. 1, 2000).

n102. Restatement (Third) of Agency ix (Tentative Draft No. 1, 2000).

n103. Restatement (Third) of Agency ix (Tentative Draft No. 1, 2000).

n104. Restatement (Third) of Agency xi (Tentative Draft No. 22, 2001).

n105. See Restatement (Third) of Agency (Tentative Draft No. 4, 2003).

n106. Restatement (Third) of Agency 5.03 (Tentative Draft No. 3, 2002). This has subsequently been revised to read:

5.03 Imputation of Notice of Fact to Principal

For purposes of determining a principal's legal relations with third parties, notice of a fact that an agent knows of has reason to know is imputed to the principal if knowledge of the fact is material to the agent's duties to the principal, unless the agent

a) acts adversely to the principal as stated in 5.04, or

b) is subject to a duty to another not to disclose the fact to the principal.

Restatement (Third) of Agency 5.03 (Tentative Draft No. 4, 2003).

n120. Restatement (Third) of Agency 5.04 cmt. c (Tentative Draft No. 3, 2002).

n121. See generally Restatement (Third) of Agency 5.04 cmt. c (Tentative Draft No. 3, 2002) (illustrating adverse actions of agents).

n122. See *199 N.E.2d 369* (NY, 1964) (holding that the mere fact the attorney acted for both vendor and purchaser of realty, with purchaser's knowledge, could not insulate purchaser).

n123. See generally id.

n124. Restatement (Third) of Agency 5.04 cmt. c (Tentative Draft No. 3, 2002).

n125. See Restatement (Third) of Agency 5.04 (Tentative Draft No. 3, 2002).

n126. Restatement (Third) of Agency 5.04(1) (Tentative Draft No. 3, 2002).

n127. Restatement (Third) of Agency 5.04(1)(a) (Tentative Draft No. 3, 2002).

n128. Restatement (Third) of Agency 5.04(1)(b) (Tentative Draft No. 3, 2002).

n129. See Restatement (Third) of Agency 5.04 (Tentative Draft No. 3, 2002).

n130. *Restatement (Second) of Agency 268*, 272 (1958); Restatement (Third) of Agency 5.03 (Tentative Draft No. 3, 2002); Restatement (Third) of Agency 5.03 (Tentative Draft No. 4, 2003); *Munroe v. Harriman, 85 F.2d 493, 494-95 (2d Cir. 1936); Farr v. Newman, 199 N.E.2d 369, 371* (NY, 1964).

n131. *Restatement (Second) of Agency 281*, 282 (1958); Restatement (Third) of Agency 5.03, 5.04 (Tentative Draft No. 3, 2002); Restatement (Third) of Agency 5.03, 5.04 (Tentative Draft No. 4, 2003).

n132. *Restatement (Second) of Agency 281* (1958); Restatement (Third) of Agency 5.03 (Tentative Draft No. 3, 2002); Restatement (Third) of Agency 5.03 (Tentative Draft No. 4, 2003).

n133. *Restatement (Second) of Agency 282* (1958); Restatement (Third) of Agency 5.03, 5.04 (Tentative Draft No. 3, 2002); Restatement (Third) of Agency 5.03, 5.04 (Tentative Draft No. 4, 2003).

n134. See supra notes 33, 64 and accompanying text.

n135. See Restatement (Third) of Agency 5.03 cmt. b (Tentative Draft No. 3, 2002).

n136. See Restatement (Third) of Agency 5.03 cmt. b (Tentative Draft No. 3, 2002).

Hon. Cindy L. Burdue
Hearing date and time: October 8, 2008 at 9:45 am
WITH ORAL ARGUMENT

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

In the Matter of **CHICAGO TITLE INSURANCE COMPANY,** An authorized insurer	Docket No. 2008-INS-0002 OIC Docket No. D07-308 **DECLARATION OF JAMES E. TOMPKINS**

I, James E. Tompkins, state and declare as follows:

1. My name is James Tompkins. I make this Declaration on the basis of first hand personal knowledge. I am over the age of eighteen (18) years. I am competent and authorized to testify to the matters set forth herein.

2. I am employed by the Washington State Office of the Insurance Commissioner (OIC). My title is Staff Attorney within the Policy Division. I have been employed by the OIC for over 16 and a half years and before that over 14 years in the title insurance industry, with most in the state of Washington.

3. Title insurance, at least as it exists in Washington, is unlike many other common types of insurance. It is different from automobile insurance and homeowner insurance, which protect an insured policyholder from an event that may occur in the future, in that title insurance offers protection from claims that might have occurred in the past. It protects against losses arising from problems connected to a particular parcel of real estate obtained in a land sale transaction and/or refinance transaction. Examples of the kinds of losses that title

insurance can protect against include such things as forged signatures on transfer documents, unpaid real estate taxes, and liens that cloud title on the property.

4. In the state of Washington, title insurance is also different because it cannot be transacted without a title insurer either owning or leasing a "complete set of tract indexes," sometimes referred to as a "title plant." While Washington's Insurance Code ("Code") contains particular requirements, such as those set forth in RCW 48.05 *et seq*, which all insurers must comply with, the Code adds further requirements just for title insurers. One is that title insurers must either own, or lease and maintain, "a complete set of tract indexes of the county in this state in which its principal office is located." RCW 48.29.020. See also WAC 284-16-030 (defining "complete set of tract indexes.") In addition, a title insurer "may be authorized to transact business in only such additional counties as to which it owns or leases and maintains, or has a duly authorized agent that owns or leases and maintains, a complete set of tract indexes." RCW 48.29.040(1). Consequently, under the Code, a title insurer that does not have a title plant of their own in a given county (such as Chicago Title Insurance Company or "Chicago Title") is dependent on a title agent that owns or leases a title plant in that other county that the insurer appoints as its agent to transact title insurance. Similarly, such agents also cannot transact title insurance without the appointment of a title insurer who is in possession of a duly issued Certificate of Authority. In this way, many title insurers and their title plant agents are codependent and reliant on one another to conduct and transact title insurance.

5. Title insurance is also different in the way it is sold. Consumers normally purchase title insurance under the singular circumstances of a land sale transaction closing, quite unlike the circumstances under which other kinds of insurance are purchased. Given the reality of land sale transactions in Washington, the typical consumer who purchases a title insurance policy does so as just one more expensive step in the dizzying, convoluted and often confusing flurry of paperwork and signings that culminate in the closing of the home

purchase. Many such consumers who might otherwise normally shop around and carefully compare prices before buying insurance typically emerge from their home closing or refinancing having paid for a title insurance policy that they know virtually nothing about. Title insurance is not only frequently purchased in this context, it is sometimes mandatory to obtain the funds needed to close on a property purchase. Most commercial lenders financing home purchases will even require Washington consumers to purchase title insurance. Consequently, under these circumstances, many Washington consumers most often simply obtain a policy from whichever title insurer one or more of various major players involved in the consumer's home sale scenario recommends. Such players include the real estate agents and agencies, banks, lenders, builders, developers and others. Call them middlemen or go-betweens.

6. The title insurance market in Washington consists of a dozen carriers, ranging in size from regional companies to national affiliates. The market itself, while varying from region to region within the state, is dominated by four groups of affiliated companies who, combined, sell about 97 percent of the title insurance policies sold in Washington. These four groups are First American, Fidelity, Land America, and Stewart. Fidelity owns several title insurance underwriters, one of which is Chicago Title.

7. Title insurance companies like Chicago Title, in marked contrast to property, casualty, life and other traditional insurance carriers, do not market their insurance products directly to the consumers who pay for them. Instead, the title insurance industry operates on what is termed a "reverse competition" model. Reverse competition means that title insurance is solicited at the middleman or go-between level.

8. Reverse competition, as the term suggests, isn't a model that benefits consumers through market-driven forces. Consumers are bypassed completely as title companies spend nearly all of their marketing budgets "wining and dining" real estate agents, banks, lenders, builders, developers and others middlemen and go-betweens in a position to steer their home-

buying clients to particular title insurance companies for their title insurance needs. Such incentives are the "inducements" which are at issue in this matter.

9. In 1988, due to complaints and reports of abuses, the OIC adopted WAC 284-30-800 (amended in 1990) in an attempt to curtail the "wining and dining" or illegal inducements within the title insurance industry. As WAC 284-38-800 states, it was enacted in light of the fact that reverse competition created a situation where consumers "do not always" end up having "free choice or unbiased recommendations as to the title insurer selected." WAC 284-38-800(1). Despite these efforts, the title insurance industry nonetheless created new schemes and methods for providing gifts and inducements in order to obtain title insurance business. Consequently, the Commissioner has continued to monitor the title industry and illegal inducements regulated by RCW 48.30.140-150 and WAC 284-30-800.

10. In 2006, the OIC issued a report entitled "An Investigation into the Use of Incentives and Inducements by Title Insurance Companies" (the "Report). Attached hereto and incorporated by reference herein as **EXHIBIT "A"** is a true and correct copy of the Report.[1] The OIC Report describes, among other things, the OIC's findings during a 10-month investigation of select title insurers and agents as their conduct related to the illegal inducement provisions of WAC 284-30-800.

11. As the OIC Report explains, the investigation uncovered a clear pattern of inducements and incentives in the title industry, including in particular Chicago Title. The Report found that "the use of inducements and incentives by title companies to obtain title insurance business in Washington appeared to be widespread and pervasive." Report at 3. Although details and form varied from company to company, it became apparent that the inducements and incentives represented similar patterns of behavior for all the companies.

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[1] A similar report concerning the California title insurance industry also articulates similar problems observed throughout the industry. (*See* Birny Birmbaum, "*Report to California Insurance Commissioner, An Analysis of Competition in the California Title Insurance and Escrow Industry*," §§ 5.1-5.2, December 2005, available at www.insurance.ca.gov.) A copy of that report is a public record, is available at www.insurance.ca.gov and is incorporated herein by reference.

Generally speaking, all of the companies investigated used some scheme or inducement (i.e., food/drinks, classes, meals, brokers opens, co-advertising, gifts, golf, sporting events, etc.) to influence the title industry's middlemen (real estate agents, banks, lenders, builders, developers and others) who were in a position to steer title insurance business to them.

12. As indicated, the Report identified Chicago Title as a violator of Washington's inducement laws. The Report explicitly found that while this affiliate "attempts to comply with the law, [ ] intentions don't necessarily translate into actions." For example, the Report noted several particular kinds of violations for benefits exceeding the $25 annual spending limit on middlemen and go-betweens:

> A review of [Chicago Title]'s records revealed that [Chicago Title] does pay some heed to the $25 limit. Yet, investigators found that [Chicago Title] repeatedly violated the limit on many occasions. [Chicago Title] often participated in coadvertising campaigns, paying the production costs and postage for flyers more than 150 times during the 18-month period. Those costs individually ranged from $100 to more than $4,300 each.
>
> [Chicago Title] made extensive use of sporting tickets, including one Seahawk game for which it paid nearly $2,400 for 26 seats. Some of these events included the use of chartered buses for transportation.
>
> [Chicago Title] spent thousands of dollars paying for food at hundreds of middlemen meetings and broker opens. [Chicago Title] sponsored golf tournaments, spending in excess of $3,000.
>
> [Chicago Title] also hosted receptions and hospitality suites at conventions on three occasions, spending a total of more than $13,000.
>
> [Chicago Title] ranks somewhere in the middle of the pack when its violation record is compared to other companies.

See Report at 6.

13. The OIC Report also made clear that one of its key purposes was to put the title insurance industry on notice that the status quo must change. As had been done for many years in the past, the Report again instructed the industry about the laws related to inducements and incentives and how to conduct business within the letter of the law. The OIC Report also put the title insurance industry on notice that an enforcement program would be undertaken, and that there would be consequences for those companies that failed in future

efforts to comply with anti-inducement laws and regulations.

14. Moreover, following the investigation and issuance of its Report, the OIC issued Technical Assistance Advisory ("TAA") 06-06 to title insurance companies, clearly stating the applicable law and offering additional compliance guidance. Attached hereto and incorporated by reference herein as **EXHIBIT "B"** is a true and correct copy of the TAA. This TAA referenced the findings of the investigation and the Commissioner simultaneously issued a press release that provided notice that the OIC would not pursue an enforcement effort aimed at past violations, rather enforcement actions would proceed on a prospective basis. The press release clearly outlined the OIC's expectation for future compliance, and provided ample warning to the title industry about penalties and sanctions that both companies and individuals could expect for future failures to follow the law.

15. OIC since made good on its promise to continue to monitor and regulate the title insurance industry. In 2007 it completed a follow-up investigation and audit of Chicago Title's title plant agent's office at Land Title of Kitsap County, Inc. Based on what the OIC discovered from this, the OIC took the position that to efficiently and properly regulate the industry it would initiate the instant enforcement action against Chicago Title.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 17th day of September, 2008 at Tumwater, Washington.

James E. Tompkins

Hon. Cindy L. Burdue
Hearing date and time: October 8, 2008 at 9:45 am
WITH ORAL ARGUMENT

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

In the Matter of **CHICAGO TITLE INSURANCE COMPANY,** An authorized insurer	Docket No. 2008-INS-0002 OIC Docket No. D07-308 **DECLARATION OF CAROL SUREAU**

Carol Sureau, under penalty of perjury, declares as follows:

1. I am Deputy Commissioner of the Legal Affairs Division for the Washington State Office of Insurance Commissioner ("OIC"). I have been so employed since October 2000 and have been employed at the OIC since 1999. I am over the age of eighteen years old and I am competent to testify. I make this Declaration based upon my personal knowledge.

2. I have read the Motion for Summary Judgment filed by Chicago Title Insurance Company (the "Appellant").

3. In the Motion, the Appellant contends, among other things, that the Appellant *cannot* be held liable for the actions of its agent, Land Title of Kitsap County, Inc., and that OIC lacks authority to seek to fine Appellant for violations of the illegal inducement laws (RCW 48.30.140-150 and WAC 284-30-800). I offer this Declaration to help clarify and explain the Commissioner's regulatory authority under the Insurance Code (Title 48 RCW) and why the Commissioner's attempt to impose the penalty authorized by RCW 48.05.185 is permitted in this case.

4. All insurance in Washington, including title insurance, is regulated under the Washington Insurance Code, Title 48 RCW. The Insurance Code creates an Insurance Commissioner under RCW 48.02.010 who is charged with regulating "all insurance and insurance transactions in this state, or affecting subjects located wholly or in part or to be performed within this state, and all persons having to do therewith" pursuant to RCW 48.01.020.

5. RCW 48.01.030, entitled "Public interest," begins the Code with a strongly worded expression of public policy that the Commissioner's responsibility in carrying out this mission is a matter of the highest public policy of this State:

> The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

6. In order to achieve this public policy, the Legislature vested the Commissioner with broad enforcement authority and discretion. RCW 48.02.060 explains the broad authority and discretion vested in the Commissioner.

7. RCW 48.02.060(1) provides that the Commissioner has the authority expressly conferred by, and also reasonably implied from, the provisions of the Insurance Code. Likewise, RCW 48.02.060(3)(c) authorizes the Commissioner to carry out any "examinations, investigations, hearings, in addition to those specifically provided for, useful and proper for the efficient administration of any provision of" the Code.

8. Of course, the Commissioner's enforcement authority is not limited to the express provisions of RCW 48.02.060. For example, RCW 48.02.080(3) permits the Commissioner to issue a cease and desist order if there is cause to believe that any person is violating or about to violate a provision of the Insurance Code. As another example, under RCW 48.17.530 the Commissioner may suspend, revoke or refuse to issue or renew an agent's license if the person violates a provision of the Insurance Code. Similarly, under

RCW 48.05.140 the Commissioner may refuse, suspend, or revoke an insurer's certificate of authority for any failure to comply with any provision of the Insurance Code.

9. Ultimately, the Commissioner has broad authority and discretion, along with a number of enforcement tools at his disposal, to properly and efficiently carry out the provisions of the Insurance Code for the public interest.

10. Further, RCW 48.04.010(a) provides that the Commissioner "may hold a hearing for 'any purpose within the scope of the Insurance Code as he or she deems necessary." As such, the OIC acted well within its authority when it issued the Notices of Hearing to the Appellant. And it is worth noting that the OIC first attempted to resolve this matter through Consent Orders, but when the Appellant refused to accept such resolution, the OIC's only course under the statute was to file the Notices of Hearing in order to resolve the matter.

11. RCW 48.05.185 clearly authorizes the Commissioner to levy a fine between $250 and $10,000 after a hearing, and in addition to or in lieu of the suspension, revocation, or refusal to renew an insurer's certificate of authority. This statute has been applied to all manner of regulatory enforcement cases before the OIC—including cases involving title insurance violations, such as this case. (*Note*: all enforcement/disciplinary orders for the last 10-years are available on the OIC's website.)

12. Ultimately, not only did the Commissioner have authority to issue Notices of Hearing in this case under RCW 48.04.010(a), but the Commissioner has the authority to seek a fine for the alleged illegal inducement violations under RCW 48.05.185.

SIGNED this 24th day of September, 2008.

Carol Sureau