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

FILED
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OIC
Patricia D. Petersen
Chief Hearing Officer

In The Matter Of: LAWYERS TITLE INSURANCE Corporation, An Authorized Insurer, Appellant.	Docket No. 2008-INS-0004
In The Matter Of: COMMONWEALTH LAND TITLE INSURANCE COMPANY, An Authorized Insurer, Appellant.	Docket No. 2008-INS-0005 Docket No. 2008-INS-0006 ORDER DENYING MOTION TO STRIKE AND MOTION FOR SUMMARY JUDGMENT

I. History of the proceedings

The Washington State Office of the Insurance Commissioner (OIC) commenced these adjudications on January 25, 2008. At the request of the respondents, the files were transferred on April 21, 2008 to the Office of Administrative Hearings (OAH) for hearing. An order was entered, denying motions to dismiss.

II. Motion for Summary Judgment

On November 4, 2008, the Respondents filed identical motions in each proceeding for summary judgment. Office of the Insurance Commissioner answered.

II. Oral argument on the motion

On November 21, 2008, Administrative Law Judge C. Robert Wallis convened a telephonic prehearing conference in Olympia, Washington pursuant to RCW 34.05.431 and

WAC 10-08-130 to hear oral argument on the motion. The Office or the Insurance Commissioner was represented by Alan M. Singer and Thomas Rowland, Staff Attorneys, OIC. Respondents Lawyers Title Insurance Corporation and Commonwealth Land Title Insurance Company, were represented by Bryan Graff and Jerry Kindlinger, attorneys, Seattle.

These matters involves allegations by the Office of the Insurance Commissioner (OIC) that the respondents, Lawyers Title Insurance Corporation and Commonwealth Land Title Insurance Company, are vicarikously responsible for violations of law or OIC regulation by other companies that act as agents for respondents. Respondents allege that the agent companies are independent contractors, not under the respondents' control, and that therefore the respondents cannot be held to vicarious responsibility.

Although complaints are alleged in three separate dockets, the motions and responses are identical. These procedural motions were heard on a single record and are resolved in a single order that will be filed in each proceeding.

Respondents have moved for summary judgment on the basis that that Washington law does not allow the OIC to penalize title underwriters for alleged violations of WAC 284-30-800 committed by separate companies that the respondents do not control. The OIC answered, and the Respondents moved to strike certain portions of the answer.

DETERMINATIONS:

For the reasons set forth herein, the motion to strike is DENIED, and the motions for summary judgment are DENIED.

III. Discussion

A. MOTION TO STRIKE

The motion for summary judgment and the answer were both supported with extensive Declarations and attachments. Respondents allege that two OIC reports (appended to a Declaration in support of the answer to the motion for summary judgment), and references to the reports, should be stricken.

The OIC Reports purport to address alleged activity by regulated companies with reference to the rule and activities in question in these matters.

Respondents' motion to strike is based on its view that the facts referenced in the cited passages may not properly be admitted into evidence. Respondents make several arguments related to admissibility:

First, Respondents argue that the reports are irrelevant, in that they do not address the issue of vicarious liability and that the specific allegations in the reports are not at issue

here. I disagree; the reports identify an asserted compliance problem and describe how the industry operates, although they are not shown to address any specific matter at issue in these proceedings. While the reports' relevance is tangential, they do describe the manner in which the industry operates and are not subject to exclusion on the grounds of irrelevancy. Second, Respondents argue that any relevance would be outweighed by the danger of unfair prejudice. I disagree; information expressed in a prior report that does not relate to specific allegations will not prejudice a decision based on the evidence of actions by parties involved in the matters alleged.

Third, Respondents argue that the contents of the reports are inadmissible hearsay. Again, I disagree. Accepting (for purposes of this discussion only) that the documents constitute hearsay and that Washington Rules of Evidence could require rejection in a civil trial, application of those rules is slightly different in administrative proceedings than in civil proceedings.

RCW 34.05.452 reads in part as follows:

> (1) Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. The presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state. The presiding officer may exclude evidence that is irrelevant, immaterial, or unduly repetitious.
>
> (2) If not inconsistent with subsection (1) of this section, the presiding officer shall refer to the Washington Rules of Evidence as guidelines for evidentiary rulings.

As a government document, the reports are entitled to credibility to the extent they describe events that the agency perceives as possible issues to address, and they would be relied on for that purpose by a reasonable person. The report is not irrelevant, it is not immaterial, and it is not unduly repetitious. It is not inadmissible and the Washington Rules of Evidence are inconsistent with the statute for application here. The reports are not excludible for the purposes of the declaration.

In summary, while the cited material is not proof of violation by respondents, it is not inadmissible in support of the response to the motion for summary judgment.

B. MOTIONS FOR SUMMARY JUDGMENT

Respondents move for summary judgment in each of the proceedings, arguing that because their relationships with the companies alleged to have committed violations is one of independent contract rather than master and servant, the respondents are immune from vicarious responsibility under the law. Respondents point to contracts that purport to define

as independent contract the relationships between the Respondents and the businesses that bring them title insurance business, and expressly disavow any control by the Respondents. They cite to a decision by an administrative law judge of the Office of Administrative Hearings that supports their view.

The OIC points to the decision of another administrative judge that supports its view, and responds essentially that the law requires an agency relationship between title insurance companies and businesses that attract business for them, and does not permit circumvention by efforts to create an independent contractor relationship. The OIC also asserts that other factors, if proved at hearing, may demonstrate the existence of control despite existence of contracts that purport to create an independent contractor relationship.

Respondents and the OIC agree that the alleged violators are agents of the Respondents. They disagree about the definition and the consequences of that label. I agree with Respondents that the contracts they cite do purport to create an independent contractor relationship, and in that sense agree with the cited prior decision to the extent that it finds the existence of a purported independent contract. However, other aspects of the business relationship between the Respondents and their agents – such as authority to review the agents' practices, the provision of information or advice – may, in actual operation, indicate the existence of control that is inconsistent with the relationship defined on paper.

The parties also disagree on the mechanism in the relationships between Respondents and the alleged violators by which Respondents acquire business. The OIC alleges that Respondents' agents are just that – agents, under the terms of applicable statutes – and that because of statutory requirements, Respondents' agents must be either agents under Respondents' controls or brokers; the law allows no other result. Respondents vehemently reject that analysis. They answer that they do not pay their agents' costs and do not rely on the agents for solicitation of business, although they do not appear to dispute OIC's assertions that the agents do deliver business to them and that, of a typical title insurance premium, a Respondent receives only about ten per cent. and the remainder is received by the agent.

I agree with the Office of the Insurance Commissioner that (1) the existence of a document purporting to create an independent contractor relationship does not require the conclusion either that a true independent contractor relationship exists, and that (2) the law might forbid insurers from creating an independent contract relationship as a means of circumventing the requirements of law.

I disagree with Respondents' assertion that the existence of a contract purporting to define an independent contractor relationship will, as a matter of law, exempt an insurer from statutory and regulatory requirements applicable to the relationships and responsibilities among insurers, agents, brokers and solicitors. However, I disagree with the OIC (which made no motion for summary determination) that the provisions of law defining insurer, agent, broker and solicitor apply as a matter of law to title company and title insurer

operations, to require Respondents to bear responsibility for its agents' violations of law or rule. Facts adduced at hearing may affect whether the law allows independent contracts in title insurers' relationships with its agents, and if so, whether the relationship between Respondents and the alleged violators is a true independent contractor relationship.
In the hearings, each party will have the opportunity to present evidence and argument that support its views. To the extent presentations would be repetitious, parties may by agreement incorporate portions of earlier records in later proceedings.

Today I merely deny Respondents' motion for summary judgment. The existence of an contract purporting to create an independent contract relatiohship between the Respondents and the alleged violators does not alone, as a matter of law, require dismissal of the complaint. Issues of fact and law remain for exploration at the hearings scheduled in each matter.

IV. Order

IT IS HEREBY ORDERED, That the motion to strike is DENIED, and the motions for summary judgment are DENIED..

Dated and Entered on the 10th day of December, 2008 at Olympia, Washington.

C. Robert Wallis
Administrative Law Judge
Office of Administrative Hearings
2420 Bristol Cort SW
PO Box 9046
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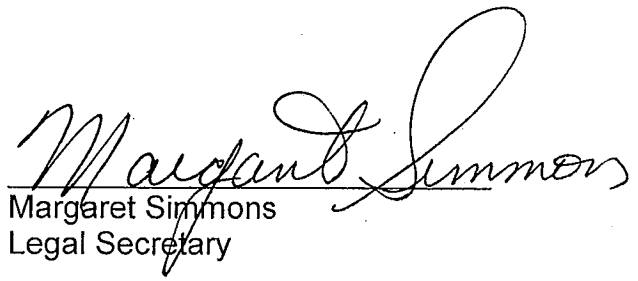
Certificate of Service

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on this 10th day of December 2008 at Olympia, Washington.



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