BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

In the Matter of:	Docket No. 15-0166
FIRST AMERICAN TITLE INSURANCE COMPANY,	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER**
Authorized Title Insurer.	

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On March 28, 2016, and March 29, 2016, this matter came before me in Tumwater, Washington, for evidentiary hearing, pursuant to the Notice of Hearing, filed January 5, 2016. Marcia Stickler, Attorney at Law, Insurance Enforcement Specialist, Legal Affairs Division, appeared on behalf of the Office of the Insurance Commissioner ("OIC"). Jerry Kindinger, Ryan, Swanson & Cleveland PLLC, appeared on behalf of First American Title Insurance Company ("First American"). I have considered the testimony of the witnesses for both the OIC and First American at the evidentiary hearing, the exhibits admitted into evidence, and the arguments of the parties.

FINDINGS OF FACT

1. This adjudicative proceeding was properly convened, and all substantive and procedural requirements under the laws of Washington have been satisfied. This Order is entered pursuant to RCW Title 48, specifically RCW 48.04; RCW Title 34; and regulations pursuant thereto.

2. On January 29, 2014, Matthew Wahlquist ("Wahlquist"), Executive Director of the Snohomish County-Camano Association of REALTORS® ("SCCAR") sent e-mail correspondence to Sara Christensen ("Christensen"), Sales Manager for Snohomish County, First American, inquiring whether First American was "planning to host another Market Update with

Zillow for 2014." Exhibit FA-3. The same e-mail correspondence added: "We really appreciated the opportunity to partner with your team and would love to participate in the event for 2014. Let me know your thoughts. I look forward to hearing from you." *Id.* I accept Christensen's testimony that sometime during the summer of 2014 she met with Wahlquist and Ryan McIrvin ("McIrvin"), Director of Government and Public Affairs, of SCCAR, about the event entitled "Real Estate in the Puget Sound and Snohomish County, Economic Forecast for 2015 with Zillow" ("Event"), to be held on October 16, 2014, from 11:30 a.m. to 1:00 p.m., at AMC Loew's Cineplex 16 Alderwood, in Lynnwood, Washington. See also Exhibit FA-8.

3. I reject Christensen's testimony that during her meeting with Wahlquist and McIrvin during the summer of 2014 Wahlquist and McIrvin recommended Cobalt Mortgage ("Cobalt") as a possible co-sponsor with First American of the Event. McIrvin stated to the OIC on March 5, 2015, that Christensen organized, arranged for the speaker, and located and paid the rent for the venue for the Event. Exhibit FA-15. I accept Christensen's testimony that Cobalt is a customer of First American, and that a First American sales representative in King County reached out to Cobalt's owner about co-sponsoring the Event, who subsequently sent Earl Schmidt ("Schmidt"), manager of Cobalt, an e-mail. I also accept her testimony that Schmidt later communicated with her via e-mail as the Event date approached. Schmidt told the OIC during an interview on March 5, 2015, that it was not until *late 2014* that Cobalt was asked to help with the Event that was organized by First American. Exhibit FA-15. Schmidt claims that Cobalt ended up buying Subway sandwiches and beverages for the Event attendees, which he remembered paying around $1,000 for. *Id.* This is consistent with Wahlquist's testimony, which I accept, that he became aware of Cobalt's involvement with the Event on the day of the Event. The snapshot of the movie theatre screen, which the attendees to the Event saw, First American posted on its Facebook page following the Event, and which First American prepared, lists both Cobalt and First American as co-sponsors of the Event. Exhibit FA-5.

4. I accept Christensen's testimony that First American's marketing department prepared the flyer for the Event (Exhibit FA-8), while Zillow provided the picture and biography of the speaker for the Event, Dr. Krishna Rao, Ph.D., Zillow Economist.[1] Jayme Tooze, graphic designer in First American's Scottsdale, Arizona office, states that she edited the flyer for the Event for less than forty-five minutes, including cutting and pasting information from the Zillow event held by SCCAR in the previous year, and adding the photo and biography of the speaker for the Event Zillow provided. Exhibit FA-27.

5. I accept Christensen's testimony that SCCAR was not equipped to handle the e-mail traffic for the Event, therefore to RSVP for the Event, guests had to send an e-mail to, or call, First American. I also accept Christensen's testimony that First American wanted to process the RSVPs for the Event in order to provide its co-sponsor for the Event, Cobalt, responsible for paying for the cost of the food and beverages for the Event, with an accurate headcount. However, I reject Christensen's testimony that she did not locate the venue for the Event, or ask SCCAR to include First American's logo and phone number on the Event flyer. McIrvin's statement to the OIC on

[1] During a March 3, 2015, interview with the OIC, Zillow Senior Economist Skyler Olsen indicated that she was the speaker for the Event. Exhibit FA-15. Who the speaker for the Event from Zillow actually was is irrelevant to the decision in this case.

March 5, 2015, contradicts this, wherein he states that he sent SCCAR's logo to Christensen, who made the flyer for the event. Exhibit FA-15. McIrvin also states that Christensen organized, arranged for the speaker, and located and paid the rent for the venue for the Event. *Id.* In an interview with the OIC on March 3, 2015, Christensen herself indicated that she assisted SCCAR in locating the venue and probably asked SCCAR to include the First American logo and phone number on the Event flyer. Exhibit FA-15.

6. In April 2, 2015, correspondence to Barry Walden ("Walden"), Senior Investigator for the OIC's Legal Affairs Division ("Legal Affairs"), Matthew B. Sager ("Sager"), Vice President, Senior Operations Counsel, for First American, in response to Walden's request for copies of e-mails by and between First American and Cobalt, stated that copies of e-mails between First American and Cobalt were not necessary for First American to show it complied with WAC 284-29-220. Exhibit FA-17. Sager added: "First American . . . is not currently able to locate emails to and from Cobalt . . . and other employees of First American as emails are automatically archived and deleted from a user's account." *Id.* However, Sager then states: "Based on discussions with its employees, First American was able to discover that communications with Cobalt . . . regarding the [Event] at issue were primarily discussing the type of menu Cobalt . . . should provide for its sponsorship of the [Event]." *Id.* (Brackets added). Sager then stated: "If you consider these emails to be an important part of the investigation, First American will, upon your request, coordinate with its IT department to attempt to locate these emails." *Id.*

7. I accept Christensen's testimony that she and other employees of First American were not involved in, or responsible for, sending the flyer for the Event to SCCAR members. E-mail correspondence dated September 3, 2014, from Christensen to Wahlquist and McIrvin states in part: "Hello gentlemen! I've attached the flyer that is being used to help bring in Brokers next month to the [Event]. Can you also put this out to the members?" Exhibit FA-13 (brackets added). On September 25, 2014, Christensen sent follow-up e-mail correspondence to both Wahlquist and McIrvin stating: "Hello, I'm following up, have you already pushed this [i.e., flyer for Event] out via e-mail? I haven't received it if so. And can you put this on the website too please?" *Id.* (Brackets added). On September 26, 2014, Wahlquist responded to Christensen, stating: "We are marketing the [Event] in our member e-newsletter. This should go out to our active members on Monday, September 29th. I have asked [McIrvin] to add the [E]vent to [SCCAR's] website." *Id.* (Brackets added).

8. Both the Electronic Delivery Report (Exhibit FA-6), and Electronic Open Report (Exhibit FA-7), demonstrate that SCCAR sent notice of the Event to all its members, including affiliates, some of which are title insurers, and direct competitors of First American. Exhibit FA-7 also demonstrates that some of those affiliates opened the e-mail correspondence from SCCAR about the Event. Wahlquist confirms as much, stating that SCCAR provided its entire membership information about the Event in two ways: (1) It sent its entire membership its monthly e-mail newsletter that contained the subject information; and (2) placed information about the event on its website prior to the Event. Declaration of Matthew Wahlquist, ¶ 5 (Exhibits FA-24, OIC-14).

9. I reject the testimony of Ruth Hopkins ("Hopkins"), who was previously employed by First American, and more recently as Sales Manager for Old Republic Title Company ("Old

Republic"),[2] that McIrvin of SCCAR told her that that the Event was a closed one, only open to customers of First American. On November 16, 2015, in an interview with Walden, OIC Senior Investigator, Hopkins stated that it was Wahlquist, not McIrvin, who told her the Event was a closed one. Exhibit OIC-19. Hopkins' testimony is inconsistent with her earlier statements, Declaration of McIrvin, ¶5 (Exhibit FA-24), September 26, 2014 e-mail correspondence from Wahlquist to Christensen discussed above (Exhibit FA-13), and with SCCAR's own documentation showing that it sent notice of the Event to all its members, including LoisChampion Myers and Jim Fetzer, her colleagues at Old Republic, and the contact persons for Old Republic listed with SCCAR (Exhibit FA-6).

10. The statement by Jim Fetzer (Exhibit OIC-23), another employee of Old Republic, that he has "no recollection of receiving an invitation to attend a [First American] seminar from SCCAR," (brackets added), does not diminish the evidence (Exhibits FA-6 and FA-7) that SCCAR sent notice of the Event to all of its members, including Old Republic. I accept Walden's testimony that he never knew about notice SCCAR sent its members of the Event, and never inquired about SCCAR's website or their advertisement of the Event. Also, I accept Walden's admission that prior to his deposition on February 23, 2016, he had never seen November 21, 2014, correspondence Sager (Vice President, Senior Operations Counsel, for First American) sent to the OIC's Fritz Denzer with the Event attendee roster demonstrating that SCCAR notified all of its members (including competitors of First American) about the Event.

11. I accept Sager's testimony that Sari-Kim Conrad ("Conrad"), Operations Division, Direct Division, is First American's Compliance Officer for the state of Washington, and their in-house expert on compliance with title insurance laws in this state. I also accept Sager's testimony that across the country First American has a large compliance audit review team, and that he becomes involved in responding to audit findings by state regulatory authorities. I accept the testimony of Sager that First American does not track employee time and/or hours with regards to trade association events. In April 2, 2015, correspondence to Walden of the OIC (Exhibit FA-17), Sager states at page 4, under paragraph 8, in part:

> . . . First American is not able to locate any rule or statute that requires recordkeeping of hours spent on a trade association event. First American has kept appropriate recordkeeping of the matters needed to demonstrate compliance with WAC 284-29-220 and WAC 284-29-235. As hours spent are not a requirement of compliance with WAC 284-29-220 and WAC 284-29-235, First American objects to a request for hours spent which is not needed in order to show compliance. Without waiving this objection, First American responds by stating that any time spent in organizing the events is minimal at best as First American would not have actively organized the trade association events. Additionally, any hours spent in connection with the sponsorship of the 2014 Economic Forecast education seminar that was held in 2013 would be similar to the amount of hours spent sponsoring the [Event].

[2] For Snohomish, King, and Pierce counties.

> In light of there being no statute or rule requiring the tracking of hours spent on trade association events, First American would cordially request that if the [OIC] is of the opinion that hours spent donated to trade association committees as well as hours spent on contributing or sponsoring trade association events and education seminars must be tracked in order to show compliance with WAC 284-29-220 and WAC 284-29-235 that the Department provide guidance to the industry either through a bulletin or "FAQ."

Exhibit FA-17 (brackets added).

12. I have serious doubts about Christensen's testimony that she spent only one hour and thirty minutes working on the Event, while her assistant Gretchen Buck only spent at most five minutes creating the slide for the movie theater screen (Exhibit FA-5) seen by attendees to the Event. This is in part because I accept Christensen's testimony that she did not track her or her assistant's time related to the Event, and therefore find that the actual amount of time she and her assistant spent working on the Event is unknown. Christensen's testimony that Conrad never asked her for the time she spent planning the Event is consistent with this. More importantly though, the Event, and others similar to it that First American either sponsors or co-sponsors, are important to First American from a marketing perspective, as evidenced by the screen shot from its Facebook site (Exhibit FA-5), which stated following the Event: "Enjoyed hearing about 2015 Economic projections with over 200 of our clients. This Team [SCCAR, Cobalt, and First American] did an outstanding job and we had a very successful event." (Brackets added). Given this context, I doubt that less than three hours of First American employee time (including the time of Jayme Tooze, graphic designer in First American's Scottsdale, Arizona office, with the creation of the flyer – discussed at ¶ 4 above) is all that was required to make the Event a successful one.

13. E-mail correspondence dated July 31, 2014, from Conrad to Christensen does not inquire as to the amount of time First American employees spent on planning the Event, but simply couches the conversation in terms of dollars spent by First American on the Event, stating in part: "Just to confirm, we are just paying $1000 for this sponsorship?" Exhibit FA-4. On the same date, Christensen responded: "$875 actually." *Id.* I accept Christensen's testimony that First American signed a contract with the movie theater (AMC Loew's Cineplex 16 Alderwood) to rent the venue for the Event, and paid $875 to rent it. First American's rental contract with AMC for the Event (Exhibit OIC-9, Page 28) is consistent with this.

14. I reject Christensen's characterization during her testimony that her coordination of the Event with Wahlquist and McIrvin, and the work of First American employees in the aggregate on the same, was part of the work of an ad hoc/planning committee of SCCAR. McIrvin testified that no SCCAR committee was formed to plan or prepare for the Event. Article XIII of SCCAR's Bylaws (Exhibit PO-2), entitled "Committees," describes the process of forming a SCCAR committee, and states:

> Section 1. **Standing Committees.** The President Elect shall appoint from among the REALTOR® Member, subject to confirmation by the Board of Directors, the following standing committee Chairmen:

Professional Standards
Education/Equal Opportunity
Grievance
Legislative Affairs/RPAC
Communications/Public Relations

The members of the Professional Standards and Grievance Committee shall be confirmed by the Board of Directors.

Section 2. **Special Committees.** The President shall appoint, subject to confirmation by the Board of Directors, special committees as deemed necessary.

Section 3. **Organization.** All committees shall be of such size and shall have duties, functions, and powers as assigned by the President or the Board of Directors except as otherwise provided in these Bylaws.

Section 4. **President.** The President shall be an ex-officio member of all standing committees and shall be notified of their meetings.

15. SCCAR's website lists Sara Christensen as the contact at First American, an affiliate member of SCCAR.[3] SCCAR's website also states that members of SCCAR are given a copy of the SCCAR bylaws at the new member orientation session, and agree to comply with them.[4]

16. I accept the testimony of Conrad, First American's Compliance Officer for the state of Washington, that she personally tracks trade association events that First American is involved with for compliance with RCW 48.29.210 and WAC Ch. 248-29. I also accept Conrad's testimony that she is the OIC Liaison (i.e., a Committee Chair) for the Washington Land Title Association ("WLTA"). I have no qualms with Conrad's testimony that on behalf of both First American and WLTA she had, and continues to have, discussions with the OIC about the regulatory provisions in WAC Ch. 284-29, and in particular with Jim Tompkins ("Tompkins"), Senior Policy Analyst with the OIC, who assisted in drafting those provisions. That said, I reject Conrad's characterization that Tompkins indicated to her during such discussions in 2009 that a trade association committee does not have to be a formal committee or planning committee, but can just be an arrangement that satisfies the dictionary definition of "committee." I reject Conrad's testimony that any group working on behalf of SCCAR constitutes a SCCAR committee, or trade association committee. I also reject Conrad's loose characterization in her testimony of a trade association (or SCCAR) committee as two or more people acting on behalf of a trade association.

17. I accept the testimony of AnnaLisa Gellermann ("Gellermann"), Deputy Commissioner of Legal Affairs, that she is the chairperson of the OIC's so-called Compliance Committee

[3] http://www.sccar.com/webpage/webpage.cfm?UUID=B38A67BC-1372-14A2-147522A1EEC1C7F0 (site last visited April 7, 2016).
[4] http://www.sccar.com/webpage/webpage.cfm?UUID=7E5AE335-3048-B0F6-6A66768BF8E8B651&ItemID=738 (site last visited April 12, 2016).

("Committee"), which consists of her and the other Deputy Commissioners of the OIC.[5] On June 17, 2015, the Committee met to consider First American, and alleged violations, among others, of RCW 48.29.210(2), and WAC 248-29-200, -220 and -265, related to its participation in the Event, and the imposition of a fine against First American pursuant to RCW 48.05.185. Exhibits FA-19, FA-20. I accept Gellermann's testimony that when considering the factors listed in Exhibit FA-19 as applied to First American, the Committee looked in particular at the prior conduct of First American, whether the alleged violations by First American were intentional, grossly negligent, or negligent, etc., and whether First American cooperated with the OIC regulators in this matter. See factors 3, 5, and 9 listed on Exhibit FA-19.

18. In the Compliance Group Review Summary, dated June 17, 2015 (Exhibit FA-20), which staff in Legal Affairs prepared for the Committee to assist them in deciding whether to propose a fine against First American for alleged violations of RCW 48.29.210(2), and WAC 248-29-200, -220 and -265, related to its participation in the Event, Legal Affairs staff states First American committed a minimum of 270 violations related to the Event, and recommends a fine of $100,000 based upon RCW 48.05.140 and RCW 48.05.185.[6]

19. On December 15, 2015, Marcia G. Stickler, Insurance Enforcement Specialist with Legal Affairs requested a hearing on the proposed imposition of a $100,000 fine against First American for alleged violations of RCW 48.29.210(2) and WAC Ch. 284-29. See Exhibit FA-26.

CONCLUSIONS OF LAW

I. *Background.*

1. This adjudicative proceeding was properly convened, and all substantive and procedural requirements under the laws of the state of Washington have been satisfied. This Order is entered pursuant to RCW Title 48 RCW, specifically RCW Ch. 48.04; RCW Title 34; and regulations pursuant thereto.

2. RCW 48.01.030 articulates succinctly the notion that the business of insurance is governed by an aspiration to preserve the integrity of insurance, and states:

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

(Emphasis added).

3. RCW 48.29.210, enacted by the Washington State Legislature, and signed by the Governor in 2008, addresses prohibited business inducements in the title insurance industry, and states:

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[5] However, the OIC's Deputy Commissioner of the Operations Division is not a member of the Committee.
[6] See Page 4, Interrogatory No. 9, OIC Answers to First Interrogatories First American Title (Exhibit FA-17), where OIC further explains its rationale for multiplying the fine authorized in RCW 48.05.185 on a per violation basis.

(1) A title insurer, title insurance agent, or employee, agent, or other representative of a title insurer or title insurance agent shall not, directly or indirectly, give any fee, kickback, or other thing of value to any person as an inducement, payment, or reward for placing business, referring business, or causing title insurance business to be given to either the title insurer, or title insurance agent, or both.

(2) A title insurer, title insurance agent, or employee, agent, or other representative of a title insurer or title insurance agent shall not, directly or indirectly, give anything of value to any person in a position to refer or influence the referral of title insurance business to either the title insurance company or title insurance agent, or both, except as permitted under rules adopted by the commissioner.

4. RCW 48.02.060(3) provides the Insurance Commissioner of the state of Washington ("Commissioner") with the authority to:

(a) Make reasonable rules for effectuating any provision of this code, except those relating to his or her election, qualifications, or compensation. Rules are not effective prior to their being filed for public inspection in the commissioner's office.

(b) Conduct investigations to determine whether any person has violated any provision of this code.

(c) Conduct examinations, investigations, hearings, in addition to those specifically provided for, useful and proper for the efficient administration of any provision of this code.[7]

5. RCW 48.29.005 explains that the Commissioner may adopt regulations (i.e., rules) to implement and administer RCW Ch. 48.29, and states in part:

The commissioner may adopt rules to implement and administer this chapter, including but not limited to:

* * *

(5) Defining what <u>things of value</u> a title insurance insurer or title insurance agent is permitted to give to any person in a position to refer or influence the referral of title insurance business under RCW 48.29.210(2). In adopting rules under this subsection, the commissioner shall work with representatives of the title insurance and real estate industries and consumer groups in developing the rules.

(Emphasis added).

6. The Final Bill Report for Substitute Senate Bill ("SSB") 6847, Chapter 110, Laws of 2008, the passage of which codified both 48.29.005 and RCW 48.29.210, explains the context of the new legislation concerning the title industry, and states in part:

[7] RCW 48.01.010 explains that RCW Title 48 constitutes the insurance code.

Background:

* * *

The federal Real Estate Settlement Procedures Act forbids giving or receiving anything of value to encourage the referral of business incident to real estate settlement services, including title insurance. Washington law prohibits title insurers and agents from providing anything of value in excess of $25 per person over a 12-month period as an inducement, payment or reward for placing or causing title insurance business to be given to the title company. The OIC may fine title companies $10,000 for each violation.

Despite these prohibitions, studies conducted by OIC in 2006 and 2007 found industry-wide, pervasive violations. Consequently, OIC convened a task force to review the title insurance industry and recommend any improvements to serve consumers better. The task force members included representatives from title companies and real estate brokers, lenders, and consumer advocates.

Summary: As a condition of licensing, title insurance agents must submit an annual report to the OIC containing the contact information of anyone who owns any financial interest in the agent and either: (1) produces business for the agent; or (2) is an associate of producers of business for the agent.

Title insurers and agents are prohibited from giving any gift or payment to influence the referral of business, or to reward the referral of business. However, gifts and payments are permitted if they are given in exchange for like value or comply with OIC rules. Realtors, escrow agents, and mortgage brokers (collectively, "producers") are prohibited from accepting any gift or payment that is illegal for a title insurer or agent to give.

(Emphasis added).

7. One of the studies mentioned in the Final Bill Report for SSB 6847, entitled "An Investigation into the Use of Incentives and Inducements by Title Insurance Companies" ("Study" – Exhibit PO-1), issued by the OIC in October 2006, following an investigation initiated in August 2005, and which concluded in June 2006,[8] states in part on pages 8-9 the following conclusions regarding violation of laws governing incentives and inducements in the title industry:[9]

[8] As page 3 of the Study explains the OIC's primary investigate tool was a demand for company documents and records for an 18-month period beginning on January 1, 2004, including title company employee expense reports and general ledgers.

[9] In his cross-examination of Jim Tompkins, Senior Policy Analyst with the OIC, counsel for First American indicated that the Study, which Tompkins assisted in drafting, laid the groundwork for class-action litigation against defendants First American and other title companies in the United States District Court for the Western District of Washington, *Blaylock v. First American Title Insurance Co.*, Case No. C06-1667RAJ. As counsel for First American noted during cross-examination of Tompkins, the Court ultimately dismissed the action against the defendants in an order dated November 7, 2008, 2008 U.S. Dist. LEXIS 123463, 2008 WL 8741396, however did so not because the title companies did not engage in illegal practices, but because the plaintiffs lacked standing, stating that the violations alleged in the

> The Office of the Insurance Commissioner's review of title company records in King, Pierce and Snohomish counties clearly established that there are pervasive and widespread problems related to violations of laws governing incentives and inducements in the title insurance industry. Investigators found a common disregard for the laws governing the amount of money that can be expended to influence the placement of title insurance business with a title company. Investigators found that the degree of disregard ranged from blatant to embarrassed chagrin. . . .
>
> At the same time, however, the investigation also provided ample evidence that some of the major offenders view the law as little more than a nuisance standing between them and their ability to have business steered to them from their middlemen, go-betweens and associates in the real estate business.

(Emphasis added).

8. Pages 7-8 of the Study specifically discussed findings and conclusions as to First American's handling of incentives and inducements to drive its business, stating:

> First American offers a prime example of how illegal inducements can help a company attain superior market share. First American, the worst offender in the investigation, has consistently been in the top two for market share since 1998, significantly ahead of the rest of the pack. While some of the companies whose records were examined during this investigation appeared to be making an effort to comply with the $25 rule, First American clearly ignored its obligation to the law. Some of the companies on the lower end of the scale committed in the neighborhood of 100 violations during the 18-month period under

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matter before the Court were the province of public attorneys general and agencies (including the OIC) to enforce, and others directly injured, stating in part at *42-43:

> Acknowledgement of the broader enforcement powers of public attorneys general and agencies provides a segue to the conclusion of this order. Plaintiffs complain that the court's "concerns" regarding their standing "pose the stark question whether Defendants can be held accountable to Washington consumers at all for the economic injuries to consumers they have caused." Pltfs.' Supp. Br. at 4 (emphasis in original). Plaintiffs' fear is unfounded for two reasons. First, direct victims can use the CPA and RESPA to hold Defendants accountable for their unlawful conduct. Second, the state of Washington can sue for a broader range of injuries than private parties. The court's decision today reflects no judgment on Defendants' conduct or the harm it may have caused; it reflects a finding that others are better suited to vindicate the public and private interest in eradicating unlawful inducements and remedying the harm they cause. In *Tank*, when the Washington Supreme Court "foreclose[ed] the right of third party claimants to sue insurers for breach of their statutory duty of good faith," it did so not because the potential harm to third parties was not significant, but because it was "persuaded that the public as a whole would not benefit from allowing such suits." 715 P.2d at 1141. The court concluded that "the Insurance Commissioner, not a third party claimant, should have the primary enforcement right." Id. In this case, either the Insurance Commissioner or private claimants who suffered more direct injuries must champion the effort to rectify the harm from Defendants' unlawful inducements.

(Emphasis added).

review. First American easily surpassed those numbers on a monthly basis.

Co-advertising is a primary tool for First American, and the company routinely paid more than $20,000 per month on this category of inducement, not including picking up the production costs and postage for flyers advertising real estate sales.

The company also spent $5,000 per month to co-advertise with one of its builder customers on billboards in the Pierce County area – the money paying for the inclusion of First American's name and logo on billboard. The name and logo are of such a size as to be barely readable from the street.

The investigation also disclosed that First American paid more than $23,000 for such co-advertising with a single King County real estate agent.

Other violations included gift certificates, golf sponsorships, broker opens, food and drink at meetings, and routinely catered meals that cost hundreds of dollars.

Tickets to sporting events were another incentive that the company used to a great extent. It spent more than $11,000 hosting two Sonics nights. The company paid $2,000 for a real estate agent's season tickets to the University of Washington football games. The company spent $7,000 to sponsor, provide food, drinks and parking for a "symposium" aboard a boat during the Seafair hydroplane races.

Other violations included sponsoring meetings, broker opens, ski buses and shopping trips.

All told, the company averaged in excess of $120,000 per month funding these activities and giveaways.[10]

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[10] The $25 rule mentioned in this portion of the Study stems from WAC 284-30-800, effectively repealed on March 20, 2009, by WSR 09-06-077, and which read:

> (1) RCW 48.30.140 and 48.30.150, pertaining to "rebating" and "illegal inducements," are applicable to title insurers and their agents. Because those statutes primarily affect inducements or gifts to an insured and an insured's employee or representative, they do not directly prevent similar conduct with respect to others who have considerable control or influence over the selection of the title insurer to be used in real estate transactions. As a result, insureds do not always have free choice or unbiased recommendations as to the title insurer selected. To prevent unfair methods of competition and unfair or deceptive acts or practices, this rule is adopted.
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> (2) It is an unfair method of competition and an unfair and deceptive act or practice for a title insurer or its agent, directly or indirectly, to offer, promise, allow, give, set off, or pay anything of value exceeding 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.
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> (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

(Emphasis added).

II. *First American's Involvement with SCCAR and the Event – Employee Time.*

9. WAC 284-29-220 governs a title company's involvement with trade associations,[11] and states in part:

> (1) A title company may donate the time of its employees to serve on a trade association committee.
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> * * *
>
> (4) For purposes of this section, trade association events include, but are not limited to, conventions, award banquets, symposiums, educational seminars, breakfasts, lunches, dinners, receptions, cocktail parties, open houses, sporting activities and other similar activities.
>
> (5) A title company may:
>
> (a)(i) Donate to, contribute to, or otherwise sponsor a trade association event under subsection (2) of this section;
>
> (ii) Advertise in a trade association publication under WAC 284-29-215(1); and
>
> (iii) Sponsor a trade association educational seminar under WAC 284-29-235(3);
>
> (b) Give a thing of value listed under (a) of this subsection to a trade association only if all of the following requirements are met:
>
> (i) The thing of value is limited to one thousand dollars per event, advertisement, or sponsorship of an educational seminar;
>
> (ii) The title company must not give a thing of value to all trade associations more than three times in a calendar year;

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selection of a title insurer, except advertising agencies, broadcasters, or publishers, and their agents and distributors, and bona fide employees and agents of title insurers, for routine advertising or other legitimate services.

(4) This section does not affect the relationship of a title insurer and its agent with insureds, prospective insureds, their employees or others acting on their behalf. That relationship continues to be subject to the limitations and restrictions set forth in the rebating and illegal inducement statutes, RCW 48.30.140 and 48.30.150.

[11] WAC 284-29-205(14) defines "trade association" as:

> . . . [A]n association of persons, a majority of whom are producers or persons whose primary activity involves real property. Trade association does not include an association of persons, a majority of whom are title insurance companies and title insurance agents.

(Brackets added). While not in dispute here, it is clear that SCCAR's membership qualifies it as a trade association per WAC 284-29-205(14).

(Brackets added).

(iii) The title company must not combine any of these permitted expenditures into one expenditure; and

(iv) The title company must not accumulate or carry forward left over or unused expenditures from one of these permitted expenditures to a subsequent expenditure. . . .[12]

(Emphasis added).

10. WAC 284-29-205(12) defines "thing of value" as:

> . . . [A]nything that has a monetary value. It includes but is not limited to cash or its equivalent, tangible objects, services, use of facilities, monetary advances, extensions of lines of credit, creation of compensating balances, title company employee time, advertisements, discounts, salaries, commissions, services at special prices or rates, sales or rentals at special prices or rates, and any other form of consideration, reward or compensation.

(Brackets and emphasis added).

11. The unanimous testimony of Christensen, Conrad, and Sager is that First American does not track employee time concerning trade association events, since it treats all such time as donations of employee time to serve on a trade association (such as SCCAR) committee per WAC 284-29-220(1). However, Article XIII, Sections 2 and 3, of SCCAR's Bylaws (Exhibit PO-2) is clear that special ad hoc committees of SCCAR are appointed members, and receive their duties, functions, and powers, by a combination of the President (Wahlquist) and the SCCAR Board of Directors. There is no evidence in this matter that any committee of SCCAR was ever created to administer or plan the Event. As such, in the context of planning the Event, First American employee time could not be donated to SCCAR via WAC 284-29-220(1).

12. The evidence also shows that First American's Compliance Officer for the state of Washington (Conrad) does not even inquire about employee time when considering thresholds in the regulatory provisions on things of value. See Exhibit FA-4. Furthermore, Sager asserts in April 2, 2015, correspondence to Walden (Exhibit FA-17), that title companies such as First American are not required to keep records concerning employee time spent on trade association events such as the Event. However, both WAC 284-29-205(12) and WAC 284-29-220(5)(b)(i) are clear that title company employee time is a thing of value that must be factored in when measuring whether the one thousand dollar threshold, or cap on things of value given by title companies to trade associations such as SCCAR, has been exceeded. As stated in *Tesoro Refining*

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[12] WAC 284-29-205(5) defines "give" as:

> . . . [T]o transfer to another person, or cause another person to receive, retain, use or otherwise benefit from a thing of value whether or not the title company receives compensation in return. It also means the transfer to a third person of anything of value that in any manner benefits a person in a position to refer or influence the referral of title insurance business.

(Brackets added).

and Marketing Co. v. Dep't of Revenue, 164 Wn.2d 310, 317, 190 P.3d 28 (2008): "The goal of statutory interpretation is to carry out the legislature's intent. *Burns,* 161 Wash.2d at 140, 164 P.3d 475. If the meaning of the statute is plain, the court discerns legislative intent from the ordinary meaning of the words." The rules of statutory construction apply to agency regulations as well as statutes. *Tesoro Refining and Marketing Co. v. Dep't of Revenue*, 164 Wn.2d 310, 322, 190 P.3d 28 (2008); *Madre v. Health Care Auth.*, 149 Wn.2d 458, 472, 70 P.3d 931 (2003).

13. WAC 284-29-265 explains what records a title company must maintain in order to comply with WAC 284-29-200 through WAC 284-29-265, and states:

> (1) A title company must keep and maintain complete, accurate, and sufficient records to demonstrate compliance with WAC 284-29-200 through this section and keep them for a period of five years after the end of the year during which any thing of value was given to a producer.
>
> (2) All records of a title company kept in order to meet the terms of WAC 284-29-200 through this section must be made available to the commissioner or the commissioner's representative during regular business hours.
>
> (3) Failure of the title company to keep the records required by WAC 284-29-200 through this section is a violation of RCW 48.29.210.

(Emphasis added).

14. First American's failure to track its employees' time for the Event was a violation of both WAC 284-29-220(5)(b)(i) and WAC 284-29-265. First American must do so for future trade association events. Sager's statement in his April 2, 2015, correspondence to Walden (Exhibit FA-17) that if the OIC is of the opinion that such time must be tracked in order to show compliance with WAC 284-29-220, it must provide guidance to the industry either through a bulletin or FAQ, is erroneous. As stated in *Leschner v. Dep't of Labor and Indus.*, 27 Wn.2d 911, 926, 185 P.2d 113 (1947): ". . . [I]gnorance of the law excuses no one." (Brackets added). Similarly, *Barlow v. United States*, 32 U.S. 404, 411, 8 L.Ed 728 (1833) states: "It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally. . . ." First American's attempt to rely upon alleged statements made by OIC Senior Policy Analyst Jim Tompkins to Conrad concerning the definition of committee in WAC 284-29-220(1), in an effort to buttress its reasoning that all time its employees spent on the Event was while participating on a SCCAR committee, and therefore does not contribute towards the one thousand dollar threshold in WAC 284-29-220(5)(b)(i), is misplaced. Equitable estoppel against the government is not favored. *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 599, 957 P.2d 1241 (1998)(citations omitted); *Pacific Land Partners, LLC v. Dep't of Ecology*, 150 Wn. App. 740, 208 P.3d 586 (2009); *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 20, 43 P.3d 4 (2002). More importantly, where the representations allegedly relied upon are matters of law, rather than fact, equitable estoppel will not be applied. *Theodoratus*, 135 Wn.2d at 599 (citations omitted); *Pacific Land Partners, LLC*, 150 Wn. App. 740, 751 ("Equitable estoppel does not apply to statements that are issues of law, even when the statement of law is incorrect.") (citations omitted); *Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1 at 20.

15. Mention of title company employee time is also made in WAC 284-29-260(7), which prohibits title companies from providing title company employee time to producers, and states:

> A title company must not provide, or offer to provide, all or any part of the time or productive effort of any employee of the title company to any producer. For example, title company employees must not be used by or loaned out to a producer for the self-promotional interests of the producer except as part of the title company's day-to-day business with producers.

(Emphasis added).

16. RCW 48.29.010(3)(e) defines "producers of title insurance business" as:

> . . . [R]eal 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 or title insurance agent whether or not the consent or approval of any other person is sought or obtained with respect to the selection of the title insurer or title insurance agent.

(Brackets added). See also WAC 284-29-205(8)("'Producers of title insurance business' or 'producer' has the meaning set forth in RCW 48.29.010(3)(e); this term includes associates of producers and any person in a position to refer or influence the referral of title business to the title company.")

17. Even though First American claims it was allegedly nominal, whereby Christensen's assistant Gretchen Buck spent at most only five minutes creating the slide for the movie theater screen (Exhibit FA-5) that included Cobalt's (i.e., producer's) name and logo, which attendees to the Event saw, in doing so First American violated WAC 284-29-260(7). In this instance, First American's employee time was used for the self-promotional purposes of a producer, Cobalt. This was also not done during First American's day-to-day business with Cobalt, but rather in the context of the Event.

18. To reiterate, the Study OIC completed in 2006, which was the precursor of both the statutory and regulatory provisions we are discussing, identified serious flaws in First American's willingness to abide by the law, and in particular noted First American's (and other title companies') disregard for it. The Study also stresses that First American and other title companies have treated the law governing inducements in the title industry as little more than a nuisance preventing it from creating more business for themselves. Unfortunately, and similar to practices identified in the Study, First American's position in this matter has been to assert ignorance on the importance of tracking employee time, even while the law is clear that title company employee time is a thing of value that must be tracked, and not be given to producers outside of the day-to-day work of the title company. First American's position that somehow its employees work on trade association events always equates to work on a trade association committee is particularly egregious given that in this case Article XIII of SCCAR's Bylaws, which First American as an

affiliate member is charged with being familiar with, contains a formal process for the formation of SCCAR committees. McIrvin of SCCAR himself testified that the planning of the Event was not the work of a SCCAR committee. Given this checkered history, I call upon First American's leadership to honor the dictates of RCW 48.31.030, and direct their staff to abstain from deception and practice honesty within the dictates of the laws and regulations governing title insurance in this state. RCW 48.31.030 requires that those that participate in the insurance industry preserve "inviolate the integrity of insurance." As First American's own website states: "First American was built more than 125 years ago on a foundation of integrity and service. . . . It's a corporate culture we continue to bring to our work – and to our clients – every day."[13]

III. *First American's Involvement with SCCAR and the Event – Co-Sponsorship with Cobalt.*

19. WAC 284-29-200(6) states: "Title companies must not enter into any agreement, arrangement, scheme, or understanding or in any other manner pursue any course of conduct, designed to avoid RCW 48.29.210 and WAC 284-29-200 through 284-29-265."

20. Setting aside the issue of employee time, and how that factors into the $1,000 threshold in WAC 284-29-220(5)(b)(i), the last minute involvement of Cobalt in buying the food and beverages for the Event (worth exactly $1,000) is an attempt by First American to avoid the restrictions of the threshold, and a violation of WAC 284-29-200(6). As I found above, aside from Christensen's testimony that a sales representative in one of First American's offices had communications with Cobalt's owner, neither SCCAR, nor Cobalt itself, were aware that Cobalt would have such a vital role in making the Event a success, until the day of the Event. See also statement of Schmidt (Exhibit FA-15). First American did not provide, and likely no longer has, e-mail or other communications its staff had with staff at Cobalt regarding the Event. See Sager's April 2, 2015, correspondence to Walden (Exhibit FA-17). This is yet another instance of First American not keeping records consistent with the dictates of WAC 284-29-265.

IV. *First American's Involvement with SCCAR and the Event – Co-Advertising with Cobalt.*

21. WAC 284-29-215 establishes parameters on how a title company may advertise, and states in part:

> (1) A title company may advertise in a trade association publication only if all of the following conditions are met:
>
> (a) The publication is an official publication of the trade association;
>
> (b) The publication must be nonexclusive so that any title company has an equal opportunity to advertise in the publication;
>
> (c) The title company must pay no more than the standard rate for the advertisement applicable to members of the trade association;
>
> (d) The title company's advertisement must be solely self-promotional; and
>
> (e) The payment for the advertisement must be included as an expenditure for the purposes of the limits in WAC 284-29-220(5).

[13] http://www.firstam.com/company-history/index.html (site last visited April 27, 2016).

(2) Except as provided in subsection (1) of this section, a title company must not directly, indirectly, by payment to a third-party or otherwise, use any means of communication or media to advertise on behalf of, for, or with a producer, including but not limited to:

(a) Advertising real property for sale or lease unless the property is owned by the title company;

(b) Advertising or promoting the listings of real property for sale by real estate licensees; or

(c) Advertising in connection with the promotion, sale, or encumbrance of real property.

(3) No advertisement may be placed in a publication that is published or distributed by or on behalf of a producer of title business, including but not limited to, web sites, flyers, postcards, for sale signs, flyer boxes, or any other means of communication or any other media. . . .

(Emphasis added). WAC 284-29-215 prevents title companies from co-advertising with a producer.

22. WAC 284-29-205(1) defines "advertising" or "advertisement" as:

> . . . [A] representation about any product, service, equipment, facility, or activity or any person who makes, distributes, sells, rents, leases, or otherwise makes available such a product, service, equipment, facility, or activity, when the representation:
>
> (a) Is communicated to a person that, to any extent, by content or context, informs the recipient about such product, service, equipment, facility, or activity;
>
> (b) Recognizes, honors, or otherwise promotes such a product, service, equipment, facility, or activity; or
>
> (c) Invites, advises, recommends, or otherwise solicits a person to participate in, inquire about, purchase, lease, rent, or use such a product, service, equipment, facility, or activity.

(Brackets added).

23. On its website, the OIC posts a question and answer ("Q&A") document concerning advertising and flyers within the context of the title insurance inducement rules (WAC Ch. 284-29),[14] which includes the following Q&A addressing Facebook postings and when they amount to co-advertising with a producer:

> **13. What kind of posting or response constitutes co-advertising on Facebook?**
>
> You can use Facebook for both commercial and personal purposes. A company may have a business Facebook page and an individual may have both a business and a personal Facebook page. To determine whether Facebook posts, photos, or comments are co-

[14] https://www.insurance.wa.gov/for-producers/title-insurance/inducement-rules/advertising-flyers/ (site last visited April 27, 2016).

advertising, you should consider what category the page falls under (commercial or personal) and the substance of the comments and responses.

Generally, a complimentary post with an acknowledgement (for example, thank you) is not considered co-advertising - regardless of whether it is posted on a business or personal Facebook page. Displaying an album of candid photographs posted by a business from a golf tournament or other social event involving industry professionals and tagging the people to appear on their personal page is not considered co-advertising. However, if the comments, responses, or tags identify a particular business or link to professional sites, then it is co-advertising.

You may use Facebook message posts to announce training and classes, and attendees may submit comments as long as those comments do not indicate a professional affiliation.

You may post on Facebook successful closings with the homebuyer, as long as they do not include images or mention a real estate professional. This would be considered an endorsement.

(Emphasis added).

24. The snapshot of the movie theatre screen, which the attendees to the Event saw, First American posted to its Facebook page following the Event, and First American prepared, lists Cobalt as a co-sponsor of the Event and includes its logo, and is co-advertising prohibited by WAC 284-29-215. This result is consistent with the Q&A document discussed above. The movie theatre screen that attendees to the Event saw, with Cobalt's name and logo included, was an instance of title company (First American) using media to advertise on behalf of a producer (Cobalt) per WAC 284-29-205(1).

IV. Fine Imposed on First American for Violations of RCW Ch. 48.29 and WAC Ch. 284-29.

25. RCW 48.05.140 allows the Commissioner to suspend or revoke an insurer's certificate of authority under the following circumstances:

> The commissioner may refuse, suspend, or revoke an insurer's certificate of authority, in addition to other grounds therefor in this code, if the insurer:
>
> (1) Fails to comply with any provision of this code other than those for violation of which refusal, suspension, or revocation is mandatory, or fails to comply with any proper order or regulation of the commissioner.
>
> * * *
>
> (6) Refuses to be examined, or if its directors, officers, employees or representatives refuse to submit to examination or to produce its accounts, records, and files for examination by the commissioner when required, or refuse to perform any legal obligation relative to the examination.

See also WAC 284-02-070(2)(c)("The commissioner may suspend or revoke any license, certificate of authority, or registration issued by the OIC.").

26. RCW 48.05.185 states that following a hearing the Commissioner may, in lieu of suspending or revoking any insurer's certificate of authority under RCW 48.05.140, impose a fine on the insurer of at least $250, and not greater than $10,000, and states:

> After hearing or with the consent of the insurer and in addition to or in lieu of the suspension, revocation, or refusal to renew any certificate of authority the commissioner may levy a fine upon the insurer in an amount not less than two hundred fifty dollars and not more than ten thousand dollars. The order levying such fine shall specify the period within which the fine shall be fully paid and which period shall not be less than fifteen nor more than thirty days from the date of such order. Upon failure to pay any such fine when due the commissioner shall revoke the certificate of authority of the insurer if not already revoked, and the fine shall be recovered in a civil action brought in behalf of the commissioner by the attorney general. Any fine so collected shall be paid by the commissioner to the state treasurer for the account of the general fund.

(Emphasis added). See also WAC 284-02-070(2)(c)(". . . [T]he commissioner may generally levy fines against any persons or organizations having been authorized by the OIC.")(Brackets added).[15]

27. Unlike the language in RCW 48.08.185, the insurance code (RCW Title 48) is replete with instances of statutory language permitting the OIC to impose a penalty or fine on a per violation or per offense basis: RCW 48.31B.050(2) ("a fine of not more than ten thousand dollars per violation"); RCW 48.31B.020(5)(b)(i) ("A montetary fine of not more than ten thousand dollars for every day of violation"); RCW 48.15.023(5)(a)(ii) ("Assess a civil penalty of not more than twenty-five thousand dollars for each violation"); RCW 48.31.141(2)(b) ("Impose a penalty of not more one thousand dollars for each violation"); RCW 48.30A.065 ("is subject to a civil penalty not to exceed ten thousand dollars for each violation"); RCW 48.160.080(3) ("the commissioner may assess a civil penalty of not more than twenty-five thousand dollars for each violation"); RCW 48.155.130(1)(b) ("impose a monetary penalty of not less than one hundred dollars for each violation and not more than ten thousand dollars for each violation"); RCW 48.110.130(3) ("in an amount not more than two thousand dollars per violation"); and RCW 48.46.135 ("After hearing . . . the commissioner may levy a fine against the party involved for each offense in amount not less than fifty dollars and not more than ten thousand dollars.") (Emphasis added).

28. Where the legislature uses certain statutory language in one statute and different language in another, a difference in legislative intent is evidenced. *In re Forfeiture of one 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 842, 215 P.3d 166 (2009)(citation omitted); *Dep't of Revenue v. Federal*

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[15] RCW 48.04.010(1)(a) states the Commissioner shall hold a hearing if required by any provision of RCW Title 48.

Deposit Insurance Corp., 190 Wn. App. 150, 162, 359 P.3d 913 (2015) ("It is an elementary rule that where the Legislature uses certain language in one instance, and different language in another, there is a difference in legislative intent.")(citations omitted).

29. The lawful penalty that can be imposed on First American under RCW 48.05.185 for violating the provisions of both RCW Ch. 48.29 and WAC Ch. 284-29 following a hearing is at least $250, but no greater than $10,000. Unlike the other statutory bases for fines and/or penalties listed above, there is no basis in the language of RCW 48.05.185 to impose a fine on First American on a per violation (or multiplier) basis. That said, the imposition of a $10,000 fine against First American, or the maximum fine allowable per RCW 48.05.185, for the violations articulated above is within the Commissioner's discretion, and one which I impose below. This discretion is unaffected by prior decisions of the Commissioner on similar matters. See Exhibit FA-34. Moreover, the considerations deemed important by the Committee in establishing a proposed fine against First American, including prior consent orders entered into by and between First American and the OIC, do not affect the Commissioner's complete discretion in administering RCW 48.05.185.

30. Appellant in *Shanlian v. Faulk*, 68 Wn. App. 320, 843 P.2d 535 (1992), appealed the trial court's order which affirmed the Department of Licensing's ("DOL's") order imposing a $1,000 statutory penalty caused by appellant's failure to comply with the statutes and rules which apply to real estate brokers. RCW 18.85.230, the statute at issue in *Shanlian*, permitted the DOL to "levy a fine not to exceed one thousand dollars for each offense" against any broker who was guilty of one of twenty-nine specified acts. Appellant argued that DOL's imposition of the penalty was excessive. Appellant also argued that the $1,000 fine was inconsistent with penalties imposed against others for similar violations, after he summarized 72 other cases DOL handled with circumstances similar to his own. In response to Appellant's arguments, the Court in *Shanlian* stated at page 328:

> Moreover, even if the penalty imposed was inconsistent with other penalties imposed, we would find no error. An agency "need not fashion identical remedies", and the courts may "not enter the allowable area of [agency] discretion." *Stahl v. UW*, 39 Wn. App. 50, 55-56, 691 P.2d 972 (1984) (quoting *In re Case E-368*, 65 Wn.2d 22, 29, 395 P.2d 503 (1964)). Because the statute authorizes a $1,000 fine for each offense, and because Shanlian violated more than one provision of the statute and regulations, the penalty imposed was within the agency's discretion.

As stated in *Stahl*, 39 Wn. App. at 975-976:

> "The relation of remedy to policy is peculiarly a matter for administrative competence, and the rule is that courts must not enter the allowable area of the board's discretion." . . . In the absence of a statutory requirement, agencies need not fashion identical remedies in each case.

(Citations omitted).

31. In *In the Matter of Case E-368* (or *Arnett v. Seattle General Hosp.*), 65 Wn.2d at 29-30, in setting aside the trial court's modification of an order of the Washington State Board Against Discrimination, the Court emphasized the sanctity of an agency's choice as to how it administers a statute that gives it discretion, stating:

> It is the well-established law in this state, as well as in other jurisdictions, that modifications of administrative orders by a court of review are limited to acts that are arbitrary or capricious, or where the tribunal proceeded on a fundamentally wrong basis, or beyond its power under the statute. The general rule is well stated in 2 Am. Jur. (2d), Administrative Law § 672:
>
> "Administrative agencies have considerable latitude to shape their remedies within the scope of their statutory authority, especially where a statute expressly authorizes the agency to require that such action be taken as will effectuate the purposes of the act being administered. The relation of remedy to policy is peculiarly one for the administrative agency and its special competence, at least the agency has the primary function in this regard. In particular cases, it is held that the fashioning of the remedy or the propriety of the order is a matter for the administrative agency and not for the court; that the courts may not lightly disturb the agency's choice of remedies; that the order should not be overturned in the absence of a patent abuse of discretion or a showing that it is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the statute; or that the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist, or is unwarranted in law or without justification in fact. Where there is a sufficient basis for the orders issued it is no concern of the court that other regulatory devices might be more appropriate, or that less extensive measures might suffice. Such matters are the province of the legislature and of the administrative agency. . . ."
>
> See *Whatcom Cy. v. Langlie,* 40 Wn. (2d) 855, 246 P. (2d) 836 (1952); *Morgan v. Department of Social Sec.,* 14 Wn. (2d) 156, 127 P. (2d) 686 (1942); *Sweitzer v. Industrial Ins. Comm.,* 116 Wash. 398, 199 Pac. 724 (1921).
>
> The reasoning of the trial judge in his oral opinion modifying the tribunal order was not based on the ground that the tribunal exceeded its statutory power, or that the board's action was arbitrary or capricious, but the order was modified solely because the trial judge disagreed with the judgment exercised by the tribunal as to the necessary action to be taken in this case to effectuate the policy against further discrimination. The trial judge substituted his judgment for that of the tribunal and, in so doing, acted beyond his power.

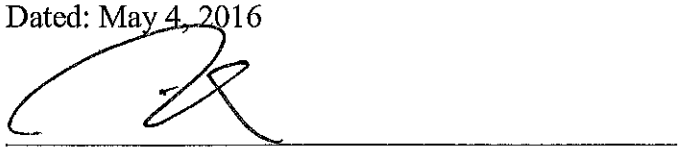
(Emphasis added).

32. The fact that the OIC has reached, or reaches, different conclusions on imposition of fines under RCW 48.05.185 in different cases does not prevent me from imposing a $10,000 fine against First American for the violations outlined above.

ORDER

Per RCW 48.05.185, I impose a $10,000 fine on First American for its violations of RCW Ch. 48.29 and WAC Ch. 284-29 articulated above. First American shall pay this amount to the OIC within thirty (30) days of the date of this Order.

Dated: May 4, 2016



William G. Pardee
Presiding Officer

Pursuant to RCW 34.05.461(3), the parties are advised that they may seek reconsideration of this order by filing a request for reconsideration under RCW 34.05.470 with the undersigned within 10 days of the date of service (date of mailing) of this order. Further, the parties are advised that, pursuant to RCW 34.05.514 and 34.05.542, this order may be appealed to Superior Court by, within 30 days after date of service (date of mailing) of this order, 1) filing a petition in the Superior Court, at the petitioner's option, for (a) Thurston County or (b) the county of the petitioner's residence or principal place of business; and 2) delivery of a copy of the petition to the Office of the Insurance Commissioner; and 3) depositing copies of the petition upon all other parties of record and the Office of the Attorney General.

CERTIFICATE OF SERVICE

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

On the date given below I caused to be filed and served the foregoing Findings of Fact, Conclusions of Law and Final Order on the following people at their addresses listed below:

Jerry Kindinger
Ryan, Swanson, & Cleveland PLLC
1201 Third Avenue, Suite 3400
Seattle, WA 98101

Mike Kreidler, Insurance Commissioner
James T. Odiorne, J.D., CPA, Chief Deputy Insurance Commissioner
Doug Hartz, Deputy Commissioner, Company Supervision Division
AnnaLisa Gellermann, Deputy Commissioner, Legal Affairs Division
Marcia G. Stickler, Insurance Enforcement Specialist, Legal Affairs Division
Office of the Insurance Commissioner
PO Box 40255
Olympia, WA 98504-0255

Dated this 4th day of May, 2016, in Tumwater, Washington.

Dorothy Seabourne-Taylor
Paralegal
Hearings Unit