

FILED  
COURT OF APPEALS  
DIVISION II

11 MAR 14 AM 8:47

STATE OF WASHINGTON

BY  DEPUTY

87215-5  
No. 40752-3-II

---

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.

---

REPLY BRIEF OF APPELLANT

---

K&L GATES LLP

Matthew J. Segal, WSBA # 29797

David C. Neu, WSBA # 33143

Sarah C. Johnson, WSBA # 34529

Jessica A. Skelton, WSBA # 36748

925 Fourth Avenue, Suite 2900

Seattle, WA 98104

(206) 623-7580

**ORIGINAL**

P.M. 3-11-2011

## TABLE OF CONTENTS

	<b>Page</b>
I. INTRODUCTION .....	1
II. ARGUMENT.....	2
A. The OIC’s Standard of Review Arguments Are Immaterial.....	2
B. The OIC Erroneously Relies on Statutory Authority that Does Not Provide for the Imputation of Liability. ....	4
1. The Insurance Code Is Silent on the Question at Issue Here. ....	4
2. The OIC’s Reliance on RCW 48.17.010 as a Basis for Liability Is Improper, and the Court Must Look to Common Law Agency Principles and the Agency Agreement. ....	6
3. The Unique Nature of the Title Insurance Industry Supports CTIC’s Arguments.....	9
4. The Inducement Regulations Do Not Support the OIC’s Actions. ....	12
5. CTIC’s Arguments Regarding the Impacts of the OIC Judge’s Order Are Proper and Not Precluded on Appeal.....	13
6. The OIC’s Reliance on RCW 48.01.030 Overreaches. ....	15
C. The OIC’s <i>De Facto</i> Rulemaking Was Improper.....	16

D.	Under Common Law Agency Principles, CTIC Cannot Be Held Liable for Land Title’s Regulatory Violations.....	18
1.	CTIC Did Not Have Actual Authority Over Land Title’s Actions at Issue Here. ....	18
2.	The Doctrine of Apparent Authority Is Inapplicable. ....	21
3.	The Arbitrary and Capricious Standard Is Applicable and Requires Reversal.....	23
III.	CONCLUSION .....	24

## TABLE OF AUTHORITIES

	Page
<b>WASHINGTON STATE CASES</b>	
<i>Am. Fid. &amp; Cas. Co. v. Backstrom</i> , 47 Wn.2d 77, 287 P.2d 124 (1955).....	6, 7
<i>Am. Seamount Corp. v. Science &amp; Eng'g Assocs., Inc.</i> , 61 Wn. App. 793, 812 P.2d 505 (1991).....	22
<i>Barry &amp; Barry, Inc. v. Dep't of Motor Vehicles</i> , 81 Wn.2d 155, 500 P.2d 540 (1972).....	17
<i>Bozung v. Condo. Builders, Inc.</i> , 42 Wn. App. 442, 711 P.2d 1090 (1985).....	20
<i>Budget Rent A Car Corp. v. Dep't of Licensing</i> , 100 Wn. App. 381, 997 P.2d 420 (2000).....	17
<i>Credit Gen. Ins. Co. v. Zewdu</i> , 82 Wn. App. 620, 919 P.2d 93 (1996).....	4
<i>D.L.S. v. Maybin</i> , 130 Wn. App. 94, 121 P.3d 1210 (2005).....	21
<i>Day v. St. Paul Fire &amp; Marine Ins. Co.</i> , 111 Wash. 49, 189 P. 95 (1920).....	5, 6
<i>Dep't of Ecology v. Campbell &amp; Gwinn, LLC</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	13
<i>Dep't of Ecology v. Lundgren</i> , 94 Wn. App. 236, 971 P.2d 948 (1999).....	3
<i>Donaldson v. Seattle</i> , 65 Wn. App. 661, 831 P.2d 1098 (1992).....	15
<i>Duckworth v. Bonney Lake</i> , 91 Wn.2d 19, 586 P.2d 860 (1978).....	3
<i>Dupont-Fort Lewis Sch. Dist. 7 v. Bruno</i> , 79 Wn.2d 736, 489 P.2d 171 (1971).....	24
<i>Ellis v. Seattle</i> , 142 Wn.2d 450, 13 P.3d 1065 (2000).....	14
<i>Failor's Pharm. v. Dep't. of Soc. &amp; Health Servs.</i> , 125 Wn.2d 488, 886 P.2d 147 (1994).....	17

<i>Federated Am. Ins. Co. v. Marquardt</i> , 108 Wn.2d 651, 741 P.2d 18 (1987) .....	14, 15
<i>Fid. Title Co. v. Dep't of Revenue</i> , 49 Wn. App. 662, 745 P.2d 530 (1987) .....	10
<i>Hillis v. Dep't. of Ecology</i> , 131 Wn.2d 373, 932 P.2d 139 (1997) .....	18
<i>Hubbard v. Spokane Cnty.</i> , 146 Wn.2d 699, 50 P.3d 602 (2002) .....	3
<i>Hunter v. Univ. of Wash.</i> , 101 Wn. App. 283, 2 P.3d 1022 (2000) .....	4
<i>Kamla v. Space Needle Corp.</i> , 147 Wn.2d 114, 52 P.3d 472 (2002) .....	20
<i>Keystone Land &amp; Dev. Co. v. Xerox Corp.</i> , 152 Wn.2d 171, 94 P.3d 945 (2004) .....	8
<i>Larner v. Torgerson Corp.</i> , 93 Wn.2d 801, 613 P.2d 780 (1980) .....	8, 10, 18, 19
<i>Miller v. United Pac. Cas. Ins. Co.</i> , 187 Wash. 629, 60 P.2d 714 (1936) .....	6, 7
<i>Neah Bay Chamber of Commerce v. Dep't of Fisheries</i> , 119 Wn.2d 464, 832 P.2d 1310 (1992) .....	15
<i>Phillips v. Kaiser Aluminum &amp; Chem. Corp.</i> , 74 Wn. App. 741, 875 P.2d 1228 (1994) .....	20
<i>Ranger Ins. Co. v. Pierce Cnty.</i> , 164 Wn.2d 545, 192 P.3d 886 (2008) .....	22
<i>Sharbono v. Univ. Underwriters Ins. Co.</i> , 139 Wn. App. 383, 161 P.3d 406 (2007) .....	16
<i>Smith v. Hansen, Hansen &amp; Johnson</i> , 63 Wn. App. 355, 818 P.2d 1127 (1991) .....	21, 22
<i>Spokane v. White</i> , 102 Wn. App. 955, 10 P.3d 1095 (2000) .....	23
<i>State v. Bainard</i> , 148 Wn. App. 93, 199 P.3d 460 (2009) .....	24
<i>State v. Phillips</i> , 94 Wn. App. 829, 974 P.2d 1245 (1999) .....	11

<i>Stenger v. State</i> , 104 Wn. App. 393, 16 P.3d 655 (2001) .....	14
<i>Stephens v. Omni Ins. Co.</i> , 138 Wn. App. 151, 159 P.3d 10 (2007) .....	18
<i>Swanson v. Liquid Air Corp.</i> , 118 Wn.2d 512, 826 P.2d 664 (1992) .....	3
<i>Verizon Nw., Inc. v. Wash. Emp't Security Dep't</i> , 164 Wn.2d 909, 194 P.3d 255 (2008) .....	3, 24

**OTHER STATE CASES**

<i>Schoener v. Hekla Fire Ins. Co.</i> , 50 Wis. 575, 7 N.W. 544 (Wis. 1880) .....	5
---	---

**RULES**

RAP 9.12 .....	14
----------------	----

**STATUTES AND REGULATIONS**

RCW 19.52.030 .....	7
RCW 34.05.570 .....	4, 14
RCW 48.01.030 .....	15
RCW 48.17.010 .....	passim
RCW 48.17.160 .....	4, 7, 12
RCW 48.30.010 .....	17
RCW 48.98.025 .....	7
WAC 284-30-800 .....	13, 14
Wis. Rev. St., Ch. 89, Sec. 1977 (1878) .....	5

**OTHER AUTHORITIES**

16A WASH. PRAC., TORT LAW & PRAC. (3d ed. 2006 & 2010  
Supp.) .....15  
Const. art. II, § 1 .....17

## I. INTRODUCTION

The OIC defends its imposition of liability on CTIC for Land Title's independent regulatory violations based solely on the appointment of Land Title as CTIC's statutory agent.<sup>1</sup> Under the OIC's theory, **any** action that it deems somehow related to the "solicitation" of insurance applications is within the scope of the statutory definition of "agent" and, therefore, within the scope of the insurer-agent relationship. Other than its assertion that the Court should defer to its reading of these statutes, the OIC does not point to any authority to support its interpretation. Indeed, none exists. The OIC's reliance on these general appointment statutes to impose vicarious liability is improper and unworkable. No statutory or regulatory authority exists to support the OIC Judge's actions here, which are plainly beyond the scope of the OIC's regulatory authority.

Contrary to the OIC's claims, CTIC does not contend that the statutory appointment of an agent is "irrelevant." Rather, it argues that this appointment alone is inadequate to impose liability in all instances, and that the Court must apply common law principles to determine the scope of the agency relationship. Applying those principles here, Land Title's actions were outside the scope of its agency agreement with CTIC

---

<sup>1</sup> The terms OIC, OIC Judge, ALJ, CTIC, and Land Title are used here as they are defined in CTIC's Opening Brief.

and thus, not subject to CTIC's control. Absent a right of control, there is no basis to hold CTIC liable for Land Title's alleged regulatory violations.

Nor is there any merit to the OIC's insinuation that no one will be held accountable if the OIC Judge's Order does not stand. The inducement statutes and regulations not only permit, but require, the OIC to fine directly the party violating the regulations -- here, Land Title. The OIC may not ignore these requirements for its administrative convenience.

Were the OIC permitted to unilaterally determine the scope of the insurer-agent relationship as it urges here, insurers and agents would have no guidance as to their liability for one another's acts. This regulatory uncertainty would be especially troubling in the context of the rural title insurance business, where independent corporate entities conduct business both on their own behalf and as appointed agents for insurers. Title insurers cannot be expected to serve as guarantors for these corporations' independent acts, and there is no basis to impose this type of liability under existing law. The OIC Judge's Order holding to the contrary must be reversed.

## **II. ARGUMENT**

### **A. The OIC's Standard of Review Arguments Are Immaterial.**

The OIC contests the standard of review with respect to the OIC Judge's factual findings, but in so doing argues for this Court to apply a

less deferential standard. The OIC argues that because this is an appeal of the OIC Judge's order on summary judgment, this Court may engage in the same inquiry as the OIC Judge and must reverse unless the undisputed facts entitle the OIC to judgment as a matter of law. *Verizon Nw., Inc. v. Wash. Emp't Security Dep't*, 164 Wn.2d 909, 915-16, 194 P.3d 255 (2008). The OIC thus suggests that all of the OIC Judge's findings of fact be reviewed *de novo*, which CTIC does not contest. *Hubbard v. Spokane Cnty.*, 146 Wn.2d 699, 706-07 & n.14, 50 P.3d 602 (2002) (citing *Duckworth v. Bonney Lake*, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978)). Under this standard, all facts must be construed in the light most favorable to CTIC as the party against which summary judgment was granted. *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 515, 826 P.2d 664 (1992) ("Since we are reviewing summary judgment granted in defendant's favor, we consider the facts in the light favorable to plaintiff.").

The OIC claims it is entitled to deference, but *de novo* review means that with respect to questions of law, the Court applies its judgment independent of the OIC Judge's rulings. *See Dep't of Ecology v. Lundgren*, 94 Wn. App. 236, 241 & n.6, 971 P.2d 948 (1999). The Court may give deference or substantial weight only to the OIC's interpretation of statutes within its expertise and of the rules that the agency has promulgated. *See, e.g., Credit Gen. Ins. Co. v. Zewdu*, 82 Wn. App. 620,

627, 919 P.2d 93 (1996). Deference is not given to the OIC's interpretation and application of common law simply because the legal issue arises in the insurance context. *See Hunter v. Univ. of Wash.*, 101 Wn. App. 283, 292 & n.3, 2 P.3d 1022 (2000). Because no statutes or regulations support the OIC's action here, deference is inappropriate.

Finally, the arbitrary and capricious standard is applicable to this appeal. OIC Br. at 11. An administrative decision such as the OIC Judge's Order may be challenged under any of the Administrative Procedure Act's ("APA's") statutory factors, including that it is arbitrary and capricious. RCW 34.05.570(3).

**B. The OIC Erroneously Relies on Statutory Authority that Does Not Provide for the Imputation of Liability.**

1. The Insurance Code Is Silent on the Question at Issue Here.

The OIC continues to claim that it may hold an insurer vicariously liable for the acts of its agent based solely on the agent's statutory appointment under former RCW 48.17.160 and the definition of the term "agent" found in former RCW 48.17.010. The OIC argues that this Court need not look beyond these statutory provisions because the insurance code alone definitively resolves all questions of an insurer's liability for the acts of its agent. OIC Br. at 15-18. To support its claim, the OIC cites a single Washington case, *Day v. St. Paul Fire & Marine Ins. Co.*, 111

Wash. 49, 189 P. 95 (1920). OIC Br. at 17. But *Day* merely addressed the question of how to determine the **existence** of an agency relationship after the passage of the insurance code, a question that is not presented here. 111 Wash. at 52-53 (recognizing insurance code established new method of determining on whose behalf agent/broker was acting). *Day* does not say that these definitional statutes alone either set the contours of the agency relationship, or establish whether *per se* liability should attach to an insurer for the acts of its appointed agent.

In the absence of Washington authority, the OIC cites *Schoener v. Hekla Fire Ins. Co.*, 50 Wis. 575, 7 N.W. 544 (Wis. 1880). OIC Br. at 20-21. But like the *Day* Court, the *Schoener* Court simply applied the statutory definition of agent to determine on whose behalf a particular agent was acting. *See* 7 N.W. at 546-47. Even if *Schoener* could be read more broadly, it is inapposite because the statute at issue there stated that an agent who undertook any of a number of activities on behalf of an insurer was deemed to be the insurer's agent for "**all intents and purposes.**" Appendix A (Wis. Rev. St., Ch. 89, Sec. 1977 (1878) (emphasis added)). No similar broad agency language exists in former RCW 48.17.010. Because **Washington's** insurance code is silent as to the scope of the agency relationship at issue here, it does not resolve the question before the Court. *Day* and *Schoener* do not establish otherwise.

2. The OIC's Reliance on RCW 48.17.010 as a Basis for Liability Is Improper, and the Court Must Look to Common Law Agency Principles and the Agency Agreement.

The OIC claims that it may use the general definition of “agent” in RCW 48.17.010 as a proxy for a statute actually governing the scope of agency. There is no support for the OIC’s claim that in defining the term “agent” as one who is authorized to “solicit applications for insurance,” the Legislature intended to prescribe the scope of every relationship authorized by this statute. OIC Br. at 16, 23-24; RCW 48.17.010(1). In fact, although the term “agent” has been defined in the insurance code for the last 100 years as one who can “solicit” insurance applications (*see Day*, 111 Wash. at 97), Washington courts continue to apply common law agency principles to determine the scope of the agency relationship for purposes of assessing vicarious liability.

For example, in *Miller v. United Pac. Cas. Ins. Co.*, 187 Wash. 629, 639, 641, 60 P.2d 714 (1936), the court applied the then existing definition of agent as one authorized to “solicit” applications for insurance to determine whether an agency relationship existed. Having established the existence of this relationship, however, the court went on to analyze common law agency principles to determine whether the agent’s acts could bind the insurer. *See also Am. Fid. & Cas. Co. v. Backstrom*, 47 Wn.2d 77, 82, 287 P.2d 124 (1955) (holding similarly). Were the OIC

correct that the statutory definition of agent was alone adequate to answer all such questions, *Miller* and *Backstrom* would not exist. Although CTIC cited these cases in its Opening Brief (Op. Br. at 29), the OIC has wholly failed to account for their holdings.

As the Superior Court recognized, RCW 48.17.010 and RCW 48.17.160 do not establish the scope of the insurer-agent relationship or provide for the imputation of liability from agent to insurer. April 2, 2010 VRP at 37:8-10 (“[t]here is no specific statutory definition of what the scope of the agency is”). CTIC does not dispute that the Legislature could have passed a statute addressing this issue, but it did not do so. In other instances, however, it has evidenced its ability to pass just this type of legislation. *See* Op. Br. at 24 (citing, among others, RCW 48.98.025 (“[t]he acts of the managing general agent are considered to be the acts of the insurer on whose behalf it is acting”)<sup>2</sup>; RCW 19.52.030 (agent’s acts deemed those of principal under usury statutes)).

Moreover, no authority suggests that these general agency statutes were intended to trump actual agreements between insurers and agents, and the OIC cites no authority permitting it to rewrite these private contracts. The OIC claims only that insurers and agents may not

---

<sup>2</sup> Again, merely because this statute was passed as part of model legislation does not change its meaning or significance.

contractually alter their rights and responsibilities under the insurance code. OIC Br. at 30. But, as established above, the insurance code is silent on the question here, and the parties are free to contract accordingly. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 176, 94 P.3d 945 (2004) (“parties are free to enter into, and courts are generally willing to enforce, contracts that do not contravene public policy”). Land Title and CTIC did, and there is no dispute that their contract expressly prevents Land Title from conducting any “marketing” or “advertising” efforts on CTIC’s behalf. AR 499, ¶ 7; AR 520, ¶ 6. Although Land Title and CTIC’s agreement does not include the term “solicit,” the OIC claims that “marketing” and “solicitation” should be given the same meaning. OIC Br. at 28. Applying the OIC’s own definitions, any purported “solicitation” activities by Land Title were outside the parties’ express contractual agreement, and CTIC may not be held liable.<sup>3</sup> *See, e.g., Larner v. Torgerson Corp.*, 93 Wn.2d 801, 804-05, 613 P.2d 780 (1980).

---

<sup>3</sup> In its Opening Brief, CTIC cited authority from other jurisdictions in which the court looked to such agency agreements to determine whether a particular action was within the scope of the agency relationship. Op. Br. at 30. In opposition, the OIC claims only that these cases are irrelevant because CTIC failed to set forth the particular statutory schemes in place in each state. OIC Br. at 40. But the point in each case was the court’s refusal to elevate the general statutory scheme over the parties’ particular agency agreement—an outcome that would be equally inappropriate here.

Were the Court to agree with the OIC that it may ignore the common law and the actual agency agreement between the parties in favor of a general definitional statute, this holding would have obvious and sweeping affects on the title insurance industry. Because the OIC would be authorized to unilaterally determine the scope of the insurer-agent relationship through its own ad hoc interpretation of the term “solicit,” insurers would be given no notice of their potential liability for their agent’s actions, requiring them to be their agent’s guarantors. Although the OIC now concedes that the agency statutes do not allow it to hold an insurer liable for “every conceivable act of its agent,” it does not identify what limits, if any, would be placed on this liability under its interpretation of these statutes. OIC Br. at 28. Indeed, it is difficult to understand what those limits might be given the broad definition of “solicitation” that the OIC advances. OIC Br. at 24, 28 (solicitation is “any attempt of an agent to bring in insurance business”).

3. The Unique Nature of the Title Insurance Industry Supports CTIC’s Arguments.

The OIC also fails to directly address CTIC’s argument that the unique nature of the title insurance industry counsels against the OIC’s one-size-fits-all definition of agent. As Washington courts have recognized, the relationship between title insurers and their agents is

unique because title agents generate business for their own account and place only a “relatively small insurance component” with their contracting insurers. *Fid. Title Co. v. Dep’t of Revenue*, 49 Wn. App. 662, 669-70, 745 P.2d 530 (1987). The OIC attempts to distinguish this authority on the ground that it addresses tax liability, but this does not alter the court’s accurate and relevant observations regarding title insurance. The OIC is simply incorrect that all of Land Title’s purported “solicitation” activities were undertaken either on CTIC’s behalf, or to its direct benefit. OIC Br. at 26. Regardless, Land Title’s marketing activities were outside the scope of the parties’ agency relationship, and CTIC cannot be held liable. *See, e.g., Larner*, 93 Wn.2d at 804-05.

The OIC also attempts to confuse the issues by claiming that two irrelevant “facts” support its position. First, the OIC claims that CTIC “stipulated” at the summary judgment phase that Land Title’s actions violated the inducement regulation, and that this “stipulation” supports a finding of liability against CTIC for those violations. OIC Br. at 25-27. But CTIC only stated, solely for the purpose of summary judgment, that it would **reserve** the question of whether Land Title’s actions violated the inducement regulations for a subsequent proceeding. AR 482, n.1. The sole reason for this was to allow the ALJ and OIC Judge to decide the question of whether there was any basis to hold CTIC liable for Land

Title's actions. Whether the parties adopted a subsequent stipulation – solely for the purposes of appeal – that Land Title's actions did violate the inducement regulation, is irrelevant to the question of whether CTIC can be liable for those violations. The Court already has determined that any reference to the "Phase II" stipulation is improper and irrelevant. *See* Order Denying Motion for Judicial Notice. Any reference to this stipulation should be stricken. *See* CTIC's Motion to Strike.

Second, the OIC claims that CTIC's own purported past violations of the inducement regulation support its finding of vicarious liability here. OIC Br. at 6-7. But, this case does not involve a claim that CTIC itself violated the inducement regulation, and the OIC's 2006 report alleging such historic violations is irrelevant to the question presented here. AR 473-H. Regardless, the report is replete with hearsay and is inadmissible for the truth of its assertions. *State v. Phillips*, 94 Wn. App. 829, 834, 974 P.2d 1245 (1999) ("To be admissible as a public record, the document must contain facts, not conclusions involving the exercise of judgment or discretion or the expression of opinion."). Likewise, the OIC's "Technical Assistance Advisory," is also irrelevant. AR 473-AF-AI; OIC Br. at 6-7. That document merely stated that the OIC would enforce the inducement regulations against both insurers and agents, but said nothing about holding insurers liable for their agent's actions. Neither the 2006 report

nor the OIC's subsequent advisory support the imposition of vicarious liability, and they should be disregarded.

In sum, the OIC's requested interpretation of RCW 48.17.010 and RCW 48.17.160 is without basis in law and exceeds the scope of both reasonable statutory interpretation and the OIC's own limited administrative authority. It should be rejected.

4. The Inducement Regulations Do Not Support the OIC's Actions.

In addition to failing to identify any statutory basis to support the imposition of vicarious liability against CTIC, the OIC has failed to point to any regulatory basis for its action. Although the OIC spends several pages touting its general regulatory authority (OIC Br. 11-15), the existence of general regulatory authority is not in question here. CTIC does not dispute that the OIC could (with proper notice and comment) pass a regulation permitting it to hold an insurer liable for its agent's violations of the inducement regulation. But it admittedly did not do so.

Recognizing that the existing regulations do not provide for the imputation of liability from agent to insurer, the OIC instead claims that because the inducement regulations apply to both "title insurers and their agents," this evidences the Commissioner's intent to "hold insurers liable for their agents' actions." OIC Br. at 23-24 (citing WAC 284-30-800(1)).

By its plain terms, however, this regulation merely says that insurers **and** agents can each be liable for their own regulatory violations. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002) (plain meaning of statute governs). The fact that insurers and agents may be held accountable for their own acts does not mean that either party is liable for the actions of the other. Indeed, the statutory authority under which the inducement regulation was promulgated permits the OIC only to assess penalties against the “person ... violating” the statute, a restriction that the OIC does not even address in its briefing. RCW 48.30.010(5).

The OIC instead implies that unless insurers are held liable for their agent's violations of the inducement regulations, these violations will go unregulated. OIC Br. at 14, 19. This argument is a red herring. There is no dispute that the OIC could have held Land Title directly liable for its regulatory violations. WAC 284-30-800. Indeed, the inducement statutes require this outcome. *See* RCW 48.30.010(5). Merely because the OIC would prefer to hold insurers liable for their agent's acts does not mean it may do so absent some basis in law.

5. CTIC's Arguments Regarding the Impacts of the OIC Judge's Order Are Proper and Not Precluded on Appeal.

The OIC also attempts to rewrite CTIC's arguments regarding the impacts of the OIC Judge's Order on the rural title insurance industry (Op.

Br. at 45-46), claiming they are a challenge to WAC 284-30-800 and are barred because not raised below. OIC Br. at 45. But CTIC is not challenging WAC 284-30-800 as against public policy; rather it continues to assert that the OIC's erroneous interpretation of its permissible regulatory authority will negatively impact certain title insurance markets. These arguments are entirely consistent with those raised below and are not barred under RAP 9.12. *See, e.g., Ellis v. Seattle*, 142 Wn.2d 450, 459 n.3, 13 P.3d 1065 (2000) (RAP 9.12 is concerned with new **evidence** not law); *Stenger v. State*, 104 Wn. App. 393, 398, 16 P.3d 655 (2001) (RAP 9.12 did not bar new argument consistent with and in support of existing claim).<sup>4</sup>

The OIC additionally claims that CTIC's policy arguments are improper under *Federated American Insurance Company v. Marquardt*, 108 Wn.2d 651, 741 P.2d 18 (1987), *superseded by statute*, RCW 34.05.570, *as recognized in Neah Bay Chamber of Commerce v. Dep't of Fisheries*, 119 Wn.2d 464, 469, 832 P.2d 1310 (1992); OIC Br. at 46. But there, the court merely declined to substitute its judgment for that of an agency where the agency had exercised its legislative power to pass a

---

<sup>4</sup> CTIC relies on information already in the AR and does not raise new evidence on appeal. *Compare* CP 87-88 (setting forth material from AR considered on summary judgment), *with* Op. Br. at 31.

regulation. *Federated Am.*, 108 Wn.2d at 658. Here, no regulations support the OIC's actions, and the issue before the Court is whether the general agency statutes permit the imposition of vicarious liability on an insurer. "[I]t is proper for the court to consider public policy in [interpreting a] statute," and CTIC's arguments in this regard are appropriate. *Donaldson v. Seattle*, 65 Wn. App. 661, 671, 831 P.2d 1098 (1992).

6. The OIC's Reliance on RCW 48.01.030 Overreaches.

The OIC also asserts that the duty of good faith set forth in RCW 48.01.030 provides an independent basis to hold CTIC liable for Land Title's actions. This statute was not one of the grounds for the OIC Judge's Order,<sup>5</sup> and with good reason – it is completely inapplicable.

With respect to the conduct of insurers, RCW 48.01.030 merely codifies the insurer's general duty of good faith. *See* 16A WASH. PRAC., TORT LAW & PRAC. § 27.1 (3d ed. 2006 & 2010 Supp.). If an insurer breaches that duty, the insured has a cause of action for the tort of bad faith. *See, e.g., Sharbono v. Univ. Underwriters Ins. Co.*, 139 Wn. App. 383, 410, 161 P.3d 406 (2007). This case is not a tort action by an insured against CTIC. The statute does not grant the OIC authority to bring an

---

<sup>5</sup> The OIC Judge's Order makes only one reference to the statute, in a footnote that characterizes the statute as analogous to the issue presented.

enforcement action against an insurer for an alleged violation of this general duty, even if such a violation could be made out (which it cannot). The OIC is unable to cite to any authority reading this statute in the manner it suggests, and the general good faith statute is irrelevant here.

**C. The OIC's *De Facto* Rulemaking Was Improper.**

In opposition to CTIC's argument that the OIC Judge's Order constituted an improper *de facto* regulation, the OIC claims only that the Order was an adjudicative decision and, therefore, not subject to APA rulemaking requirements. OIC Br. at 46-48. The OIC's attempt to recast the OIC Judge's actions as mere adjudication is unsupported. The OIC's Judge's Order undisputedly created a new rule of general application that would hold all title insurers liable for their agents' violations of the inducement regulations. RCW 34.05.010(16) (defining "rule" as an order of general applicability "the violation of which subjects a person to a penalty or administrative sanction"). As such, the OIC was required to follow proper rulemaking procedures.

In opposition, the OIC claims that the OIC Judge's Order was not of general applicability and thus not a rule. But by repeatedly claiming that "all insurers in Washington [] may be held accountable . . . for [their agent's] illegal solicitations" under the Order's holding (OIC Br. at 2), the OIC concedes its general applicability. *Failor's Pharm. v. Dep't. of Soc.*

& *Health Servs.*, 125 Wn.2d 488, 495, 886 P.2d 147 (1994) (“An action is of general applicability if applied uniformly to all members of a class.”). The OIC may not advance this regulatory position through adjudicative actions such as this. *Budget Rent A Car Corp. v. Dep’t of Licensing*, 100 Wn. App. 381, 387, 997 P.2d 420 (2000) (agency may not advance new regulatory policy through adjudication if it would “circumvent APA requirements”).

Indeed, the Legislature expressly has constrained the manner in which the OIC must implement the inducement regulations, and the OIC may not simply ignore these limits. RCW 48.30.010 (requiring the OIC to promulgate rules implementing the provisions of the inducement statutes). To do so would undermine the procedural safeguards required to make the Legislature’s grant of administrative authority to the OIC constitutional. Const. art. II, § 1; *Barry & Barry, Inc. v. Dep’t of Motor Vehicles*, 81 Wn.2d 155, 159, 500 P.2d 540 (1972) (absent procedural safeguards, grant of legislative authority will be deemed unconstitutional). Notably, the OIC does not even address CTIC’s arguments on this point.

The OIC Judge’s Order effectively established a new regulatory policy of general applicability without undertaking the rulemaking procedures necessary to do so. It must be reversed on this additional ground. *Hillis v. Dep’t. of Ecology*, 131 Wn.2d 373, 399-400, 932 P.2d

139 (1997) (“The remedy when an agency has made a decision which should have been made after engaging in rule-making procedures is invalidation of the action.”).

**D. Under Common Law Agency Principles, CTIC Cannot Be Held Liable for Land Title’s Regulatory Violations.**

Because there is no statutory or regulatory basis for the OIC to impose liability against CTIC for Land Title’s independent acts, the Court must look to common law agency principles. Op. Br. at 38-42. Although CTIC established why such liability was inappropriate, the OIC asserts both the doctrines of actual and apparent authority support the imposition of liability here. The OIC’s arguments on both counts fail.

1. CTIC Did Not Have Actual Authority Over Land Title’s Actions at Issue Here.

In its Opening Brief, CTIC established that a principal may only be held liable for the acts of its agent that are subject to the principal’s control. Op. Br. at 39-42 (citing *Larner v. Torgerson Corp.*, 93 Wn.2d 801, 804-05, 613 P.2d 780 (1980); *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 183, 159 P.3d 10 (2007), *et al.*). In opposition, the OIC only argues that CTIC’s authority is irrelevant to the determination of whether the Commissioner had the “**statutory authority** to hold insurers responsible for the illegal solicitations by their agents.” OIC Br. at 34 (emphasis added). But the OIC’s argument merely restates its statutory

arguments and fails to address CTIC's authority establishing that control is the touchstone of Washington's law of agency. *See, e.g., Larner*, 93 Wn.2d at 804-05 (principal may be held liable for acts of agent only if subject to principal's control). Because there is no statutory basis for the imposition of liability here, the common law governs.

The OIC's only substantive argument on the issue of actual authority is its claim that as long as CTIC retained the "right to control" Land Title's actions, it may be held liable for them. OIC Br. at 35-36. But the record indicates that CTIC neither actually controlled nor had the right to control Land Title's marketing and solicitation activities. Indeed these acts were expressly outside the scope of CTIC's contract with Land Title. AR 519, ¶ 3; AR 520, ¶ 6. Additional evidence before the OIC Judge also established CTIC's lack of control over the Land Title's actions at issue. AR 517, ¶ 8 ("CTIC does not have any input in, or oversight of, Land Title's marketing practices or procedures."); AR 499, ¶ 9 (same). This undisputed evidence establishes that CTIC lacked the requisite control necessary to impute liability to CTIC for Land Title's actions.

In an effort to overcome this evidence, the OIC argues from the negative, claiming that because CTIC's declarants never expressly disclaimed the "right" to control Land Title, it must have retained that right. OIC Br. at 35-36. The OIC cites no authority establishing that the

failure to expressly disclaim the right to control affirmatively establishes that right. The only case cited by the OIC, *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 52 P.3d 472 (2002), is a direct, not vicarious, liability case. See, e.g., *Phillips v. Kaiser Aluminum & Chem. Corp.*, 74 Wn. App. 741, 749, 875 P.2d 1228 (1994) (distinguishing between direct and vicarious liability). Even if *Kamla* did apply, it supports CTIC's argument that CTIC did not have a sufficient "right to control" Land Title.<sup>6</sup> In *Kamla*, the court determined that the Space Needle could not be liable for the actions of its independent contractor because it did not expressly retain the right to interfere with or control the manner in which the contractor completed its work. 147 Wn.2d at 121-22. The same is true here – CTIC did not retain any right to control Land Title's marketing activities, which were expressly outside the parties' agreement.

---

<sup>6</sup> The OIC claims that the "right to control" is demonstrated by CTIC's ability to review Land Title's books and to terminate the parties' contractual relationship. OIC Br. at 36, n.27. But *Kamla* establishes that "general contractual rights," such as the right to inspect (or even oversee) a contractor's work, are insufficient to support a finding of control. 147 Wn.2d at 121 (citing *Bozung v. Condo. Builders, Inc.*, 42 Wn. App. 442, 445-46, 711 P.2d 1090 (1985)). Regardless, none of these provisions speak to the issue presented – whether CTIC could control Land Title's independent marketing practices at issue here.

In short, because CTIC neither controlled nor had the right to control Land Title's marketing and solicitation activities at issue here, it may not be held liable under the doctrine of actual authority.<sup>7</sup>

2. The Doctrine of Apparent Authority Is Inapplicable.

The OIC argues that even if Land Title did not have actual authority to engage in the alleged conduct on behalf of CTIC, CTIC can nevertheless be held vicariously liable under the doctrine of apparent authority. This argument fails for two reasons.

First, the doctrine of apparent authority is not itself an affirmative grant of regulatory authority to the OIC. The purpose of the doctrine is to provide a means of recourse to innocent third parties in their dealings with people or entities that they reasonably believe are acting as agents of another. *See, e.g., D.L.S. v. Maybin*, 130 Wn. App. 94, 98, 121 P.3d 1210 (2005) (action brought against franchisor for franchisee's negligence); *Smith v. Hansen, Hansen & Johnson*, 63 Wn. App. 355, 363-64, 818 P.2d 1127 (1991) (purchaser brought action against seller's employer). Thus, for example, the doctrine might apply if a purchaser of insurance brought an action against CTIC based on Land Title's actions. But here, the OIC

---

<sup>7</sup> The OIC also claims that CTIC relies on the provision in its contract with Land Title forbidding violation of state regulations as further evidence of its lack of control (OIC Br. at 29-30), but CTIC did not make this argument in its brief.

claims that this doctrine serves as an independent basis for it to exert its regulatory authority over CTIC for Land Title's actions. This is not the purpose of this doctrine, and there is no basis to extend it in this manner.

Second, even if the doctrine applied in this context, the OIC has not made a *prima facie* showing that Land Title had apparent authority to engage in the alleged conduct on CTIC's behalf. An agent has apparent authority only to the extent that the principal's objective manifestations cause the party seeking to rely on the apparent authority to subjectively and reasonably believe that the agent had the authority to do the **specific act** in question. *See, e.g., Ranger Ins. Co. v. Pierce Cnty.*, 164 Wn.2d 545, 555, 192 P.3d 886 (2008) (power of attorney to post bonds on behalf of principal did not constitute an objective manifestation of authority to redirect funds).<sup>8</sup> The OIC points to only one such objective manifestation of authority – CTIC's appointment of Land Title as its statutory agent. OIC Br. at 32. But the reasonableness of the OIC's reliance on this appointment is once again wholly dependent on its argument that this

---

<sup>8</sup> It is worth noting that in both of the OIC's cited cases, the court concluded that apparent authority did not exist because it was unreasonable for the third-party to believe the putative agent was acting on his behalf. *Smith*, 63 Wn. App. at 364 (unreasonable to believe "manager of manufacturing services" had authority to sell materials and designs); *Am. Seamount Corp. v. Science & Eng'g Assocs., Inc.*, 61 Wn. App. 793, 797, 812 P.2d 505 (1991) (unreasonable to believe consultant was acting as agent after plaintiff was notified that authority had been terminated).

appointment alone is sufficient to hold CTIC vicariously liable for Land Title's specific misconduct here. *See* OIC Br. at 22–24. In other words, the OIC's apparent authority argument merely recasts its statutory claims, and must be rejected for the reasons stated above.

Finally, the OIC incorrectly argues that CTIC has conceded the apparent authority argument by not briefing it in its Opening Brief. CTIC assigned error to the OIC Judge's conclusions regarding apparent authority and affirmatively argued that Land Title had no authority to bind CTIC. Op. Br. at 2, 46-59. The OIC now has briefed this issue in its response, and CTIC may address it on reply. RAP 10.3(c) ("A reply brief should . . . be limited to a response to the issues in the brief to which the reply brief is directed."); *Spokane v. White*, 102 Wn. App. 955, 963, 10 P.3d 1095 (2000) (considering argument not raised in opening brief but briefly discussed in respondent's brief).

3. The Arbitrary and Capricious Standard Is Applicable and Requires Reversal.

The OIC Judge's Order must be reversed not only because it was based on errors of law, but also because it was arbitrary and capricious. The OIC claims this argument is an attempt to revive CTIC's challenge to the OIC Judge's failure to recuse herself, and is barred by the doctrine of invited error. OIC Br. at 43-45. But CTIC's arguments address the errors

in the substance of the OIC Judge's Order itself, not the failure to recuse. Op. Br. at 49-50 (examples of erroneous findings and conclusions). Because CTIC did not materially contribute to these substantive errors by not pursuing remand of this matter, the invited error doctrine does not apply. *State v. Bainard*, 148 Wn. App. 93, 100-01, 199 P.3d 460 (2009) (doctrine bars a party from "benefitting from an error [it] caused at trial").

The OIC does not address the merits of CTIC's arguments, which plainly indicate that the OIC Judge's Order was arbitrary and capricious because it was made "without consideration and in disregard for the facts or circumstances" at issue here. *Dupont-Fort Lewis Sch. Dist. 7 v. Bruno*, 79 Wn.2d 736, 739, 489 P.2d 171 (1971). The OIC Judge disregarded the facts and circumstances by weighing the evidence and making findings of fact on summary judgment. *See Verizon Nw.*, 164 Wn.2d at 914, n.3 ("It is curious that the ALJ made 'findings of fact.' The ALJ never served as a fact finder because she decided the case on summary judgment."). This was error, and the OIC Judge's Order should be reversed on this independent ground.

### **III. CONCLUSION**

The OIC Judge erred in holding CTIC liable for acts of Land Title outside CTIC's control. This does not preclude the OIC's pursuit of Land Title to remedy any alleged violations, nor does it preclude the future

adoption of rules affording the OIC the authority it purports to exercise here. Under the current law, however, there is no basis to impose vicarious liability. CTIC, therefore, 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 11th day of March, 2011.

K&L GATES LLP

By 

Matthew J. Segal, WSBA # 29797

David C. Neu, WSBA # 33143

Sarah C. Johnson, WSBA # 34529

Jessica A. Skelton, WSBA # 36748

Attorneys for Appellant

Chicago Title Insurance Company

---

# **APPENDIX A**

1. WISCONSIN. LAWS, &c.

2" REVISED STATUTES <sup>c</sup>

OF THE

STATE OF WISCONSIN,

PASSED AT THE

EXTRA SESSION OF THE LEGISLATURE, COMMENCING JUNE 4, 1878, AND  
APPROVED JUNE 7, 1878;

TO WHICH ARE PREFIXED

THE CONSTITUTIONS OF THE UNITED STATES AND THE  
STATE OF WISCONSIN;

WITH

AN APPENDIX

CONTAINING CERTAIN ACTS OF CONGRESS REQUIRED TO BE PUBLISHED THEREIN.

---

*Printed and Published Pursuant to Chapter 3, Laws of Wisconsin, Extra Session, 1878.*

---

MADISON, WIS.:  
DAVID ATWOOD, STEREOTYPER AND PRINTER.  
1878.

## Chap. 89.

## CHAPTER LXXXIX.

## OF INSURANCE CORPORATIONS.

Insurance compa-  
nies may organize.

15 Wis. 119.

Articles of organi-  
zation.Notice of intention  
to be published.Amount of stock  
fixed.

SECTION 1896. Any number of persons, not less than fifteen, may, in the manner hereinafter prescribed, form a corporation for the purpose of insuring dwellings, stores, buildings of any kind, and any kind of personal property, against loss or damage by fire; and when such purpose shall have been expressed in their articles of organization and patent, may insure vessels, boats, cargoes, goods, merchandise, freights and other property against loss or damage by all or any of the risks of lake, river, canal and inland navigation and transportation.

SECTION 1897. Such persons shall make, sign and file in the office of the commissioner of insurance, written articles of organization, containing a declaration in which shall be stated:

1. That they associate for the purpose of forming a corporation under this chapter to transact the business of insurance, stating the nature and kind thereof.

2. The name of the corporation and the place where the principal office for the transacting of business shall be located.

3. The capital stock, the number of shares thereof and the amount of each share.

4. The designation of the general officers and the number of directors or trustees.

5. The mode and manner of electing directors or trustees, filling vacancies in their number and their term of office.

6. The period for the commencement and termination of their fiscal year.

7. The time for which such corporation shall continue, which shall not in any case exceed fifty years.

8. Such other provisions or articles, not inconsistent with law, as they may deem proper to be therein inserted for the interest of such corporation or the accomplishment of the purposes thereof, or to define the manner in which the corporate powers granted in this chapter shall be exercised; and shall thereupon publish a notice of such intention once in each week for at least four weeks, in all the public newspapers published in the county where such insurance corporation is proposed to be located.

SECTION 1898. No such stock corporation with a less capital than one hundred thousand dollars, actually paid in, in cash, shall be organized under this chapter in any city, nor establish an agency for the transaction of business therein, or elsewhere in the state, with a capital of less than fifty thousand dollars actually paid in, in cash; nor shall any corporation so organized for the purpose of doing the business of fire and inland navigation or transportation insurance on the plan of mutual insurance, commence business until agreements have been entered into for insurance with at least three hundred applicants, the premiums on which shall amount to not less than one hundred and fifty thousand dollars, of which at least thirty thousand dollars shall have been paid in, in cash, and notes of solvent parties founded on actual and bona fide applications for insurance shall have been received for the remainder; nor shall any corporation so organized for the purpose of

**Chap. 80.** take and hold on deposit, the securities of any life insurance corporation, incorporated under the laws of this state, which are deposited by it for the purpose of securing policy holders, and complying with the laws of any other state, in order to enable such corporation to transact business in such state, and also to receive and hold in trust for the policy holders of any other insurance corporation of this state, such bonds, stocks, or other securities as may be offered by such corporation; and upon the application of such corporation to give such a certificate, from year to year, of such deposit as may be required by the laws of other states in order to the transaction of the business of insurance therein; every corporation depositing such securities shall have the right to receive the income thereof, and to exchange the same from time to time, according to the laws of the state in which it may be doing business, and to withdraw the same when it no longer desires to maintain such deposit.

hold securities deposited.

And give certificate as to deposit.

No policy to issue after sixty days neglect to pay final judgment.

**SECTION 1974.** No insurance corporation doing any kind of insurance in this state, against which a final judgment shall have been recorded in any court in this state shall, after sixty days from the rendition of such judgment, and whilst the same remains unpaid, issue any new policy of insurance in this state; and in case any such insurance corporation or its officers or agents shall violate the provisions of this section, it shall forfeit the sum of one thousand dollars. And any agent of any such corporation who shall knowingly so violate the same, shall forfeit not less than one hundred nor more than five hundred dollars.

Contract, etc., not to contain provision, as to court in which it shall be sued.

**SECTION 1975.** No insurance corporation, underwriter or agent shall incorporate in any contract, mortgage, note, bond, obligation or policy of insurance, any condition or provision prescribing in what court any action may be brought thereon, or that no action or suit shall be brought thereon, or brought in any of the courts of this state, and all and every such condition and provision, if so incorporated, shall be null and void; and any renewal of any policy of insurance, containing any such provision or condition, shall not be a renewal of such conditions or provisions therein, but shall be deemed a renewal thereof without such conditions and provisions. A violation of this section shall be cause of forfeiture of any license to do business in this state.

Agent not to act without certificate of authority.

**SECTION 1976.** No officer, agent or subagent of any insurance corporation of any kind, doing business in this state, except town insurance corporations, shall act or aid in any manner in transacting the business of insurance of or with such corporation, in placing risks or effecting insurance therein, without first procuring from the commissioner of insurance a certificate of authority as provided by law, nor after the period named in such certificate shall have expired. Every person violating the provisions of this section shall forfeit not less than fifty nor more than five hundred dollars for each offense.

Penalty.

Who are agents.

**SECTION 1977.** Whoever solicits insurance on behalf of any insurance corporation, or transmits an application for insurance or a policy of insurance to or from any such corporation, or who makes any contract of insurance or collects or receives any premium for insurance, or in any manner aids or assists in doing either, or in transacting any business for any insurance corporation, or advertises to do any such thing, shall be held an agent of such corporation to all intents and purposes, and the word agent, whenever used in this chapter, shall be construed to include all such persons.

All insurance com-

**SECTION 1978.** No corporation, association, partnership, or indi-

FILED  
COURT OF APPEALS  
DIVISION II

11 MAR 14 AM 8:47

STATE OF WASHINGTON  
BY 

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.

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 11th day of March, 2011, I caused to be served a true and correct copy of the following:

1. **Reply Brief of Appellant; and**
2. **Proof of Service**

to be delivered via U.S. Mail to:

**ORIGINAL**

Victor M. Minjares, WSBA # 33946  
Marta U. DeLeon, WSBA # 35779  
Office of the Attorney General  
1125 Washington Street SE  
Olympia, WA 98504-0100  
Attorneys for Respondent  
Washington State Office of the Insurance Commissioner

  
\_\_\_\_\_  
Bill Hill

K:\2047571\00120\20572\_JAS\20572P21XW