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**SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON, OFFICE OF THE INSURANCE  
COMMISSIONER,

Petitioner,

v.

CHICAGO TITLE INSURANCE COMPANY,

Respondent.

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**SUPPLEMENTAL BRIEF OF PETITIONER OFFICE OF THE  
INSURANCE COMMISSIONER**

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ROBERT M. MCKENNA  
Attorney General

CHRISTINA BEUSCH,  
WSBA #18226  
Deputy Attorney General  
MARTA DELEON,  
WSBA # 35779  
Assistant Attorney General  
1125 Washington Street SE  
PO Box 40100  
Olympia, WA 98504-0100  
(360) 664-9006

**TABLE OF CONTENTS**

I. INTRODUCTION

II. STATEMENT OF THE CASE .....1

    A. Historical Marketing Of Title Insurance And The  
        Statutory And Regulatory Response .....1

    B. The Relationship Between Chicago Title, An Insurance  
        Company, And Land Title, Its Appointed Agent.....4

    C. The Investigation Into Illegal Inducements .....7

    D. Procedural History .....8

III. ISSUE .....9

IV. STANDARD OF REVIEW.....9

V. ARGUMENT .....10

    A. An Insurance Company That Obtains Business Through  
        The Illegal Sales Practices Of Its Agent Is Subject To The  
        Insurance Commissioner’s Enforcement Authority.....10

        1. Holding a title insurer accountable for its appointed  
            agent’s solicitations on its behalf protects consumers.....10

        2. The scope of an insurer’s regulatory responsibility  
            for its agent’s use of illegal inducements is defined  
            by the Insurance Code and regulations.....11

        3. This Court has held that when an insurer appoints an  
            agent, the insurer is bound to the acts of the agent.....13

    B. Even If Common Law Principles Apply, Chicago Title Is  
        Still Responsible For Its Appointed Agent’s Illegal  
        Actions .....16

VI. CONCLUSION .....20

## TABLE OF AUTHORITIES

### Cases

<i>American Fidelity &amp; Casualty Co. v. Backstrom</i> , 47 Wn.2d 77, 287 P.2d 124 (1955).....	15
<i>Credit General Ins. Co. v. Zewdu</i> , 82 Wn. App. 620, 919 P.2d 93 (1996).....	10
<i>Day v. St. Paul Fire &amp; Marine Ins. Co.</i> , 111 Wash. 49, 189 P. 95 (1920).....	14
<i>Ellis v. William Penn Life Assurance Co. of America</i> , 124 Wn.2d 1, 873 P.2d 1185 (1994).....	15
<i>Equitable Life Assur. Soc. v. Com.</i> , 28 Ky. L. Rptr. 333, 121 Ky. 543 (1905).....	16
<i>Fanning v. Guardian Life Ins. Co. of Am.</i> , 59 Wash. 2d 101, 366 P.2d 207 (1961).....	18
<i>Franklin Life Ins. Co. v. People</i> , 200 Ill. 619, 66 N.E. 379 (1903) .....	16
<i>Hollingberry v. Dunn</i> , 68 Wn.2d 75, 411 P.2d 431 (1966) .....	19
<i>Hubbard v. Hartford Fire Ins. Co.</i> , 135 Wash. 558, 238 P. 569 (1925).....	18
<i>Ins. Co. of North America v. Kueckelhan</i> , 70 Wn.2d 822, 425 P.2d 669 (1967).....	10
<i>King v. Riveland</i> , 125 Wn.2d 500, 507, 886 P.2d 160 (1994).....	16, 17
<i>Metropolitan Life Ins. Co. v. People</i> , 209 Ill. 42, 70 N.E. 643 (1904) .....	15
<i>Miller v. United Pacific Casualty Ins. Co.</i> , 187 Wash. 629, 60 P.2d 714 (1936).....	15

<i>Nat'l Fed. of Ret. Pers. v Ins. Comm'r</i> , 120 Wn.2d 101, 838 P.2d 680 (1992).....	5, 12
<i>Omega Nat'l Ins. Co. v. Marquardt</i> , 115 Wn.2d 416, 799 P.2d 235 (1990).....	10, 19
<i>Pacific Title, Inc. v. Pioneer Nat'l Title Ins. Co.</i> , 33 Wn. App. 874, 658 P.2d 684, rev. denied, 99 Wn.2d 1020 (1983).....	14
<i>Pagni v. New York Life Ins. Co.</i> , 173 Wash. 322, 23 P.2d 6 (1933)...	17, 20
<i>People v. American Life Ins. Co.</i> , 267 Ill. 504, 108 N.E. 679 (1915).....	15
<i>Port of Seattle v. Pollution Control Hearings Board</i> , 151 Wn.2d 568, 90 P.3d 659 (2004).....	10
<i>Premera v. Kreidler</i> , 133 Wn. App. 23, 131 P.3d 930 (2006).....	10
<i>Regence Blue Shield v. Ins. Comm'r</i> , 131 Wn. App. 639, 128 P.3d 640 (2006).....	10
<i>Rocky Mountain Fire &amp; Cas. Co. v. Rose</i> , 62 Wn.2d 896 385 P.2d 45(1963).....	18
<i>State v. Chicago Title</i> , 166 Wn. App. 844, 271 P.3d 373 (2012).....	9, 13, 14, 18, 19
<i>Tank v. State Farm Fire &amp; Cas. Co.</i> , 105 Wn.2d 381, 715 P.2d 1133 (1986).....	19
<i>Udall v. T.D. Escrow Services, Inc.</i> , 159 Wn.2d 903, 154 P.3d 882 (2007).....	17, 18

**Statutes**

RCW 34.05.570 .....	9
RCW 34.05.570(1)(a) .....	9
RCW 34.05.570(3).....	9

RCW 48.01.030 .....	10
RCW 48.01.060 .....	5
RCW 48.05.030(1).....	6
RCW 48.17.010 .....	5, 12
RCW 48.17.010(5) and (15) (2009).....	5
RCW 48.17.160 .....	5
RCW 48.17.160 and .060.....	12
RCW 48.18.140(2)(a) .....	6
RCW 48.29.040 .....	5
RCW 48.29.210 .....	3
RCW 48.30.010 .....	11
RCW 48.30.060 .....	6
RCW 48.31B.005(1), (2), and (3).....	5

**Other Authorities**

“Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers,” General Accounting Office (GAO) Report 07-401 (April 2007) [ <a href="http://www.gao.gov/products/GAO-07-401">http://www.gao.gov/products/GAO-07-401</a> ].....	2, 3
“Protecting Title in Continental Europe and the United States—Restriction of a Market,” 7 Hastings Bus. L. J. 411, 434-41(2011) .....	3
Report of the Insurance Commissioner, “An Investigation into the Use of Incentives and Inducements by Title Insurance Companies” (October 2006) .....	2

Testimony of the National Association of Insurance Commissioners  
(NAIC) before the U.S. House of Representatives, Committee on  
Financial Services Regarding: “State Insurance Regulators’  
Investigations of the Title Insurance Industry” (April 26, 2006)  
[[http://www.naic.org/Releases/2006\\_docs/title\\_insurance.htm](http://www.naic.org/Releases/2006_docs/title_insurance.htm)] ..... 2

**Rules**

WAC 284-30-800..... 3, 4, 7, 11, 12

## I. INTRODUCTION

The Insurance Commissioner is seeking to protect consumers by taking enforcement action against a title insurance company that is benefitting from its agent's conduct in providing illegal inducements. Holding a title insurance company accountable for its appointed agent's actions is consistent with statute, with regulations adopted pursuant to legislatively granted authority, and with this Court's decisions. Accordingly, the Court of Appeals should be reversed.

## II. STATEMENT OF THE CASE

### A. Historical Marketing Of Title Insurance And The Statutory And Regulatory Response

Unlike other types of insurance, title insurance is not marketed directly to the paying consumers. Instead, title insurance companies and their agents market to "middlemen" in the real estate transaction, including real estate agents and mortgage lenders, who can direct homebuyers to purchase title insurance from particular companies. Unbeknownst to consumers, title insurance companies and their agents have historically "wined and dined" lenders and real estate professionals to induce them to steer consumers to their "preferred" companies. AR 469-70, 473C.<sup>1</sup> Nationally, title insurers and their agents have

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<sup>1</sup> AR refers to the administrative record, transmitted with the Clerk's Papers.

provided realtors and lenders premium kickbacks; payments to cover business expenses for advertising, printing, training, and office space; and expense-paid trips, sporting events, and dining.<sup>2</sup>

Washington's Insurance Commissioner has uncovered similar abuses.<sup>3</sup> AR 471-72. In this state, title insurance companies have hosted open houses; paid for meals, sponsorships, and sporting and social events; and paid tens of thousands of dollars to subsidize advertising, all for real estate professionals and lenders. AR 471-72, 473G – 473K. In the county where the violations were most egregious, companies kept pace in an apparent attempt to be first in the inducement competition. AR 473I.

In such an environment, competition in price and quality can be suppressed – a situation that is exacerbated by the limited number of title insurers in the market. AR 470, 473C. The GAO and the NAIC have concluded that when title companies market to lenders and real estate

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<sup>2</sup> See "Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers," General Accounting Office (GAO) Report 07-401 (April 2007) at 27 [<http://www.gao.gov/products/GAO-07-401>]; Testimony of the National Association of Insurance Commissioners (NAIC) before the U.S. House of Representatives, Committee on Financial Services Regarding: "State Insurance Regulators' Investigations of the Title Insurance Industry" (April 26, 2006) at 8-10, 16 [[http://www.naic.org/Releases/2006\\_docs/title\\_insurance.htm](http://www.naic.org/Releases/2006_docs/title_insurance.htm)].

<sup>3</sup> Report of the Insurance Commissioner, "An Investigation into the Use of Incentives and Inducements by Title Insurance Companies" (October 2006) (the "Report"). AR 473A-473AI.

professionals using inducements, conflicts of interest arise, consumers have fewer choices, and pricing is not competitive.<sup>4</sup>

In response to such practices, the Legislature has long prohibited insurers and their agents from offering inducements of prizes, goods, or merchandise valued at greater than \$25 in connection with any insurance transaction. RCW 48.30.150; AR 473C. Moreover, the Legislature has granted the Insurance Commissioner the authority to identify and prohibit by regulation, unfair or deceptive acts or practices, even where they are not specifically prohibited by statute. RCW 48.30.010.

Because of widespread abuses in the title insurance industry, in 1988, the Insurance Commissioner adopted WAC 284-30-800. AR 471, 473D. The regulation provided that it is an unfair method of competition and a deceptive act or practice for a title insurer or its agent, *directly or indirectly*, to offer or give anything of value in excess of twenty-five dollars, *to any person* as an inducement for placing or causing title insurance business to be given to the title insurer. WAC 284-30-800(2).<sup>5</sup> The regulation was intended to curb the undue influence that title insurers and their appointed agents exercised when they used inducements to

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<sup>4</sup> See GAO Report 07-401 at 21-29; NAIC Testimony at 4-6; see also “Protecting Title in Continental Europe and the United States—Restriction of a Market,” 7 Hastings Bus. L. J. 411, 434-41(2011).

<sup>5</sup> In 2008, after the relevant time period in this case, the substance of WAC 284-30-800 was codified in RCW 48.29.210. This brief refers to the WAC as it was in force at the time of the events of this case.

convince real estate professionals to steer clients to certain companies. WAC 284-30-800(1). By referring to direct *or indirect* inducements, the regulation addressed the varied ways that influence has been peddled in the industry. Soon after the rule was adopted, industry representatives were informed they would be responsible for their agents' actions. AR 348, 417.<sup>6</sup>

Even with WAC 284-30-800 in place, illegal inducements in the title insurance industry remained prevalent. AR 471-72, 473E-473K. Because the violations were so widespread, in 2006 the Commissioner's office undertook a program of educating the industry and consumers and put the industry on notice that enforcement would occur for future violations. AR 473L-473K; AR 473-AF.

**B. The Relationship Between Chicago Title, An Insurance Company, And Land Title, Its Appointed Agent**

Chicago Title represents that it is the largest title insurance company in the nation. AR 406. It is owned by one of only four holding companies that sell 97 percent of the title insurance policies in Washington. AR 470. During the relevant time period, the same parent

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<sup>6</sup> The Office of the Insurance Commissioner (OIC) issued Bulletin No. 88-5 explaining the requirements of the regulation. AR 418, 420. In September 1989, the OIC met with and again informed the industry of the obligations of title insurers and title agents not to provide illegal inducements. AR 417.

company wholly owned Chicago Title and, through a subsidiary, also owned 45 percent of Land Title, its appointed agent.<sup>7</sup> AR 511-12.

Chicago Title may do business in a county in this state *only* if it or, as in this case, its “duly authorized agent . . . owns or leases and maintains, a complete set of tract indexes” in that county. RCW 48.29.040; AR 469. An “agent” means “any person appointed by an insurer to solicit applications for insurance on its behalf. If authorized to do so, an agent may effectuate insurance contracts. An agent may collect premiums on insurances so applied for or effectuated.” RCW 48.17.010.<sup>8</sup> The Insurance Code, Title 48 RCW, requires insurance companies to appoint their agents, file the appointment with the Commissioner, and notify the Commissioner if the appointment is ever revoked. RCW 48.17.160.

Pursuant to RCW 48.17.160, Chicago Title appointed Land Title, a licensed insurance agency, as its sole appointed agent for the transaction of title insurance business in four Washington counties.<sup>9</sup> AR 350, 355, 395-96, 398, 469, 498-99. Land Title solicits title insurance business *only*

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<sup>7</sup> The Insurance Code presumes that ownership of 10 percent or more is a controlling interest. RCW 48.31B.005(1), (2), and (3).

<sup>8</sup> The Legislature has since defined “insurance producer” to refer generally to agents and brokers and “title insurance agent” to refer to business entities “appointed by an authorized title insurance company to sell, solicit, or negotiate insurance on behalf of the title insurance company.” RCW 48.17.010(5) and (15) (2009). There has been no relevant change in the definitions related to a title agent.

<sup>9</sup> “Insurance transaction” means any “(1) solicitation, (2) negotiations preliminary to execution, or (3) execution of an insurance contract.” RCW 48.01.060. “Solicitation” is broadly defined. See *Nat’l Fed. of Ret. Pers. v Ins. Comm’r*, 120 Wn.2d 101, 110-12, 838 P.2d 680 (1992).

for Chicago Title and derives approximately 72 percent of its revenue from transacting title insurance business. *See* AR 398, 499.<sup>10</sup>

Land Title is not an insurance company; it is an agent appointed to transact insurance business, including solicitation, on behalf of Chicago Title. AR 395-96, 498; *see* RCW 48.05.030(1) (requiring insurance companies to have a certificate of authority). Land Title cannot assume any insurance risk; that risk lies with Chicago Title. The Insurance Code requires that the “insurer’s name be clearly shown in the policy.” RCW 48.18.140(2)(a). Chicago Title is the insurer identified on all policies sold by Land Title; and in fact, it would be illegal for Land Title to suggest it is an insurer, rather than an appointed agent. RCW 48.30.060.

In addition to these roles and responsibilities set by statute, Chicago Title and Land Title have executed an agency agreement. AR 398-401. Chicago Title is identified as the “Principal” and Land Title as the “Issuing Agent.” AR 398. The agreement provides that Land Title may use Chicago Title’s name in advertising and printing “to indicate the Issuing Agent is a policy issuing agent of the Principal.” AR 399. The parties have an exclusive arrangement in the counties covered by the appointment. AR 398. Land Title binds coverage and effectuates

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<sup>10</sup> Chicago Title has accepted financial responsibility for Land Title for fraudulent or dishonest acts in its handling of escrow accounts. AR 408.

contracts in Chicago Title's name and on Chicago Title's forms. AR 398. Land Title collects the premium for Chicago Title and is paid 88 percent of the gross as commission. AR 398. Chicago Title has the right to examine Land Title's accounts, books, and other records which relate to the title insurance business. AR 400. The agreement requires Land Title to follow all state statutes and regulations and to notify Chicago Title of any complaints or inquires from the Insurance Commissioner. AR 398.

**C. The Investigation Into Illegal Inducements**

After the Insurance Commissioner warned of upcoming enforcement of WAC 284-30-800, the Commissioner's office investigated Chicago Title through its appointed agent, Land Title. AR 546. The investigator reviewed Land Title's checkbook, ledger, and expense account documents for the period between December 1, 2006, and March 31, 2007. AR 546. The records revealed that Land Title, while soliciting insurance business on behalf of Chicago Title as its appointed agent, provided illegal inducements to lenders and real estate agents and brokers. During a four-month period, Land Title subsidized the cost of access to online property information services and of "flyer delivery" services, sponsored a lender's golf tournament, and paid for advertising, meals, and attendance at the Seattle Seahawks 2006 championship game. AR 547. As a result, the Commissioner's Office filed a notice of hearing proposing

disciplinary action against Chicago Title as the responsible principal insurance company. AR 545-50.

**D. Procedural History**

An Administrative Law Judge initially granted Chicago Title's motion for summary judgment, but the Review Judge reversed. The final administrative order concluded that the Commissioner could take action against Chicago Title for the acts of its appointed agent, Land Title, in providing illegal inducements when soliciting title insurance. AR 167.<sup>11</sup> In protecting insurance consumers, the Commissioner could rely on the definition and scope of the principal-agent relationship established as a matter of law in the Insurance Code. AR 157. Using illegal inducements in the course of marketing title insurance constitutes solicitation and is within the statutory scope of the agency relationship. AR 156. The order explained that there was no need to resort to common law theories of agency to ascertain whether there is an agency. AR 154. Yet even under common law principles of agency, Chicago Title cannot abdicate responsibility for Land Title's illegal conduct in soliciting. AR 158.

Chicago Title appealed the Commissioner's final order to Thurston County Superior Court, which affirmed. Clerk's Papers (CP) at 163-64.

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<sup>11</sup> The case was bifurcated. The second phase, which addresses the specific violations and amount of the penalty, is resolved separately, depending on the outcome of this first phase. AR 533.

The Court of Appeals reversed, holding that the Insurance Code does not define the scope of the agency relationship between an insurance company and its appointed agent. *State v. Chicago Title*, 166 Wn. App. 844, 846, 271 P.3d 373 (2012). Rather, the Commissioner must engage in a case-by-case, common law agency analysis in every case where it seeks to take an enforcement action against an insurance company based on the acts of its agent. *Id.* at 852. The court then concluded that Land Title's illegal inducements did not satisfy the common law requirements for holding an insurance principal liable for its agent's conduct, and determined that the Commissioner did not have statutory, inherent, or common law authority to take enforcement action against Chicago Title. *Id.* at 846, 856-58.

### **III. ISSUE**

May the Insurance Commissioner take enforcement action against a title insurance company whose agent illegally solicited insurance business for that company using illegal inducements?

### **IV. STANDARD OF REVIEW**

Judicial review of the Commissioner's Final Order is governed by RCW 34.05.570. The burden of establishing that an agency's order is invalid rests with the party asserting the invalidity. RCW 34.05.570(1)(a). Under RCW 34.05.570(3), the Court reviews the agency's legal

conclusions *de novo*, but gives substantial weight to the Insurance Commissioner's interpretation of the laws he administers.<sup>12</sup>

## V. ARGUMENT

### A. An Insurance Company That Obtains Business Through The Illegal Sales Practices Of Its Agent Is Subject To The Insurance Commissioner's Enforcement Authority.

#### 1. Holding a title insurer accountable for its appointed agent's solicitations on its behalf protects consumers.

The business of insurance is "one affected by the public interest." RCW 48.01.030. All persons engaged in the business must "be actuated by good faith, abstain from deception, and practice honesty and equity." *Id.* In preventing unfair or deceptive practices, it is "the public policy to protect policyholders from abuses by insurance companies, and *the insurance commissioner represents such policyholders by virtue of his office and represents the state in the enforcement of the insurance laws.*" *Omega Nat'l Ins. Co. v. Marquardt*, 115 Wn.2d 416, 427, 799 P.2d 235 (1990) (citation omitted) (emphasis added). The Legislature has granted the Insurance Commissioner the authority to regulate the industry and enforce the Insurance Code. *See Ins. Co. of North America v. Kueckelhan*, 70 Wn.2d 822, 831, 425 P.2d 669 (1967).

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<sup>12</sup> *Credit General Ins. Co. v. Zewdu*, 82 Wn. App. 620, 627, 919 P.2d 93 (1996). *Premiera v. Kreidler*, 133 Wn. App. 23, 37, 131 P.3d 930 (2006); *Regence Blue Shield v. Ins. Comm'r*, 131 Wn. App. 639, 646, 128 P.3d 640 (2006); *see also Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004).

Illegal inducements have been pervasive in the title insurance industry, even after the adoption of WAC 284-30-800. Indeed, violations were so widespread that it was not feasible for the Commissioner to undertake enforcement proceedings against all violators. AR 473-L. Thus, the Insurance Commissioner reasonably exercised his discretion to focus limited resources by taking action against a principal-insurer who is in a position of power over its direct business and the business of its eleven agents operating in Washington. AR 473, 516. By holding insurers responsible for their agents' illegal inducements, as permitted by statute and regulation, industry practices may change more rapidly. This approach is consistent with the Commissioner's duty to protect consumers, because it encourages a more competitive market and levels the playing field for title insurers and agents who follow the law.

**2. The scope of an insurer's regulatory responsibility for its agent's use of illegal inducements is defined by the Insurance Code and regulations.**

The Legislature granted the Commissioner clear authority to identify and prohibit by regulation unfair or deceptive acts or practices, even where they are not specifically prohibited by statute. RCW 48.30.010. Pursuant to this authority, the Commissioner promulgated WAC 284-30-800, under which a title insurer could not, *directly or indirectly*, offer, promise, allow, give, set off, or pay anything

*to any person* as an inducement for placing or causing title insurance business to be given to the title insurer. The regulation plainly prevented a title insurer from doing indirectly (for example, through its appointed agent) what it could not do directly through its employees.

Application of WAC 284-30-800 to Chicago Title in this case is consistent with the Insurance Code. Under the Code, an agent appointed by an insurance company is authorized to solicit applications on behalf of the insurer. RCW 48.17.010; *See also* RCW 48.17.160 and .060 (appointment required for agent to transact insurance business on behalf of an insurer). Thus, as a matter of law, the Legislature has defined the scope of the agency relationship between an insurer and its appointed agent to include solicitation. Moreover, this Court has broadly construed the term “solicitation.” Solicitation is not limited to a person-to-person sales pitch, but can take the form of broader marketing schemes, such as sending mailers and developing lead cards. *Nat’l Fed. of Ret. Pers.*, 120 Wn.2d at 110-12 (holding that mailers commenting on certain insurance policies and offering additional information constituted solicitation of insurance). “Solicit” means “[t]o appeal for something. . . [t]o tempt. . . [t]o lure. . . [t]o awake or excite to action . . . or [t]o invite . . . .” *Id.* at 112 (citing Black’s Law Dictionary 1564 (4th ed. 1968)).

Here, the lower court suggests that Land Title's conduct was not solicitation on behalf Chicago Title but "involved strictly marketing issues," as if marketing has nothing to do with solicitation. 166 Wn. App. at 855. However, by providing an inducement in money or other things of value to tempt or invite a person to recommend or select a particular title insurer, an agent solicits title insurance policies on behalf of the insurer. Indeed, providing meals, tickets to sporting events, free or subsidized advertising, and other services to people who control your customer base is as much "solicitation" as sending out a mass mailer.

In sum, pursuant to its legislatively granted authority, the Commissioner's rule prohibited a title insurer from directly *or indirectly* paying an inducement to entice a real estate professional or lender to steer clients to that insurer's product. The rule is consistent with the Legislature's plain recognition that an appointed agent engages in solicitation on behalf of its appointing insurer. Chicago Title, albeit indirectly through its appointed agent, engaged in prohibited conduct. The Commissioner's enforcement action was supported by both statute and regulation.

**3. This Court has held that when an insurer appoints an agent, the insurer is bound to the acts of the agent.**

The purpose of requiring insurance companies to be authorized and

insurance agents to be licensed is to protect the public and enable the Commissioner to effectively regulate the business of insurance. These provisions are not merely a “method to determine who the law will consider to be an agent.” 166 Wn. App. at 853. The Court of Appeals cited no precedent for the conclusion that a state’s chief insurance regulator cannot enforce laws prohibiting unfair and deceptive sales practices against an insurer where the insurer’s agent unlawfully solicits business for the insurer. Rather, the court drew distinctions between this case and cases involving private causes of action by insureds against insurers. Whatever those distinctions might be, those cases confirm that a person appointed as an agent under the Insurance Code is authorized to act *for the insurer* in the solicitation and sale of insurance.

In *Day v. St. Paul Fire & Marine Ins. Co.*, 111 Wash. 49, 52-54, 189 P. 95 (1920), this Court stated that “the duties and powers of such insurance agent...are defined” by statute, and the Insurance Code “was passed for the purpose of clearly defining the insurance company’s duties and liabilities.” The *Day* Court recognized that where an insurer appoints an agent, the Insurance Code establishes as a matter of law that the agent’s solicitation of insurance is made on behalf of the principal insurer. *Id.*; See also *Pacific Title, Inc. v. Pioneer Nat’l Title Ins. Co.*, 33 Wn. App. 874, 878, 658 P.2d 684, *rev. denied*, 99 Wn.2d 1020 (1983) (appointment

established principal-agent relationship).

This Court has repeatedly relied on the Insurance Code's definition of "agent" to hold an insurer accountable for its agent's actions. *See American Fidelity & Casualty Co. v. Backstrom*, 47 Wn.2d 77, 81, 287 P.2d 124 (1955) (where person fell within the definition of agent, insurer was liable on a policy solicited by the agent even though the agent knew ownership of the vehicle had not transferred to the insured); *Miller v. United Pacific Casualty Ins. Co.*, 187 Wash. 629, 636-38, 60 P.2d 714 (1936) (person who fell within definition of agent acted as "alter ego of respondent" in placing insurance, even if doing so was improper); *See also Ellis v. William Penn Life Assurance Co. of America*, 124 Wn.2d 1, 15-17, 873 P.2d 1185, 1192-93 (1994) (strong public policy in preventing an insurer from benefiting from the unfair and deceptive practices of its agent obligates an insurer to pay on a policy even where insured was complicit). Thus, where the statutory definition of "agent" has been satisfied, this Court has held insurers liable for the mistakes and misdeeds of their agents in soliciting and selling insurance, even if the insurer did not have knowledge of the agent's actions.<sup>13</sup> To hold otherwise in this case would

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<sup>13</sup> In Illinois, for example, insurance companies have also been held liable in debt actions for violations of the insurance anti-rebating and anti-inducement statutes, regardless of the insurers' knowledge of or direct participation in the illegal conduct of their agents. *People v. American Life Ins. Co.*, 267 Ill. 504, 508-09, 108 N.E. 679 (1915); *Metropolitan Life Ins. Co. v. People*, 209 Ill. 42, 48, 70 N.E. 643 (1904) ("[T]o give

be inconsistent with this Court's prior treatment of insurers and their agents. It would also permit Chicago Title to sidestep the prohibition against illegal inducements while benefitting from the unlawful conduct of the appointed agent acting on in its behalf.

**B. Even If Common Law Principles Apply, Chicago Title Is Still Responsible For Its Appointed Agent's Illegal Actions.**

The Insurance Code provides the framework within which the Commissioner may enforce the law in the interest of consumers. Applying the plain language of the Insurance Code, Land Title was acting as Chicago Title's appointed agent to solicit title insurance. Yet even applying common law agency principles, Chicago Title is accountable to the Commissioner for Land Title's illegal conduct.

In *King v. Riveland*, this Court described the agency doctrines of actual (express or implied) and apparent authority. 125 Wn.2d 500, 507, 886 P.2d 160 (1994). "Both actual and apparent authority depend upon objective manifestations made by the principal": to the agent in the case of actual authority and to a third person in the case of apparent authority. *Id.*

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immunity to the principal would be to undermine and practically destroy the protection afforded to the people in the general laws."); *Franklin Life Ins. Co. v. People*, 200 Ill. 619, 621, 66 N.E. 379 (1903) ("[A] violation on the part of such agent . . . is the violation of the company itself."). *But cf. Equitable Life Assur. Soc. v. Com.*, 28 Ky. L. Rptr. 333, 121 Ky. 543 (1905) (holding in a penal action an insurance company that did not assent to conduct could not be *criminally* liable for the conduct of its agent, even if acting with apparent authority).

Both actual and apparent authority can exist in a given situation, but only one need be present to bind the principal. *See Id.* at 507-08.

With apparent authority, the third person must have a reasonable belief that the agent has the authority to act for the principal. *Id.* Where the principal places the agent in charge of a class of transactions, this is a manifestation to others that the agent is generally authorized to conduct those transactions, even if the principal has placed limitations on the agent. *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 913-14, 154 P.3d 882 (2007). The focus is not on whether the principal authorized the specific act of the agent, but whether the agent “had authority to act for” the principal. *Id.* at 913. With respect to solicitation of insurance, this Court has observed that insurance agents are granted the power to solicit business on behalf of insurers who profit from their agents’ efforts:

An insurance agent represents his company and stands in its place in his community. Ordinarily, he is the only person the policyholder knows and deals with in his transactions with the insurer. He is dealt with on the faith of his authority to do those things which he claims and has the ostensible right to do.

*Pagni v. New York Life Ins. Co.*, 173 Wash. 322, 350, 23 P.2d 6 (1933)  
(internal citation omitted).

Because questions regarding agency law in the insurance context generally arise where a third party (insured) is suing an insurer based on conduct of an agent, this Court has relied primarily on the apparent

authority doctrine. This Court has consistently followed the principle that an insurance company should not be permitted to benefit from the wrongdoing of its agent. *See, e.g., Rocky Mountain Fire & Cas. Co. v. Rose*, 62 Wn.2d 896, 903-04, 385 P.2d 45(1963); *Hubbard v. Hartford Fire Ins. Co.*, 135 Wash. 558, 565, 238 P. 569 (1925). Here, Chicago Title gave Land Title complete authority to act on its behalf in the counties in which it was appointed. Land Title was authorized to solicit insurance, bind coverage, prepare policy forms, collect premiums, and keep the books and records related to title business. AR 398-401. Chicago Title clothed Land Title with the apparent authority to act for it. *See Fanning v. Guardian Life Ins. Co. of Am.*, 59 Wash. 2d 101, 104-05, 366 P.2d 207 (1961). The question is not whether Chicago Title specifically authorized Land Title to use illegal inducements in soliciting business, but whether Land Title was authorized to act for Chicago Title in soliciting – and it was. *Udall*, 159 Wn.2d at 913.

The Court of Appeals, however, declined to apply apparent authority principles here because, in the court's mind, there was no innocent third party harmed by reliance on the agency relationship. 166 Wn. App. at 857. The court completely ignored the harm that illegal inducements cause to consumers and the legal principle that the Commissioner represents the interests of consumers in enforcing the

Insurance Code. *Omega Nat'l Ins. Co.*, 115 Wn.2d at 427; *See Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 394, 715 P.2d 1133 (1986) (Commissioner has primary responsibility for enforcing insurance regulations to achieve goal of a well-regulated insurance industry). It appears the court would require evidence of harm *to the Commissioner*. But, it does not make sense to require proof of harm to the Commissioner in cases involving violation of the Insurance Code because enforcement of the Code is to protect the public, not the Commissioner.

The Court of Appeals also absolved Chicago Title from responsibility for Land Title's illegal inducements on the assumption that it did not have a "right of control" over Land Title's solicitation activities. 166 Wn. App. at 856. "Right of control" is a concept used mostly in tort actions to determine if a defendant is vicariously liable for the acts of an employee or contractor. *E.g., Hollingberry v. Dunn*, 68 Wn.2d 75, 79, 411 P.2d 431 (1966). This concept is not necessary to establish Chicago Title's responsibility under either the Insurance Code or the common law doctrine of apparent authority. But in any case, Chicago Title *did* have a right of control - it just chose not to exercise it.

Chicago Title entered into a contract with Land Title giving Land Title authority to act for Chicago Title to solicit and sell title insurance. AR 398. Chicago Title had the right to inspect Land Title's books and

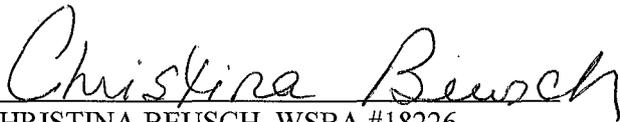
accounts, the same records the Commissioner inspected to uncover illegal inducements. AR 400. Land Title and Chicago Title had an exclusive relationship for the sale of title insurance in the counties covered by the appointment, and Land Title was financially dependent on its agency relationship with Chicago Title; and Chicago Title held the power to terminate the relationship. *See* AR 398, 499.

This Court has held that insurance companies cannot disavow their agents' actions, even if those actions violate express instructions given by the insurer to the agent. *See Pagni*, 173 Wash. at 349-50. This Court should not apply the common law principles of agency where the issues in this case are plainly governed by statute. But even if this Court were to do so, it should hold that Chicago Title is accountable for Land Title's illegal conduct in providing inducements to steer title insurance business to Chicago Title.

## VI. CONCLUSION

For the reasons set forth above, this Court should reverse the Court of Appeals.

RESPECTFULLY SUBMITTED this 10th day of September, 2012.

  
CHRISTINA BEUSCH, WSBA #18226  
Deputy Attorney General  
MARTA DELEON, WSBA #35779  
Assistant Attorney General

# APPENDIX

reserves or the quality of an insurer, in a manner to suggest that such figures or comments are impressive or that the report demonstrates the company to be particularly strong financially or of high quality relative to other companies, when such is not the case, creates a false impression and is deceptive.

[Statutory Authority: RCW 48.02.060, 88-24-053 (Order R 88-12), § 284-30-660, filed 12/7/88.]

**WAC 284-30-700 Restrictions as to denial and termination of homeowners insurance affected by day-care operations.** (1) Beginning August 1, 1985, pursuant to RCW 48.30.010, it shall be an unfair practice for any insurer transacting homeowners insurance to deny homeowners insurance to an applicant therefor, or to terminate any homeowners insurance policy covering a dwelling located in this state, whether by cancellation or nonrenewal, for the principal reason that an insured under such policy is engaged in the operation of a day care facility, pursuant to chapter 74.15 RCW, at the insured location.

(2) This rule does not prevent an insurer from excluding or limiting coverage with respect to liability or property losses arising out of business pursuits of an insured, specifically including those related to the operation of day care facilities.

[Statutory Authority: RCW 48.02.060, 85-17-018 (Order R 85-3), § 284-30-700, filed 8/12/85.]

**WAC 284-30-750 Brokers' fees to be disclosed.** It shall be an unfair practice for any broker providing services in connection with the procurement of insurance to charge a fee in excess of the usual commission which would be paid to an agent without having advised the insured or prospective insured, in writing, in advance of the rendering of services, that there will be a charge and its amount or the basis on which such charge will be determined.

[Statutory Authority: RCW 48.02.060, 48.44.050 and 48.46.200, 87-09-071 (Order R 87-5), § 284-30-750, filed 4/21/87.]

**WAC 284-30-800 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

(2007 Ed.)

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.

[Statutory Authority: RCW 48.02.060 (3)(a), 48.30.140, 48.30.150, 48.01.030 and 48.30.010(2), 90-20-104 (Order R 90-11), § 284-30-800, filed 10/2/90, effective 11/2/90. Statutory Authority: RCW 48.02.060 (3)(a), 88-11-056 (Order R 88-6), § 284-30-800, filed 5/17/88.]

## ENVIRONMENTAL CLAIMS

**WAC 284-30-900 Purpose.** (1) There are many insurance coverage disputes involving Washington insureds who face potential liability for their roles at polluted sites in this state. State and federal mandates exist for cleaning up the environment in order to address the adverse effects of hazardous substances on human health and safety and the environment in general. It is in the public interest to reduce the costs incurred in connection with environmental claims and to expedite the resolution of such claims. The state of Washington has a substantial public interest in the timely, efficient, and appropriate resolution of environmental claims involving the liability of insureds at polluted sites in this state. This interest is based on practices favoring good faith and fair dealing in insurance matters and on the state's broader health and safety interest in a clean environment.

(2) Insureds and insurers alike face claims complicated by factual issues concerning events that occurred in the distant past. Many sites with environmental damage involve long-term operations with multiple owners; therefore, issues related to lost policies which may provide insurance coverage in the environmental claims context provide uniquely challenging problems of both lost evidence and witnesses.

(3) Cooperation between insureds and insurers in fairly and expeditiously resolving legitimate disputes and in reducing or eliminating nonmeritorious claims is in the public interest. Facilitating cooperation in resolving legitimate lost policy disputes in environmental claims will reduce unnecessary litigation, thereby freeing more resources for environmental cleanup. Insureds and insurers are encouraged to participate in a mediation program in order to achieve a mutually acceptable, expeditious resolution of environmental claims without resort to costly and lengthy litigation.

(4) This regulation is adopted to provide minimum standards for the conduct of insureds and insurers for presenting and resolving environmental claims with the goal of facilitat-

[Title 284 WAC—p. 189]

*Rebating: RCW 48.30.140.*

*"Twisting" prohibited: RCW 48.30.180.*

*Unfair practices: Chapter 48.30 RCW.*

**48.17.005 Rule making.** (*Effective July 1, 2009.*) The commissioner may adopt rules to implement and administer this chapter. [2007 c 117 § 35.]

**48.17.010 "Agent" defined.** (*Effective until July 1, 2009.*) "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. [1985 c 264 § 7; 1981 c 339 § 9; 1947 c 79 § .17.01; Rem. Supp. 1947 § 45.17.01.]

**48.17.010 Definitions.** (*Effective July 1, 2009.*) The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Adjuster" means any person who, for compensation as an independent contractor or as an employee of an independent contractor, or for fee or commission, investigates or reports to the adjuster's principal relative to claims arising under insurance contracts, on behalf solely of either the insurer or the insured. An attorney-at-law who adjusts insurance losses from time to time incidental to the practice of his or her profession, or an adjuster of marine losses, or a salaried employee of an insurer or of a managing general agent, is not deemed to be an "adjuster" for the purpose of this chapter.

(a) "Independent adjuster" means an adjuster representing the interests of the insurer.

(b) "Public adjuster" means an adjuster employed by and representing solely the financial interests of the insured named in the policy.

(2) "Business entity" means a corporation, association, partnership, limited liability company, limited liability partnership, or other legal entity.

(3) "Home state" means the District of Columbia and any state or territory of the United States or province of Canada in which an insurance producer maintains the insurance producer's principal place of residence or principal place of business, and is licensed to act as an insurance producer.

(4) "Insurance education provider" means any insurer, health care service contractor, health maintenance organization, professional association, educational institution created by Washington statutes, or vocational school licensed under Title 28C RCW, or independent contractor to which the commissioner has granted authority to conduct and certify completion of a course satisfying the insurance education requirements of RCW 48.17.150.

(5) "Insurance producer" means a person required to be licensed under the laws of this state to sell, solicit, or negotiate insurance. "Insurance producer" does not include title insurance agent as defined in subsection (15) of this section.

(6) "Insurer" has the same meaning as in RCW 48.01.050, and includes a health care service contractor as defined in RCW 48.44.010 and a health maintenance organization as defined in RCW 48.46.020.

(7) "License" means a document issued by the commissioner authorizing a person to act as an insurance producer or

(2008 Ed.)

title insurance agent for the lines of authority specified in the document. The license itself does not create any authority, actual, apparent, or inherent, in the holder to represent or commit to an insurer.

(8) "Limited line credit insurance" includes credit life, credit disability, credit property, credit unemployment, involuntary unemployment, mortgage life, mortgage guaranty, mortgage disability, automobile dealer gap insurance, and any other form of insurance offered in connection with an extension of credit that is limited to partially or wholly extinguishing the credit obligation that the commissioner determines should be designated a form of limited line credit insurance.

(9) "NAIC" means national association of insurance commissioners.

(10) "Negotiate" means the act of conferring directly with, or offering advice directly to, a purchaser or prospective purchaser of a particular contract of insurance concerning any of the substantive benefits, terms, or conditions of the contract, provided that the person engaged in that act either sells insurance or obtains insurance from insurers for purchasers.

(11) "Person" means an individual or a business entity.

(12) "Sell" means to exchange a contract of insurance by any means, for money or its equivalent, on behalf of an insurer.

(13) "Solicit" means attempting to sell insurance or asking or urging a person to apply for a particular kind of insurance from a particular insurer.

(14) "Terminate" means the cancellation of the relationship between an insurance producer and the insurer or the termination of an insurance producer's authority to transact insurance.

(15) "Title insurance agent" means a business entity licensed under the laws of this state and appointed by an authorized title insurance company to sell, solicit, or negotiate insurance on behalf of the title insurance company.

(16) "Uniform business entity application" means the current version of the NAIC uniform application for business entity insurance license or registration for resident and non-resident business entities.

(17) "Uniform application" means the current version of the NAIC uniform application for individual insurance producers for resident and nonresident insurance producer licensing. [2007 c 117 § 1; 1985 c 264 § 7; 1981 c 339 § 9; 1947 c 79 § .17.01; Rem. Supp. 1947 § 45.17.01.]

**48.17.020 "Broker" defined.** (*Effective until July 1, 2009.*) "Broker" means any person who, on behalf of the insured, for compensation as an independent contractor, for commission, or fee, and not being an agent of the insurer, solicits, negotiates, or procures insurance or reinsurance or the renewal or continuance thereof, or in any manner aids therein, for insureds or prospective insureds other than himself. [1947 c 79 § .17.02; Rem. Supp. 1947 § 45.17.02.]

**48.17.030 "Solicitor" defined.** (*Effective until July 1, 2009.*) "Solicitor" means an individual authorized by an agent or broker to solicit applications for insurance as a representative of such agent or broker and to collect premiums in

NO. 87215-5

**SUPREME COURT OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, OFFICE  
OF THE INSURANCE  
COMMISSIONER,

Petitioner,

v.

CHICAGO TITLE INSURANCE  
COMPANY,

Respondent.

DECLARATION OF  
SERVICE

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I declare that I served the State of Washington Insurance  
Commissioner's Supplemental Brief and this Declaration of Service on all  
parties or their counsel of record on the date below as follows:

Stephen John Sirianni  
Sirianni Youtz Meier & Spoonmore  
999 3<sup>rd</sup> Ave., Ste 3650  
Seattle, WA 98104-4038  
steve@sylaw.com

David C. Neu  
K&L Gates LLP  
925 Fourth Ave., Ste 2900  
Seattle, WA 98104  
David.neu@klgates.com

Jessica Anne Skelton  
Matthew J. Segal  
Sarah Johnson  
Pacifica Law Group LLP  
1191 2nd Ave., Ste 2100  
Seattle, WA 98101-2945  
Jessica.Skelton@pacificalawgroup.com  
Matthew.Segal@pacificalawgroup.com  
Sarah.Johnson@pacificalawgroup.com

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 10th day of September, 2012, at Olympia, Washington.

  
SAPHRON WEATHERLY, Legal Assistant