

The Honorable Patricia Petersen

FILED

DEC 08 2008

Hearings Unit, OIC
Patricia D. Petersen
Chief Hearing Officer

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

In Re:

CHICAGO TITLE INSURANCE COMPANY,

An authorized insurer

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

CHICAGO TITLE INSURANCE
COMPANY'S PETITION FOR
DISQUALIFICATION OF JUDGE
PATRICIA PETERSEN

I. INTRODUCTION / RELIEF REQUESTED

Pursuant to RCW 34.05.425, Chicago Title Insurance Company ("CTIC") hereby petitions for the disqualification of Judge Patricia Petersen as the administrative law judge based on her historical role in dealing with the precise issue raised by the Office of the Insurance Commissioner ("OIC") in this proceeding. When serving as Deputy Insurance Commissioner, Judge Petersen was charged with the interpretation and enforcement of the insurance code including WAC 284-30-800 (the "Inducement Regulations"). In 1989, Judge Petersen authored a letter (the "Petersen Letter") setting forth the OIC's position that Title Insurance Underwriters are liable for violations of the Inducement Regulation committed by underwritten title companies ("UTCs") - the precise issue which is now before her. The Petersen Letter was submitted by the OIC as evidence in support of its

1 position (Exhibit M to Declaration of Alan Singer dated September 24, 2008), and relied upon by the
2 OIC in its argument (Response and Opposition to Chicago Title Insurance Company's "Motion for
3 Summary Judgment re: Agency Liability" at pp. 19-20).

4 The interpretation of the OIC's authority, as expressed in the Petersen Letter, directly
5 contradicts to the conclusions of law made by Judge Cindy Burdue of the Office of Administrative
6 Hearings. Furthermore, if the summary judgment were reversed and the matter remanded for an
7 evidentiary hearing, Ms. Petersen could be a witnesses.

8 II. BACKGROUND AND STATUS OF PROCEEDING

9 On January 25, 2008, the OIC filed a Notice of Hearing, proposing a disciplinary action
10 against CTIC, for alleged violations of the Inducement Regulation by Land Title of Kitsap County,
11 Inc. ("Land Title"), an independent title company. The OIC does not allege any violations of the
12 Inducement Regulation by CTIC, nor does it allege that CTIC was involved in Land Title's alleged
13 violations. (See Notice of Hearing). Land Title is not a party to this OIC enforcement action.
14 However, Land Title is a party to an agreement with CTIC, pursuant to which CTIC underwrites the
15 majority of the risk of title insurance policies issued by Land Title.

16 The Administrative Law Judge bifurcated this case into two phases. The issue in Phase I is
17 whether CTIC is legally responsible for the marketing conduct of Land Title. Depending on the
18 outcome of the issue in Phase I, the issue of whether the conduct of Land Title violates the
19 Inducement Regulations is reserved for Phase II. See First Pre-Hearing Order dated April 1, 2008.

20 On September 9, 2008. CTIC filed its motion for summary judgment in Phase I, asserting
21 that the OIC lacks authority, under the existing statutes and regulations, to impose vicarious liability
22 on CTIC for the acts of a third-party, absent the existence of an agency relationship that gives rise to
23 such liability under common law principles. On September 29, 2008, the OIC filed its response to
24 the motion for summary judgment, in which it asserted that common law principles of agency
25 liability were inapplicable, and that the Insurance Commissioner, even in the absence of any statutes
26

1 or regulations expressly conferring such power, has the power under his general regulatory authority,
2 to fine underwriters for violations committed by UTCs.

3 On October 30, 2008, Judge Cindy Burdue entered an Initial Order Granting Summary
4 Judgment in favor of CTIC (the "Summary Judgment Order"), in which she ruled that as a matter of
5 law, the OIC cannot impose liability on underwriters for UTCs' violations, absent either a basis
6 under common law agency principles or a basis in statute or regulation. With respect the latter, she
7 concluded:

8 [t]here is no question that the [Insurance] Code and regulations amply authorize
9 the OIC to take action against a title insurer directly for *its own* violations, or
10 directly against the title company for *its* violations. . . . [a]bsent in the Insurance
11 Code and its regulations cited by the OIC is the authority for the OIC to hold the
12 insurer liable for the 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 . . .

13 See Summary Judgment Order at ¶33.

14 On November 19, 2008, the OIC filed its Brief in Support of Review of Initial Order (the
15 "OIC Review Brief"), arguing that Judge Burdue's ruling was erroneous and that common law
16 agency principles do not apply to the relationship between CTIC and Land Title by virtue of the fact
17 that the relationship is "fixed by the Insurance Code." It argues that once a UTC is appointed as an
18 "agent," the limited scope of the agency contract becomes irrelevant, and the underwriter has blanket
19 liability for the misdeeds of the UTC. It asks that Judge Petersen to reverse the reasoned decision of
20 Judge Burdue and to hold that a "title insurer is responsible" for violations of the Inducement
21 Regulation committed by an insurance agent. See OIC Review Brief at p.1.

22 III. ARGUMENT

23 There are three independent bases for the disqualification of an administrative law judge.

24 RCW 34.05.425 provides, in relevant part, "[a]ny individual serving or designated to serve
25 alone or with others as presiding officer is subject to disqualification for bias, prejudice,
26 interest, or any other cause provided in this chapter or for which a judge is disqualified."
RCW 34.05.425.

1
2 Second, Canon 3(D) of the Code of Judicial Conduct provides that a judge should disqualify herself in a proceeding in which her impartiality may be reasonably questioned. CJC 3(D).

3
4 Finally, the appearance of fairness doctrine requires that an administrative body must be fair, free from prejudice, and have the appearance of impartiality. *Sherman v. State*, 128 Wn.2d 164, 188, 905 P.2d 355 (1996) (citing *Narrowview Preservation Ass'n v. City of Tacoma*, 84 Wn.2d 416, 420, 526 P.2d 897 (1974)).

6 As held by the Washington Court of Appeals, "[t]he law goes farther than requiring an impartial
7 judge; it also requires that the judge *appear to be impartial*." *State v. Baughman*, 119 Wn. App.
8 1025, Not reported in P.2d, 2003 WL 22753623 (2003) (emphasis added). To prevail under the
9 appearance of fairness doctrine, the claimant must only provide evidence of the *potential for bias*.
10 *See State v. Dugan*, 96 Wn. App. 346, 354, 979 P.2d 885 (1999) ("to prevail under the appearance of
11 fairness doctrine, the claimant must provide some evidence of the judge's or decisionmaker's actual
12 or potential bias")

13 CTIC wishes to stress that in seeking the disqualification of Judge Petersen, it is not in any
14 way seeking to impugn her integrity. That said, the appearance of impropriety, and the potential for
15 bias and interest, are profound, such that CTIC would be prejudiced were Judge Petersen to preside
16 over the review of the Summary Judgment Order. As evidenced by the Petersen Letter, Judge
17 Petersen not only asserted the OIC's interpretation of the law that Judge Burdue found erroneous, but
18 was the person who formulated the interpretation and argument on which the OIC relies. In the
19 Petersen Letter, Judge Petersen stated:

20 [T]itle insurers are liable for any activity conducted by their agents regarding the
21 [Inducement Regulation], whether the title insurers have knowledge of the
22 activity or not. As of this writing, the first fine, in the amount of \$20,000 is being
levied against a title insurer.

23 Petersen Letter at p.1, Exhibit M to Declaration of Alan Singer dated September 24, 2008).

24 Although the Petersen letter is nearly 20 years old, the OIC has never promulgated any
25 regulations on the issue of underwriter liability for conduct of an underwritten title company; instead
26

1 the OIC seeks to fine underwriters for the misdeeds of UTCs based solely on the policy first
2 articulated in the Petersen Letter. Moreover, the OIC's argument that it has the authority to do so
3 without express statutory or regulatory basis or a showing of common law agency liability is the
4 interpretation of law which necessarily underlies the policy expressed in the Petersen Letter.

5 In short, sustaining Judge Burdue's decision requires disavowal of the legal position asserted
6 in the Petersen Letter and relied upon by the OIC and reversal of Judge Burdue's decision requires
7 adoption of legal position asserted in the Petersen Letter. It can be presumed that even the most fair-
8 minded of individuals would have difficulty being impartial given the close-nexus which exists
9 between Judge Petersen and the OIC's position in this matter - a nexus so close that Judge Petersen
10 could theoretically be a witness in any evidentiary hearing. Certainly, there is, at least, the potential
11 for bias or interest, no matter how unconscious or unintentional. Under the applicable legal
12 standard, that potential for bias or interest makes it inappropriate for Judge Petersen to hear this
13 matter.

14 IV. CONCLUSION

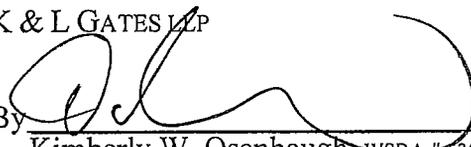
15 As has been held by the Washington Court of Appeals, "[a] judicial proceeding is valid only
16 if it has *an appearance of impartiality*, such that a reasonably prudent and disinterested person
17 would conclude that all parties obtained a fair, impartial, and neutral hearing." *State v. Ra*, 144 Wn.
18 App. 688, 705, 175 P.3d 609 (2008) (emphasis added). As further noted by the Court of Appeals,
19 "[t]he effect on the judicial system can be debilitating even when a trial judge's decisions are tainted
20 by even a mere suspicion of partiality." *In re the Marriage of Davidson*, 112 Wn. App. 251, 257, 48
21 P.3d 358 (200³) (citing *State v. Sherman*, 128 Wn.2d 164, 205, 905 P.2d 355 (1996)).

22 The mere fact that Judge Petersen is an employee of the OIC is not an issue. *See, e.g.*,
23 *Kendall v. Reid*, 93 Wn. App. 1050, Not Reported in P.2d, 1999 WL 7828 (1999). It is Judge
24 Petersen's direct involvement with the OIC's policies and interpretation of law directly at issue that
25 creates the potential for prejudice and the appearance of impropriety. Under RCW 34.05.425, CJC
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1 3(D), and the appearance of fairness doctrine, it is necessary that Judge Petersen disqualify herself,
2 so that CTIC's due process rights are assured. Accordingly, CTIC respectfully requests that Judge
3 Petersen disqualify herself in this matter.

4 DATED this 8th day of December, 2008.

6 K & L GATES LLP

7
8 By 

Kimberly W. Osenbaugh, WSBA # 5307

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9 Attorneys for Chicago Title Insurance Company

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1 CERTIFICATE OF SERVICE

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

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

- 6 • *Chicago Title Insurance Company's Petition for Disqualification*

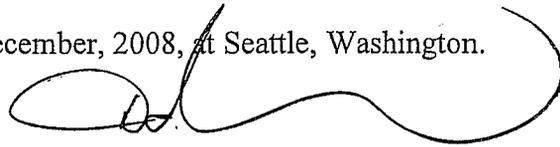
7 in the manner indicated:

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EXECUTED this 8th day of December, 2008, at Seattle, Washington.



David C. Neu