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

Patricia D. Peterson
Chief Hearing Officer

In the Matter of

Docket No. 2008-INS-0002

**CHICAGO TITLE INSURANCE
COMPANY,**

**OIC'S BRIEF IN SUPPORT OF
REVIEW OF INITIAL ORDER**

An authorized insurer

Is a title insurer responsible for the unfair and illegal sales practices of its appointed agents? Chicago Title Insurance Company ("Chicago" or "CTIC") urged below, and the OAH Judge agreed, that the answer is "no". The OIC staff believes the answer is clearly "yes". Hence this brief¹ and the OIC Staff's request that the Chief Presiding Officer set aside the Initial Order Granting Summary Judgment entered by Administrative Law Judge Cindy Burdue on October 30, 2008 ("Order"), enter an order agreeing that a title insurer is responsible for the unfair and illegal sales practices of its appointed agents, and remand this matter back to the OAH for hearing on the merits.

BACKGROUND

This is an enforcement action brought by the OIC against Chicago for illegal inducements provided by Chicago through its exclusive agent in Kitsap, Mason, Clallam and Jefferson counties, Land Title Company of Kitsap County, Inc. ("Land" or "LT"). The matter was decided below by OAH Administrative Law Judge, Cindy Burdue, who granted

¹ This petition is also supported by the "Declaration of Alan Michael Singer in Support of Review of Initial Order," filed herewith. Although findings of fact and conclusions of law on summary judgment are surplusage that may be disregarded by a reviewing court, *Redding v. Virginia Mason Medical Center*, 25 Wn. App. 425, 878 P.2d 483 (1994), the declaration sets forth portions of the Order to which exception is taken pursuant to WAC 10-08-211(3).

1 Chicago's motion for summary judgment based on theory that Chicago's failure to control its
2 agent relieves Chicago of responsibility for the agent's actions under common law agency
3 principles.

4 Although Judge Burdue's Order recites the definition of "agent" set forth in RCW
5 48.17.010, the Order makes no attempt to apply that definition to the uncontroverted facts,
6 which are in summary as follows.

7 FACTS

8 It is uncontroverted that Chicago appointed Land as its exclusive agent and that Land
9 solicited and took title insurance applications on *only* Chicago's behalf — and that Land was
10 legally able to do so *only* on Chicago's behalf — in Kitsap, Mason, Clallam and Jefferson
11 counties.² It is uncontroverted that Land holds only a title agent's license and is not
12 authorized to solicit or transact insurance as a broker. It is also uncontroverted, for purposes
13 of the underlying motion, that during its appointment as Chicago's exclusive agent, Land did
14 give illegal inducements to realtors and others who were in a position to refer title insurance
15 business to it.³

16 Although findings of fact and conclusions of law on summary judgment are
17 surplusage that may be disregarded by a reviewing court, *Redding v. Virginia Mason Medical*
18 *Center*, 25 Wn. App. 425, 878 P.2d 483 (1994), the Order's "Undisputed Findings of Fact"
19 correctly acknowledged that the violations of the inducement regulation by Land included
20 such things as wining and dining of realtors, builders and mortgage lenders, golf tournaments,
21 free advertising, and professional football championship game tickets in amounts over the
22 \$25 limit allowed by WAC 284-30-800. (Finding #3.) The Order's findings of fact also
23 correctly acknowledges that Chicago is wholly owned and Land is partly owned (forty-five

² See declaration of Alan Michael Singer filed in support of OIC's response and opposition to Chicago's motion for summary judgment, at exhibits C, D, E, and F. See also OIC's brief in response and opposition to Chicago's motion for summary judgment at page 8, footnotes 16, 17, and 18. See also Findings of Fact #1, #6, and #12.

³ See Order at page 2, finding 2.

1 percent) by companies who have the same parent (Finding #7), and that between 33% and
2 44% of Land's board of directors since 2002 work or have worked for Chicago's parent or
3 one of its subsidiaries. (Finding #8.)

4 Based upon the conclusory declaration of Land's president, Gene Kennedy, the
5 Administrative Law Judge entered a finding of fact that Land does not market "on behalf" of
6 Chicago, but "only for itself" (Finding #24). On the other hand, citing the Declaration of
7 Chicago's Brad London, Finding of Fact #6 states that "CTIC conducts no marketing
8 activities in Kitsap and Mason counties" and that "CTIC relies entirely on the efforts of LT to
9 market the title insurance policies in these geographic areas."⁴

10 The Administrative Law Judge also made a finding of fact that "there is no evidence
11 that [Chicago] did control the actions of LT..." (Finding #20) On the other hand, conclusion
12 of law #15 recognized that Land is an "agent" under RCW 48.17.010, and conclusion of law
13 #14 recognized that as the contract designated Land as Chicago's "agent," "an agency
14 relationship is suggested by the contract." The Administrative Law Judge found that
15 Chicago's contract required Land to comply with all laws and regulations (Finding #16), but
16 did not acknowledge that the contract also authorized — and in fact, *required* — Chicago to
17 issue whatever written guidance and instructions it chose to ensure its agent *did* comply with
18 WAC 284-30-800.⁵ The Administrative Law Judge also did not acknowledge that Chicago
19 required Land to "forward annually" to Chicago "a copy of [Land's] balance sheet and profit
20 and loss statement" revealing all of Land's operating expenses,⁶ but did find that the contract

21 ⁴ Actually, the undisputed evidence shows that Chicago conducts no solicitation or marketing on its
22 own behalf in the four counties where Land is licensed — Kitsap, Mason, Clallam and Jefferson. *See*
23 declaration of Alan Michael Singer filed in support of OIC's response and opposition to Chicago's
motion for summary judgment, at exhibit E, e.g., interrogatory #13, request #4.

⁵ *Id.* at ¶¶ 4B(2) and 8E.

⁶ *Id.* at ¶ 4M.

1 also reserved Chicago Title's right to freely examine all pertinent Land records "which relate
2 to the title insurance business carried on by [Land Title] for [Chicago Title]." ⁷

3 From her findings of fact, the Administrative Law Judge concluded, *inter alia*, that
4 "CTIC is not obligated by law to monitor its UTS agent's compliance with law" and that "the
5 agency relationship is defeated by the fact that CTIC did not have the right to control the
6 marketing actions or business procedures of LT and therefore the OIC cannot impute the
7 illegal acts of LT to CTIC." (Conclusion of Law # 28.)

8 The OIC staff respectfully submits that Judge Burdue's Order should be reversed for
9 two reasons. First, it is inconsistent with the provisions of the Insurance Code defining
10 insurance agents and distinguishing between insurance agents and brokers, and it effectively
11 converts Chicago's appointed agent into an independent contractor broker. Second, the Order
12 is also not supported by the facts of record. Although the agency contract and common law
13 rules of agency are irrelevant to the issue presented, the Order is even contrary to the very
14 common law rules of agency upon which the Administrative Law Judge purported to rely.

15 Implicit in Judge Burdue's ruling is the proposition that an insurer may, by a secret,
16 private agreement, evade responsibility for the way its insurance is sold by failing to control
17 its agency force. Though this proposition is of obvious regulatory concern beyond the
18 contours of this case, the Order reflects the opposite of what the law provides. Accordingly,
19 the OIC staff requests that the OAH Administrative Law Judge's erroneous conclusions and
20 ruling be reversed and this matter remanded for hearing.

21 ARGUMENT AND AUTHORITY

22 A. Review is *De Novo*.

23 The Administrative Law Judge's Initial Order in this matter grants Chicago's Motion
for Summary Judgment and effectively terminates the OIC's enforcement action.

Accordingly, under both the Administrative Procedures Act ("APA") and the rules governing

⁷ See *Id.* at ¶ 11 and Finding #15.

1 appellate review, review is *de novo* and the Initial Decision and Order is entitled to no
2 deference from the reviewing officer.

3 RCW 34.05.464(2) provides in pertinent part that “As authorized by law, an agency
4 head may appoint a person to review initial orders and to prepare and enter final agency
5 orders.” Chief Hearing Officer, Patricia Peterson, has been so appointed by the Washington
6 State Insurance Commissioner. And under WAC 284-02-080(2)(c), “[t]he initial order of an
7 administrative law judge will not become a final order without the commissioner’s review.”

8 With the limited exception of findings based upon *viva voce* testimony where witness
9 demeanor may be relevant, the reviewing officer is free to disregard both findings of fact and
10 legal conclusions entered by the initial presiding Administrative Law Judge. RCW
11 34.05.464(4) provides as follows:

12 The officer reviewing the initial order (including the agency head reviewing an
13 initial order) is, for the purposes of this chapter, termed the reviewing officer.
14 The reviewing officer shall exercise all the decision-making power that the
15 reviewing officer would have had to decide and enter the final order had the
16 reviewing officer presided over the hearing, except to the extent that the issues
17 subject to review are limited by a provision of law or by the reviewing officer
18 upon notice to all the parties. In reviewing findings of fact by presiding
19 officers, the reviewing officers shall give due regard to the presiding officer's
20 opportunity to observe the witnesses.

21 See also RCW 34.05.464(5), providing that “(t)he reviewing officer shall personally consider
22 the whole record or such portions of it as may be cited by the parties” and RCW 34.05.464(6),
23 providing that “the reviewing officer shall afford each party an opportunity to present written
24 argument and may afford each party an opportunity to present oral argument.”

25 These rules are consistent with the rules governing appellate judicial review of orders
26 granting summary judgment, set forth in *Redding vs. Virginia Mason Medical Center*, supra,
27 at 75 Wn. App. 485, as follows:

28 In reviewing a summary judgment, the appellate court must draw all
29 reasonable inferences from the pleadings, affidavits, depositions and
30 admissions in the light most favorable to the nonmoving party. *Hemenway v.*

1 *Miller*, 116 Wn.2d 725, 731, 807 P.2d 863 (1991). The reviewing court
2 considers all facts submitted, engaging in the same inquiry as the trial court,
3 *Scott Galvanizing, inc. v. Northwest EnviroServices, Inc.*, 120 Wn.2d 573, 580,
4 844 P.2d 428 (1993), and may affirm on any basis supported by the record.
5 *Hadley v. Cowan*, 60 Wn. App. 433, 804 P.2d 1271 (1991). It is unnecessary
6 for the trial court to enter findings on summary judgment. CR 52(a)(5)(B). Any
7 that are entered may be disregarded on appeal, because summary judgment
8 determines issues of law, not issues of fact. *Duckworth v. City of Bonney
9 Lake*, 91 Wn.2d 19, 586 P.2d 860 (1978). The moving party bears the burden
10 of showing the absence of a material issue of fact. *Safeco Ins. Co. of America
11 v. Butler*, 118 Wn.2d 383, 395, 823 P.2d 499 (1992).

12 Accordingly, review by the Chief Hearing Officer is *de novo* and the initial decision is
13 entitled to no deference.

14 **B. The Order is clearly erroneous because the Insurance Code fixes the relationship
15 between the insurers and their agent as one of principal/agent; common law
16 agency and independent contractor principles do not apply.**

17 The Initial Order entered by the Administrative Law Judge purports to rely on the
18 common law of agency. This reliance is misplaced, since Chicago's relationship to Land is
19 fixed by the Insurance Code.

20 Under the Insurance Code there are only two options. Either Land was Chicago's
21 agent, which is what the OIC contends and what Land's title insurance agent license, agency
22 agreement, and appointment clearly state, or it was acting as an unlicensed broker.

23 RCW 48.17.010 defines an "agent" as follows:

"Agent" means any person appointed by an insurer to *solicit* applications for
insurance on its behalf. If authorized so to do, an agent may effectuate
insurance contracts. An agent may collect premiums on insurances so applied
for or effectuated. (Emphasis added.)

"Solicitation" under the insurance code encompasses a broad array of activities and includes
any endeavor to obtain an insurance subscription. Giving illegal inducements to realtors who
refer title insurance business obviously constitutes one form of solicitation. Although this
proposition seems self evident, any doubt is surely removed by *National Federation of
Retired Persons v. Insurance Commissioner*, 120 Wn.2d 101, 110-111, 838 P.2d 680 (1992),
in which the Washington Supreme Court broadly interpreted the term "solicit" as applied to

1 insurance agents and held that the generation and sale of lead cards involves an insurance
2 solicitation and requires an agent's license even though no specific insurance company or
3 policy was ever mentioned:

4 Our Insurance Code, RCW Title 48, does not specifically define the term
5 "solicitation", and a review of Washington case law has yielded no
6 authority defining the term in the context of RCW 48.01.060. However,
7 in defining the word "solicits" in the context of its insurance code, at
8 least one State (Oregon) has held that the term "includes the kind of
9 activities normally engaged in by a person proposing that another person
10 subscribe to an insurance policy" (Footnote omitted.) According
11 to *Paulson v. Western Life Ins. Co.*, 292 Or. 38, 636 P.2d 935 (1981),
12 "solicits" includes inviting, requesting, urging, or advising a person to
13 subscribe to insurance, endeavoring to obtain such a subscription, or
14 approaching a person for the purpose of receiving an application for
15 insurance coverage.

16 Chicago title insurance policies were undeniably part of the title packages Land sold in
17 Kitsap County. Regardless of which of the inconsistent "marketing" findings of the
18 Administrative Law Judge one accepts and even if, *arguendo*, Land's motive for giving illegal
19 inducements was purely selfish, its inducements were part and parcel of its title insurance
20 solicitation activities and benefited Land's principal as well as itself.⁸ Practically, most of
21 Land's commissions — and *all* of Chicago's — depend on having customers to whom Land
22 issues Chicago's title policies, and Chicago left the necessary task of soliciting new business
23 entirely up to Land to perform. Because Land's illegal inducements were title insurance
solicitation, they fall squarely within the scope of the Insurance Code definition of what an
insurance agent is and what an insurance agent does. They also fall clearly within the scope
of Land's appointment to solicit title insurance on Chicago's behalf. Moreover, as Chicago is
just a corporation,⁹ it is "an artificial being, invisible, intangible, and existing only in

⁸ For example, only about 28% of Land's total revenue comes from escrow services. *See* Decl. Kennedy at ¶ 5 and Finding #25. *All* the rest of its revenue — clearly, the vast majority of it — comes from selling its appointing insurer's title insurance policies.

⁹ *See*, e.g., answer to interrogatory #1 in Decl. Singer Exh. D (Chicago is a Missouri corporation).

1 contemplation of law,' which by necessity 'must act through its officers, directors, or other
2 agents.'" *Broyles v. Thurston County*, __ Wn. App. __, __ P.3d __, (November 12, 2008),
3 citing 18 Am. Jur. 2d Corporations §§ 1, 2 (2004). This corporation not only chose to solicit
4 its title insurance only through its appointed agent, but by necessity, as a corporation, it *had to*
5 solicit through its agent. Thus, under the Code, its agent's conduct is therefore properly
6 attributable to its appointing insurer. Land's conduct is therefore attributable to Chicago.

7 This conclusion is confirmed by comparing the Insurance Code provisions governing
8 brokers. Except in dual license cases where a broker is appointed with an insurer, a broker
9 generally represents the insured and acts as an independent contractor. RCW 48.17.020,
10 which defines "broker," provides:

11 "Broker means any person who, on behalf of the insured, for compensation as
12 an independent contractor, for commission, or fee, and not being an agent of
13 the insurer, solicits, negotiates, or procures insurance or reinsurance, or the
14 renewal or continuance thereof, or in any manner aids therein, for insureds or
15 prospective insureds other than himself.

16 Even if Land had dual licenses, which it did not, and even if the Insurance Code authorized
17 title insurance brokers as well as agents, which it does not, Land's only possible relationship
18 to Chicago under the Insurance Code was that of Chicago's agent. Another Code provision
19 governing brokers, RCW 48.17.270(1), makes this clear:

20 A licensed agent may be licensed as a broker and be a broker to insurers for
21 which the licensee is not then appointed as agent. A Licensed broker may be
22 licensed as and be an agent as to insurers appointing such agent. The *sole*
23 *relationship* between a broker and an insurer as to which the licensee is
appointed as an agent shall, as to transactions arising during the existence of
such agency appointment, be that of *insurer and agent.*" (Emphasis supplied.)

These provisions confirm that the Insurance Code simply does not permit Chicago's
appointed agent to act as an independent contractor. As indicated, the "sole" relationship that
the Insurance Code legally permits an insurer to have with an appointed agent is that of
principal and agent. The "sole" capacity in which Land was legally permitted to act in
soliciting Chicago's title insurance business during the appointment was as Chicago's agent.

1 This conclusion is also fully consistent with WAC 284-30-800's language. It indicates
2 that RCW 48.30.150 and WAC 284-30-800¹ "are applicable to *title insurers and their*
3 *agents.*" (Emphasis added.) WAC 284-30-800(1). Likewise, WAC 284-30-800(2) states that
4 it is an unfair and deceptive act or practice for "a *title insurer or its agent, directly or*
5 *indirectly*, to offer, promise, allow, give, set off, or pay anything of value exceeding twenty-
6 five dollars. . . ." (Emphasis added.) WAC 284-30-800(2).

7 Because Land's status is legally established and fixed by the Insurance Code, not by
8 common law implied agency principles, Chicago's arguments below and the lengthy common
9 law discourse set out in the Administrative Law Judge's Initial Order are largely irrelevant.
10 The only case cited by Chicago below that even involves an insurance agent is *American*
11 *National Ins. v. Denke*, 95 S.W.2d 370, 373 (Tex. 1936), and this case does not involve the
12 agent's insurance business conduct, but his driving. *American* merely held that an insurer was
13 not vicariously liable for an auto accident caused by one of its agents who was driving his
14 wife's car to visit a prospect because the agent was not acting as the insurer's servant and
15 because the agent's transportation and driving behavior were not subject to the insurer's
16 control. This unsurprising holding scarcely illuminates the scope of an insurance agent's
17 authority to solicit business and does not diminish Chicago's responsibility for the solicitation
18 activities of its appointed agent here.

19 While neither the Order nor Chicago cited any authority suggesting that common law
20 agency principles govern in the regulatory enforcement context this matter presents, at least
21 one other state's highest court, in evaluating insurance code language elsewhere similar to
22 Washington's, observed that such language is intended to bind insurers by their agents'
23 actions, not release them. In *Paulson v. Western Life Ins. Co.*, 292 Or. 38, 636 P.2d 935
(1981), which was relied upon by the Washington Supreme Court in the *National Federation*
of Retired Persons case, *supra*, the Oregon Supreme Court considered ORS 744.165, which
provided as follows:

1 Any person who solicits or procures an application for insurance shall in
2 all matters relating to such application for insurance and the policy
3 issued in consequence thereof be regarded as the agent of the insurer
4 issuing the policy and not the agent of the insured. * * *

5 ORS 744.165 bears substantial similarity to Washington's RCW 48.17.010,
6 which provides:

7 "Agent" means any person appointed by an insurer to solicit applications
8 for insurance on its behalf. If authorized so to do, an agent may
9 effectuate insurance contracts. An agent may collect premiums on
10 insurances so applied for or effectuated.

11 And of ORS 744.165, the Oregon Supreme Court observed:

12 The goal the statute [ORS 744.165] aimed to achieve was to bind
13 insurers for the acts of those persons who were involved in the insurance
14 business, including but not limited to licensed agents, as regards the
15 soliciting and procuring of applications for insurance policies. As early
16 as 1889, the Illinois court, in construing a similar statute, stated:

17 "* * * The manifest intention was, to make such companies
18 responsible for the acts not only of its acknowledged agents, etc.,
19 but also of all other persons who in any manner aid in the
20 transaction of their insurance business." *Continental Ins. Co. v.*
21 *Ruckman*, 127 Ill 364, 378, 20 NE 77, 81 (1889); *accord:*
22 *Schomer and another v. The Heckla Fire Ins. Co.*, 50 Wis 575,
23 583, 7 NW 544, 547 (1880).

We believe that ORS 744.165 should be construed consistent with the
objective for which it was enacted, and that independently of common
law tests of agency it sets the policy of this state toward the position of
intermediaries in the sale of insurance.

Paulson, 292 Or. at 40-41.

The Administrative Law Judge appears to have relied primarily on *Stephens v. Omni*
Ins. Co., 138 Wn. App. 151, 153 P.3d 10 (2007), review accepted, 180 P.3d 1289 (2008),
which remains unresolved as it is still on appeal to the Washington Supreme Court. *Omni*
held that a debt collection firm to which insurers assigned subrogation claims was not the
insurers' agent and that its unfair collection practices therefore could not be imputed to the
insurers. At page 12 of the Administrative Law Judge's Order below, she stated "(t)he *Omni*

1 court refused to impute the agent's bad acts in violation of the Consumer Protection Act to the
2 principal, on the basis that the principal had nothing whatever to do with the collection
3 company's business practices or behavior." Contrary to this recitation, *Omni* did not
4 characterize the debt collection firm as the insurer's agent. More importantly, *Omni* involved
5 an independent outside debt collector — not an appointed insurance agent. *Omni* sheds no
6 light what so ever on the scope of an insurance agent's appointment generally, or the scope of
7 Land's appointment here. Nor does anything in *Omni* support a finding of lack of control in a
8 case such as this one where there is an express agency appointment, an express contract
9 requiring the agent to comply with all laws and regulations, and the principal has merely to
10 enforce its own contract. In short, the OIC staff finds nothing in *Omni* that supports
11 Chicago's argument that its appointed insurance agent's inducements to obtain insurance
12 business were somehow beyond the scope of the agent's authority.

12 **C. Washington courts consistently hold insurers responsible for their agents' illegal
13 conduct, even when the insurer is ignorant of the violation.**

13 Regardless of whether it might be wise policy to allow insurers to try to escape
14 responsibility by professing ignorance of their appointed insurance agents' conduct,¹⁰
15 Washington courts consistently hold insurers responsible for the illegal conduct of their
16 agents, even though the insurer may be ignorant of the violation.

16 For example, *Ellis v. William Penn Life Assurance Co.*, 124 Wn.2d 1, 873 P.2d 1185
17 (1994), involved agents for two life insurance companies who knew the policies they sold
18 were replacement policies, but failed to complete and submit replacement forms to their
19 insurer principals in violation of Washington's replacement regulations, WAC 284-23-400
20 through 485. Although the applicants made material misrepresentations in obtaining the
21 replacing coverage, the Court nonetheless agreed that because the insurers were obligated to

22 ¹⁰ As a matter of policy, if ignorance on the part of the principal and illegality on the part of the agent
23 were a defense, market conduct enforcement action could rarely, if ever, be taken against an insurer
for the illegal sales practices of its agency force.

1 require their agents to comply with those regulations, the insurers were estopped by their
2 agents' regulatory violations from denying coverage for at least the face amount of the
3 replaced coverage.

4 Similarly, in *American Fidelity and Casualty Company v. Backstrom*, 47 Wn.2d 77,
5 287 P.2d 124 (1955), the Washington Supreme Court held that the law imputes to the
6 principal the acts of his agent. In *Backstrom*, an individual was appointed by an insurer to be
7 a limited agent with the authority to solicit business on behalf of the insurer and receive and
8 forward premium payments, but not to bind risk to the insurer. *Id.* at 79. At some point, the
9 agent sold a policy and informed the insurer of the facts relating to the policy and
10 recommended a course of action that the company followed. A claim was later made against
11 the policy and the insurer sought to deny coverage on grounds the agent's actions were not
12 imputed to the insurer and not binding. The Court disagreed and held the agent was acting
13 within his scope of authority, despite his limited appointment agency and lack of authority to
14 bind the insurer.

15 In making its decision, the *Backstrom* Court, citing its prior decision in *Miller v.*
16 *United Pacific Casualty Company*, 187 Wn. 629, 60 P.2d 714 (1936), articulated the general
17 rule of imputation, which applies to this case:

18 The law imputes to the principal, and charges him with, all notice or
19 knowledge relating to the subject-matter of the agency which the agent
20 acquires or obtains while acting as such agent and within the scope of his
21 authority, which he may previously have acquired, and which he then had in
22 mind, or which he had acquired so recently as to reasonably warrant the
23 assumption that he still retained it. Provided, however, that such notice or
24 knowledge will not be imputed: (1) Where it is such as it is the agent's duty
25 not to disclose, (2) Where the agent's relations to the subject-matter are so
26 adverse as to practically destroy the relation of agency, and (3) Where the
27 person claiming the benefit of the notice, or those whom he represents,
28 colluded with the agent to cheat or defraud the principal.

29 *Backstrom*, 47 Wn.2d at 82, quoting *Miller*. Ultimately, in both *Backstrom* and *Miller*, legal
30 mistakes were made by insurance agents, which the insurers attempted to disavow after
31 claims were made on the policies. In neither case were the agents deceitful or in collusion

1 with the insureds. In neither case were the agents specifically authorized to make the
2 mistakes. Nevertheless, in both cases, Washington courts affirmed the general rule that the
3 agents' knowledge and actions were imputed to the insurers — even though the insurers knew
4 nothing of the mistakes.

5 Other Washington cases holding insurers responsible for the insurance related
6 misconduct of their agents include *Codd v. New York Underwriters Insurance Company*, 19
7 Wn.2d 671, 144 P.2d 234 (1943) (holding agent's receipt of premium is receipt by insurer
8 even though agent converts the funds); *Turner v. American Casualty Company*, 69 Wash.
9 154, 124 P. 486 (1912), (holding agent's knowledge of applicant's disqualifying health
10 infirmity imputed to health insurer which cannot deny coverage); and *McCann v. Washington*
11 *Public Power Supply System*, 60 Wn. App. 353, 803 P.2d 334 (1991), (holding
12 agent/employer's knowledge of employee's work hours imputed to group insurer barring
13 challenge to claimant's status as full time employee).

14 In the *McCann* case, an employee's widow appealed to the Washington Court of
15 Appeals, arguing that the trial court improperly granted summary judgment in favor of an
16 insurer on grounds that there were issues of fact as to whether the employer/master
17 policyholder — who acted as a solicitor of the insurer's insurance policy — was an "agent" of
18 the insurer. *McCann*, 60 Wn. App. at 359-60. In reversing the trial court's grant of summary
19 judgment in favor of the insurer, and finding that issues of fact precluded a grant of summary
20 judgment, the Court of Appeals looked to the Oregon *Paulson* case, *supra*, for guidance, and
21 observed that "as the employer assumes responsibility for more administrative or sales
22 functions which are customarily performed by an insurer," it was more likely that an agency
23 relationship existed. *McCann*, 60 Wn. App. at 361, citing *Paulson*, 292 Or. at 44. Moreover,
the *McCann* Court rejected general common law agency principles as the way to assess
whether a principal/agent relationship existed:

... the courts should consider closely the facts of each case to determine
whether the insurer should be held responsible for the acts of the master

1 policyholder, instead of approaching the cases from a standpoint of whether or
2 not the master policyholder is the agent of the insurer in performing certain
functions. That is the courts should look at the equities of the situation rather
than the agency position of the parties.

3 *Id.* at 361. In accepting the soundness of this approach, the Court expressed the sentiment that
4 “[t]he insurer rather than the insured is in a better position to control the conduct of the master
5 policyholder.” *Id.* This is the same sentiment expressed by numerous other commentators as
6 reason for supporting the imputation principles articulated in cases like *Backstrom, supra*.
7 For example, see, e.g., Professor Marin R. Scordato, *Article: Evidentiary Surrogacy and Risk*
8 *Allocation: Understanding Imputed Knowledge And Notice in Modern Agency Law*, 10
9 *Fordham J. Corp. & Fin. L.* 129 at 150 (2004) (“Given that the principal is the one who
10 generally selects and hires the agent, who monitors the agent's activity and compensates him,
11 who has the power to terminate the agency and on whom the agent may depend for future
12 references and referrals, it is, in general, the principal who is in the best position to manage
the risk of a possible failed transmission.”)¹¹

13 Nor may an insurer rely upon a private agreement to try to change the requirements
14 and applicability of the Code, or seek to use such a secret agreement to deny agency. As
15 stated in *Hall v. Union Central Life Insurance Company*, 23 Wash. 610, 613, 63 P. 505
16 (1900), holding an insurer cannot escape responsibility for the acts of a sub-agent when the
17 sub-agent is held out to the public as the direct agent of the insurer and is clothed with
authority to do business for it:

18 It is too late in the history of jurisprudence, if such time ever existed, to allow
19 corporations or individuals to escape their honest liabilities by secret
20 understandings between principals and agents of which the public has, and can
21 have, no knowledge. Under this contract, which provides that Doser shall
work for the company, although he was to be the agent of Leavy only, he is
22 clothed with authority not only to solicit and procure persons to insure with
said company, but to collect and pay over the premiums to the agent of the

23 ¹¹ See also *Id.* at 149 fn. 82 (“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.”)

1 company; and the company cannot escape its responsibilities when he
2 does collect them from his patrons and fails to turn them over to the company.

3 **D. Even under common law agency principles, the result would be the same:
4 Chicago had a right to control its agent.**

5 Even if one undertook an excursion into common law independent contractor and
6 agency principles, which it would be inappropriate for this tribunal to do here, those
7 principles also lead to the same conclusion as the above-cited provisions of the Washington
8 Insurance Code.

9 Although under the terms of the agency contract Chicago requires Land to obey all
10 laws and regulations, it is up to Land to drum up business. Finding #15 recognized that
11 Chicago's agency contract reserved to it its right to examine any of its agent's accounts,
12 books, ledgers, searches, abstracts and other records which relate to the title insurance
13 business carried on by Land for Chicago regarding its compliance with RCW 48.30.140,
14 RCW 48.30.150, WAC 284-30-800, or the topic of inducements. The agency contract also
15 required Chicago to provide Land with any such written instructions as it deemed
16 appropriate.¹² Thus, although Chicago could have controlled Land's solicitation activities by
17 the simple expedient of enforcing its contract, this is something Chicago failed to do.
18 Chicago and its parent company even had Board members directing Land's operations, and
19 one of its parent's companies even owned almost half of Land's shares. Chicago is facing
20 OIC disciplinary action not because of any lack of rights or opportunity to control, but
21 because of its own lack of diligence.

22 As the above-cited cases make clear, courts in Washington, as elsewhere, do not
23 hesitate to hold insurers responsible for the solicitation and sales practices of their agents.
Chicago has cited no case exonerating an insurer for its own appointed agent's conduct based
on agency principles in such a case. The OIC staff is certainly aware of none. Whether one
looks to case law and the general common law principles of agency or to the specific agency

¹² See Decl. Randolph, Exh. A at ¶¶ 4B(2) and 8E.

1 provisions of the Washington insurance code, the result is the same. Land was clearly acting
2 within the scope of its agency and its conduct is therefore the conduct of its principal,
3 Chicago.

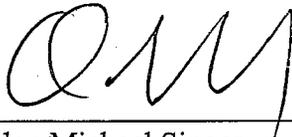
4 CONCLUSION

5 Chicago had the duty to comply with Insurance Code and the illegal inducement rules
6 promulgated under it. Chicago cannot escape that duty by delegating the solicitation of
7 business to an appointed agent, turning a blind eye, and then disclaiming control over the
8 agent's actions. The contrary conclusion reached by the OAH Judge's Initial Order is
9 inconsistent with the facts of record, the provisions of RCW Chapter 48.17 governing agents,
10 and Washington case law. The OIC believes Chicago's Motion for Summary Judgment was
11 utterly devoid and logical or legal merit. An order should have entered denying the motion
12 and stating that OIC may undertake the present matter against Chicago.

13 The OIC staff respectfully submits that the OAH Administrative Law Judge's Initial
14 Order should be reversed and this matter remanded for hearing.

15 Respectfully submitted this 19th day of November, 2008.

16 OFFICE OF INSURANCE COMMISSIONER

17 By: 

18 Alan Michael Singer
19 Staff Attorney
20 Legal Affairs Division
21
22
23

FILED

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

Commissioner
Deputy Commissioner
Chief Hearing Officer

In the Matter of

Docket No. 2008-INS-0002

**CHICAGO TITLE INSURANCE
COMPANY,**

**DECLARATION OF ALAN
MICHAEL SINGER IN SUPPORT
OF PETITION FOR REVIEW OF
INITIAL ORDER**

An authorized insurer

I, Alan Michael Singer, under penalty of perjury under the laws of the State of Washington, declare that the following is true and correct:

1. I am a Staff Attorney of the Legal Affairs Division for 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. The undersigned OIC staff takes exception to the following portions of Hon. Cindy L. Burdue's October 30, 2008 Initial Order Granting Summary Judgment ("Order") in the above-entitled Chicago Title Insurance Company ("Chicago Title") matter:

"ISSUE PRESENTED"

3. Page 2 of the Order states that the issue presented is:

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

It is respectfully submitted that if this is a "finding," it is not based on the evidence; it misapprehends the issue presented and is in error. Rather, the issue presented was whether

1 the OIC may undertake the present action against Chicago Title when Chicago Title, by and
2 through its agent, pursuant to RCW 48.10.010, Land Title, violated WAC 284-30-800.

3 **“UNDISPUTED FINDINGS OF FACT”**

4 4. Page 2, at the third and fourth lines of finding 1, states that the OIC alleged
5 that CTIC¹ is liable for violations committed by Land Title “with whom CTIC has an “Issuing
6 Agency” contract.” It is respectfully submitted that this finding is not based on the evidence,
7 misapprehends the issue presented, and is in error. OIC’s Notice of Hearing made *no*
8 allegation about the “Issuing Agency” contract. Rather, it alleged that under the Insurance
9 Code, Chicago Title violated WAC 284-30-800, by and through its “agent, pursuant to RCW
10 48.17.010,” Land Title — whom Chicago Title had “appointed,” pursuant to RCW 48.17.160,
11 “to solicit and effectuate Chicago Title’s business of title insurance on Chicago Title’s
12 behalf.” And at oral argument on Chicago Title’s motion, for example beginning at 1:18:16,
13 OIC emphasized that Chicago Title’s private “Issuing Agency” contract — which was not
14 entered into with OIC — is “not the issue.”² Moreover, page 27 of the OIC’s Opposition to
15 Chicago Title’s Motion for Summary Judgment, in rejecting Chicago Title’s contrary
16 allegation that its “issuing agency agreement” somehow precludes this matter, called such an
17 allegation “absurd”:

18 Such an argument seeks to undermine the Commissioner’s regulatory
19 responsibilities with a private, independent agreement to which the
20 Commissioner was not a signatory. Such an argument should be rejected as
21 absurd. After all, if regulated entities could so escape regulation simply by
22 entering into private agreements with third parties, the important public
23 interests and purposes advanced by such regulation would be vastly
24 undermined, if not thwarted outright.

25 ¹ The Order refers to Chicago Title as “CTIC.”

26 ² The OIC also broadly takes exception to all findings reflecting what is submitted to be a misplaced
27 reliance and emphasis on the “Issuing Agent’ contract.” Findings like 12, 13, and 15 - 20 discuss
28 what the contract does and does not authorize, but as OIC emphasized, the contract “is not the issue.”

1 5. Similarly, page 2, at the second through fifth lines of finding 2, states that the
2 OIC seeks to impose fines on Chicago Title “based on the “Issuing Agent” contract. For the
3 same reasons stated in paragraph 4 of this declaration, it is respectfully submitted that this
4 finding is not based on the evidence, misapprehends the issue presented, and is in error.

5 6. Page 2, at the first line of finding 4, states that “LT³ is known as an
6 ‘underwritten title company,’ or ‘UTC.’” It is respectfully submitted that this finding is
7 irrelevant to the issue presented and is not based on the evidence. Status as an underwritten
8 title company has no relevance under the Insurance Code and makes no difference to the
9 determination of the issue presented. Nor is there any evidence Land Title is “known” this
10 way to the OIC, or that if it were that it makes any difference to what Land Title can or cannot
11 do under the Insurance Code, to Chicago Title’s duties under the Code.

12 7. Page 3, from the fourth line of finding 5 through the third line of finding 6,
13 states “[i]n the counties where it does direct business, CTIC conducts marketing to sell its
14 services. CTIC conducts no marketing activities in Kitsap and Mason counties, however.
15 CTIC relies entirely on the efforts of LT to market the title insurance policies in these
16 geographic areas.” It is respectfully submitted that this finding is not based on the evidence,
17 misapprehends the issue presented, and is in error. Judge Burdue found that “CTIC relies
18 entirely on the efforts of LT to market the title insurance policies in these geographic areas,”
19 but the undisputed facts are actually that Chicago Title relies entirely on the efforts of Land
20 Title to market Chicago Title’s title insurance policies for Chicago Title in the geographic
21 areas of Kitsap and Mason counties (and also Clallam and Jefferson counties). Judge
22 Burdue’s findings suggest that the Insurance Code somehow authorizes title insurers to
23 subcontract away all responsibility for the solicitation of insurance depending on the status of
the person with whom the insurer happens to have privately contracted, but such would be
directly contrary to the Insurance Code.

³ The Order refers to Land Title as “LT.”

1 8. Page 3, at lines three and four of finding 8, states “[o]ther than the shared
2 parent company identity, CTIC has no corporate affiliation with LT.” It is respectfully
3 submitted that this finding is not based on the evidence, misapprehends the issue presented,
4 and is in error. It is contrary to the relationship between Chicago Title and Land Title under
5 the Insurance Code and assumes facts not in evidence.

6 9. It is respectfully submitted that finding 9 is contrary to the law and the facts. It
7 adopts portions of the declaration of Don Randolph (“there are a number of UTC’s or
8 ‘independent title companies’ that provide title insurance”) but is contrary to law to the extent
9 it suggests the UTCs are the ones who “provide” the insurance. The Insurance Code is clear
10 that only insurers holding a Certificate of Authority granted by the OIC may legally “provide”
11 their own insurance. Of course, the Code also provides that others can “solicit” an authorized
12 insurer’s insurance for them, but only such duly authorized insurers’ appointed agents. No
13 law in the Code or elsewhere allows an agent to “provide” *their own* insurance. Moreover,
14 finding 9 is contrary to the facts by suggesting that Land Title could sell *any* insurer’s
15 insurance in counties where “national companies do not sell this directly.” Such a suggestion
16 contradicts the undisputed evidence that Land Title only solicited Chicago Title’s insurance,
17 and has been for more than a decade only authorized to solicit that insurer’s title insurance.

18 10. OIC also respectfully takes exception to finding 10. The finding suggests
19 Land Title markets only its own services, a suggestion contrary to the facts and the law.
20 When Land Title markets its “services,” those necessarily include its appointing insurer’s title
21 insurance. Moreover, the undisputed evidence showed that Chicago Title’s title insurance is
22 the only title insurance Land Title is legally authorized to solicit and transact for any insurer.

23 11. OIC also respectfully takes exception to finding 12, which provides that “[t]he
‘Issuing Agency’ contract between CTIC and LT spells out specifically” their relationship.
As indicated, the contract “is not the issue”; the law as set forth in the Insurance Code, not
some private secret contract, spells out specifically who may transact and solicit title

1 insurance and who may do so on an insurer's behalf. Finding that the "Issuing Agency'
2 contract" governs the determination of the issue presented is clearly erroneous.

3 12. OIC also respectfully takes exception to the first sentence of finding 17, which
4 implies again that the issue presented is resolved solely by any private, secret agency
5 agreement. This finding is clearly erroneous in that it does not merely identify the agreement
6 as one setting forth and allocating liabilities between the contracting parties. Instead, it
7 suggests that Land Title is "liable for everything else," rather than just liable to *Chicago Title*
8 for everything else.

9 13. OIC also respectfully takes exception to the first sentence of finding 20, which
10 erroneously concludes that "CTIC has no right to control the actions of LT other than as
11 specified in the contract." Aside from Chicago Title's ability to choose and appoint
12 whichever agent it wished to carry out the solicitation of its insurance for it under the
13 Insurance Code, Chicago Title contract also granted it the right to control its agent's activities.
14 For example, that contract required as a condition between the two that Land Title comply
15 with WAC 284-30-800, and Chicago Title had the right to examine all pertinent records and
16 issue whatever guidance and instructions it chose to ensure its agent did comply with WAC
17 284-30-800.

18 14. OIC also respectfully takes exception with the third sentence of finding 20, the
19 second sentence of finding 21, finding 23, and finding 24 for erroneously considering and
20 adopting as fact summary and conclusional evidence that should have been stricken and not
21 considered. At page 13 of OIC's response brief, OIC pointed out that the law provides that
22 "conclusory statements of fact will not suffice for summary judgment proceedings. *Grimwood v.*
23 *University of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988); *Parking v.*
Colocousis, 53 Wn. App. 649, 651-52, 769 P.2d 326 (1989). And unsupported conclusional
statements and legal opinions cannot be considered in a motion for summary judgment."
(Cites omitted.) Pursuant to this authority, the OIC's brief moved to strike all such
conclusory statements in the Kennedy and other declarations. But the order fails to show,

1 pursuant to RCW 34.05.461(3) and (4), whether OIC's request was ever even considered.
2 Moreover, although the OIC's brief pointed to evidence which at minimum created issues of
3 fact that countered the conclusory assertions in the declarations, and the OIC brief at page 13
4 also pointed out that "the court must consider all facts and evidence presented, and the
5 reasonable inferences therefrom, in a light most favorable to the nonmoving party. *Folsom v.*
6 *Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)," the order went so far as to adopt
7 each and every such inadmissible conclusory, self-serving declaration offered by Chicago
8 Title as a statement of undisputed fact.

8 15. OIC also respectfully takes exception with finding 28 and the last sentence of
9 finding 29. Although finding 27 acknowledged that the Advisory was issued "to all
10 'Washington insurers and their title insurance agents,'" and the first sentence of finding 29
11 indicates that the letter referred to was sent to Chicago Title, finding 28 and the last sentence
12 of finding 29 incorrectly imply that OIC had some duty to state what finding 27 indicates the
13 Advisory failed to state and what the last sentence of finding 29 indicates the letter failed to
14 state. It is respectfully submitted that both implications are erroneous.

14 16. OIC also respectfully takes exception with finding 30. Finding that "[t]he OIC
15 also addressed the Washington Land Title Association ["WLTA"] in September 1989," is
16 contrary to Exhibit M or any other evidence. Exhibit M is a letter to title insurers and title
17 insurance agents. It is not an 'address' to WLTA. No other evidence supports this part of
18 finding 30. In addition, the finding also erroneously states "CTIC is not a member of that
19 organization [WLTA]." Though this statement is unsupported by any evidence in the record,
20 the evidence establishes that the opposite is true.⁴ And a quick search at the WLTA website,
21 http://www.wltaonline.org/member_directory/search_results.asp?CountyName=%25&CompanyName=CHICAGO+TITLE&Submit_Search=Search, also confirms that Chicago Title is a
22 WLTA member. In addition, in its contract with its appointed agent, Land Title, Chicago

23 ⁴ See declaration of Alan Michael Singer filed in support of OIC's response and opposition to Chicago's motion for summary judgment, at exhibit E, interrogatory #22.

1 Title even requires Land Title to “[b]ecome and remain a member in good standing of the
2 State Land Title Association in any state where the Issuing Agent [Land Title] conducts
3 business [...]” See Decl. Singer Exh. G at ¶ 4P.

4 17. OIC also respectfully takes exception with the second sentence of finding 32.
5 It is unsupported by the evidence in the record.

6 **“CONCLUSIONS OF LAW”**

7 18. OIC respectfully takes exception with conclusions of law 4 and 5, 12 through
8 15, and 18 and 19. The OIC respectfully submits that such common law agency principles do
9 not apply in this matter.

10 19. OIC also respectfully takes exception with conclusion of law 11.

11 20. OIC also respectfully takes exception with conclusions of law 16 and 17. As
12 to 16, the Insurance Code *does* legally establish and fix the status of Chicago Title’s agents,
13 and whether the agent is a UTC or not makes no difference under the Code. However, the
14 OIC agrees that a title insurer and its appointed agent may not enter into an agreement “in
15 conflict with the Insurance Code or the OIC’s regulations.” The OIC respectfully takes
16 exception with conclusion of law 17 in its entirety.

17 21. OIC respectfully takes exception with conclusions of law 20 through 24. It is
18 respectfully submitted that the *Omni* case has no application in his matter, although
19 conclusion of law 24 is also erroneous and contrary to the evidence because the evidence also
20 shows that Chicago Title had the right to control Land Title but failed to do so.

21 22. OIC also respectfully takes exception with conclusions of law 25 through 29,
22 for their misplaced emphasis on the private agency contract and for failing to consider the
23 Insurance Code provisions that legally establish and fix the status of Chicago Title’s agents.
Conclusion 28 is also erroneous and contrary to the evidence because the evidence also shows
that Chicago Title had the right to control Land Title but failed to do so.

Exhibit A

OCT 31 2008

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

INSURANCE COMMISSIONER
LEGAL AFFAIRS DIVISION

IN THE MATTER OF:

Chicago Title Insurance Company,
An Authorized Insurer,

Respondent.

Docket No. 2008-INS-0002

Infraction No. D07-308

**INITIAL ORDER GRANTING
SUMMARY JUDGMENT****Telephonic Summary Judgment Hearing:**

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

Appearances by Telephone:

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

Material Considered:

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

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

ISSUE PRESENTED:

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

UNDISPUTED FINDINGS OF FACT:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

called for in the contract.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

Jurisdiction:

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

Summary Judgment Standard:

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

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

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

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

Insurance Code, Chapter 48 RCW:

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

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

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

RCW 48.17.010 defines "agent" as any person appointed by an insurer to solicit applications for insurance on its behalf. If authorized so to do, an agent may effectuate insurance contracts. An agent may collect premiums on insurances so applied for or effectuated.

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

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

The Inducement statutes and regulation at issue:

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

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

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

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

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

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

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

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

Unfair practices applicable to title insurers and their agents.

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

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

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

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

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

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

The parties' positions:

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

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

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

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

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

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

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

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

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

"Agent" means any person² appointed by an insurer to solicit applications for insurance on its behalf. If authorized so to do, an agent may effectuate insurance contracts. An agent may collect premiums on insurances so applied for or effectuated.

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

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

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

OIC's regulations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The OIC does not have authority to impute bad acts of a title policy "issuing agent" to a title insurer where no provision exists for this in the law:

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

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

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

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

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

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

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

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

ORDER

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

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



Cindy L. Burdue
Administrative Law Judge
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REVIEW RIGHTS

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

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

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

Certificate of Service

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

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