

No. 40752-3-II

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY: 

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

CHICAGO TITLE INSURANCE COMPANY, an Authorized Insurer,
Appellant,

v.

WASHINGTON STATE OFFICE OF THE INSURANCE
COMMISSIONER,
Respondent.

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

Washington State Office of the Insurance Commissioner (“OIC”) Hearing Examiner Patricia D. Peterson (“OIC Judge”) erroneously concluded that a title insurer’s mere appointment of a limited statutory agent rendered the title insurer vicariously liable for all regulatory violations of that agent. In so ruling, the OIC Judge refused to consider whether, under Washington law, the scope of the agency relationship between Appellant title insurer Chicago Title Insurance Company (“CTIC”), and its limited agent, Land Title of Kitsap County (“Land Title”), was sufficient to establish vicarious liability (and, indeed, it was not). The OIC Judge erred as a matter of law by applying chapter 48.17 RCW, which does not define the scope of the agency relationship between a title insurer and its limited agent and does not allow for vicarious liability. Worse, the OIC Judge summarily reversed an earlier grant of summary judgment by Administrative Law Judge Cindy L. Burdue (“ALJ”) in CTIC’s favor, which properly applied the record and agency law principles.

The OIC Judge’s order would greatly expand the OIC’s existing regulatory authority, without resort to required rulemaking procedures necessary to provide notice and an opportunity to be heard. Thus, the order is unconstitutional and in excess of the agency’s delegated authority.

The OIC Judge's order also will significantly and negatively impact Washington consumers and businesses, with the harshest impacts felt in rural areas. The result of a decision effectively imposing strict liability on principals for the regulatory violations of limited agents will be the reduction or elimination of insurers willing to write title policies in Washington, particularly in rural areas where policies are often issued by local producers. Those insurers that remain may no longer be able to utilize local businesses as producers if they are held strictly liable for the producers' regulatory violations. Reduction or elimination of insurers issuing policies in Washington will, in turn, limit competition and access to title insurance, which many lenders require for home loans. CTIC respectfully requests that this Court reverse the OIC Judge's decision, and reinstate the ALJ's grant of summary judgment to CTIC.

II. ASSIGNMENTS OF ERROR

1. The OIC Judge erred in declining to adopt the ALJ's initial order.
2. The OIC Judge erred in denying summary judgment to CTIC on the issue of whether it can be held responsible for the alleged regulatory violations of Land Title.
3. The OIC Judge erred in ruling that the OIC could hold CTIC responsible for acts of Land Title beyond the scope of Land Title's

agency relationship with CTIC, and that the OIC could take action against CTIC for those alleged acts.

4. The OIC Judge erred in concluding that common law agency principles, and in particular with regard to the scope of the agency, did not apply to the relationship between CTIC and Land Title.

5. The OIC Judge erred in adopting Finding of Fact No. 1.¹

6. The OIC Judge erred in adopting Finding of Fact No. 2.

7. The OIC Judge erred in adopting Finding of Fact No. 3.

8. The OIC Judge erred in adopting Finding of Fact No. 4.

9. The OIC Judge erred in adopting Finding of Fact No. 6.

10. The OIC Judge erred in adopting Finding of Fact No. 9.

11. The OIC Judge erred in adopting Finding of Fact No. 10.

12. The OIC Judge erred in adopting Finding of Fact No. 11.

13. The OIC Judge erred in adopting Finding of Fact No. 12.

14. The OIC Judge erred in adopting Finding of Fact No. 13.

15. The OIC Judge erred in adopting Finding of Fact No. 14.

16. The OIC Judge erred in adopting Finding of Fact No. 15.

17. The OIC Judge erred in adopting Finding of Fact No. 16.

18. The OIC Judge erred in adopting Finding of Fact No. 17.

¹ The full text of this and each of the subsequent Findings of Fact to which CTIC assigns error are set forth in Appendix A.

19. The OIC Judge erred in adopting Finding of Fact No. 18.
20. The OIC Judge erred in adopting Finding of Fact No. 20.
21. The OIC Judge erred in adopting Finding of Fact No. 21.
22. The OIC Judge erred in adopting Finding of Fact No. 23.
23. The OIC Judge erred in adopting Finding of Fact No. 24.
24. The OIC Judge erred in adopting Finding of Fact No. 27.
25. The OIC Judge erred in adopting Finding of Fact No. 28.
26. The OIC Judge erred in adopting Finding of Fact No. 29.
27. The OIC Judge erred in adopting Finding of Fact No. 30.
28. The OIC Judge erred in adopting Finding of Fact No. 33.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the OIC Judge err in concluding that the mere appointment of Land Title under former RCW 48.17.010 and former RCW 48.17.160 allows imputation of vicarious liability to CTIC for regulatory violations, when the mere act of appointment does not define the scope of the relationship? (Assignments of Error Nos. 1-4).

2. Does the OIC Judge's imputation of vicarious liability from Land Title to CTIC constitute the improper promulgation of a retroactive scope of agency regulation without following Administrative Procedure Act notice procedures essential to public trust and confidence in agency

action, thereby exceeding the OIC's delegated authority in violation of the Washington Constitution? (Assignments of Error Nos. 1-3).

3. Did the OIC Judge err by concluding that the common law did not apply to the determination of the scope of any agency relationship between Land Title and CTIC? (Assignments of Error Nos. 1-4).

4. Did the OIC Judge err in concluding that, even if the common law did apply, it likely would support a determination that an agent-principal relationship exists, when the scope of agency created by contract and course of conduct between the parties does not support vicarious liability because CTIC lacked control over Land Title's solicitation activities? (Assignments of Error Nos. 1-28).

IV. STATEMENT OF THE CASE

A. The Nature of CTIC's Relationship with Land Title.

1. The Title Insurance Industry.

Title insurance identifies and insures against certain defects in title to real property. In issuing a title insurance policy, a title company performs most of the work up-front by researching the chain of title to a particular parcel. *See* Agency Record ("AR") 513-14. Title companies either maintain or subscribe to a title plant² through which they research

² A title plant collects all documents recorded for real property in that jurisdiction (counties, in the case of Washington), and indexes them by

chain of title. *See id.* Thus, unlike other types of insurance, which primarily insure the risk of incurring costs after the policy is issued, title insurance premiums largely correlate to the work performed by the title company prior to issuing the policy. *See* AR 516.

2. CTIC's Direct Operations in Washington.

CTIC engages in the business of providing title insurance nationally and directly provides title insurance to consumers in eight Washington counties. AR 513, ¶ 3. CTIC maintains "direct operations" in these eight counties and offers both title insurance products, which requires that CTIC maintain or subscribe to a title plant in the county, as well as other services such as closing and escrow services. *Id.* While CTIC markets in Washington counties where it has direct operations, CTIC does not conduct any marketing or sales efforts in counties, such as Kitsap County, where CTIC does not maintain direct operations or subscribe to a title plant. *Id.*

3. CTIC's Relationship with Underwritten Title Companies.

In addition to national title insurers, such as CTIC, who operate in Washington, there also are a number of independent title companies,

legal description or address. This allows a title company to access records for a specific county, indexed by parcel, so that the title company can research the chain of title for any parcel in that county. AR 513-14.

commonly known as “independent agents” or “underwritten title companies” (“UTCs”), who provide title insurance, most often in markets where national title companies do not have direct operations. AR 515, ¶ 2. Because UTCs generally lack the capital required to meet the financial requirements of RCW 48.29.020(3), UTCs contract with larger insurers, like CTIC, who underwrite the risk for policies the UTC issues. AR 516, ¶ 3. UTCs may have agreements with more than one underwriter. *Id.*

CTIC is not involved in the title searches conducted by the UTC. *Id.*, ¶ 5. The UTC either owns or subscribes to a title plant in their county or counties of operation. *Id.* The UTC prepares its own commitments for title insurance. *Id.* CTIC has no involvement in preparing the title policies it underwrites, beyond providing legal underwriting assistance as requested or required by the UTC. *Id.* Simply put, the UTCs market their own services, which on the title side include conducting title searches, issuing preliminary commitments for title insurance, addressing exceptions to title identified in the preliminary commitment, and issuing title policies. *Id.* CTIC does nothing more than underwrite risk. *Id.*

CTIC has underwriting agreements with eleven UTCs in Washington. *Id.*, ¶ 4. Under the agreements, CTIC contracts to underwrite risk and to assume liability for claims arising under policies the UTCs issue. *Id.* UTCs pay CTIC an underwriting fee, typically between

12 and 15 percent of the title premium charged to the UTC's customer. *Id.* The UTCs otherwise retain the premium paid for the title insurance policy. *Id.* CTIC is not involved in the marketing strategies and expenditures of the UTCs with which it has underwriting agreements. *Id.*, ¶ 5.

4. CTIC's Relationship with Land Title.

Land Title is a UTC operating in Kitsap County. AR 498, ¶ 2. Land Title was founded in 1968, and has provided title and escrow services to customers in Kitsap County since that time.³ *Id.* Land Title owns and operates its own title plant in Kitsap County. AR 498, ¶ 3.

Land Title is a special "policy issuing" agent of CTIC. CTIC and Land Title's relationship is governed by a written contract, the Issuing Agency Agreement ("Agreement"), which is express and unambiguous as to the limited scope of the relationship between the parties. AR 516, ¶ 7. Under the Agreement, Land Title's authority on behalf of CTIC is limited to accepting and processing applications for title insurance in accordance with prudent underwriting practices and issuing title insurance policies underwritten by CTIC, on forms provided by CTIC, on Kitsap County properties. AR 519, ¶¶ 3-4. Land Title is not authorized to take any other

³ Land Title has no corporate affiliation with CTIC, other than the fact that another of the numerous subsidiaries of CTIC's parent, Fidelity National Financial Inc., owns a minority interest in the shares of Land Title stock. AR 511, ¶ 2.

action on behalf of CTIC. The Agreement specifically provides that Land Title “shall not be deemed or construed to be authorized to do any other act for principal not expressly authorized herein.” *Id.*, ¶ 3.

Land Title has no authority to market or advertise on behalf of CTIC. Paragraph 6 of the Agreement, captioned “Prohibited Acts of Issuing Agents,” expressly prohibits Land Title from using the name of CTIC in any of its advertising or printing, other than to indicate its authority to issue policies underwritten by CTIC. AR 520, ¶ 6. Land Title employs its own sales personnel who market Land Title’s services to potential customers in Kitsap County. AR 499, ¶ 6. Land Title’s marketing materials do not promote its relationship with CTIC; in fact, they do not mention CTIC at all. *Id.*, ¶ 7; AR 500-510. Additionally, Land Title’s marketing materials include services entirely unrelated to the title insurance products that CTIC underwrites, including escrow and closing services, which constitute approximately 28 percent of Land Title’s total revenue. *See id.*, AR 499, ¶ 5. Land Title retains 100 percent of the fees it collects for its escrow services. *Id.* Land Title’s Agreement with CTIC does not involve these independent aspects of Land Title’s business.

5. The OIC’s Investigation of Land Title.

In May 2007, the OIC began investigating Land Title. AR 546, ¶ 2.2. The investigation considered whether Land Title had acted in

violation of former WAC 284-30-800(2) (“Inducement Regulation”),

which provided that:

[I]t 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.⁴

The OIC promulgated the Inducement Regulation pursuant to its statutory authority under RCW 48.30.010(2) to define “methods of competition and other acts and practices in the conduct of such business reasonably found by the commissioner to be unfair or deceptive.”

CTIC was not a party to the investigation of Land Title. Indeed, the OIC never contacted CTIC during the course of the investigation. AR 514, ¶ 5. It did not request records or examine CTIC’s marketing practices. *Id.* In November 2007, the OIC requested that CTIC sign a Consent Order Levying Fine, pursuant to which CTIC was asked, without the participation or joinder of Land Title: (1) to stipulate that Land Title’s conduct violated the Inducement Regulation; (2) to agree to pay a fine of

⁴ In 2009, WAC 284-30-800 was eliminated, and a new statutory and regulatory scheme was adopted. *See* RCW 48.29.210 and WAC 284-29-210 through WAC 284-29-260. The full text of former WAC 284-30-800 (2006) is set out in Appendix B.

\$114,500 based on Land Title's alleged violations; (3) to enter into a compliance plan that required specific tracking of expenditures, semi-annual internal audits and related reporting and corrective actions relating to Land Title; and (4) to represent that CTIC has "the authority to comply fully with the terms and conditions of the [Compliance] Plan." *Id.*, ¶ 6.

Because CTIC has no authority or ability to control Land Title's marketing practices, or other business conduct, it declined to enter into the proposed Consent Order. *See id.*

On January 25, 2008, the OIC filed a Notice of Hearing proposing disciplinary action against CTIC, not Land Title, for alleged violations of the Inducement Regulation committed solely by Land Title. AR 564-69. The Notice of Hearing alleged thirteen violations by Land Title of the Inducement Regulation. AR 565-66. The thirteen alleged violations included providing access to online property information and offering "Flyer Delivery" services to real estate agents, lenders, and builders for a limited fee;⁵ paying \$56.46 for a floral arrangement for a real estate broker's office; purchasing tickets to a football game for a mortgage

⁵ The OIC claimed that the \$25.00 annual "access fee" for online property information and \$2.50 "per zone" real estate flyer delivery fee did not reflect the actual value of the services provided, and thus violated the \$25.00 per annum limit on providing "anything of value" to persons in a position to direct title insurance business. *See* AR 566-67; *see also* former WAC 284-30-800.

broker and real estate broker; sponsoring a golf tournament for a mortgage lender; spending \$145.00 for items at the Mason County Board of Realtors auction; paying for a realtor's advertising in the amount of \$68.00 per month; and purchasing approximately six meals for real estate agents, builders, and mortgage lenders that exceeded the allotted twenty-five dollar limitation in a twelve-month period. *See id.* The Notice of Hearing does not and could not allege that CTIC directly participated in or had any knowledge of the acts allegedly committed by Land Title. *See* AR 564-68.

B. Procedural History.

1. The ALJ Reviews the OIC's Efforts to Impose Vicarious Liability on CTIC and Grants Summary Judgment to CTIC.

On March 3, 2008, pursuant to chapter 48.04 RCW and CTIC's request, the proceeding initiated by the OIC was transferred to the Office of Administrative Hearings ("OAH"), and assigned to an ALJ. AR 556-57. On September 9, 2008, CTIC moved for summary judgment before the OAH. AR 482-97. CTIC's primary argument was that the OIC lacks authority, under the applicable statutes and regulations, to summarily impose vicarious liability on CTIC for the regulatory violations of a third party. AR 482-97. The OIC opposed CTIC's motion but did not file a cross-motion for summary judgment. *See* AR 311-45.

On October 30, 2008, the ALJ granted CTIC's motion for summary judgment. AR at 278-93 ("Initial Order"). The Initial Order determined as a matter of law that the OIC lacked authority to fine CTIC for the alleged misdeeds of Land Title absent a basis in common law agency liability, and that no such basis existed under Washington's common law. *Id.* In the Initial Order, the ALJ made a number of "undisputed findings of fact," including that:

- [Land Title] market[s] [its] own services without the involvement or financial contribution of CTIC. AR 280, ¶ 10.
- The "Issuing Agent" contract between CTIC and [Land Title] spells out specifically the relationship between the two companies. AR 281, ¶ 12.
- The Issuing Agent contract gives [Land Title] no authority to advertise or market for CTIC. *Id.*, ¶ 13.
- CTIC does not pay any of the business expenses of [Land Title], nor pay for any of its services. *Id.*, ¶ 14.
- CTIC has no right to control the actions of [Land Title] other than as specified in the contract, directly relating to [Land Title]'s title search activity. Further, there is no evidence that CT *did* control the actions of [Land Title], especially the marketing practices of [Land Title]. AR 282, ¶ 20.
- The OIC has presented no evidence that CTIC . . . is involved in [Land Title's] marketing or other business conduct. There is no evidence to counter the declarations offered by CTIC which show it does not have any control or right to control the operational conduct or decisions of [Land Title]. *Id.*, ¶ 21.

In the Initial Order, the ALJ also made a number of conclusions of law:

- The Insurance Code . . . does not specifically define the “agency relationship” or the parties’ rights or responsibilities vis-à-vis each other. AR 288-89, ¶ 16.
- The Legislature could have included in the Insurance Code a clear description of the agency relationship, setting forth the rights and obligations of the principal and agent as between title insurer and title company. . . . As neither the OIC nor CTIC has identified a statute or regulation that clearly defines the relationship between the principal (CTIC) and agent [Land Title], the traditional agency law principles apply. AR 289, ¶ 17.
- [T]he agency relationship is defeated by the fact that CTIC did not have the right to control the marketing actions or business procedures of [Land Title]. AR 291, ¶ 28.
- There is no question that the Code and regulations amply authorize the OIC to take action against a title insurer directly for its *own* violations, or directly against the title company for *its* violations. CTIC readily concedes this to be the law. Absent in the Insurance Code and regulations cited by OIC is the authority for OIC to hold the insurer liable for the illegal acts of another company, with whom it contracted for limited purposes, specifically to underwrite title policies. The “broad authority” of the OIC stops short of being quite that broad; it must have an underpinning of law. AR 291-92, ¶ 33.

After applying common law agency principles to the Agreement between CTIC and Land Title, the ALJ granted summary judgment to CTIC and ruled that the OIC could not impose vicarious liability on CTIC for the regulatory violations of Land Title. AR 292, ¶¶ 36-37.

2. The OIC Judge Reverses the ALJ’s Initial Order.

The OIC petitioned for review of the ALJ’s Initial Order. AR 244-68; *see also* RCW 34.05.464. It was assigned for review to OIC Judge

Patricia D. Petersen.⁶ AR 227-43. Judge Petersen heard oral argument on the OIC's petition for review and then entered Final Findings of Fact, Conclusions of Law and Order on Chicago Title Insurance Company's Motion for Summary Judgment ("OIC Judge's Order") and entered judgment in favor of the OIC. AR 118-167.

While the ALJ's Initial Order included certain "Undisputed Findings of Fact," the OIC Judge's Order asserted that those findings were "actually disputed by the OIC in this proceeding," and changed the

⁶ Prior to serving as an OIC hearing officer, OIC Judge Petersen served as Washington's Deputy Insurance Commissioner and, in that capacity, authored a letter on which the OIC substantially relied as a basis for its legal position. AR 329-330, 417-19. CTIC petitioned for the disqualification of OIC Judge Petersen pursuant to RCW 34.05.425 based on the appearance of impropriety created by her potential bias and interest in the outcome of the matter and the potential for prejudice to CTIC. AR 218-224. Judge Petersen denied the disqualification petition. AR 181-191. CTIC appealed the disqualification issue to the Thurston County Superior Court, and the Honorable Paula Casey agreed that OIC Judge Peterson created a "glaring problem" by denying the request to disqualify her. January 22, 2010 Verbatim Report of Proceedings ("VRP") at 10:20 – 12:10. Judge Casey determined that the remedy for this error consisted of a remand for a new hearing and suggested that counsel could stipulate to waive the hearing. *Id.* at 12:11 – 13:11. In order to avoid the additional costs and delays associated with a remand, CTIC and the OIC stipulated to entry of an Order Retaining Case and Setting Hearing on Remaining Issues Presented for Review ("Order Retaining Case"). Clerk's Papers ("CP") 158-60. The Order Retaining Case provides that "[t]he recusal issue is waived for all purposes and is no longer an issue on appeal." CP 160. The propriety of Judge Petersen's ruling on the merits, however, remains before this court in all respects, and her bias in favor of the OIC is particularly relevant insofar as it contributed to the arbitrary and capricious nature of her Order. *See* Section V(D)(2)(b), *infra*.

heading to “Initial Findings of Fact.” AR 122. The OIC Judge’s Order then substantially revised and/or deleted nearly every Finding of Fact entered by the ALJ, often without citation to the evidence provided by the OIC disputing the ALJ’s Finding. *See, e.g.*, AR 134-35 (determining that ALJ’s findings were “not supported by the evidence,” but failing to identify evidence in support of OIC Judge’s revisions).

The OIC Judge’s Order similarly revised and/or deleted nearly every Conclusion of Law entered by the ALJ. The Order concluded that “principles of common law agency” were not relevant, because Land Title was CTIC’s statutorily “appointed title insurance agent.” AR 149; *see also* AR 154-55. The OIC Judge’s Order then concluded that even if common law agency principles did apply, “it is most likely that Conclusions of Law would determine that the traditional common law of agency analysis would also support a determination that a principal-agent relationship exists between [CTIC] and Land Title.” AR 156. As a result, the OIC Judge’s Order determined that the OIC could hold CTIC “responsible for the illegal acts of its legally appointed insurance agent, Land Title, in violating” the Inducement Regulation. AR 167.

3. The Superior Court Affirms the OIC Judge’s Order.

CTIC timely petitioned the Thurston County Superior Court for review of the OIC Judge’s Order. AR 2-81. Although the superior court

determined that “[t]he statute [relied on by the OIC] does not further identify what is meant by the agency” and “[t]here is no specific statutory definition of what the scope of the agency is,” it nonetheless proceeded “to determine . . . that the principal-agent relationship is for all purposes a means of regulation by the Insurance Commissioner.” April 2, 2010 VRP at 37:8-13. The superior court affirmed the OIC Judge, ruling that “[t]he [OIC] . . . had the legal authority to hold [CTIC] responsible for regulatory violations by Land Title, its appointed agent.” CP 173. While the superior court recognized that a contract existed between CTIC and Land Title, the court stated it was not concerned with the provisions of that contract in making its findings. April 2, 2010 VRP at 37:19-23.

CTIC timely appealed the superior court’s decision. CP 169-73.

V. ARGUMENT

The OIC Judge improperly relied on definitional and procedural statutes in determining that CTIC could be held vicariously liable for the marketing practices of Land Title. Because there is no statute or regulation that allows for vicarious liability in this context, the OIC Judge’s Order constitutes improper *de facto* rulemaking in excess of the OIC’s delegated authority. Moreover, under long-standing Washington authority, vicarious liability may be imposed only where a principal controls the agent’s acts giving rise to the liability. The only evidence in

the record supports the conclusion that CTIC did not control Land Title's marketing practices. Because the OIC Judge's Order imposes liability on title insurers far beyond any reasonable legal expectations, the Order likely will have the effect of discouraging title insurers from underwriting policies for UTCs or independent agents, who operate primarily in rural markets. This, in turn, will limit competition to the detriment of Washington property owners and prospective property owners. The OIC Judge's Order should be reversed.

A. Standard of Review.

1. Grounds for Relief from Agency Action.

The Administrative Procedure Act ("APA") governs this Court's review of agency decisions. RCW 34.05.510; *Judd v. Am. Tel. & Tel. Co.*, 116 Wn. App. 761, 771, 66 P.3d 1102 (2003) ("The Administrative Procedure Act, RCW 34.05.510, is the exclusive means of judicial review of agency action."). Under the APA, this Court sits in the same position as the superior court and reviews the order of the agency rather than the order of the trial court. *H.E.A.L. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 526, 979 P.2d 864 (1999).

Under RCW 34.05.570(3), this court may grant relief from an agency order rendered after an adjudicative proceeding if it determines:

- (a) The order...is in violation of constitutional provisions on its face or as applied;

- (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law; . . .
- (d) The agency has erroneously interpreted or applied the law;
- (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court; . . . [or]
- (i) The order is arbitrary and capricious.

The OIC Judge's Order should be reversed because it erroneously interpreted and applied the law of agency in Washington. RCW 34.05.570(3)(d). Additionally, because the OIC Judge improperly concluded that the mere appointment of an agent under chapter 48.17 RCW created vicarious liability, the OIC exceeded its jurisdiction and acted beyond its constitutionally delegated authority. RCW 34.05.570(3)(a), (b). Finally, in rejecting nearly every finding and conclusion properly entered by the ALJ, the OIC Judge's order was arbitrary and capricious, and unsupported by substantial evidence. RCW 34.05.570(3)(e), (i).

2. Review of Legal Conclusions Is *De Novo*.

In reviewing an agency order, an appellate court reviews legal conclusions *de novo*. *H.E.A.L.*, 96 Wn. App. at 526. Although this Court may defer to an agency's interpretation in an area where the agency

exercises special expertise, this Court otherwise may substitute its judgment for that of the agency. *Dep't of Ecology v. Lundgren*, 94 Wn. App. 236, 241 and n.6, 971 P.2d 948 (1999). Courts determine legislative intent and do not defer to an agency interpretation that is inconsistent with a statute or that decides the scope of the agency's own authority. *Clay v. Portik*, 84 Wn. App. 553, 557-58, 929 P.2d 1132 (1997). Constitutional challenges to agency action are also reviewed *de novo*. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006).

3. Review of Factual Findings Is Based on Substantial Evidence.

Courts will grant relief from factual determinations if the agency's order is "not supported by evidence that is substantial when viewed in light of the whole record before the court." RCW 34.05.570(3)(e). Substantial evidence is defined as "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *H.E.A.L.*, 96 Wn. App. at 526.

B. The OIC Judge Erred by Holding CTIC Liable for the Acts of Land Title Based Solely on the Appointment of Land Title Pursuant to Former RCW 48.17.010 and RCW 48.17.160.

The OIC Judge held CTIC liable for the independent acts of Land Title based solely on general statutes defining the term "agent" and creating a statutory procedure for appointment of an agent. The OIC Judge concluded that these statutes alone established CTIC's vicarious

liability for Land Title's regulatory violations, regardless of whether the acts at issue were within the scope of Land Title's actual agency relationship with CTIC (including its Agreement with CTIC). The statutes do not support the OIC Judge's conclusion. Under established Washington law, a principal is only liable for the acts of its agent performed within the scope of the agency relationship.

1. The Statutes on Which the OIC Judge's Order Relies Do Not Define the Agency Relationship Between CTIC and Land Title.

The OIC Judge based her ruling on two insurance code statutes: former RCW 48.17.160, which established the process through which an insurer could appoint a statutory agent; and former RCW 48.17.010, which provided a general definition of a statutory agent under the insurance code.⁷ In the OIC Judge's words, these statutes "define[d] the requirements and procedures" for insurers and agents to create one form of statutory principal-agent relationship. AR 158. These statutes did not purport to define the scope of that agency, nor did they expressly provide for a finding of liability against the insurer for the acts of its appointed agent. The OIC Judge nonetheless erroneously ruled that because CTIC

⁷ Both statutes have been amended since the proceedings below. Laws of 2007, ch. 117, § 1 (amending RCW 48.17.010); Laws of 2009, ch. 162, § 18 (amending RCW 48.17.160). See Appendix B for the complete text of the former statutes.

appointed Land Title as a statutory agent under former RCW 48.17.160, “the OIC may hold [CTIC] responsible for the acts of Land Title in violating the illegal inducement statutes and regulation.” AR 164.

Under Washington law, a principal may be held vicariously liable for the acts of its agent only when those acts are undertaken within the scope of the agency relationship and subject to the principal’s control. *Larner v. Torgerson Corp.*, 93 Wn.2d 801, 804-05, 613 P.2d 780 (1980) (absent control, principal cannot be held liable for the acts of agent); *see also Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 183, 159 P. 3d 10 (2007), *review granted on other issues and aff’d sub nom. Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 204 P.3d 885 (2009); *McLean v. St. Regis Paper Co.*, 6 Wn. App. 727, 729-730, 496 P.2d 571 (1972) (citing RESTATEMENT (SECOND) OF AGENCY § 250 cmt. a (1958)); *Hollingbery v. Dunn*, 68 Wn.2d 75, 79-80, 411 P.2d 431 (1966). The OIC Judge’s Order bypasses this requirement, and instead asserts that the existence of an agency appointment under the Insurance Code, without more, is adequate to hold CTIC liable for all regulatory violations of Land Title regardless of CTIC’s control. AR 163-64.

CTIC does not dispute that it has a limited statutory principal-agent relationship with Land Title, authorized by chapter 48.17 RCW. Nor does CTIC dispute that chapter 48.17 RCW contains a statutory procedure to

appoint a form of limited agent, and that such limited agents may be authorized to issue policies of insurance. It is an extraordinary leap, however, to conclude that merely because a statutory process exists to create a form of limited agency, that all limited agency relationships created pursuant to that statute are identical, and that any principal appointing a limited agent assumes vicarious liability for any and all regulatory violations of the agent.

Put another way, the fact that an agency relationship is created does not mean *per se* liability will attach to the principal for the acts of its agent. *See, e.g., Kroshus v. Koury*, 30 Wn. App. 258, 263, 633 P.2d 909 (1981) (label “agent” does not create *per se* liability in tort context). Absent an express statute or regulation authorizing such strict liability, common law agency principles must be applied to determine whether Land Title was acting within the scope of its agency before CTIC may be held liable for its actions. Otherwise, taken to its extremes, the OIC Judge’s Order would allow vicarious liability based on the illegal acts of a UTC over which an insurer clearly has no control, such as the UTC’s lease negotiations, involvement in trade associations, or memorial gifts and charitable contributions. *See, e.g., WAC 284-29-245* (limitations on a title company renting office space from a producer of title insurance business);

WAC 284-29-220 (limitations on trade association activities); WAC 284-29-250 (limitations on memorial gifts or charitable contributions).

Here, no statute or regulation authorizes the imposition of liability on CTIC for the regulatory violations of Land Title. The superior court confirmed this on the record, observing that “[t]he statute [relied on by the OIC] does not further identify what is meant by the agency” and “[t]here is no specific statutory definition of what the scope of the agency is....” April 2, 2010 VRP at 37:8-10. Moreover, RCW 48.30.010(5) only authorizes the OIC to assess penalties against the “person...violating” the statute. In other words, the statute allows the OIC to hold Land Title responsible for its violations of the Inducement Regulation, not CTIC.

Had the Legislature intended to create the type of vicarious liability established by the OIC Judge’s Order, it would have done so within the title insurance code. One such example is found in chapter 48.98 RCW of the insurance code governing the appointment of Managing General Agents. This statute provides that, when an insurer appoints a managing general agent (as opposed to an issuing agent, such as Land Title), “[t]he acts of the managing general agent are considered to be the acts of the insurer on whose behalf it is acting.” RCW 48.98.025.⁸ No

⁸ Before the superior court, the OIC tried to minimize the impact of RCW 48.98.025 by arguing that it was enacted as part of an effort to conform to

such provision exists with respect to issuing agents or UTCs, and the Legislature's silence in this regard indicates its unwillingness to statutorily define the scope of this insurer-agent relationship. *See Spain v. Emp't Sec. Dep't*, 164 Wn.2d 252, 259, 185 P.3d 1188 (2008) ("It is an elementary rule that where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent." (internal quotations omitted)).

This point is further exemplified when reviewing the significant number of statutes that use or define the term "agent." *See, e.g.*, RCW 20.01.010 (defining agricultural product "agent"); RCW 19.305.010 (defining "agent" authorized to affix tax stamps on cigarette packages); RCW 76.06.020 (defining "agent" of timberland owner for purposes of forest regulation); RCW 4.24.710 (referencing "agent" of outdoor music festival for purposes of alcohol enforcement); RCW 4.24.720 (granting media "agent" immunity for broadcast of Amber alert information).⁹

national accreditation requirements. *See* CP 130-31. Regardless of the reason for its enactment, the statute demonstrates that when the Legislature intends to set out vicarious liability by statute, it does so. *See also* RCW 21.30.070 (the acts of an agent in context of commodity transactions shall be deemed the acts of the principal on whose behalf agent is acting); RCW 19.52.030 (the acts of agent in loaning money are considered acts of principal and will bind principal under usury statute).

⁹ Indeed, a search for the term "agent" in Washington statutes yields more than 2,000 results.

Although these statutes all use the term “agent,” they do not establish a homogenous general agency relationship through which the principal may be held liable for all regulatory violations of its agent. For example, although RCW 23B.05.010 requires a corporation to register an “agent” for the purpose of accepting service on its behalf, it would be illogical to contend that the corporation should then be *per se* liable for the agent’s regulatory violations notwithstanding the actual agency relationship between the parties. But in relying solely on the registration of Land Title as an “agent” as a basis to find vicarious liability, the OIC Judge’s Order reaches the same result.

The OIC Judge’s imposition of liability based solely on general statutory use of the term “agent” is especially troubling because UTCs are not typical insurance “agents.” This Court has acknowledged that the statutory definition of “agent” in former RCW 48.17.010 (the statute at issue here) does not aptly describe the activities of a typical title insurance issue agent or UTC such as Land Title. *Fid. Title Co. v. Dep’t of Revenue*, 49 Wn. App. 662, 669, 745 P.2d 530 (1987). Rather, as the Court noted, because title insurance issuing agents only “place[] the relatively small insurance component” with an insurer qualified to underwrite the risk, the relationship between title insurers and their issuing agents is unique in the insurance context. *Id.* at 669-70; *see also First Am. Title Ins. Co. v. Dep’t*

of Revenue, 144 Wn.2d 300, 305, 27 P.3d 604 (2001) (citing favorably to *Fidelity Title* and holding that a title insurance agent is not a typical agent as defined in the insurance code). Although these cases analyze the definition of “agent” in the taxation context, they recognize the general proposition that “a UTC is not a mere insurance agent or broker, but rather generates business for its own account.” *First Am. Title Ins. Co.*, 144 Wn.2d at 305.

The OIC Judge’s Order baldly asserts that because former RCW 48.17.010 defined an “agent” as one appointed “to solicit applications for insurance,” Land Title’s marketing activities in violation of the inducement statute are within this statutory definition and thus attributable to CTIC. AR 158. But this general definitional statute does not trump the contractual agreement between CTIC and Land Title, which does not contain the word “solicit,” and expressly precludes Land Title from marketing or advertising on CTIC’s behalf. AR 499 ¶ 7, 520 ¶ 6(G). Regardless, in its Notice of Hearing, the OIC did not contend that Land Title violated the Inducement Regulation in the course of soliciting applications from potential insureds as described in former RCW 48.17.010. *See* AR 565-66. Rather, the marketing practices identified by the OIC as violations all were targeted toward realtors and other “middlemen” in an effort to secure referrals of potential clients. *Id.*

(providing services and purchasing goods such as flowers, meals, and football tickets for realtors, mortgage brokers, lenders, etc.). There is no basis, statutory or otherwise, to conclude that CTIC appointed Land Title as its agent for the purpose of marketing to these middlemen.

In sum, the fact that chapter 48.17 RCW allows for the creation of an agency relationship is the beginning of the inquiry, and not the end. The OIC Judge was required to proceed to the next step in the analysis and determine whether liability could attach, and her stated grounds for dispensing with that requirement fail to withstand scrutiny.

2. The OIC Judge's Cited Authorities Did Not Support Her Interpretation of Chapter 48.17 RCW.

The OIC Judge asserted in her order that “[d]ecades, a century, of well established case law” support the conclusion that the relationship between CTIC and Land Title “is defined by statute and need not be analyzed based on common law.” AR 155. While there are decades of well established Washington case law governing agency relationships, no case stands for the proposition that an insurer’s mere appointment of an agent may serve as the sole basis for vicarious liability, and none stand for the proposition that an insurer is liable for its agent’s regulatory violations based exclusively on the statutory definition of “agent.”

In each case relied upon by the OIC Judge, the court looked to common law principles to determine whether the agent was acting within the scope of his or her authority before making a determination of liability on the part of the insurer. *Am. Fid. & Cas. Co. v. Backstrom*, 47 Wn.2d 77, 82, 287 P.2d 124 (1955) (finding that because general agent was acting within the scope of his authority, the knowledge of the agent is imputed to the insurer); *Miller v. United Pac. Cas. Ins. Co.*, 187 Wash. 629, 641, 60 P.2d 714 (1936) (using common law agency principles to determine whether general agent was acting within the scope of authority as necessary to impute knowledge of agent to insurer); *see also Paulson v. W. Life Ins. Co.*, 292 Or. 38, 636 P.2d 935, 938 (Or. 1981) (determining that whether party was an agent for the purposes of the insurance code was a question for the jury);¹⁰ *Ellis v. William Penn Life Assurance Co. of Am.*, 124 Wn.2d 1, 14, 873 P.2d 1185 (1994) (finding insurers liable for their own acts in violation of the insurance regulation and not addressing whether they were liable for acts of agents).

¹⁰ The OIC Judge's Order also cites *National Federation of Retired Persons v. Insurance Commissioner*, 120 Wn.2d 101, 838 P.2d 680 (1992), claiming that Washington courts have adopted *Paulson*. But *National Federation* addressed only the question of whether a particular act constituted solicitation for purposes of insurance regulation. The case did not address vicarious liability.

Washington courts are not alone in the practice of analyzing common law agency principles to determine whether liability should attach to an insurer for the regulatory violations of its statutory agent. Courts in other jurisdictions have declined to elevate the statutory relationship between insurer and agent over the common law principles of agency. Just like the Washington decisions cited by the OIC Judge, these courts look to principles of agency law and to the operating agreement between the parties to determine whether a title insurer can be liable for acts of its agent. *Nat'l Mortg. Warehouse, LLC v. Bankers First Mortg. Co., Inc.*, 190 F. Supp. 2d 774, 779-80 (D. Md. 2002) (analyzing agency agreement between insurer and title insurance agent to determine scope of agency relationship and finding no liability for acts of agent); *Bus. Bank of Saint Louis v. Old Republic Nat'l Title Ins. Co.*, No. ED 93569, 2010 WL 1794396, at *3-7 (Ct. App. Mo. May 4, 2010) (same); *Fid. Nat'l Title Ins. Co. v. Mussman*, 930 N.E.2d 1160, 1165-68 (Ct. App. Ind. 2010) (same); *see also Proctor v. Metro. Money Store Corp.*, 579 F. Supp. 2d 724, 739 (D. Md. 2008) (recognizing that Maryland insurance code does not supersede the contractual relationship between an insurer and title insurance agent and analyzing that agreement to determine scope of insurer's liability). These cases hold that the scope of the agency

relationship is properly determined by reference to the agreement between title insurer and agent. This is the proper result here.

3. The OIC Judge's Order Will Result in Reduced Access to Title Insurance, which Negatively Impacts Homeownership.

Were it allowed to stand, the OIC Judge's Order would result in CTIC being liable for the regulatory violations of Land Title and other UTCs regardless of whether they were within the scope of the parties' issuing agent agreement merely because CTIC registered Land Title or others as its statutory agent. CTIC would be liable for the regulatory violations of its agents that are outside the scope of its knowledge and control.

As a practical matter, this would disproportionately burden rural markets in Washington, where the use of UTCs is prevalent. AR 515, ¶ 2 (noting use of UTCs common in markets where national title companies do not have direct operations); AR 513-14 ¶¶ 3-4 (identifying limited counties in which CTIC directly operates). Title insurers are required to maintain title plants in Washington. RCW 48.29.020(2). While an underwriter may do business in a rural community through a UTC that maintains or subscribes to a plant, if the underwriter were forced to stop doing business through the UTC, the investment in creating or subscribing to a plant likely would be unworkable. *See* AR 513-14. Underwriters

likely would confine their business to metropolitan areas where they have direct operations and the volume of business supports their investment in the title plant. Likewise, small UTCs that have provided valuable services to the community would be stressed to find an underwriter.

Title insurers' expectations regarding the scope of an agency relationship and liability stemming from that agency relationship are tied to the concept of control. *See, e.g., Larner*, 93 Wn.2d at 804-05; *Stephens*, 138 Wn. App. at 183. This, in turn, has shaped the development of the industry, through the use of UTCs to extend service and open markets to competition. If title insurance underwriters cannot rely on the venerable legal requirement of control, the industry simply cannot function as it historically has functioned.

If national title insurance underwriters pull out of these mostly rural markets, these markets will be left without title insurance or with reduced competition for title insurance business. The lack of availability and/or increased expense of title insurance in these areas would create barriers to obtaining financing and, thus, homeownership. *See* AR 470 (OIC declaration stating “[m]ost commercial lenders financing home purchases will even require Washington consumers to purchase title insurance.”); *see also Informal Homeownership in the United States and the Law*, 29 St. Louis U. Pub. L. Rev. 113, 123 (2009) (emphasizing

importance of clear title to home ownership and discussing lender requirements that mortgagee obtain title insurance as prerequisite to obtaining a home loan); A CONSUMER'S GUIDE TO MORTGAGE SETTLEMENT COSTS, <http://www.federalreserve.gov/pubs/settlement/default.htm> ("Most lenders require a title insurance policy to protect the lender against an error in the results of the title search.") (last visited Nov. 3, 2010). Although the OIC's stated intent in enforcing the Inducement Regulations was to increase consumer choice for title insurance (by preventing title insurers from directing title insurance business by "winning and dining" middlemen), the OIC Judge's Order would have the opposite effect – reduced competition and availability of title insurance. *See* AR 470-71. The OIC Judge's Order not only is bad law but also is in conflict with its purported policy underpinnings. It should be reversed.

C. The OIC Lacked Regulatory Authority to Hold CTIC Summarily Liable for the Acts of Land Title.

1. The OIC Judge Promulgated a *De Facto* Regulation without Undertaking Required Rulemaking.

The OIC Judge's Order also should be reversed on the alternative ground that it effectively promulgates a *de facto* regulation in excess of the OIC's jurisdiction. The OIC's authority is limited to that "expressly conferred . . . by or reasonably implied from the provisions of [the Insurance Code]." RCW 48.02.060(1). The OIC's authority is to be

implemented and effectuated through rulemaking. RCW 48.02.060(3); *see also* RCW 48.17.005 (“The commissioner may adopt rules to implement and administer this chapter.”); *see also* CP 127 (OIC’s brief arguing that the OIC “has the power to define unfair trade practices *by promulgating regulations*, and ‘shall enforce the provisions’ of the Insurance Code.”) (emphasis added). In fact, the Legislature *expressly* required the OIC to engage in rulemaking to define what unfair methods, acts or practices would be subject to regulation and penalty. RCW 48.30.010 (setting forth requirements for promulgation of regulations).

There is, however, no statute or regulation authorizing the OIC to impose vicarious liability on a title insurer for violations of the Inducement Regulation by a UTC such as Land Title. *See* RCW 48.30.010(5) (authorizing the OIC to assess penalties against the “person...violating” a regulation”). Although the Inducement Regulation defines the “unfair trade practice” of providing “anything of value” to a person in the position to direct title insurance business, that regulation does not address the issue of vicarious liability. *See* former WAC 284-30-800(2) (provided in Appendix B). By contrast, the OIC has adopted, in other contexts, regulations specifically providing that an insurer may be held responsible for certain acts of its agents. *See, e.g.*, WAC 284-30-580 (providing that “[i]f an insurer relies upon its agents to make deliveries of

its policies, the insurer, as well as the agent, is responsible for any delay resulting from the failure of the agent to act diligently” and that “[e]ach insurer shall inform its agents and appropriate representatives of the requirements of this section.”); WAC 284-30-610 (providing that it is an unfair practice for “[a]n insurer to permit its appointed licensed agent” to “solicit” insureds for coverage under certain out-of-state group policies).

An agency must engage in rulemaking when its action falls within the definition of a “rule” in RCW 34.05.010(16). *Hillis v. Dep’t of Ecology*, 131 Wn.2d 373, 398, 932 P.2d 139 (1997). RCW 34.05.010(16) defines a “rule” as, among other things, “any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction.” Because the OIC’s action in holding CTIC vicariously liable for the regulatory violations of Land Title subjects CTIC to a penalty (a fine), the OIC was required to engage in rulemaking prior to taking that action.

2. The OIC Judge’s *De Facto* Regulation Exceeds the Agency’s Delegated Authority in Violation of the Washington Constitution.

By failing to engage in the required rulemaking procedures set forth in RCW 48.30.010, the OIC Judge’s Order also exceeds the scope of authority delegated to the OIC.

Rulemaking requires prenotice procedures that are designed “[t]o meet the intent of providing greater public access to administrative rule making and to promote consensus among interested parties.” RCW 34.05.310 (1). Other important safeguards in the rulemaking process include the notice procedures of RCW 34.05.320, the required procedures to ensure public participation in rule-making hearings set forth in RCW 34.05.325, and the post-adoption notice procedures in RCW 34.05.362, which requires an agency to give notice to businesses either before or within 200 days of the effective date of a regulation “that imposes additional requirements on businesses the violation of which subjects the business to a penalty, assessment, or administrative sanction.” RCW 34.05.375 provides that a rule is not “valid unless it is adopted in substantial compliance with” the APA’s rule-making procedures.

These are not mere technical requirements. Rulemaking, properly conducted, is essential to the APA system that fosters public trust and confidence. Bypassing the rulemaking process here denied CTIC, other industry members, and consumers the opportunity for notice and participation. This is particularly important where, as here, the agency hearing officer that effectively promulgated a “rule” of vicarious liability, is an employee of the agency whose actions they review. *See* AR 118-19.

Although the Legislature may delegate legislative authority to an administrative agency such as the OIC, under article II, section 1 of the Washington Constitution, the delegation is lawful only if procedural safeguards are in place to “control arbitrary administrative action and any administrative abuse of discretionary power.” *Barry & Barry, Inc. v. Dep’t of Motor Vehicles*, 81 Wn.2d 155, 159, 500 P.2d 540 (1972) (setting forth requirements for constitutional delegation of power).¹¹ These safeguards “ensure that administratively promulgated rules and standards are as subject to public scrutiny and judicial review as are standards established and statutes passed by the legislature.” *Id.* at 164. Absent such safeguards, the delegation is unconstitutional. *Id.*; *State v. Brown*, 95 Wn. App. 952, 960, 977 P.2d 1242 (1999); *In re Powell*, 92 Wn.2d 882, 893, 602 P.2d 711 (1979).

By enacting RCW 48.30.010, the Legislature established the limits of the OIC’s authority to regulate the type of unfair practices at issue here. *See, e.g., Barry*, 81 Wn.2d at 158 (stating that an administrative official may be authorized by statute to issue rules and regulations to carry out the purposes of that statute). But the OIC has not followed the rulemaking

¹¹ In addition, a lawful delegation of legislative power requires that the Legislature provide standards defining what is to be done in a general manner and the administrative body appointed to do it. *Barry & Barry*, 81 Wn.2d at 159.

procedures necessary to establish liability on behalf of CTIC for the acts of Land Title. As such, its acts were taken without following the necessary safeguards the Legislature imposed and are outside the scope of its delegated authority. CTIC is entitled to relief from the OIC Judge's Order because it "is in violation of constitutional provisions on its face or as applied" and "is outside the statutory authority or jurisdiction of the agency conferred by any provision of law." RCW 34.05.570(3)(a), (b).

D. The ALJ Properly Ruled that Under Common Law, CTIC Was Not Vicariously Liable for Land Title's Independent Marketing Practices.

Because the scope of CTIC's agency relationship with Land Title is not determined by definitional and procedural statutes, the ALJ's application of the common law was the correct analysis, and should be affirmed. Where, as here, there is no statute or rule governing vicarious liability, any imposition of liability necessarily requires an inquiry into the nature and scope of the relationship between the principal and agent, not simply the use of the label "agent." *See, e.g., Kroshus*, 30 Wn. App. at 263 (vicarious liability requires a determination of whether the principal control the acts of the agent, not just that the label "agent" is used). Thus, the determination of whether CTIC can be held vicariously liable for the acts of Land Title necessarily requires resort to the common law and an

inquiry into the nature and scope of the relationship between CTIC and Land Title.

It is unclear from the OIC Judge's Order whether she actually undertook a common law analysis, but to the extent she did, it should be reversed as both legally erroneous and contrary to the record. *Compare* AR 156 (OIC Judge's Order stating that "common law principles of principal and agent do not apply") *with* AR 161 (determining that CTIC had the "right to control, but chose not to control" Land Title). The proper result under the common law was that reached by the ALJ – summary judgment in favor of CTIC. AR 292.

1. Under Washington Common Law, A Principal Cannot Be Held Vicariously Liable for the Independent Acts of Its Agent Absent Legal Control Over Those Acts.

As discussed above, vicarious liability in Washington turns on whether the principal controls the party whose actions give rise to the claim of liability. *Stephens*, 138 Wn. App. at 183 ("The right to control is indispensable to vicarious liability."); *McLean*, 6 Wn. App. at 729-730 (citing RESTATEMENT (SECOND) OF AGENCY § 250 cmt. a (1958)). As the Washington Supreme Court explained:

The factors to be considered are listed in the Restatement (Second) Agency s 220(2) (1958) and the most crucial factor is the right to control the details of the work. When a superior business party has retained no right of control and there is not reason to infer a right

of control over a subordinate business party, then he cannot be held liable for the negligent acts of the subordinate party.

Larner, 93 Wn.2d at 804-05. If the principal does not control the “servant” in conducting its services, then the “servant” is an independent contractor for liability purposes. *Hollingbery*, 68 Wn.2d at 79-80 (an independent contractor is “generally defined as one who contractually undertakes to perform services for another, but who is not controlled by the other nor subject to the other’s right to control with respect to his physical conduct in performing the services”).

In *Stephens*, the Washington Court of Appeals refused to impose vicarious liability on an insurer for the acts of its collection agent because the insurer lacked control over the agent’s actions. 138 Wn. App. at 183. The defendant, Omni Insurance, had retained a collection agency to pursue its subrogation claims. *Id.* at 160. The collection agency allegedly engaged in impermissible collection practices in collection notices sent by the agency. *Id.* The plaintiffs asserted claims against Omni under the Consumer Protection Act based on the conduct of the collection agency. *Id.* at 162. Like CTIC, Omni did not participate in the collection practices at issue. *Id.* at 183. The trial court granted partial summary judgment holding Omni liable for the conduct of the collection agency. *Id.* The Court of Appeals reversed:

The right to control is indispensable to vicarious liability. . . .
Because Stephens ***has not shown that Omni controlled any aspect of the notices sent by Credit***, there was no basis upon which to impose vicarious liability. We conclude the trial court erred by granting summary judgment to Stephens in his claim against Omni.

Id. (citations omitted, emphasis added). Thus, because the Plaintiff failed to prove that the principal controlled the specific acts of the agency giving rise to the liability, vicarious liability could not attach.

The ALJ's Initial Order followed *Stephens* and other Washington authority in ruling that control of the agent's actions was "indispensable to vicarious liability" and that CTIC exercised no such control over Land Title. AR 160, ¶ 20. By contrast, the OIC Judge's Order improperly sought to minimize the impact of *Stephens* primarily because the case was "unresolved as it is still on appeal to the Washington Supreme Court." *Id.* Of course, *Stephens* is merely the latest case among many Washington cases reiterating the importance of control to establish vicarious liability. *See, e.g., Larner*, 93 Wn.2d at 804-05 (vicarious liability requires right of control); *Kroshus*, 30 Wn. App. at 263 (same); *McLean*, 6 Wn. App. at 729-730 (same); *Hollingbery*, 68 Wn.2d at 79-80 (same).

At any rate, as CTIC advised the OIC Judge below, the only issue on review in *Stephens* concerned an unrelated question of standing. AR 208, n.10. The conclusion that no vicarious liability could be imposed was not further appealed and Omni was not even a party to the Supreme

Court proceeding. *See id.* Although the vicarious liability issue was finally determined in the Court of Appeals' opinion, which was binding on the OIC Judge, the OIC Judge's Order wholly incorporated a contrary statement in the OIC's brief. *Compare* AR 236 (OIC brief stating that *Stephens* "remains unresolved as it is still on appeal to the Washington Supreme Court") *with* AR 160 (OIC Judge's Order containing nearly identical language). Moreover, by the date of the OIC Judge's Order, the Washington Supreme Court had affirmed the Court of Appeal's decision on the standing issue. *See Panag*, 166 Wn.2d at 34.

The OIC Judge's further efforts to distinguish *Stephens* through application of former RCW 48.17.010 and 48.17.160 fail for the reasons articulated in Section V(B), *supra*. The OIC Judge's Order cited no authority for the proposition that these statutes obviate the longstanding requirement that the OIC prove that CTIC controlled the actions of Land Title. Indeed, no such authority exists. Here, the OIC failed to prove that CTIC controlled the *particular marketing practices* that allegedly gave rise to liability under the Inducement Regulation. Absent evidence of such control, there is no basis for vicarious liability under Washington law.

2. Under Correct Agency Law, the Record Does Not Support Vicarious Liability.

Not only did the OIC fail to prove that CTIC controlled the marketing practices of Land Title at issue, the only evidence in the record supports the conclusion that CTIC did not control those practices (and, as a result, that CTIC was entitled to summary judgment). To the extent the OIC Judge purported to hold CTIC vicariously liable at common law, such a conclusion was unsupported by substantial evidence, and an arbitrary and capricious agency decision. Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth or correctness of the order. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). An agency acts arbitrarily and capriciously if it takes “willful and unreasoning action, without consideration and in disregard of facts or circumstances.” *Dupont-Ft. Lewis School Dist. 7 v. Bruno*, 79 Wn.2d 736, 739, 489 P.2d 171 (1971).

a. Substantial Evidence Does Not Support Vicarious Liability.

The starting point in the record to evaluate the nature and scope of Land Title’s agency was the Agreement between it and CTIC. AR 519-23. The Agreement does not permit, and in fact forbids, Land Title from marketing on behalf of CTIC. Under the Agreement, Land Title’s authority on behalf of CTIC is limited to accepting and processing

applications for title insurance in accordance with prudent underwriting practices and issuing title insurance policies underwritten by CTIC, on forms provided by CTIC, on Kitsap County property. AR 519, ¶¶ 3-4. The Agreement specifically provides that Land Title “shall not be deemed or construed to be authorized to do any other act for principal not expressly authorized herein.” *Id.*, ¶ 3.

Moreover, the Agreement forbids Land Title from marketing on behalf of CTIC. Paragraph 6 of the Agreement, entitled “Prohibited Acts of Issuing Agents,” expressly prohibits Land Title from using the name of CTIC in any of its advertising or printing, other than to indicate its authority to issue policies underwritten by CTIC. AR 520, ¶ 6. Thus, the Agreement does not provide that Land Title is CTIC’s agent for the purpose of marketing CTIC’s title insurance products or that CTIC can or does control Land Title’s marketing practices. To the contrary, such marketing practices are specifically excluded from the scope of CTIC and Land Title’s agency relationship.

Additional evidence provided both by CTIC (AR 513-517) and by Land Title (AR 498-510) confirms the undisputed fact that CTIC asserted no control over Land Title’s marketing, and the OIC presented no evidence to the contrary. As Mr. Don Randolph, Western Agency Manager for CTIC, stated in his declaration:

CTIC's relationship with Land Title extends no further than the limited scope set forth in the Issuing Agreement. CTIC does not pay Land Title for its services nor pay any of Land Title's expenses. CTIC does not play any role in or exercise any control over Land Title's business operations or finances. CTIC does not provide any advice to Land Title on compliance with the regulations enforced by the Washington Office of the Insurance Commissioner. CTIC does not have any input in, or oversight of, Land Title's marketing practices or procedures. CTIC merely underwrites the risk of title policies issued by Land Title, in exchange for 12% of the premium collected by Land Title.

AR 517, ¶ 8. Corroborating Mr. Randolph's testimony was the undisputed testimony of Mr. D. Gene Kennedy, President of Land Title, stating that:

Land Title employs sales personnel which market its services to potential customers in Kitsap County.

[] In its marketing materials, Land Title does not promote its relationship with CTIC. In fact, it does not mention CTIC at all in its marketing materials . . .

[] Land Title markets to promote its own business, not the business of CTIC.

[] CTIC does not pay Land Title for its services nor pay any of Land Title's expenses. CTIC does not play any role in or exercise any control over Land Title's business operations. CTIC does not provide any advice to Land Title on compliance with the Inducement Regulation. CTIC does not have any input in, or oversight of, Land Title's marketing practices or procedures.

AR 499, ¶¶ 6-9; *see also* AR 500-510 (Land Title's marketing materials).

Thus, both the Agreement and the additional evidence submitted by CTIC and Land Title establish that CTIC does not in any way control Land Title's operations, including its marketing practices. Because CTIC could not and did not control Land Title's marketing practices, CTIC cannot be liable for those practices under common law. *See, e.g., Larner*, 93 Wn.2d at 804-05.

Although the OIC Judge's Order concluded that common law principles of agency are inapplicable to the determination of whether CTIC may be held vicariously liable for the regulatory violations of Land Title, the OIC Judge's Order contradictorily and repeatedly found that CTIC did control Land Title. *See, e.g., AR 136-38, ¶¶ 15, 17.* In making these unsupported findings and conclusions, the OIC Judge relied on two inapplicable provisions of the Agreement, which have no bearing on CTIC's alleged right to control Land Title's marketing practices.

First, the OIC Judge cited Paragraph 11 of the Agreement, pursuant to which CTIC has the right to examine Land Title's books and records related to its title insurance business. AR 136, ¶ 15. Such authority, however, does not equate to the authority to control Land Title's marketing practices. *See, e.g., Henning v. Crosby Group, Inc.*, 116 Wn.2d 131, 134, 802 P.2d 790 (1991) (authority to inspect work to ensure

compliance with contract does not equate to control for common law liability purposes).

Second, the OIC Judge's Order cited Paragraph 9 of the Agreement, pursuant to which Land Title has agreed to indemnify CTIC for losses incurred by CTIC as a result of Land Title's negligence in issuing title assurances, performing escrow services, or for acts of fraud, dishonesty, or defalcation. AR 137-138, ¶ 17. This indemnification provision, while potentially relevant to Land Title's authority to act as CTIC's issuing agent, has no bearing on Land Title's marketing practices. The OIC Judge's Order does not elaborate on how this indemnification provision evidences CTIC's right to control the marketing activities of Land Title, other than stating that the provision "requires that Land Title comply with instructions given by Chicago to Land Title, and applicable laws, or face liability to Chicago for that failure." *Id.*

Here, the only instructions given to Land Title regarding marketing were that it was not permitted to market on CTIC's behalf, other than to indicate its authority to issue policies underwritten by CTIC. AR 520, ¶ 6. The indemnification provision does not in any way allocate to CTIC the right to control Land Title's marketing practices and the OIC Judge erred by relying on the provision as evidence of such control. There is no evidence in the record, let alone substantial evidence, to support the OIC

Judge's findings and conclusions that CTIC had the right to control (much less did control) the marketing activities of Land Title.¹²

b. The OIC Judge's Order Is Arbitrary and Capricious.

A comparison of the OIC Judge's Order with the factual record as a whole also demonstrates that the OIC Judge's Order is reversible as arbitrary and capricious. The findings of fact and conclusions of law suggest a clear objective to rule in the OIC's favor irrespective of the law or evidence. This outcome-oriented approach by the OIC Judge mirrors a legal position she advocated for in her capacity as Deputy Insurance Commissioner.¹³ *See* AR 417-20.

¹² Even if such evidence were in the record, however, that evidence was disputed by evidence provided by CTIC, including declarations regarding CTIC's lack of control from CTIC and Land Title's management. *See* AR 498-510, 515-523. Thus, the facts purportedly relied on by the OIC Judge were, at most, disputed material facts, and the OIC's Judge's findings and conclusions that CTIC controlled Land Title were not appropriate determinations on summary judgment in the OIC's favor. CR 56(c); *Ranger Ins. Co. v. Pierce Cnty.*, 164 Wn.2d 545, 556, 192 P.3d 886 (2008) (issue of material fact relating to apparent authority rendered summary judgment inappropriate). Thus, even if some evidence supported the OIC Judge's findings and conclusions, summary judgment in favor of the OIC was inappropriate, and the appropriate remedy would be a remand for a hearing on the issue of control. *See, e.g., Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S.*, 112 Wn. App. 677, 688-89, 50 P.3d 306 (2002).

¹³ Although CTIC waived, before the superior court, its right to a remand for a new hearing by the OIC based on OIC Judge Peterson's appearance of unfairness, it did not waive its right to a determination that the OIC Judge's Order is arbitrary and capricious. *See* CP 158-60.

For example, while the OIC Judge erroneously concludes that common law agency principles, including that principal's control over the agent, are irrelevant to the agency determination (Conclusions of Law 18, 24 and 26; AR 159, 161-163), she proceeds to adopt no fewer than eight Findings of Fact and three Conclusions of Law¹⁴ that CTIC had the right to control the marketing practices of Land Title. As discussed in Section V(D)(2)(a), *supra*, these findings and conclusions are unsupported by any authority or evidence in the record. Moreover, while the OIC Judge's Order finds that the Agreement "is not relevant to a determination of the relationship between the parties" (Finding of Fact No. 12, AR 134), the OIC Judge's Order nonetheless relies on two provisions of the Agreement as a basis for the Findings. *See* AR 136-138.

The OIC Judge's Order is replete with other erroneous and unsupported findings and conclusions. Examples include Finding of Fact No. 13, that Land Title has the right to name CTIC in its advertising and printing, and Finding of Fact No. 14, that CTIC pays business expenses of Land Title. As discussed, *supra*, the Agreement specifically forbids Land Title from using CTIC's name in any advertising or printing (AR 520, ¶

¹⁴ Finding of Fact Nos. 10, 11, 15, 17, 20, 23, 24, 33; Conclusion of Law Nos. 14, 16, 24.

6(G) (Agreement)) and CTIC does not pay any of the business expenses of Land Title. AR 517 (Randolph Decl.); AR 499, ¶ 9 (Kennedy Decl.).

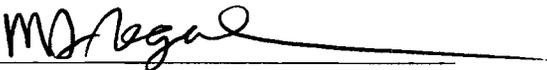
In sum, the OIC Judge's Order conveniently ignores the evidence in the record and applicable law, instead crafting "facts" and applying inapposite law to support the OIC's position. For these reasons, it is arbitrary and capricious. *Dupont-Ft. Lewis School Dist.*, 79 Wn.2d at 739.

VI. CONCLUSION

For the foregoing reasons, CTIC respectfully requests that the Court reverse the decision of the OIC Judge, and reinstate the ALJ's Initial Order granting summary judgment to CTIC as the final agency order.

RESPECTFULLY SUBMITTED this 3rd day of November, 2010.

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APPENDIX A

APPENDIX A
FINDINGS OF FACT CHALLENGED BY CTIC

1. The Office of the Insurance Commissioner (OIC) alleges that the Respondent, Chicago Title Insurance Company (Chicago), violated WAC 284-30-800, by and through the acts of its agent, Land Title Company of Kitsap County, Inc. (Land Title), which Chicago had legally appointed as its title insurance agent pursuant to RCW 48.17.160 to act on Chicago's behalf to solicit and effectuate Chicago's title insurance. [Notice of Hearing; Amended Notice of Hearing.] Chicago is a domestic Missouri title insurance corporation which has been authorized by the OIC since 1977 as a title insurer to underwrite and sell title insurance in Washington and elsewhere. [Ex. A to Decl. of Singer; Decl. of London.] Land Title is a Washington corporation, incorporated in 1967, which is licensed by the OIC as a title insurance agent as defined in RCW 48.17.010. [Exs. A, B to Decl. of Singer; Decl. of Kennedy.] Since March 5, 1993, Chicago, as an insurer, has filed an Appointment with the OIC as required by RCW 48.17.160, on forms prescribed by the OIC, and paid the proper Appointment fee therefore, formally appointing Land Title to act as a title insurance agent to act on Chicago's behalf in Mason, Kitsap, Clallum and Jefferson counties (although Land Title is not undertaking these activities in Clallum and Jefferson counties). [Decl. of Randolph; Ex. C to Decl. of Singer.] Pursuant to specific authority given to appointed insurance agents under RCW 48.17.010 and 48.17.160, Land Title has at all times pertinent hereto had the authority to solicit, specifically on behalf of Chicago, applications for Chicago's title insurance, without the requirement of any further authority needed from the appointing insurer. Further, as specifically allowed under RCW 48.17.010 and 48.17.160, Chicago may authorize Land Title to act on Chicago's behalf to effectuate Chicago title insurance policies and to collect premiums on insurances so applied for or effectuated (on forms prescribed by Chicago and using rates prescribed by Chicago as required by the OIC). In fact, since May 1, 1992, Chicago has additionally authorized Land Title to effectuate Chicago title insurance policies on Chicago's behalf and to collect premiums therefore. [Decl. of Randolph; Exs. C, D, E, and G of Decl. of Singer; "Issuing Agency Agreement" entered into between Chicago and Land Title May 1, 1992 and included as Ex. A to Decl. of Randolph.] At all times pertinent hereto, Land Title was not appointed as an agent to represent, including solicit or effectuate insurance policies for, any other title

insurance company [Exs. E, F of Decl. of Singer] and under its contract with Chicago, Land Title was prohibited from acting on behalf of any other title insurer. [“Issuing Agency Agreement.”] Likewise, Chicago appointed Land Title as its exclusive agent to act on its behalf in these counties. If Land Title were not appointed to represent Chicago in these counties, Land Title would have no title insurance to market or sell to consumers. Further, because Chicago does not operate directly in these counties, the only way Chicago can solicit for and effectuate its title insurance there is through Land Title. [Exs. A-P of Decl. of Singer; “Issuing Agency Agreement.”] Finally, Land Title collects the Chicago title insurance premiums, pays 12% of the gross premium for each title policy effectuated to Chicago and retains the balance for itself. [Decl. of Randolph; “Issuing Agency Agreement.”] Approximately 28% of Land Title’s total revenue comes from escrow services [Decl. of Kennedy at 5; Initial Finding 25]; all the rest of its revenue - 72% - comes from selling Chicago’s title insurance policies.

2. As found above, Land Title is licensed by the OIC as a title insurance agent. Land Title also conducts escrow services, which are not considered part of its business as an insurance agent. While not relevant, Land Title is not a party to this action. The OIC seeks to impose fines against Chicago, based upon the illegal acts of its appointed agent, Land Title acting on Chicago’s behalf in soliciting Chicago’s title insurance. *For the purposes of this motion only, it is stipulated that Land Title did commit the alleged violations of the inducement regulation.*

3. *The stipulated violations of the WAC 284-30-800, the Illegal Inducement Regulation, by Land Title include “winning and dining” of real estate agents, builders, and mortgage lenders with meals, golf tournaments, advertising for one real estate agent, purchases at a Board of Realtors auction; and professional football championship game tickets, in amounts over the \$25.00 limit allowed by WAC 284-30-800.* [Amended Notice of Hearing.] Because the Illegal Inducement Regulation provides limitations on title insurers and their agents on giving things of value in excess of \$25.00 to producers of title business, such as the above-referenced real estate agents and others who are in a position to direct the purchase of title insurance to certain title insurers over others, the act of either title insurers or their agents giving such inducements to such producers is clearly a form of solicitation for the purchase of title insurance.

4. Land Title is licensed as a title insurance agent by the OIC, and is formally appointed by Chicago to solicit for Chicago's title policies on Chicago's behalf. Although title insurance literature might also informally designate it as a "UTC," whether a title insurance agent is also referred to as a "UTC" is irrelevant; its nature as a title insurance agent, with the ensuing rights and responsibilities of a title insurance agent which acts on behalf of its appointing insurer(s), remains the same. In those counties where it wishes to sell Chicago title policies, Chicago may appoint a title insurance agent, such as Land Title, to act on Chicago's behalf to solicit for itself directly and/or to solicit and effectuate issuance of Chicago title policies. However, it is Chicago, as the insurer, which is the entity authorized by the OIC to write and issue Chicago title policies and to serve as the underwriter of those title policies. Chicago, as an insurer, is required by law to legally appoint any entity which it authorizes to act on its behalf. This requires that Chicago file a formal Appointment form with the OIC, formally appointing Land Title, an insurance agent, to act as a title insurance agent representing Chicago. Chicago complied with this requirement beginning on March 5, 1993 and continuing during all pertinent times hereto and continuing currently. [Exs. A-P to Decl. of Singer.] Under the Insurance Code, agents which are legally appointed by insurers may solicit applications for insurance on the insurer's behalf and, if authorized so to do, the appointed agent may effectuate insurance contracts. Agents may also collect premiums on insurances so applied for or effectuated. As found above, in the case of Chicago's appointment of Land Title as an insurance agent, in addition to having the right to solicit applications for insurance on Chicago's behalf solely by virtue of its appointment, Land Title has also since 1993 been authorized by Chicago, as provided for under the Insurance Code, to effectuate Chicago's title policies (Decl. of Randolph; "Issuing Agency Agreement" 1 and to collect premiums for the Chicago title policies from purchasers (as required by the OIC, on forms prescribed by Chicago and premium rates as prescribed by Chicago). (Issuing Agency Agreement.)

6. Chicago conducts no direct marketing activities in Kitsap, Mason, Clallam and Jefferson counties. (Decl. of London.) Chicago relies solely on the efforts of Land Title, (Decl. of London; Decl. of Kennedy.) as its exclusive appointed insurance agent, to act, on behalf of Chicago, to

solicit for and effectuate Chicago title policies in these counties and to collect Chicago's established premiums for these title policies (although Land Title does not actually operate in Clallam and Jefferson counties). (Ex. E to Decl. of Singer.)

9. In Washington, there are a number of title insurance agents which also are called in title insurance literature, "UTCs"; these "UTCs," such as Land Title, are title insurance agents appointed by a title insurer(s), such as Chicago, to solicit for and effectuate title insurance policies issued and underwritten by the title insurer, mainly in counties where national title insurers do not solicit and effectuate their title policies directly. [Decl. of Randolph; Exs. A-P of Decl. of Singer.] In Washington, title literature has informally designated certain entities, such as Land Title as "UTCs" or "independent title companies." Whether they are designated as "UTCs" or not these entities, like Land Title, are only recognized by the Insurance code - and only authorized to represent title insurers - if they are licensed as title insurance agents by the OIC and are duly appointed by title insurer(s) to act on behalf of the title insurer to solicit for and if authorized by the insurer, effectuate title policies on the insurer's behalf and collect premiums therefor. This arrangement occurs typically in counties, such as Mason and Kitsap counties where title insurers do not solicit for and effectuate their title insurance policies directly, and Chicago has appointed some eleven of these entities to represent it in various counties throughout Washington state. [Decl. of Randolph.] As with any appointed insurance agent whether the agent is designated a "UTC" or not, it derives its authority from being licensed by the OIC as a title insurance agent and then being appointed by a title insurer to act on the insurer's behalf, thereby Chicago has so appointed Land Title to solicit for Chicago's title insurance and is further authorized by Chicago, as permitted by the OIC, to effectuate Chicago's title insurance policies and to collect the premiums therefor, all on behalf of Chicago. In the situation at issue herein, Land Title also conducts the title search and, on behalf of Chicago, determines whether to effectuate a Chicago title policy in each specific case. If the title search was bad and there is a defect in title, then Chicago, as the insurer and underwriter of the title policy, must assume liability to the purchaser/policyholder for any loss as a result. Additionally, Land Title conducts title searches in specific counties, where, as required by the OIC, it owns or subscribes to title plants in those counties where it operates. [Decl. of Randolph.]

10. *Chicago has no involvement in the title search with these contracted UTC's [sic], including Land Title. (Decl. Randolph)* UTCs, including Land Title, may market their own services, such as escrow services which are not part of Land Title's duties as an appointed insurance agent of Chicago, without the involvement or financial contribution of Chicago. As with other UTCs similarly situated to Land Title, as the only appointed agent of Chicago in the relevant counties and on behalf of the only insurer it is authorized to represent, Land Title also, all on behalf of Chicago, solicits for Chicago's title insurance, issues preliminary commitments for Chicago's title insurance, addresses exceptions to the title identified in the preliminary commitment; and effectuates the issuance of Chicago's title policies, all without Chicago's participation. [Decl. of Randolph; Exs. A-P of Decl. of Singer.] Whether or not Chicago chooses to be involved or otherwise participate in these activities which are conducted on its behalf does not affect the relationship of Chicago as the appointing insurer and Land Title as its appointed agent. In addition, as is typical of many insurer-agent relationships, for each Chicago title policy which Land Title effectuates, Land Title is required to pay 12% of the gross premium charged for each Chicago Title policy to Chicago and retains the balance for itself, thereby receiving financial remuneration from Chicago. [Decl. of Randolph; "Issuing Agency Agreement".]

11. *Chicago receives specific information from Land Title when it is called upon to insure a title policy: a policy number; the UTC's internal file number; the effective date of the policy; the type of policy; the premium paid; and the amount of liability. (Decl. Randolph)* Unless the need arises, Chicago does not receive a copy of the preliminary commitment or any of the documents associated with the closing. (Decl. Randolph) Unless the need arises, Chicago does not receive a copy of the preliminary commitment or any of the documents associated with the closing. [Decl. of Randolph.] Other than receiving this specific information, Chicago has chosen to normally exercise little control or supervision over Land Title in the solicitation and effectuation of Chicago title insurance conducted by Land Title on Chicago's behalf. Instead, Chicago has chosen to allow Land Title as its appointed insurance agent to act on Chicago's behalf somewhat independently, even though as the appointing insurer Chicago could have exercised more control over the solicitation and effectuation activities of Land Title acting on Chicago's behalf. In fact, the only function Chicago

has chosen to undertake in the insurance transaction in these counties is to insure the risk of later-discovered title imperfections (which it must do, as the insurer) and to receive the pertinent details of each Chicago policy sold, and to examine certain specified information on a regular basis or if it chooses to do so. However, the fact that Chicago chose to be uninvolved in all of these other aspects of the insurance transaction being conducted by Land Title on Chicago's behalf does not relieve Chicago for responsibility for Land Title's solicitation or other activities conducted on Chicago's behalf.

12. The fact that Chicago and Land Title have a private "Issuing Agency Agreement" between them is not relevant to a determination of the relationship between the parties. The OIC's disciplinary action taken against Chicago which is the subject of this appeal is an administrative, regulatory action, not a civil or criminal action. By virtue of Chicago's appointment of Land Title to act as its agent, it is the Insurance Code which determines the relationship of Chicago as insurer/principal and Land Title as appointed agent/agent. The Insurance Code defines the parties to a title insurance transaction including what entity may act on behalf of the insurer and what types of activities that entity may perform. A private contract between the insurer and the appointed insurance agent does not alter the rights and responsibilities set forth in the Insurance Code. *The contract requires Land Title to use Chicago to underwrite its title insurance, although an addendum allows Old Republic Insurance to underwrite for Land Title as well. However, Land Title has used only Chicago for this function for some years and Old Republic has never accomplished the legal requirements to be able to underwrite for Land Title. (Decl. Singer, and Ex. F)* Pursuant to the "Issuing Agency Agreement," and as is fairly common in insurer-agent transactions, Land Title collects the premium for the title insurance, in the amounts set by Chicago, and then pays a percentage of the gross premium charged for each title policy - here it is 12% by agreement - over to Chicago. [Decl. of Randolph; "Issuing Agency Agreement."]

13. As Chicago's duly appointed agent under the Insurance Code, Land Title is given the specific right, without also being required to have specific authorization from the appointing insurer elsewhere, to solicit on behalf of Chicago. Further, as specifically allowed under the Insurance Code if the appointing insurer authorizes the appointed agent, Land Title was in fact given the authority to effectuate Chicago's title policies and

also to collect the premiums therefor (in the amounts prescribed by Chicago and as Chicago has had to file with the OIC) in the “Issuing Agency Agreement.” While not a requirement, it is noted that a review of the situation between these parties and the “Issuing Agency Agreement” shows that, as Chicago’s exclusive agent and as the only insurer for whom Land Title can solicit and effectuate title policies, the private “Issuing Agency Agreement” does in fact give Land Title the right to solicit for Chicago’s title insurance - by having the right to name Chicago in its advertising and printing, among other activities. Without Chicago, Land Title would have no title insurance to sell and without Land Title, Chicago, because it has chosen not to solicit directly in these counties, Chicago would have no one to solicit for its title policies. *Land Title employs its own sales personnel to market its services to potential customers in Kitsap County. (Decl. Kennedy) The marketing materials used by Land Title do not mention its relationship to Chicago. (Decl. Kennedy, Ex. A-E) However, the website of Land Title does have a hyperlink to “National Website” which takes the user to Chicago’s website. (Decl. Singer, Ex. H) Otherwise, the Land Title website makes no mention of its underwriter or any connection to Chicago.* Therefore, while the marketing materials used by Land Title may not always indicate its relationship to Chicago (Decl. of Kennedy’), under the terms of the “Issuing Agency Agreement” Land Title may use the name of Chicago in its advertising and printing. [“Issuing Agency Agreement”.] Further, since Chicago is the only insurer which Land Title is appointed to solicit for (Finding No. 12 above) - and is allowed to represent under its “Issuing Agency Agreement” - Land Title is clearly advertising for Chicago’s title insurance. In fact, only about 28% of Land Title’s total revenue comes from escrow services [Decl. of Kennedy at 5; Initial Finding of Fact 25]; all the rest of its revenue, 72% - comes from selling Chicago’s title insurance policies. Further, while the Land Title website may not mention its underwriter or any connection to Chicago, it does include a hyperlink to “National Website” which takes the user to Chicago’s website. [Decl. of Singer, Exs. A-P.] Such activities clearly constitute solicitation by Land Title for Chicago’s title insurance. All solicitation of title insurance by Land Title was done on behalf of Chicago, as Land Title’s only appointing insurer.

14. It cannot be found that Chicago does not pay any of the business expenses of Land Title, nor pay for any of its services: under the terms of

the “Issuing Agency Agreement,” Land Title collects the premiums for each Chicago title policy it effectuates, then sends just 12% of the gross premium for each policy to Chicago. [Decl. of Randolph; Issuing Agency Agreement.]

15. *In the contract, Chicago retains the right to examine the records of Land Title “which relate to the title insurance business carried on by Land Title for Chicago,” including accounts, books, ledgers, searches, abstracts, and other related records.” (Decl. Randolph, Ex. A) The contract also requires that Land Title preserve for ten years the documents upon which “title assurances and underwriting decisions were made, including searches, worksheets, maps, and affidavits.” (Decl. Randolph, Ex. A) Therefore Chicago had the right during the period at issue herein to review the records created preliminary to sales of Chicago’s title policies and at other times, solely by virtue of its position as the appointing insurer of Land Title. While irrelevant to the issue herein, Chicago was also permitted under the “Issuing Agency Agreement” to review those records and to exercise other significant controls over Land Title. However, Chicago chose not to review any of these records or conduct many of the other activities of control it could have exercised over Land Title, either as its appointing insurer or in the “Issuing Agency Agreement” during the period at issue here. [Decl. of Randolph; “Issuing Agency Agreement.”]*

16. *Land Title is required by the contract to comply with all laws and regulations, and to note Chicago of any alleged violations or complaints about Land Title’s compliance with such laws and regulations. The OIC did not notify or include Chicago in its investigation of Land Title for the inducement violations at issue, but Land Title notified Chicago of the investigation and its results, as called for in the contract. Simply because in the “Issuing Agency Agreement” Land Title has committed to comply with all laws and regulation and to notify Chicago of any alleged violations or complaints about Land Title’s compliance with them does not affect Chicago’s status as the appointing insurer and Land Title its appointed agent. Although not required in the analysis herein, in fact this provision supports the principal/agent relationship created under the Insurance Code, evidencing the principal’s concern that its agent comply with applicable laws and- regulations (which are imposed upon Land Title by the Insurance Code based upon its status as an insurance agent) and*

requiring that its agent notify the principal of any significant occurrences with regard to the agent's compliance.

17. The insurance customers are those of Chicago; which sells, through Land Title, Chicago title policies to those customers. In the "Issuing Agency Agreement," loss is allocated between Chicago and Land Title, with the insurer being liable, as the insurer, to its policyholders for any failures of the title search, and Land Title being "responsible to [Chicago] for all loss, cost or damage, ... caused by ... 9.B(1) Failure of Issuing Agent [Land Title] to comply with the ... rules, regulations or instructions given to Issuing Agent [Land Title] by Principal [Chicago] and nearly all of Land Title's other activities... and also for (8) Allegations, against either [Chicago] or [Land Title] by reason of the activities of [Land Title] ... or failure to comply with any Federal or State Law or regulation [Decl. of Randolph; "Issuing Agency Agreement at 9(B)(1)-(8)."] Therefore, while not necessary to the analysis of the issue herein, the wording of the "Issuing Agency Agreement" clearly indicates that Chicago — exercising control over its agent - requires that Land Title comply with instructions given by Chicago to Land Title, and applicable laws, or face liability to Chicago for that failure. Further, as indicated, Chicago provides for the possibility that allegations might be made against Chicago for the acts of Land Title in violating federal or state laws or regulations including the Illegal Inducement Regulation. ["Issuing Agency Agreement at 9.B(8).] *The contract requires Land Title to indemnify 'Chicago against loss from Land Title's actions of fraud, conspiracy, or failure to comply with all Federal and State laws. (Decl. Randolph, Ex. A Sec. 9(B)(8)).* However, the fact that Chicago may be attempting in its "Issuing Agency Agreement" to somehow evade responsibility to the OIC or others for the acts of Land Title by requiring that Land Title indemnify Chicago against loss from Land Title's fraud, conspiracy or "failure to comply with Federal or State Law or regulation," including the Illegal Inducement Regulation, is irrelevant.

18. Land Title is authorized by the Insurance Code, as the appointed agent of Chicago, to solicit on behalf of Chicago for Chicago's title insurance. Additionally, Land Title is specifically authorized by Chicago to not only solicit for, but also to effectuate title policies on behalf of Chicago and collect the premiums therefor. [Decl. of Randolph; "Issuing

Agency Agreement.”] *Land Title is required to use forms provided by Chicago for these functions.*

20. Chicago, as the appointing insurer, had the *right* to control the actions of Land Title, as its appointed insurance agent, in all activities conducted by Land Title on behalf of Chicago, most specifically, solicitation and effectuation of Chicago title policies including Land Title’s compliance with the Illegal Inducement Regulation in its solicitations. See Finding 17 above. Moreover, while not necessary to find herein, even under an analysis of common law agency and under the “Issuing Agency Agreement,” Chicago had a clear right to control the actions of Land Title in solicitation and effectuating of Chicago’s title insurance. [“Issuing Agency Agreement”]. Further, Chicago could have terminated Land Title’s agreement appointment at any time. The evidence shows that Chicago may have chosen not to oversee or otherwise control Land Title’s acts, conducted on behalf of Chicago, in solicitation of Chicago’s title insurance either as the appointing insurer or as a common law principal. However, the fact that Chicago may have chosen to look the other way and not participate or control its agent’s activities in this area does not relieve Chicago from being accountable for the acts of its appointed agent.

21. As found in Finding 14 above, it cannot be found that Chicago does not pay any of the business expenses of Land Title, nor pay for any of its services: under the terms of the “Issuing Agency Agreement,” Land Title collects the premiums for each title policy it effectuates, then sends just 12% of the gross premium for each policy to Chicago. [Decl. of Randolph; Issuing Agency Agreement.]

23. As found above, Chicago, as the appointing insurer, had at all pertinent times, the right to control Land Title, its appointed agent, in all activities conducted on behalf of Chicago. These activities include, as found above, all solicitation and effectuation of Chicago title insurance policies. This right to control the activities of Land Title in soliciting on its behalf specifically includes Chicago’s right to control Land Title’s compliance with the Illegal Inducement Regulation and statute, a well known problem which had been occurring for some time in the title industry and had been addressed many times by the OIC in its efforts to advise title insurers and their agents for whom they were responsible, of the need for strict compliance with that regulation. [Decl. of

Tompkins, with Exs.] The fact that Chicago and Land Title entered into a private “Issuing Agency Agreement” which appears to attempt to transfer responsibility from Chicago to Land Title for compliance with all applicable statutes and regulations, and many other activities, does not relieve Chicago of its responsibility for the acts of Land Title’s and certainly for Land Title’s violations of the Illegal Inducement Regulation and statute. *Chicago does not provide any advice to Land Title about compliance with the laws, including the inducement laws. (Decl. Kennedy.)*

24. As set forth in the Insurance Code, as Chicago’s appointed insurance agent, Land Title markets for Chicago’s title insurance on behalf of Chicago. While Chicago chose not to provide advice to Land Title regarding compliance with the Illegal Inducement Regulation and chose not to conduct any oversight of any of Land Title’s marketing practices or procedures, and in fact Chicago appears to perhaps have attempted to evade its responsibility to the OIC and others by shifting responsibility for compliance to Land Title in its “Issuing Agency Agreement,” this does not relieve Chicago of its responsibility for compliance with the Illegal Inducement Regulation whether through its direct acts or through the acts of its agent, Land Title. Further, although this was not required as a precondition to enforcement action against Chicago, Chicago and all title insurers operating in Washington were clearly apprised by the OIC of the problem of widespread violations of the Illegal Inducement Regulation and of insurers’ liability for their appointed agents’ violations of the Illegal Inducement Regulation. Title insurers were also informed that this area was of great priority and importance to the OIC. See Findings 26-30 below. In 1989, the OIC mailed a communication concerning the problem directly to Chicago. [Decl. of Tompkins, w/ Exs.] Further, in 2006, an OIC investigation and report found that Chicago was one of four title insurers operating in Washington involved in widespread violations of the Illegal Inducement Regulation. [Decl. of Tompkins, w/ Exs.] See Findings 26 - 30 below.

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

insurers and their agents” of the requirements of the inducement and rebating laws. (Decl. Tompkins, Ex. B) Thereby, although it was not a precondition to the OIC taking enforcement action against title insurers for violations of the Illegal Inducement Regulation by their agents, the OIC attempted to ensure that both title insurers and their agents were fully aware of the Illegal Inducement Regulation and the liability of title insurers for violations by their agents. [Decl. of Tompkins, Ex. B.]

28. The Advisory was issued simply to assist title insurers and their agents with compliance with the illegal inducement laws and further advised title insurers and their agents that title insurers *would be liable for violations of the inducement laws committed by their agents.* [Decl. of Tompkins, w/ Exs.] The fact that Chicago and Land Title might choose to refer to Land Title as a “UTC” or any other chosen designation makes no difference: Land Title is an appointed insurance agent of Chicago and, as advised in the OIC’s communications with Chicago and other title insurers, title insurers would be held responsible for the acts of their agents in violating the Illegal Inducement Regulation. Chicago cannot possibly understand itself not to be a title insurer, or Land Title not to be Chicago’s appointed title insurance agent. [Decl. of Tompkins, incl. Technical Assistance Advisory attached as Ex. B thereto.] The existence of private contracts between title insurers and their agents, and/or the parties’ designation of a title insurance agent as a “UTC,” does not change the identity of the “UTC” as an appointed title insurance agent acting on behalf of the appointing title insurance company, nor does the designation of “UTC” affect the liability of title insurers for their agents’ violations of the Illegal Inducement Regulation and statute, or of any other statutes and regulations found in the Insurance Code. *No mention is made of the UTC’s, and the relationships between these underwritten title companies and the insurers, in the Advisory letter.*

29. *In 1989, the OIC also sent a letter to Chicago in Tacoma, Washington, stating specifically that the letter was to be given to “each of your branch offices and to each of your agents.” The letter further elaborated that, “Title insurers are liable for any activity conducted by their agents regarding this regulation whether the title insurers have knowledge of the activity or not.”* Therefore, in 1989 Chicago was directly advised by the OIC that title insurers are liable for any acts of their agents relative to compliance with the Illegal Inducement Regulation whether the title insurer has knowledge of the activity or not. [Ex. M to

Decl. of Singer.] The regulation being referred to is the Illegal Inducement Regulation, which limits the amount that a title insurer or title insurance agent can spend on “items of value” given to potential producers of title insurance business such as builders and real estate agents/brokers, as inducements for referring title insurance business to those title insurers. [Ex. M to Decl. of Singer.] Contrary to the assertions of Chicago in this proceeding, there are no such different entities as “UTCs” or “underwritten title companies.” Land Title and other similar entities exist as they were created by their voluntary compliance with the Insurance Code: since March 5, 1993, and because it chooses not to solicit and effectuate Chicago title policies directly in Mason, Kitsap, Jefferson and Clallam counties, Chicago has chosen to appoint Land Title as a title insurance agent to act on Chicago’s behalf to solicit and effectuate Chicago title policies in those counties. Because Chicago has appointed Land Title to act on its behalf in solicitation of Chicago’s title insurance in these counties, Chicago is responsible to the OIC as if Chicago had itself committed the subject violations of the Illegal Inducement Regulation, no matter what other label Chicago or Land Title, or others, or the private “Issuing Agency Agreement” may assign to Land Title.

30. *The OIC also addressed the Washington Land Title Association in September, 1989, about the on-going violations of the inducement laws, to put the title companies and agents present on notice that further violations would not be tolerated. (Decl. Singer, Ex. M)* The OIC’s efforts, through letter to Chicago, by extensive investigation of Chicago and ensuing report of Chicago’s violations of the Illegal Inducement Regulation, Technical Assistance Advisory, and by presentation before Washington Land Title Association were voluntary efforts by the OIC to further ‘inform title insurers and agents - including Chicago - of the Illegal Inducement Regulation and the consequences of their or their agents’ violations of that Regulation. Performance of these efforts by the OIC was not a precondition to enforcement action against title insurers or their agents. [Decl. of Tompkins, w/ Exs.] Even so, Chicago had been aware of the Illegal Inducement Regulation and its liability for its agents’ violation of the Regulation, for many years before the time period at issue herein. [Decl. of Tompkins, w/ Exs.]

33. [Finding added by Review Judge in its entirety.] It has been found in the Final Findings of Fact above that, based on the weight of the

evidence presented, in order to market its title insurance policies in Mason, Kitsap, Jefferson and Clallam counties where Chicago does not market directly, in 1993 Chicago formally appointed Land Title as its exclusive Agent to act on Chicago's behalf to market Chicago's policies and Land Title, in turn, committed to act as an agent only for Chicago. It has also been found above that pursuant to the Insurance Code, appointed agents are authorized to solicit insurance on behalf of the appointing insurer, which includes compliance with the Illegal Inducement Regulation because the giving of inducements to producers of title insurance is a form of solicitation for the purchase of insurance. It has also been found above that Land Title did perform all solicitation, on behalf of Chicago, for Chicago's title insurance in the pertinent counties and in fact was authorized by the OIC to solicit only on behalf of Chicago in those counties. Finally, it has been found that because Land Title was at all times acting on behalf of Chicago in soliciting for Chicago's title insurance, including the giving of illegal inducements in violation of the Illegal Inducement Regulation, the violations should be treated as if committed by Chicago itself. Therefore it is reasonable to find that Chicago can be held responsible to the OIC for Land Title's violations of the Illegal Inducement Regulation. Specifically, insofar as is relevant herein, the OIC may take action against Chicago, and hold Chicago responsible for, the illegal acts of Land Title in violation of the Illegal Inducement Regulation and statute. For this reason, the ALJ's Initial Order Granting Summary Judgment to Chicago should be set aside and the parties should be instructed to proceed to Phase II of this proceeding.

APPENDIX B

APPENDIX B - STATUTES

RCW 48.02.060 - General powers and duties - State of emergency.

- (1) The commissioner has the authority expressly conferred upon him or her by or reasonably implied from the provisions of this code.
- (2) The commissioner must execute his or her duties and must enforce the provisions of this code.
- (3) The commissioner may:
 - (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.
- (4) When the governor proclaims a state of emergency under RCW 43.06.010(12), the commissioner may issue an order that addresses any or all of the following matters related to insurance policies issued in this state:
 - (a) Reporting requirements for claims;
 - (b) Grace periods for payment of insurance premiums and performance of other duties by insureds;
 - (c) Temporary postponement of cancellations and nonrenewals; and
 - (d) Medical coverage to ensure access to care.
- (5) An order by the commissioner under subsection (4) of this section may remain effective for not more than sixty days unless the commissioner extends the termination date for the order for an additional period of not

more than thirty days. The commissioner may extend the order if, in the commissioner's judgment, the circumstances warrant an extension. An order of the commissioner under subsection (4) of this section is not effective after the related state of emergency is terminated by proclamation of the governor under RCW 43.06.210. The order must specify, by line of insurance:

(a) The geographic areas in which the order applies, which must be within but may be less extensive than the geographic area specified in the governor's proclamation of a state of emergency and must be specific according to an appropriate means of delineation, such as the United States postal service zip codes or other appropriate means; and

(b) The date on which the order becomes effective and the date on which the order terminates.

(6) The commissioner may adopt rules that establish general criteria for orders issued under subsection (4) of this section and may adopt emergency rules applicable to a specific proclamation of a state of emergency by the governor.

(7) The rule-making authority set forth in subsection (6) of this section does not limit or affect the rule-making authority otherwise granted to the commissioner by law.

RCW 48.17.005 - Rule making.

The commissioner may adopt rules to implement and administer this chapter.

Former RCW 48.17.010 (2006) - "Agent" defined.

"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.

Former RCW 48.17.160 (2006) - Appointment of agents – Revocation – Expiration – Renewal.

(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 procedures for individuals within licensed firms, corporations, or sole proprietorships who are empowered to exercise the authority conferred by the firm, corporate, or sole proprietorship license.

(2) Each appointment shall be effective until the agent's license expires or is revoked, the appointment has expired, or written notice of termination of the appointment is filed with the commissioner, whichever occurs first.

(3) When the appointment is revoked by the insurer, written notice of such revocation shall be given to the agent and a copy of the notice of revocation shall be mailed to the commissioner.

(4) Revocation of an appointment by the insurer shall be deemed to be effective as of the date designated in the notice as being the effective date if the notice is actually received by the agent prior to such designated date; otherwise, as of the earlier of the following dates:

(a) The date such notice of revocation was received by the agent.

(b) The date such notice, if mailed to the agent at his last address of record with the insurer, in due course should have been received by the agent.

(5) Appointments expire if not timely renewed. Each insurer shall pay the renewal fee set forth for each agent holding an appointment on the renewal date assigned the agents of the insurer by the commissioner. The commissioner, by rule, shall determine renewal dates. If a staggered system is used, fees shall be prorated in the conversion to a staggered system.

RCW 48.30.010 - Unfair practices in general - Remedies and penalties.

(1) No person engaged in the business of insurance shall engage in unfair methods of competition or in unfair or deceptive acts or practices in the conduct of such business as such methods, acts, or practices are defined pursuant to subsection (2) of this section.

(2) In addition to such unfair methods and unfair or deceptive acts or practices as are expressly defined and prohibited by this code, the commissioner may from time to time by regulation promulgated pursuant to chapter 34.05 RCW, define other methods of competition and other acts and practices in the conduct of such business reasonably found by the commissioner to be unfair or deceptive after a review of all comments received during the notice and comment rule-making period.

(3)(a) In defining other methods of competition and other acts and practices in the conduct of such business to be unfair or deceptive, and after reviewing all comments and documents received during the notice and comment rule-making period, the commissioner shall identify his or her reasons for defining the method of competition or other act or practice in the conduct of insurance to be unfair or deceptive and shall include a statement outlining these reasons as part of the adopted rule.

(b) The commissioner shall include a detailed description of facts upon which he or she relied and of facts upon which he or she failed to rely, in defining the method of competition or other act or practice in the conduct of insurance to be unfair or deceptive, in the concise explanatory statement prepared under RCW 34.05.325(6).

(c) Upon appeal the superior court shall review the findings of fact upon which the regulation is based de novo on the record.

(4) No such regulation shall be made effective prior to the expiration of thirty days after the date of the order by which it is promulgated.

(5) If the commissioner has cause to believe that any person is violating any such regulation, the commissioner may order such person to cease and desist therefrom. The commissioner shall deliver such order to such person direct or mail it to the person by registered mail with return receipt requested. If the person violates the order after expiration of ten days after

the cease and desist order has been received by him or her, he or she may be fined by the commissioner a sum not to exceed two hundred and fifty dollars for each violation committed thereafter.

(6) If any such regulation is violated, the commissioner may take such other or additional action as is permitted under the insurance code for violation of a regulation.

(7) An insurer engaged in the business of insurance may not unreasonably deny a claim for coverage or payment of benefits to any first party claimant. "First party claimant" has the same meaning as in RCW 48.30.015.

RCW 48.98.025 - Examinations - Acts of a managing general agent are acts of the insurer.

The acts of the managing general agent are considered to be the acts of the insurer on whose behalf it is acting. A managing general agent may be examined as if it were the insurer, as provided in chapter 48.03 RCW.

APPENDIX B - REGULATIONS

WAC 284-29-220 - Trade associations.

- (1) A title company may donate the time of its employees to serve on a trade association committee.
- (2) A title company may donate to, contribute to or otherwise sponsor a trade association event only if all of the following conditions are met:
 - (a) The event is a recognized association event that generally benefits all members and affiliated members of the association in an equal manner;
 - (b) The donation must not benefit a selected producer member of the association unless through a random process; and
 - (c) Solicitation for the donation must be made of all association members and affiliated members in an equal manner and amount.
- (3) A title company may pay for its employees and a single guest of each employee to attend trade association events only if all of the following conditions are met:
 - (a) The title company pays a fee equal to fees paid by producer members of the association in the events;
 - (b) The title company employees and their guest(s) actually attend the event (except when attendance is prevented by an emergency); and
 - (c) The guest of the title company employee is not a producer (except where the guest is related to the title company employee by blood or marriage or their domestic partner).
- (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;

(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.

(6) If a title company owns or leases and maintains a complete set of tract indexes in more than one county:

(a) The limits set forth in subsection (5) of this section apply on a county by county basis for donations, contributions, sponsorships, payments for events, advertisements, or sponsorship of educational seminars of trade associations a majority of whose members are located in that county;

(b) A donation, contribution, sponsorship, payment for an event, advertisement, or sponsorship of an educational seminar to a statewide trade association shall constitute one of its expenditures for each and every county in which the title company is authorized to issue title insurance policies; and

(c) The title company must not combine or accumulate unused expenditures of these permitted expenditures from one county to another county nor to a statewide trade association.

(7) If a title company that is under common ownership makes a donation, contribution, sponsorship, payment for an event, advertisement, or sponsorship of an educational seminar to a statewide trade association, the expenditure shall constitute an expenditure as one of the expenditures for each and every one of the title companies that are under common control.

WAC 284-29-245 - Locale of title company employees.

A title company and its employees must not lease or rent a workspace location owned or leased by a producer unless all of the following conditions are met:

(1) The space is secured by a bona fide written lease or rental agreement;

(2) The rent paid for the workspace is consistent with the prevailing rent charged for similar space in the market area of the workspace;

(3) Renting the space is not contingent upon the volume of title company business and is paid only in cash and not by trade or barter;

(4) There is no sharing of employees unless the title company only pays for its reasonably proportionate share;

(5) There is no common usage of equipment between the title company and the producer unless the title company only pays for its proportionate share; and

(6) The workspace is occupied by a bona fide employee of the title company a minimum thirty hours per week, except for holidays and bona fide emergencies, and is open to the public during regular business hours. However, if for appropriate business reasons the title company ceases conducting business at the locale and there is a remaining term on the lease or rental agreement, the title company may continue to pay the rent until the expiration of the lease or rental agreement or the next renewal date of the lease or rental agreement, whichever is earlier.

WAC 284-29-250 - Memorial gifts and charitable contributions - Limitations.

(1) A title company may provide no more than two hundred dollars in value of food, floral bouquets, or memorial donations for the death of a producer or a producer's immediate family member. This includes contributions to medical funds for a producer or a producer's seriously injured or seriously ill immediate family member.

(2) A title company may contribute to a charity only if:

(a) The contribution by the title company is made payable directly to the charity; and

(b) The solicitation for the contribution and the contribution are not, directly or indirectly, in exchange for the referral of title insurance business.

(3) Title company employees may attend and volunteer their time at events hosted by charities.

WAC 284-30-580 - Policies to be delivered, not held by agents.

(1) RCW 48.18.260 requires that policies be delivered within a reasonable period of time after issuance. If an insurer relies upon its agents to make deliveries of its policies, the insurer, as well as the agent, is responsible for any delay resulting from the failure of the agent to act diligently.

(2) Insurance agents delivering insurance policies to insureds must make an actual physical delivery. It is not acceptable for an agent to merely obtain a receipt indicating a delivery and then to retain the policy, for safekeeping or otherwise, in the agent's possession.

(3) Agents may obtain policies from owners or insureds and hold such policies briefly for analysis or servicing, giving a receipt therefor in every instance, but shall promptly return any such policies to their owners or insureds. Agents shall not otherwise take custody of, or hold, insurance policies, whether for fee or at no charge, unless a family or legal relationship clearly justifies such conduct, as, for example, where a policy

belonging to a minor child of the agent is held, or where the agent is acting as a legal guardian or a court appointed representative and holds a policy of a ward or of an estate.

(4) It shall be an unfair practice and unfair competition for an insurer or agent to engage in acts or practices which are contrary to or not in conformity with the requirements of this section, and a violation of this section is prohibited and shall subject an insurer and agent to the penalties or procedures set forth in RCW 48.05.140, 48.17.530, or 48.30.010.

(5) Each insurer shall inform its agents and appropriate representatives of the requirements of this section.

WAC 284-30-610 - Unfair practices with respect to the solicitation of coverage under out-of-state group policies.

(1) It is an unfair method of competition and an unfair practice for:

An insurer to permit its appointed licensed agent;

An insurance agent;

Solicitor; or

A broker,

to solicit an individual in the state of Washington to buy or apply for life insurance, annuities, or disability insurance coverage when the coverage is provided under the terms of a group policy delivered to an association or organization (or to a trustee designated by the association or organization), as policyholder, outside this state, unless the following steps are taken:

(a) An accurately completed disclosure statement, substantially in the form set forth in subsection (2) of this section, must be brought to the attention of the individual being solicited before the application for coverage is completed and signed. The disclosure form must be signed by both the soliciting licensee and the individual being solicited and it must be given to the individual.

(b) A copy of the completed disclosure statement must be submitted by the soliciting licensee, with the application for coverage, to the insurer providing the coverage.

(c) The insurer must confirm the accuracy of the form's contents, and retain the copy for not less than three years from the date the coverage commences or from the date received, whichever is later.

(2) Disclosure statement form: (Type size to be no less than ten-point)

[Form omitted.]

(3) This section does not apply with respect to coverage provided to individuals under a group contract which is provided for a group of a type described in RCW 48.24.035, 48.24.040, 48.24.060, 48.24.080, 48.24.090, or 48.24.095.

Former WAC 284-30-800 (2006) - Unfair practices applicable to title insurers and their agents.

(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.

(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.

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

(4) This section does not affect the relationship of a title insurer 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.

COURT OF APPEALS
DIVISION II
NOV 03 2010
STATE OF WASHINGTON
BY: *[Signature]*

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

CHICAGO TITLE INSURANCE
COMPANY, an Authorized
Insurer,

Appellant,

v.

WASHINGTON STATE OFFICE
OF THE INSURANCE
COMMISSIONER,

Respondent.

No. 40752-3-II

PROOF OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on this 3rd day of November, 2010, I caused to be served a true and correct copy of the following:

- 1. Opening Brief of Appellant; and**
- 2. Proof of Service**

to be delivered via U.S. Mail to:

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