FILED

STATE OF WASHINGTON
BEFORE THE OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of: **STEWART TITLE GUARANTY COMPANY,** **An Authorized Title Insurer.**	**Docket No. 11-0106** STEWART TITLE GUARANTY COMPANY'S SUPPLEMENTAL MEMORANDUM CONCERNING THE EFFECT OF *CHICAGO TITLE INSURANCE CO. V. OIC*

The OIC seeks to hold Stewart Title Guaranty Company ("Stewart"), a title underwriter, vicariously liable for the regulatory violation committed by its independent agent, Rainier Title. However, on February 29, 2012, Division II of the Court of Appeals decided *Chicago Title Ins. Co. v. OIC.* A copy is attached. The court held that a title insurance underwriter has no vicarious liability for the regulatory violations of its independent agents.

On March 15, 2012, the parties were asked to provide briefing and argument concerning the applicability of the *Chicago* decision to this case. The question is whether there are differences between this case and *Chicago* that—despite the holding in *Chicago*—justify holding Stewart vicariously liable for Rainier's advertising violation.

With one exception, there are no relevant factual or legal differences between the two cases. The exception is that Stewart and Rainier are competitors. This, however, provides additional support for a ruling consistent with *Chicago*. OIC's claim against Stewart should be dismissed.

A. NO FACTUAL DIFFERENCES BETWEEN THIS CASE AND *CHICAGO* JUSTIFY HOLDING STEWART VICARIOUSLY LIABLE

1. The Relationship Between Stewart And Rainier Is Identical In All Relevant Respects To The Relationship Between Chicago Title And Land Title

(a) *Overview.* Chicago Title is the underwriter for Land Title, an underwritten title company ("UTC"). Stewart Title is the underwriter for Rainier Title,

ORIGINAL

a UTC.[1] Chicago Title's title business is as recited in *Chicago*. Stewart's title business is identical.

(b) ***Direct Operations and UTC Operators.*** Stewart and Chicago Title provide title insurance nationally. Both maintain direct operations (operations in which Chicago Title or Stewart has an ownership interest) in several Washington counties. Both Stewart's and Chicago Title's direct operations research title, prepare preliminary commitments and policies of title insurance, assess title risk, offer escrow and closing services, and market services to customers.

In smaller counties, Stewart, like Chicago Title, maintains no direct operations and instead underwrites polices generated and issued by independent title companies such as Land Title and Rainier. *Chicago* at 2; Pillette Decl., ¶ 4.

Rainier's activities are identical to those of the underwritten title companies, including Land Title, described in *Chicago* at pages 2-3. Thus, Rainier conducts its own marketing and sales, maintains its own title plant, does title research, determines exceptions to coverage, prepares preliminary commitments for title insurance, prepares title policies, and collects all fees and premiums. Pillette Decl., ¶ 4; Bickel Decl., ¶ 13, and testimony. Like the typical underwriter, Stewart receives no documents regarding a Rainier transaction until after it closes. Even then, Stewart only receives the title policies. Those policies are issued by Rainier. Pillette testimony.

(c) ***No Material Differences.*** With one exception, discussed below, the agency agreements and relationships between Chicago Title and Land Title, and Stewart and Rainier, are identical on all relevant points:

---

[1] See page 10, discussing the lack of significance of the name ("UTC," "agent," "independent agent") used to describe Rainier or Land Title.

- Both agreements "authorize" the agent to "issue" title insurance policies on forms provided by the underwriter. *Chicago* at 3 (Land Title Agreement, ¶ 3); Rainier Agreement, ¶ 4(a).

- Both agreements require the agent to issue policies in accordance with "recognized underwriting practices" or "prudent underwriting principles," and in accordance with the rules and instructions provided by the underwriter. Rainier Agreement, ¶ 3(a); *Chicago* at 3-4 (Land Title Agreement, ¶ 4.B).

- Both agreements require the agent to pay the underwriter a small percentage of the premium collected—12% in Land Title's case, 10% in Rainier's case. *Chicago* at 4; Rainier Agreement, ¶ 11(a).

- Both agreements require the agent to comply with all federal and state statutes, rules, and regulations. *Chicago* at 4; Rainier Agreement, ¶ 3(a), ¶ 7(b).

- Both agreements provide for the allocation of certain title-related losses. *Chicago* at 4; Rainier Agreement, ¶ 5. Rainier's agreement designates Rainier as responsible for losses arising from its own negligence or malfeasance; Stewart is responsible for all other loss (after Rainier pays the first $5,000 of loss).

- Both agreements allow the underwriter to audit accounts, books and records relating to issuance of title insurance policies. *Chicago* at 4; Rainier Agreement, ¶ 3(e).

- Neither Chicago Title nor Stewart has any relationship with the agent regarding its escrow and closing service. That is, neither underwriter has any liability for the escrow operations of its underwritten title companies, and neither receives any fees from those escrow operations. Both Land Title and Rainier retain all escrow fees. Land Title received 28% of its revenue from its escrow business; Rainier receives 34% of its revenue from its escrow business. *Chicago* at 4; Bickel Decl., ¶ 12.

- Chicago Title does not compensate Land Title for marketing expenses. It does not exercise any control over Land Title's marketing practices or procedures. Stewart provides no marketing expense compensation to Rainier and does not control its marketing activity. *Chicago* at 4; Bickel, ¶ 13; Pillette, ¶ 5, and testimony.

- Land Title makes no mention of Chicago Title in its marketing materials, which emphasize that Land Title is a local company performing title insurance and escrow and closing services. *Chicago* at 4. Similarly, Rainier makes no mention of Stewart in its marketing materials. Pillette Decl., ¶ 8. The top banner of Rainier's website states, "**100% Locally Owned and Operated.** We provide high-quality title insurance, property information, and escrow services in King, Pierce, and Snohomish Counties." OIC's Exh. 5, p. 1 (emphasis in original).

- Both Land Title and Rainier were at the relevant times underwritten by only one title insurer, which was the sole recipient of its agent's premium remissions. OIC Brief, Exh. 4 at 4, 7. The OIC argues that the *de facto* exclusivity of Rainier's relationship to Stewart justifies a different conclusion here than in *Chicago*. Yet, the facts are the same as the *Chicago* court considered, and the OIC made the identical argument to the *Chicago* court.[2] This fact did not affect that court's decision, and it should not affect this tribunal's decision.

2. The Only Difference Between The Relationships Is That Chicago Title And Rainier Compete For Business

There is one difference between the Rainier and Land Title agreements. The Land Title agreement specifically prohibited Land Title from using Chicago Title's

---

[2] The OIC argues here that "the solicitation to a sale of a Stewart insurance policy is inevitable, since Rainier Title was appointed by no other insurer during the relevant time frame." OIC Brief at 8.

The OIC also argued before the *Chicago* appellate court that "the regulatory enforcement action against Chicago Title was reasonable "in light of the fact that Chicago was the sole beneficiary of Land Title's solicitations of insurance applications...." Respondent's Brief at 26.

name in any advertising, other than to indicate Land Title is a policy issuing agent of Chicago Title. *Chicago* at 4. Rainier's agreement does not have a specific prohibition against advertising with the Stewart name, but in fact, Rainier has never used Stewart's name in any of its advertising, nor would it. That is because ***Stewart competes with Rainier for business***. Pillette Decl., ¶ 8. Dwight Bickel and Mark Pillette testified at length about the significant competition between Stewart and Rainier.

Stewart (unlike Chicago Title) maintains its own agencies in the counties where Rainier operates. Stewart receives only a 10% remittance for a policy that Rainier issues. Stewart gets 100% of the premium if its own direct operation had obtained the order. Moreover, when Rainier issues a policy, it frequently serves as the escrow agent and receives the escrow fee. Stewart receives none of the escrow fee. Yet, had a Stewart direct operation issued the policy and also served as escrow, it would have received the escrow fee itself. Even though Stewart may receive 10% of the premium paid for the policy Rainier issues, it may lose substantially more income by not closing and insuring the transaction directly.

Rainier has substantial information that it will not provide to Stewart because that information, including marketing information, would give Stewart a competitive advantage. Bickel testimony. If Stewart were responsible for monitoring Rainier's marketing activities, Stewart would require access to all of Rainier's marketing plans, contacts, and expenses. Since Stewart and Rainier are competing for the same business in these counties, Rainier is understandably unwilling to share this information with its competitor. Bickel testimony.

Chicago Title (unlike Stewart) did not have a direct operation in the counties where Land Title operated. Chicago Title did not compete with Land Title for business. In the Chicago Title proceedings, this tribunal cited that fact as evidence that

Land Title was Chicago Title's agent.[3] The *Chicago* court, however, did not find that fact sufficiently persuasive to hold Chicago Title vicariously liable.

The fact of competition between the agent and principal is the real difference between this case and *Chicago*. That fact, had it been before the *Chicago* court, would have been even stronger support for its ruling that there is no vicarious liability.

3. Both Rainier And Land Title Issued Their Underwriters' Policies

A question was raised as to which company issues policies. The facts here are identical to those in *Chicago*. In both cases, the agent "issues" the policies. Under the relevant agency agreements, Chicago Title and Stewart underwrite (assume most of the liabilities under) the policies.

The OIC recognizes that title insurance differs from other forms of insurance "because the agent does most of the work of determining insurability, and keeps the lion's share of the premium for doing so." OIC Brief at 2. That difference is significant. The UTC maintains the title plant and does the research about the insurability of title. It also issues the policies. Loss is minimized if the UTC performs a careful and thorough job of searching and evaluating title. Because that job falls to the UTC, it retains most of the premium. These realities are no different for Stewart than for Chicago Title.

Where and how the Chicago Title and Land Title names appear on policies would not have affected the *Chicago* decision. The court, relying on statutory language, rejected OIC's argument that the statute automatically renders a title underwriter vicariously liable for the acts of its UTC merely by appointing it. That alone, the court held, does not make the principal vicariously liable for all acts of an agent. *Chicago* at 3. This is true even though the agency agreement permits a UTC to

---

[3] Finding of Fact 12, attached to Chicago Title's Opening Brief before Division II.

"issue" Chicago Title policies. ***The relevant question in Chicago was whether Chicago Title controlled Land Title's marketing practices, not whose name appeared on the policy.*** There was no evidence that Chicago Title controlled Land Title's marketing. Likewise, there is no evidence that Stewart controlled Rainier's marketing practices. Stewart has no vicarious liability for Rainier's marketing violations.

B. THERE ARE NO DIFFERENCES BETWEEN THE LEGAL THEORIES THAT APPLY TO THIS CASE AND THOSE APPLIED IN *CHICAGO*

1. OIC's Statutory Argument Here Is Identical to the Argument Rejected in *Chicago*

In *Chicago,* the court flatly rejected the OIC's argument, made here, that an insurer is vicariously liable for the regulatory violations of its agent simply because the insurer complies with the insurance code's procedure for appointing an agent. The *Chicago* court also rejected the OIC's argument, also made here, that the statute establishes the scope of an agency relationship. *Chicago* is binding.

The only difference OIC identifies between the law the *Chicago* court considered and the law before this tribunal is an insignificant modification of the statute. The statute applicable in *Chicago* defined agent as one "appointed by an insurer to solicit ... and ... [i]f authorized so to do, ... effectuate insurance contracts on its behalf." Old RCW 48.17.010. The amendment, effective July 1, 2009,[4] defines a "title insurance agent" as "a business entity ... appointed by an authorized title insurance company to sell, solicit or negotiate insurance on behalf of the title insurance company." The only substantive differences are that "sell" replaces "effectuate" in the old statute, and "negotiate" has been added.

[4] The OIC alleges Rainier's violation began on March 20, 2009, ***before*** the revised statute became effective.

These changes would have made no difference in *Chicago*. The crucial point for *Chicago* was that the statute did not then—nor does it now—define ***the scope*** of the agency or make an insurer vicariously liable for the acts of its agent. The limited change to the statute does not expand the scope of the agency relationship to include marketing activities.

The OIC argues here, as it did in *Chicago*, that the statute defines an agent as one who "solicits." Thus, it argues, the agent's marketing activities fall within the scope of the agency. Even under the old statute, an agent was defined to include those who "solicit." Yet the *Chicago* court considered and rejected the OIC's argument that because agents are defined as those who "solicit," marketing activities are brought into the scope of agency.

2. Stewart, Like Chicago Title, Did Not Control Its Agent's Marketing Activities, And Is Not Vicariously Liable For Its Agent's Marketing

Chicago held that common law agency principles determine whether an insurer is vicariously liable for the misdeeds of its agent. The first question is whether the principal controlled or had the right to control the "activities from whence the actionable negligence flowed." *Chicago* at 10, *quoting Kroshus v. Koury*, 30 Wn.App. 258, 264, 633 P.2d 909 (1981) (quoting *Jackson v. Standard Oil Co.*, 8 Wn. App. 83, 91, 505 P.2d 139 (1972)). *Chicago* examined the agreement between Chicago Title and Rainier and considered testimony from Land Title's president. Both demonstrated that Chicago Title played no role in and exercised no control over Land Title's business operations or marketing practices or procedures.

As discussed above, Rainier's and Land Title's agency agreements and relationship are identical on all relevant points. Rainier's Dwight Bickel and Stewart's

Mark Pillette both testified that Stewart did not control business operations and had no role in marketing practices or procedures.

Chicago considered and rejected OIC's argument that since Chicago Title (like Stewart) preserved a right to inspect Land Title's books, it maintained some right to control. *Chicago* at 11, n.7. Consistent with *Chicago*, the same argument should be rejected here. In short, Rainier was not Stewart's agent for marketing purposes.

3. OIC's Argument Here Regarding Apparent Authority Is Identical To The Argument The *Chicago* Court Rejected

The *Chicago* court also determined that Chicago Title was not vicariously liable under the doctrine of apparent authority. That doctrine applies "only when the principal makes objective manifestations of the agency's authority 'to a third person.'" *Chicago* at 12, *quoting Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 555, 192 P.3d 886 (2008). Chicago Title's filing of the required OIC agency appointment form, the court held, was not enough to make Land Title its agent for purposes of its marketing actions. The Court would make the same determination here.

In particular, the marketing activities the OIC claims violate the regulation would not lead a consumer to believe: (a) Rainier was advertising on behalf of Stewart; or (b) Stewart itself was manifesting Rainier's authority to advertise on its behalf. There is no mention of Stewart in Rainier's web pages. OIC Brief, Exh. 5. Instead, the pages make clear that Rainier is acting on its own behalf: "100% Locally Owned and Operated." "We ... understand local customs and procedures. You can depend on Rainier Title to provide you with consistent, accurate and timely service for all of your title and escrow needs." "Rainier Title is honored to be selected ... by Nest Financial." Nothing here suggests that Rainier was merely working as an agent for a larger national underwriter. There has been no "objective manifestation" in the advertising that

Stewart had authorized Rainier to act on its behalf. Under *Chicago*, there is no apparent authority here.

4. The Names Given To The Parties In *Chicago* Had No Legal Significance

Did the designations "underwritten title company (UTC)" or "underwriting insurer" affect the outcome in *Chicago* in a way that justifies a different outcome here? The *Chicago* court's analysis of common law agency principles was based solely on the actual substantive relationship between Chicago Title and Land Title, not on the generic labels used to refer to them in the briefing. It makes no difference whether we call: (a) Rainier an "agent" or a "UTC"; or (b) Stewart an "underwriter" or a "title insurer." The *Chicago* court considered the statutory definitions and structure. It held that nowhere in the statute is an insurance company made vicariously liable for the acts of an agent just because it appointed the agent under the terms of the statute. The court did not come to this conclusion because Chicago Title refers to its agents as UTCs.

Here, as well, the question is not which name or label is applied; the question is whether Rainier actually acted as Stewart's agent in its marketing activities. There are no facts to suggest Stewart had any control over the marketing activities, just as there were no such facts in *Chicago*. The names used do not justify any result other than as dictated by *Chicago*.

C. THE OIC MISUNDERSTANDS *CHICAGO*

The OIC claims the *Chicago* court confused "underwriter" with "reinsurer." It argues that the court somehow assumed that Land Title did not issue "Chicago Title" policies. To the contrary, *Chicago* recited the provision in the agency agreement that Land Title has the "authority ***on behalf of [Chicago Title]*** to sign

countersign and issue [***Chicago Title's***] title assurances ***on forms supplied and approved by [Chicago Title]....***" *Chicago* at 3 (emphasis added).

The court fully understood that Land Title issued *Chicago Title's* title insurance policies. Because they were Chicago Title policies, Chicago Title would have a contractual obligation to the insured if a covered title claim arose. The liability Chicago Title assumed under the policy, however, was not at issue, so there was no reason for the court to address that topic at length. The issue was whether Chicago Title was liable for marketing activity violations which it did not control.

No one contended, in *Chicago*, that Land Title did not issue Chicago Title policies. No one in this matter claims that Rainier does not issue Stewart policies. Which entity's name appears on the policies, however, is not relevant to whether Chicago Title or Stewart controlled the marketing activities of its respective agents.

D. CONCLUSION

The OIC disagrees with the *Chicago* court's: (a) interpretation of agency and insurance case law; (b) interpretation of the statute; (c) conclusion that the common law of agency defines the scope of the agency relationship; and (d) conclusion that apparent authority does not arise simply by appointing an agent on the form supplied by the insurance commissioner.

OIC's disagreement with the court, however, does not affect the precedential value of the court's decision. The proper place to raise these disagreements is on appeal. This is not the time or place to second-guess the Court of Appeals or rule in a manner contrary to *Chicago*.[5]

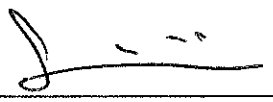
---

[5] The OIC also argues that the "*Chicago* Court appeared to take umbrage at the lack of notice to Chicago Title about its agent's alleged regulatory violation." OIC Brief at 8. Any "umbrage," if it existed, was not the basis for the court decision. The decision was based entirely on an interpretation of the insurance statute, common law agency principles, and the relationship between Chicago Title and Land Title.

There are no relevant legal differences between this case and the case before the appellate court in *Chicago*. The only relevant factual difference—that Stewart and Rainier are competitors—makes Stewart's case ***stronger*** than Chicago Title's. There is nothing to justify holding Stewart liable for the marketing violations of Rainier. *Chicago* is binding. The claim against Stewart Title Guaranty Company should be dismissed.

DATED: April 18, 2012.

SIRIANNI YOUTZ SPOONEMORE
999 Third Avenue, Suite 3650
Seattle, WA 98104
Tel.: (206) 223-0303 • Fax: (206) 223-0246
Email: ssirianni@sylaw.com



Stephen J. Sirianni (WSBA #6957)
Attorneys for Stewart Title Guaranty Co.

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on April 18, 2012, I caused a copy of this document to be filed and served as follows:

Filing and Judge's Working Copy:

Kelly A. Cairns
Legal Affairs Division
OFFICE OF THE INSURANCE COMMISSIONER
P.O. Box 40255
Olympia, WA 98504-0255

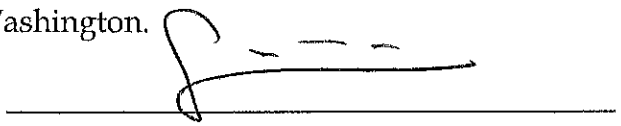
[x] By USPS First-Class Mail
[x] By Email
kellyc@oic.wa.gov

Service Copy:

Marcia G. Stickler
Legal Affairs Division
OFFICE OF THE INSURANCE COMMISSIONER
P.O. Box 40255
Olympia, WA 98504-0255

[x] By USPS First-Class Mail
[x] By Email
marcias@oic.wa.gov

DATED: April 18, 2012, at Seattle, Washington.



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CHICAGO TITLE INSURANCE CO., an Authorized Insurer, Appellant, v. WASHINGTON STATE OFFICE OF THE INSURANCE COMMISSIONER, Respondent.	No. 40752-3-II PUBLISHED OPINION

JOHANSON, J. — Chicago Title seeks reversal of an Office of Insurance Commissioner (OIC) ruling, arguing that the ruling erroneously imposed vicarious liability on Chicago Title for the regulatory violations of Land Title Insurance (Land Title) merely because Chicago Title underwrites Land Title's title insurance policies. We hold that the OIC did not have statutory, inherent, or common law authority to impose vicarious liability on Chicago Title for regulatory violations Land Title committed. We reverse the OIC judge's decision and reinstate the Administrative Law Judge's (ALJ) order granting summary judgment to Chicago Title.

FACTS

I. TITLE INSURANCE

Title insurance insures owners of real property against loss by encumbrance, defective title, or adverse claim. RCW 48.11.100. Consumers typically select title insurance in connection with a "middlem[a]n," (i.e., their real estate agent, builder, banker, etc.) who may exert great influence on the consumer's decision. Administrative Record (AR) at 470, 472. In 1988, Washington State's OIC adopted a rule to protect consumers by limiting the gifts or inducements that a title insurance company or its agent could offer to a middleman in return for steering customers into buying title insurance from specific companies. Former WAC 284-30-800.[1]

Chicago Title provides title insurance nationally. In eight Washington counties, Chicago Title maintains direct operations, meaning that it researches title,[2] proposes the policy, underwrites the policy, offers escrow and closing services, and markets all these services to customers. In smaller counties, Chicago Title maintains no direct operations and instead only underwrites the policies generated by independent title insurance companies, also known as underwritten title companies (UTC).

In an underwritten title insurance agreement, the UTC conducts its own marketing and sales, maintains the title plant, performs the research for clients, determines the commitments

[1] Former WAC 284-30-800 was in effect during the relevant period of this case. The legislature enacted a new regulatory scheme effective in 2009, RCW 48.29.210 and WAC 284-29-210 through WAC 284-29-260. These superseding regulations still prohibit excessive inducements.

[2] Title search requires that title companies maintain or subscribe to a title plant, which collects all documents recorded for real property in that county and indexes them by legal description or address.

and exceptions to coverage, and collects all fees and premiums. The underwriting insurance company contracts with the UTC to assume liability for title claims arising from the UTC's policies in exchange for a percentage of the title premiums. Generally, the underwriting title insurance company does not receive documents associated with closing or information about the policy or commitment except for (1) the policy number, (2) the internal file number, (3) the effective date of policy, (4) the type of policy, (5) the premium paid, and (6) the amount of liability. UTCs may have agreements with several underwriting title insurance companies and underwriting title insurance companies may have agreements with several UTCs. This arrangement is beneficial to both small and larger insurance companies because RCW 48.29.020(3) requires that title insurers maintain sufficient capital. But small insurance companies generally lack the requisite capital and the larger title insurance companies are disinclined to maintain title plants in smaller counties, which generate less business and profit.

Chicago Title underwrites title insurance policies for 11 independent UTCs in Washington, including Land Title of Kitsap County. In 1992, Chicago Title and Land Title entered into a written contract, naming Land Title as the issuing agent and Chicago Title as the principal. The "Issuing Agency Agreement" provided:

> 3. Issuing Agent . . . shall have authority on behalf of Principal to sign, countersign and issue Principal's title assurances on forms supplied and approved by Principal and only on real property located in the County or Counties listed above. . . . Agent shall not be deemed or construed to be authorized to do any other act for principal not expressly authorized herein.
> 4. . . . Issuing Agent shall:
>
> . . .
>
> B. Receive and process applications for title assurances
>
> (1) In accordance with usual customary practices and procedures and prudent underwriting principles; and

(2) In full compliance with instructions, rules and regulations of Principal given to Issuing Agent.

AR at 519. The agreement further specified that Land Title pay Chicago Title 12 percent of the gross premium and "[c]omply with all federal and state, municipal ordinances, statutes, rules and regulations." AR at 519. The agreement also provided, "Issuing Agent shall not . . . [u]se the name of the Principal in any advertising or printing other than to indicate the Issuing Agent is a policy issuing agent of the Principal." AR at 520. In the agreement, the parties allocated losses by designating that Chicago Title was responsible for loss connected with any failure of the title search and Land Title was responsible for other causes of loss. The agreement retained Chicago Title's right to examine "all accounts, books, ledgers, searches, abstracts and the records which relate to the title insurance business." AR at 521.

Land Title employs sales personnel who market its services to potential customers in Kitsap County. Land Title makes no mention of Chicago Title in its marketing materials, which emphasize that Land Title is a local company performing title insurance and escrow and closing services. Land Title and Chicago Title have no relationship regarding Land Title's escrow and closing service, for which Land Title retains all of its fees and receives 28 percent of its total revenue. Chicago Title does not compensate Land Title for marketing expenses and does not exercise any control over Land Title's marketing practices or procedures.

In 2006, the OIC published a report on violations of the anti-inducement regulation. The investigation inspected 11 title insurance companies, including Chicago Title, but not Land Title. Prompted by its investigation, the OIC issued a technical assistance advisory to all Washington title insurers and title insurance agents clarifying the regulation's provisions and informing them

that the law authorized the OIC to assess penalties for violations. The advisory did not mention UTCs or state that underwriting insurance companies would be liable for violations the UTCs commit.

In 2007, the OIC investigated Land Title for violations of the anti-inducement regulation and found multiple violations. The OIC did not contact Chicago Title during its investigation of Land Title. After concluding its investigation, the OIC asked Chicago Title to sign an order (1) stipulating that Land Title's conduct violated the inducement regulation, (2) agreeing to pay a fine of $114,500 for Land Title's alleged violations, (3) submitting to a compliance plan, which included specific tracking and auditing provisions, and (4) declaring that Chicago Title has "the authority to comply fully with the terms and conditions of the [Compliance] Plan." AR at 514 (no. 6). Chicago Title refused to sign the order.

II. PROCEDURE

In January 2008, the OIC filed a notice of hearing, proposing disciplinary action against Chicago Title (and not Land Title) for 13 alleged violations of the anti-inducement regulation committed solely by Land Title. The notice of hearing did not allege that Chicago Title participated or knew of the violations but indicated that Land Title acted as Chicago Title's agent. The Office of Administrative Hearings (OAH) granted Chicago Title's request to transfer the matter to an ALJ.

Chicago Title and the OIC agreed to bifurcate the proceedings into two phases. In phase I, the ALJ would consider only whether Chicago Title could be vicariously liable for Land Title's actions. Depending on the outcome of phase I, in phase II the ALJ would consider whether Land Title actually violated regulatory provisions of the insurance code. Chicago Title

moved for summary judgment on the vicarious liability issue.[3] The OIC opposed Chicago Title's summary judgment motion without filing a cross motion for summary judgment.

The ALJ granted summary judgment in favor of Chicago Title's motion and issued a number of "undisputed findings of fact" and conclusions of law. AR at 279 (capitalization and boldface omitted). The ALJ ruled that, although the insurance code provisions of Washington statutes granted the OIC "broad authority" to take action against a title insurer directly for its own violations, these code provisions did not authorize imposing vicarious liability where the common law of agency did not support such imposition. AR at 291-92.

The OIC hearings unit accepted OIC's petition for review of the ALJ's ruling. After hearing oral argument, the OIC judge, ruling de novo, denied Chicago Title's motion for summary judgment. The OIC judge ruled that the ALJ's "*[u]ndisputed findings of fact*" were "actually disputed" by the OIC and she deleted or revised them. AR at 122. The OIC judge also deleted or revised the ALJ's conclusions of law, and rejected the ALJ's reliance on "the principles of common law agency," and instead adopted the conclusion that the insurance code determined the insurer/insurance agent relationship. Although stating it was not necessary, the OIC judge added to the findings of fact that Chicago Title was vicariously liable under a strict common law analysis, including the theories of actual authority and apparent authority. The OIC judge determined that the OIC can hold Chicago Title responsible for Land Title's regulatory violations and transferred the case back to the OAH for phase II of the proceedings.

[3] On appeal, the OIC erroneously suggests that Chicago Title "stipulated" to Land Title's regulatory violations. The parties merely reserved the question of Land Title's regulatory violation for phase II of the proceedings.

Chicago Title petitioned for review and the superior court upheld the OIC judge's final decision. Chicago Title appeals.

ANALYSIS

I. STANDARD OF REVIEW

"In reviewing a superior court's final order on review of a Board decision, an appellate court applies the standards of the Administrative Procedures Act directly to the record before the agency, sitting in the same position as the superior court." *Honesty in Envtl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 526, 979 P.2d 864 (1999). We review the OIC judge's legal determinations using the Administrative Procedure Act's "error of law" standard, which allows us to substitute our view of the law for that of the OIC. *Verizon NW, Inc. v. Emp't Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008); *see* RCW 34.05.570(3)(d).

We review an agency's interpretation or application of the law de novo. *HEAL*, 96 Wn. App. at 526. "We accord deference to an agency interpretation of the law where the agency has specialized expertise in dealing with such issues, but we are not bound by an agency's interpretation of a statute." *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). Where we review purely a question of law, however, we do not defer to the agency's interpretation. *Hunter v. Univ. of Wash.*, 101 Wn. App. 283, 292, n.3, 2 P.3d 1022 (2000), *review denied*, 142 Wn.2d 1021 (2001).

II. STATUTORY PROVISION OF AGENCY

A. Statutes Do Not Provide Vicarious Liability

The OIC argues that when read together, the insurance code statutes establish as a matter of law not only the existence of an agency relationship in the insurance context but also a scope of agency that makes the principal vicariously liable for the agent.[4] We disagree.

Former 48.17.010 (1985) defines an "agent" and permits an agent to "effectuate" insurance contracts, if authorized by the principal, and to collect premiums on those insurance policies.[5] Former RCW 48.17.160 (1994) describes the mandatory procedure for appointing an insurance agent, requiring filing with the commissioner and paying a fee.[6]

---

[4] The OIC also argues that the legislature need not have expressly granted the OIC authority to hold insurers vicariously liable because it provided the commissioner with authority "reasonably implied from the provisions" of this code. Br. of Resp't at 11; RCW 48.02.060 (1). Although we agree that the insurance commissioner has authority to enforce provisions of the insurance code and to make reasonable rules and regulations according to rulemaking procedure, we disagree that by implication, the legislature authorized the insurance commissioner to declare one insurance company vicariously liable for another without a common law basis.

[5] Former RCW 48.17.010 defined "agent" as:

> "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.

[6] Former RCW 48.17.160 provides for the appointment of agents:

> (1) Each insurer on appointing an agent in this state shall file written notice thereof with the commissioner on forms as prescribed and furnished by the commissioner, and shall pay the filing fee therefor as provided in RCW 48.14.010. The commissioner shall return the appointment of agent form to the insurer for distribution to the agent. The commissioner may adopt regulations establishing alternative appointment process for individual within licensed firms, corporations, or sole proprietorships who are empowered to exercise the authority conferred by the firm, corporate, or sole proprietorship license.

Relying on *Day v. St. Paul Fire & Marine Insurance Company*, 111 Wash. 49, 53, 189 P. 95 (1920), the OIC argues that by enacting the insurance code in 1911, the legislature determined the scope of agency for insurance transactions as a pure issue of law. Although the *Day* court noted that the legislature passed the insurance code "for the purpose of clearly defining the insurance company's duties and liabilities" as a matter of law, the opinion recognizes only that the insurance code established a new method to determine who the law will consider to be an agent. *Day*, 111 Wn.2d at 54. *Day* does not address the scope of agency established between an insurance company and its appointed agent. *Day* neither states nor implies that per se vicarious liability should attach to the principal for an agent duly appointed under the statute. Washington's insurance code is silent regarding both the scope of agency generally and vicarious liability specifically.

The OIC also argues that the legislature expanded the insurance code after the *Day* opinion, eliminating the need for an extensive, case-by-case common law analysis to establish vicarious liability. But case law does not support the conclusion that by defining the term "agent" the legislature intended to establish the scope of every relationship authorized by former RCW 48.17.010. Instead, case law supports vicarious liability only on a common law basis. *Am. Fid. & Cas. Co. v. Backstrom*, 47 Wn.2d 77, 81, 287 P.2d 124 (1955) (after determining that an individual was properly considered an agent because he conformed to the statutory definition of "insurance agent," our Supreme Court applied common law agency principles to determine that the insurance agent's knowledge would be imputed to the principal), *see also Miller v. United Pac. Cas. Ins. Co.*, 187 Wash. 629, 638-39, 60 P.2d 714 (1936).

No authority supports the OIC's argument that the insurance code eliminates the need for a case-by-case common law analysis to establish vicarious liability and we reject that argument.

B. Common Law Vicarious Liability

Chicago Title argues that, because it could not and did not control Land Title's marketing practices, it cannot be vicariously liable for Land Title's marketing practices under common law. We agree.

1. Right to control

When the facts are not in dispute and not susceptible to more than one interpretation, we determine vicarious liability in a business relationship as a question of law. *Larner v. Torgerson*, 93 Wn.2d 801, 804-05, 613 P.2d 780 (1980). We consider several factors before imposing vicarious liability, but the most crucial factor is the right to control the manner, method, and means by which the work and the desired result was to be accomplished. *Hollingbery v. Dunn*, 68 Wn.2d 75, 80-81, 411 P.2d 431 (1966). When the superior business party has retained no right of control over the subordinate business party and there is no reason to infer a right of control, we will not hold the superior business party vicariously liable for the subordinate party's acts. *Larner*, 93 Wn.2d at 804-05. The significance of the principal's right to control the agent's operation pertains particularly to the "'control or right of control over those activities from whence the actionable negligence flowed.'" *Kroshus v. Koury*, 30 Wn. App. 258, 264, 633 P.2d 909 (1981) (quoting *Jackson v. Standard Oil Co.*, 8 Wn. App. 83, 91, 505 P.2d 139 (1972), *review denied*, 82 Wn.2d 1001 (1973)), *review denied*, 96 Wn.2d 1025 (1982).

The agreement between Chicago Title and Land Title, which appointed Land Title as an issuing agent to potential insured persons, also precluded Land Title from marketing on Chicago

Title's behalf. The OIC's identified regulatory marketing violations did not involve the insured person but involved the use of marketing practices that attempt to induce realtors and other middlemen to influence referrals for marketing purposes. Undisputed testimony from the president of Land Title included that:

> [Chicago Title] does not play any role in or exercise any control over Land Title's business operations. [Chicago Title] does not provide any advice to Land Title on compliance with the Inducement Regulation. [Chicago Title] does not have any input in, or oversight of, Land Title's marketing practices or procedures.

AR at 499.

Despite maintaining that a common law analysis is superfluous, the OIC alternatively argues that Chicago Title is vicariously liable for Land Title's marketing because the pertinent parties never affirmatively disclaimed having the right to control Land Title but merely disclaimed exercising that right.[7] OIC's argument relies on *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 119-20, 52 P.3d 472 (2002). But *Kamla* does not support the OIC's strained argument (that a party who fails to disclaim expressly the right to control, thereby acts affirmatively to establish the party's right to control). Additionally, the OIC misplaces its reliance on *Kamla* because that analysis involved direct, not vicarious, liability, which entails a different test.

The evidence shows that Land Title's alleged violations of the anti-inducement regulation involve strictly marketing issues. The evidence also shows that Chicago Title did not control any

[7] The OIC argues that, because the written agreement preserves Chicago Title's right to inspect Land Title's books, Chicago Title must affirmatively rebut the implication that it had a right to control Land Title. But evidence that Chicago Title retained general contractual rights does not support the OIC's assertion that Chicago Title retained the specific rights at issue here, i.e., the right to control Land Title's marketing.

aspect of Land Title's marketing. Because Land Title's alleged violations of the anti-inducement regulation involve strictly marketing issues, the evidence does not support the OIC's alternative argument that the OIC judge properly found Chicago Title vicariously liable under a strict common law agency analysis. *See Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 183, 159 P.3d 10 (2007), *aff'd*, 166 Wn.2d 27, 204 P.3d 885 (2009).

2. Doctrine of apparent authority

The OIC argues that the OIC judge properly found Chicago Title vicariously liable under the theory of apparent authority[8] because Chicago Title's compliance with the insurance code's procedure to appoint an agent objectively manifested that Land Title acted on its behalf. We disagree.

"An agent has apparent authority to act for a principal only when the *principal* makes objective manifestations of the agent's authority 'to a third person.'" *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 555, 192 P.3d 886 (2008) (quoting *King v. Riveland*, 125 Wn.2d 500, 507, 886 P.2d 160 (1994)). The apparent authority doctrine protects third parties who justifiably rely upon the belief that another is the principal's agent. *D.L.S. v. Maybin*, 130 Wn. App. 94, 98, 121 P.3d 1210 (2005). The doctrine has three basic requirements: (1) The putative principal's actions must lead a reasonable third party to conclude that the actors are employees or agents; (2) the innocent third party must believe they are agents; and (3) the third party must rely on that

[8] The OIC also argues that, because Chicago Title did not address apparent authority in its opening brief, it conceded that argument. But in its opening brief, Chicago Title assigned error to the OIC judge's findings of fact and conclusions of law, asserting the doctrine of apparent authority, and in its reply brief, Chicago Title responded fully to the OIC's apparent authority argument. Thus, Chicago Title has not conceded this argument. RAP 10.3(c); *Spokane v. White*, 102 Wn. App. 955, 963, 10 P.3d 1095 (2000), *review denied*, 143 Wn.2d 1011 (2001).

mistaken belief to its detriment. *D.L.S.*, 130 Wn. App. at 98. The innocent third party's subjective belief must be objectively reasonable based on the principal's specific objective manifestation. *Ranger Ins. Co.*, 164 Wn.2d at 555 (power of attorney to post bonds on behalf of principal does not constitute an objective manifestation of authority to redirect funds).

The apparent authority doctrine is inapplicable here because that doctrine's purpose is to provide judicial recourse for innocent third parties whose reliance has harmed them, which circumstance is not present here. *See D.L.S.*, 130 Wn. App. at 98. Additionally, the OIC's apparent authority argument depends on its statutory authority argument and does not constitute a strict common law analysis. Finally, Chicago Title's filing of the required OIC form and paying the required OIC fee to make Land Title its issuing agent does not constitute a specific objective manifestation that it authorized Land Title to violate the anti-inducement regulation. *See Ranger Ins. Co.*, 164 Wn.2d at 555.

The OIC does not show a basis upon which to impose vicarious liability, neither on the doctrines of actual authority nor apparent authority. Neither does the law support the OIC's argument that the insurance code, which defines and establishes the mandatory procedure for the appointment of an insurance agent, eliminates the need for a case-by-case common law analysis. Finally, the OIC fails to explain why Land Title should not be solely accountable for its own alleged violations of anti-inducement regulations.[9] We hold that the OIC has neither statutory

[9] The OIC implies that, unless we hold title insurance underwriters vicariously liable for their UTCs, insurance code violations will go unregulated. We note, however, that nothing in this opinion prevents the OIC from holding the UTCs solely responsible for complying with anti-inducement regulations.

authority to impose vicarious liability on Chicago Title for Land Title's marketing nor does it show that vicarious liability is proper under the common law.[10]

We reverse the OIC judge's decision and reinstate the ALJ's order granting summary judgment to Chicago Title.

Johanson, J.

We concur:

Hunt, P.J.

Van Deren, J.

[10] Because we hold that the OIC neither has statutory authority to impose vicarious liability nor shows that vicarious liability is proper under the common law, we do not reach Chicago Title's alternative argument that the OIC judge exceeded its delegated legislative authority and effectively promulgated a de facto regulation.