

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Sep 10, 2012, 4:53 pm
BY RONALD R. CARPENTER
CLERK

Case No. 87215-5

RECEIVED BY E-MAIL

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, OFFICE OF THE INSURANCE
COMMISSIONER,

Petitioner,

v.

CHICAGO TITLE INSURANCE COMPANY,

Respondent.

**SUPPLEMENTAL BRIEF OF RESPONDENT
CHICAGO TITLE INSURANCE COMPANY**

PACIFICA LAW GROUP LLP

Matthew J. Segal, WSBA #29797
Jessica A. Skelton, WSBA #36748
1191 Second Avenue, Suite 2100
Seattle, WA 98101
(206) 245-1700

Attorneys for Respondent Chicago
Title Insurance Company

ORIGINAL

Table of Contents

I.	INTRODUCTION	1
II.	FACTUAL & PROCEDURAL HISTORY	2
	A. The OIC Seeks to Hold CTIC Liable for Marketing Practices of Land Title, Who Does Not Market on CTIC's Behalf.....	2
	B. The Court of Appeals Reverses the OIC Judge's Order Holding CTIC Vicariously Liable.....	4
III.	STATEMENT OF ISSUES	6
IV.	AUTHORITY & ARGUMENT	6
	A. Standard of Review.....	6
	B. The Insurance Code Does Not Authorize Holding CTIC Vicariously Liable for Land Title's Alleged Violations.....	7
	C. The Court of Appeals Properly Determined that CTIC Was Not Liable for Land Title's Actions Under the Common Law.....	10
	1. Vicarious Liability May Be Imposed Only When One Party Has the Right to Control the Other Party's Actions.....	10
	2. Other Jurisdictions, as Well as Washington, Have Recognized the Limited Agency at Issue.....	11
	3. The OIC's Apparent Authority Argument Also Fails.....	13
	D. The Court of Appeals Decision Also Should Be Upheld on Alternative Grounds.....	14

1.	The OIC Engaged in <i>de facto</i> Rulemaking in Violation of the APA and the Washington Constitution.....	15
2.	The OIC Judge’s Decision Was Arbitrary and Capricious, and Not Supported by Substantial Evidence.....	18
V.	CONCLUSION.....	20

Table of Authorities

Washington State Cases

<i>Am. Fid. & Cas. Co., Inc. v. Backstrom</i> , 47 Wn.2d 77, 287 P.2d 124 (1955).....	9
<i>Barry & Barry, Inc. v. Dep't of Motor Vehicles</i> , 81 Wn.2d 155, 500 P.2d 540 (1972).....	17
<i>Bluehaven Funding, LLC v. First Am. Title Ins. Co.</i> , 594 F.3d 1055 (8th Cir. 2010)	12
<i>Budget Rent A Car Corp. v. Wash. State Dep't of Licensing</i> , 100 Wn. App. 381, 997 P.2d 420 (2000)	16
<i>Chicago Title Ins. Co. v. Wash. St. Office of Ins. Comm'r</i> , 166 Wn. App. 844, 271 P.3d 373 (2012)	passim
<i>D.L.S. v. Maybin</i> , 130 Wn. App. 94, 121 P.3d 1210 (2005)	13
<i>Day v. St. Paul Fire Marine Ins. Co.</i> , 111 Wash. 49, 189 P. 95 (1920).....	8, 9
<i>First Am. Title Ins. Co. v. Dep't of Revenue</i> , 144 Wn.2d 300, 27 P.3d 604 (2001)	9
<i>Hayes v. City of Seattle</i> , 131 Wn.2d 706, 934 P.2d 1179 (1997).....	19
<i>In re Marriage of Rideout</i> , 150 Wn.2d 337, 77 P.3d 1174 (2003).....	15
<i>In re Powell</i> , 92 Wn.2d 882, 602 P.2d 711 (1979).....	18
<i>Larner v. Torgerson Corp.</i> , 93 Wn.2d 801, 613 P.2d 780 (1980).....	10

<i>McGee Guest Home, Inc. v. Dep't of Soc. & Health Servs. of State of Wash.</i> , 142 Wn.2d 316, 12 P.3d 144 (2000).....	18
<i>Miller v. United Pac. Cas. Ins. Co.</i> , 187 Wash. 629, 60 P.2d 714 (1936).....	9
<i>Probst v. State Dep't of Ret. Sys.</i> , 167 Wn. App. 180, 271 P.3d 966 (2012).....	18
<i>Stephens v. Omni Ins. Co.</i> , 138 Wn. App. 151, 159 P. 3d 10 (2007).....	11
<i>Towle v. Wash. Dep't of Fish & Wildlife</i> , 94 Wn. App. 196, 971 P.2d 591 (1999).....	14
<i>Truck Ins. Exch. v. VanPort Homes, Inc.</i> , 147 Wn.2d 751, 58 P.3d 276 (2002).....	15
<i>Verizon NW, Inc. v. Wash. Emp't Sec. Dep't</i> , 164 Wn.2d 909, 194 P.3d 255 (2008).....	7
<i>Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n</i> , 149 Wn.2d 17, 65 P.3d 319 (2003).....	6

Other State Cases

<i>Bus. Bank of Saint Louis v. Old Republic Nat. Title Ins. Co.</i> , 322 S.W.3d 548 (Mo. Ct. App. 2010).....	12
<i>Columbia Town Center Title Co. v. 100 Investment Ltd. P'ship</i> , 36 A.3d 985 (Md. App. 2012).....	12

Federal Cases

<i>Wells Fargo Bank, N.A. v. Old Republic Title Ins. Co.</i> , Case No. 10-1087, 2011 WL 703475 (4th Cir. Mar. 1, 2011).....	11
--	----

Washington Statutes & Regulations

Ch. 34.05 RCW 15

RCW 34.05.010 16

RCW 34.05.570 7, 8, 18, 20

RCW 34.05.574 14

RCW 48.02.060 15

RCW 48.17.005 15

RCW 48.17.010 8, 9

RCW 48.17.160 8

RCW 48.30.010 15

WAC 284-30-580..... 16

WAC 284-30-610..... 16

Other Authorities

Informal Homeownership in the United States and the Law,
29 St. Louis U. Pub. L. Rev. 113, 123 (2009) 18

I. INTRODUCTION

The Court of Appeals correctly determined that the Office of the Insurance Commissioner (“OIC”) cannot hold Chicago Title Insurance Company (“CTIC”) strictly liable for the independent marketing practices of its limited agent, Land Title of Kitsap (“Land Title”), because CTIC had no right to control and did not control those practices. Thus, the Court of Appeals properly reinstated the initial order of an administrative law judge (“ALJ”) granting summary judgment to CTIC. In reaching its conclusion, the Court of Appeals relied on more than 100 years of established case law regarding agency in the State of Washington. The decision was correct and should be affirmed.

The Court of Appeals also may be affirmed on two alternative grounds. First, the OIC seeks to exercise regulatory authority in conflict with fundamental rulemaking requirements under the Administrative Procedure Act (“APA”). The OIC attempts to circumvent the APA’s directive that rules be adopted only after notice and the opportunity for comment, a mandate designed to assure full public trust and engagement in the regulatory process. Reversal of the Court of Appeals would institute a sea change in the title insurance industry, effectively throwing out limited agency agreements relied on for decades to provide title services in regions where insurers do not maintain a title plant. This

change would harm consumers by reducing the availability of title insurance in Washington's rural counties, where relationships with underwritten title companies ("UTCs") such as Land Title are prevalent. Second, the Court of Appeals also should be affirmed because the decision of the OIC Judge was arbitrary and capricious, and contrary to the record.

The OIC could have accomplished its regulatory objectives by pursuing the party actually alleged to have violated regulations, by establishing common law vicarious liability, or by passing a rule allowing vicarious liability beyond the common law. The OIC did none of these and the Court of Appeals rightly reinstated the order of the ALJ.

II. FACTUAL & PROCEDURAL HISTORY

A. The OIC Seeks to Hold CTIC Liable for Marketing Practices of Land Title, Who Does Not Market on CTIC's Behalf.

This appeal arises from a typical relationship between a title insurer (CTIC) and a UTC (Land Title).¹ Title insurance is issued after researching the chain of title to a particular parcel through use of a title plant, which collects all documents recorded as to real property in a county. *See* AR 513-14. Although CTIC operates or subscribes to title plants in some of the most populous counties of Washington, it does not do so in most of Washington's rural counties. AR 513-14. In those

¹ CTIC's Opening Brief ("CTIC Op. Br.") in the Court of Appeals contains a more detailed statement of facts and discussion of this relationship. CTIC Op. Br. at 5-17.

counties, title searches are performed and title insurance policies are issued by UTCs such as Land Title. *See* AR 515-16. Because UTCs generally lack the reserve and capital necessary to underwrite the risk on title insurance policies, they typically contract with insurers, such as CTIC, to underwrite those policies. AR 516.

In this case, Land Title entered into a Policy Issuing Agreement (“Agreement”) with CTIC that created a limited scope of agency between the parties. AR 519-523. Importantly, the Agreement specifically forbids Land Title from marketing on CTIC’s behalf. AR 520, ¶ 6(G). Land Title President D. Gene Kennedy provided undisputed testimony that the parties complied with this provision, stating that “Land Title markets to promote its own business, not the business of CTIC” and that “CTIC does not have any input in, or oversight of, Land Title’s marketing practices or procedures.” AR 499, ¶¶ 8-9. Land Title’s marketing materials do not mention CTIC and promote only Land Title’s slate of services, including services that do not involve CTIC.² AR 499, ¶¶ 5-7; AR 500-510.

In 2007, the OIC began investigating Land Title to determine whether the company had violated former WAC 284-30-800(2) (“Former

² In its Petition for Review (“Pet.”), the OIC incorrectly states that Land Title “is only licensed and authorized by law to act as Chicago Title’s agent.” Pet. at 5, n.4. In fact, Land Title is a registered Washington corporation that, in addition to owning and operating a title plant, offers non-title services such as escrow services, which produce more than a quarter of Land Title’s annual revenue. *See* AR 498-99.

Inducement Regulation”).³ AR 546, ¶ 2.2. The Former Inducement Regulation forbade title insurers or their agents from giving anything of value exceeding \$25.00 to a person as an inducement to direct title insurance business to the company. CTIC was not a party to the OIC’s investigation of Land Title. AR 514, ¶ 5. In fact, the OIC did not request any records from or even contact CTIC during the investigation. *Id.* Yet, after the OIC determined that Land Title allegedly had violated the Former Inducement Regulation, the OIC filed a Notice of Hearing proposing disciplinary action against CTIC, *not* Land Title. AR 564-69.

B. The Court of Appeals Reverses the OIC Judge’s Order Holding CTIC Vicariously Liable.

CTIC objected to the Notice of Hearing and requested that the administrative proceeding be assigned to an ALJ at the Office of Administrative Hearings. *See* AR 556-57. The ALJ granted CTIC’s motion for summary judgment and ruled that the OIC could not impute liability to CTIC for marketing practices CTIC did not control. AR 278-92. The OIC petitioned for review of the ALJ’s Order, and the matter was assigned to an OIC Review Judge (“OIC Judge”).⁴ *See* AR 118-19. The

³ In 2009, WAC 284-30-800 was eliminated, and a new statutory and regulatory scheme was adopted. *See* RCW 48.29.210 and WAC 284-29-210 through WAC 284-29-260. The full text of former WAC 284-30-800 (2006) is set out in Appendix A.

⁴ CTIC petitioned to disqualify the OIC Judge, Patricia D. Petersen, on the grounds that she, in her previous capacity as Washington’s Deputy Insurance Commissioner, authored a letter on which the OIC relied as a basis for its legal position. AR 329-330, 417-19. Judge Peterson denied the disqualification petition, which the Thurston County Superior

OIC Judge summarily rewrote or deleted nearly every finding and conclusion in the ALJ's Order, and then entered judgment in favor of the OIC. AR 118-67 ("OIC Judge's Order").⁵

On appeal, the Thurston County Superior Court ruled that "[t]here is no specific statutory definition of what the scope of the agency is," but nonetheless affirmed the OIC Judge's Order. April 2, 2010 VRP at 37:8-13. CTIC timely appealed to the Court of Appeals, and a unanimous panel from Division II reversed the OIC Judge and reinstated the ALJ's Order. *Chicago Title Ins. Co. v. Wash. St. Office of Ins. Comm'r*, 166 Wn. App. 844, 271 P.3d 373 (2012) ("*CTIC*"). The Court of Appeals rejected the OIC's argument that it could impose vicarious liability because CTIC appointed Land Title as its agent under the insurance code statutes, holding that "Washington's insurance code is silent regarding both the scope of agency generally and vicarious liability specifically." *Id.* at 853. Instead, relying on established principles of common law agency, the Court of Appeals determined that the OIC lacked statutory, inherent, or common law authority to impose vicarious liability on CTIC for Land

Court later determined was error. January 22, 2010 Verbatim Report of Proceedings ("VRP") at 10:20-12:10. In order to avoid the additional costs and delays associated with a remand, CTIC stipulated that Judge Petersen's failure to recuse was "waived for all purposes and is no longer an issue on appeal." CP 160. The propriety of Judge Petersen's ruling on the merits, however, remains before this court in all respects, and her bias in favor of the OIC is particularly relevant insofar as it contributed to the arbitrary and capricious nature of her Final Order. See Section IV(D)(2), *infra*.

⁵ A copy of the OIC Judge's redlines to and commentary on the ALJ's Order is attached hereto as Appendix B.

Title's regulatory violations. *Id.* at 857-58. The OIC petitioned for review to this Court, which granted review.

III. STATEMENT OF ISSUES

- A. Should the Court of Appeals decision be affirmed because it properly determined that the Insurance Code does not establish a statutory scope of CTIC and Land Title's agency relationship?
- B. Should the Court of Appeals decision be affirmed because it properly determined, based on common law principles of agency, that Land Title was not CTIC's agent for marketing purposes?
- C. Should the Court of Appeals decision be affirmed on the alternative ground that the OIC engaged in *de facto* rulemaking and exceeded the scope of its delegated authority?
- D. Should the Court of Appeals decision be affirmed on the alternative ground that the OIC Judge's Order was arbitrary and capricious?

IV. AUTHORITY & ARGUMENT

A. Standard of Review.

In reviewing an agency order, this Court sits in same position as the superior court and applies the standards of the APA to the agency record. *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 149 Wn.2d 17, 24, 65 P.3d 319 (2003) (citation omitted). This Court reviews

the agency's legal determinations using the "error of law" standard, which allows the Court to substitute its view of the law for that of the OIC.

Verizon NW, Inc. v. Wash. Emp't Sec. Dep't, 164 Wn.2d 909, 915, 194 P.3d 255 (2008); RCW 34.05.570(3)(d). Under RCW 34.05.570(3), relief from the OIC Order is proper if *any* of the following are met:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law; . . .

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter; . . . [or]

(i) The order is arbitrary or capricious.

Because all of these criteria apply, the Court of Appeals decision can and should be affirmed on multiple, alternative grounds.

B. The Insurance Code Does Not Authorize Holding CTIC Vicariously Liable for Land Title's Alleged Violations.

The Court of Appeals correctly determined that the Insurance Code does not authorize holding CTIC vicariously liable for Land Title's marketing practices. The OIC relies on the definition of "agent" in former

RCW 48.17.010 (1985) and the provision for the appointment of agents in former RCW 48.17.160 (1994)⁶ to argue not only that an agency relationship exists between CTIC and Land Title, but that the scope of that agency relationship makes CTIC liable for Land Title's actions. *See, e.g., CTIC*, 166 Wn. App. at 852. But these general definitional and procedural statutes do not define the scope of the agency at issue and cannot provide a basis for the OIC to impose liability on CTIC. *See CTIC Op. Br.* at 20-31. In relying on these statutes, the OIC Judge committed an error of law under RCW 34.05.570(3)(d).

The OIC argues that because former RCW 48.17.010 defines agent as “any person appointed by an insurer to solicit applications for insurance on its behalf...,” an agent appointed pursuant to this statute is necessarily authorized to market on behalf of the insurer. *See, e.g., Pet.* at 9. The Court of Appeals properly rejected this argument, holding that “case law does not support the conclusion that by defining the term agent the legislature intended to establish the scope of every relationship authorized by former RCW 48.17.010.” *CTIC*, 166 Wn. App. at 854. The Court of Appeals concluded that the OIC's authority, most prominently *Day v. St. Paul Fire Marine Ins. Co.*, 111 Wash. 49, 53, 189 P. 95 (1920), “neither states nor implies that per se vicarious liability should attach to the

⁶ The full texts of former RCW 48.17.010 (1985) and former RCW 48.17.160 (1994) are attached in Appendix A.

principal for an agent duly appointed under the statute.” *Id.* at 853. This ruling is particularly appropriate in the title insurance context since the general term “agent” does not address the range of activities of a UTC such as Land Title. *See First Am. Title Ins. Co. v. Dep’t of Revenue*, 144 Wn.2d 300, 305, 27 P.3d 604 (2001) (“a UTC is not a mere insurance agent or broker, but rather generates business for its own account”).

The Court of Appeals also correctly rejected the OIC’s argument that the existence of the term “solicit” in the definition of agent in RCW 48.17.010 is sufficient to define the scope of the agency relationship. *See CTIC*, 166 Wn. App. at 854. This Court previously has applied the definition of an agent as one authorized to “solicit” applications for insurance to determine whether an agency relationship existed, but then proceeded to analyze common law agency principles to determine whether the agent’s acts could bind the insurer. *Am. Fid. & Cas. Co., Inc. v. Backstrom*, 47 Wn.2d 77, 82, 287 P.2d 124 (1955); *Miller v. United Pac. Cas. Ins. Co.*, 187 Wash. 629, 638-39, 641, 60 P.2d 714 (1936). Contrary to the OIC’s characterization, *Backstrom* and *Miller* rely on common law agency principles, not solely the statutory definition of “agent,” to determine the scope of the agency relationship. *See* Pet. at 12.⁷

⁷ The OIC also incorrectly construes the phrase “directly or indirectly” in the Former Inducement Regulation, which provides that it is an unfair act or practice for “a title insurer or its agent, directly or indirectly, to offer promise, allow, give, set off, or pay

Accordingly, because neither the Insurance Code nor the Former Inducement Regulation establishes a statutory or regulatory scope of agency, the Court of Appeals correctly applied the common law.

C. The Court of Appeals Properly Determined that CTIC Was Not Liable for Land Title's Actions Under the Common Law.

1. Vicarious Liability May Be Imposed Only When One Party Has the Right to Control the Other Party's Actions.

Under Washington's established common law of agency, one party may be held liable for the actions of another party only when it has the right to control those actions. *See* CTIC Op. Br. at 38-42; *Larner v. Torgerson Corp.*, 93 Wn.2d 801, 804-05, 613 P.2d 780 (1980) ("When a superior business party has retained no right of control and there is not reason to infer a right of control over a subordinate business party, then he cannot be held liable for the negligent acts of the subordinate party."). Washington courts have applied these principles in the insurance context and refused to impose vicarious liability on an insurer for the acts of its collection agent because the insurer lacked control over the agent's actions. *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 183, 159 P. 3d 10

anything of value exceeding twenty-five dollars." *See, e.g.*, Pet. at 10. By its plain language, the phrase "directly or indirectly" does not address vicarious liability, but instead makes clear that both direct inducement payments for business and *quid pro quo* arrangements are prohibited. Regardless, there is no evidence in the record, and the OIC never has alleged, that CTIC had any knowledge of Land Title's alleged violations, such that it could have "indirectly" participated in them. *See* AR 564-68.

(2007), *aff'd sub nom Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 204 P.3d 885 (2009).

Applying these legal principles to the undisputed evidence in the administrative record, the Court of Appeals properly determined that CTIC had no right to control the marketing activities of Land Title. Specifically, the Court of Appeals relied on the express provisions in the Agreement limiting the scope of Land Title's agency and prohibiting Land Title from marketing on CTIC's behalf. *CTIC*, 166 Wn. App. at 855; AR 519, ¶¶ 3-4, AR 520, ¶ 6. The Court of Appeals also relied on undisputed testimony from the President of Land Title that CTIC does not exercise any control over Land Title's business operations, including its compliance with the Former Inducement Regulation or its marketing practices. *CTIC*, 166 Wn. App. at 855 (quoting AR 499). Finally, the Court properly rejected the OIC's "strained" argument that CTIC failed to disclaim any right of control over Land Title, which was unsupported by any authority. *Id.* at 856.

2. Other Jurisdictions, as Well as Washington, Have Recognized the Limited Agency at Issue.

Authority from other jurisdictions further supports the Court of Appeals' conclusion. Courts routinely have accepted agreements between title insurers and UTCs as defining the scope of these limited agency

relationships. *See, e.g., Wells Fargo Bank, N.A. v. Old Republic Title Ins. Co.*, Case No. 10-1087, 2011 WL 703475, at *574 (4th Cir. Mar. 1, 2011) (“Courts throughout the country ... agree that such an express limitation on agency duties controls.”); *see also* Br. of *Amici Curiae* Stewart Title Guar. Co. & First Am. Title Ins. Co. (“*Amicus* Br.”) at 6-7, *CTIC*, 166 Wn. App. 844.

Based on the recognition of these limited agency relationships, courts have rejected attempts to impose vicarious liability on title insurers for the actions of UTCs that fall outside the scope of that limited agency. *See, e.g., Bus. Bank of Saint Louis v. Old Republic Nat. Title Ins. Co.*, 322 S.W.3d 548, 553-55 (Mo. Ct. App. 2010) (insurer not liable for acts of UTC under express, implied, or apparent authority theories); *Bluehaven Funding, LLC v. First Am. Title Ins. Co.*, 594 F.3d 1055, 1060 (8th Cir. 2010) (holding that because the alleged conduct fell outside the scope of the agent’s authority, “the vicarious liability claims necessarily fail as a matter of law.”); *Columbia Town Center Title Co. v. 100 Investment Ltd. P’ship*, 36 A.3d 985, 1004-06 (Md. App. 2012) (CTIC held not liable for negligence of its issuing agent). Based on Washington’s similar recognition that the right to control is essential to common law vicarious liability, the Court of Appeals reached a result completely consistent with existing law and practice.

3. The OIC's Apparent Authority Argument Also Fails.

The Court of Appeals also correctly rejected the OIC's attempt to apply the doctrine of apparent authority, holding that it applies to "provide judicial recourse for innocent third parties whose reliance has harmed them, which circumstance is not present here." *CTIC*, 166 Wn. App. at 857 (citing *D.L.S. v. Maybin*, 130 Wn. App. 94, 98, 121 P.3d 1210 (2005)). The OIC does not claim that consumers relied on the apparent authority of Land Title to their detriment, but rather that CTIC should be held vicariously liable for Land Title's alleged regulatory violations. The Court of Appeals dismissed the OIC's claims that refusing to impose vicarious liability under these circumstances would prevent the OIC from regulating the insurance industry. *See CTIC*, 166 Wn. App. at 858, n.9 ("nothing in this opinion prevents the OIC from holding the UTCs solely responsible for complying with anti-inducement regulations"). The Court of Appeals specifically noted that "the OIC fail[ed] to explain why Land Title should not be solely accountable for its own alleged violations of anti-inducement regulations." *Id.* at 858. The Court of Appeals decision does not prevent the OIC from regulating the marketing activities at issue against the entity that conducted the alleged unlawful marketing. The decision simply recognizes that CTIC cannot be held liable for another's activity over which CTIC had no control.

The Court of Appeals also correctly rejected the OIC's apparent authority argument because it is dependent on its faulty statutory authority argument (discussed in Section IV(B), *supra*), and because the record does not reflect a sufficient objective manifestation of apparent authority by CTIC. *See id.* at 857. CTIC's appointment of Land Title as its issuing agent under the Insurance Code was not a sufficient manifestation by CTIC that Land Title was its agent for all purposes, including marketing, which is required to make a showing of apparent authority. To the contrary, the record confirms that CTIC had no knowledge of, no involvement in, and no control over Land Title's alleged violations of the Former Inducement Regulation. AR 499, ¶¶ 8-9; AR 564-68. Vicarious liability cannot be imposed on the basis of apparent authority.

In sum, for the reasons stated in its opinion, the Court of Appeals should be affirmed.⁸

D. The Court of Appeals Decision Also Should Be Upheld on Alternative Grounds.

This Court also may “affirm the [lower] court on any grounds established by the pleadings and supported by the record.” *In re*

⁸ The Court of Appeals also correctly reinstated the ALJ's Initial Order, rather than remanding to the OIC. *See Pet.* at 19-20. Where an agency's changes to an ALJ's initial order are not supported by substantial evidence, an appellate court may reinstate the ALJ's order. *Towle v. Wash. Dep't of Fish & Wildlife*, 94 Wn. App. 196, 210, 971 P.2d 591 (1999). Moreover, because the ALJ's Order applied the correct legal principles to the agency record, remand to the OIC only would cause unnecessary delay. RCW 34.05.574(1) (remand to agency is unnecessary if it “would cause unnecessary delay”).

Marriage of Rideout, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003) (quoting *Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002)). There are two alternative grounds not reached by the Court of Appeals upon which this Court also may affirm.

1. The OIC Engaged in *de facto* Rulemaking in Violation of the APA and the Washington Constitution.

The Court of Appeals should also be affirmed because the OIC's attempt to impute liability to CTIC for a UTC's acts is *de facto* rulemaking in violation of both the APA and constitutional safeguards. *See* CTIC Op. Br. at 33-38.

First, the OIC's actions violate the APA because although RCW 48.30.010(5) authorizes the OIC to assess penalties against the "person... violating" a regulation (Land Title), no statute or rule allows the OIC to impute that liability to CTIC. The Legislature required the OIC to define "*by regulation* promulgated pursuant to chapter 34.05 RCW... other acts and practices... reasonably found by the commissioner to be unfair or deceptive after a review of all comments received during the notice and comment rule-making period." RCW 48.30.010(2) (emphasis added); *see also* RCW 48.02.060(3)(a) ("The commissioner may... [m]ake reasonable rules for effectuating any provision of this code[.]"); RCW 48.17.005.

An agency may not circumvent the APA by announcing new rules through adjudication. *See Budget Rent A Car Corp. v. Wash. State Dep't of Licensing*, 100 Wn. App. 381, 387-88, 997 P.2d 420 (2000).⁹ But the OIC never passed a rule imposing vicarious liability on a title insurer for the acts of a UTC. *See* RCW 34.05.010(16) (defining a “rule” as, among other things, “any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction.”). By contrast, the OIC has adopted, in other contexts, regulations specifically providing that an insurer may be held liable for the acts of its agent. *See, e.g.*, WAC 284-30-580(1) (providing that “[i]f an insurer relies upon its appointed insurance producers or title insurance agents to make deliveries of its policies, the insurer, as well as the appointed insurance producer or title insurance agent, is responsible for any delay resulting from the failure of the appointed insurance producer or title insurance agent to act diligently.”); WAC 284-30-610(1) (providing that it is an unfair practice for “an insurer to permit a licensed insurance producer” to “solicit” insureds for coverage under certain out-of-state group policies).

⁹ *See also McGee Guest Home, Inc. v. Dep't of Soc. & Health Servs. of State of Wash.*, 142 Wn.2d 316, 322, 12 P.3d 144 (2000) (“We have been vigilant in insisting that administrative agencies treat policies of general applicability as rules and comply with necessary APA procedures.”).

Second, the OIC's position violates article II, section 1 of the Washington Constitution, which allows administrative enforcement subject to procedural safeguards that "control arbitrary administrative action and the abuse of discretionary power." *Barry & Barry, Inc. v. Dep't of Motor Vehicles*, 81 Wn.2d 155, 159, 164, 500 P.2d 540 (1972) ("the applicable provisions of the [APA] ensure that interested parties will be heard [b]efore a rule is adopted"). This case underscores the need for basic safeguards. By avoiding rulemaking, the OIC failed to consider how its position would disrupt the availability of title insurance in Washington. *See* CTIC Op. Br. at 31-33. Allowing the OIC to hold insurers strictly liable for acts of UTCs outside insurers' control would alter dramatically the nature of the relationship between UTCs and insurers and unilaterally increase insurers' operating costs in rural areas. *See* AR 513-14.

These increased operating costs either would be passed along to consumers in the form of increased title insurance premiums or would deter title insurers from providing insurance in rural markets altogether.¹⁰ The increased cost and reduced availability of title insurance in rural areas would, in turn, create barriers to financing and home ownership. *See* AR 470 ("[m]ost commercial lenders financing home purchases will even require Washington consumers to purchase title insurance."); *see also*

¹⁰ *See Amicus Br.* at 9-15.

Informal Homeownership in the United States and the Law, 29 St. Louis U. Pub. L. Rev. 113, 123 (2009).

By avoiding rulemaking here and instead summarily imposing a penalty on a party other than the “person ... violating” the Former Inducement Regulation, the OIC acted in excess of the APA and the agency’s delegated authority, and in violation of the Washington Constitution. *See, e.g., In re Powell*, 92 Wn.2d 882, 893, 602 P.2d 711 (1979) (delegation of authority to promulgate rule without procedural safeguards, including notice, was unlawful and unconstitutional); *see also McGee Guest Home, Inc.*, 142 Wn.2d at 322-23. Accordingly, the Court of Appeals decision also may be affirmed because the OIC Judge’s Order “is in violation of constitutional provisions on its face or as applied” and “is outside the statutory authority or jurisdiction of the agency conferred by a provision of law.” RCW 34.05.570(3)(a), (b).

2. The OIC Judge’s Decision Was Arbitrary and Capricious, and Not Supported by Substantial Evidence.

The Court of Appeals decision also should be affirmed because the OIC Judge’s Order was arbitrary and capricious. *See CTIC Op. Br.* at 48-50. “An agency’s decision is arbitrary and capricious if it results from willful and unreasoning disregard of the facts and circumstances.” *Probst v. State Dep’t of Ret. Sys.*, 167 Wn. App. 180, 191, 271 P.3d 966 (2012)

(agency's willful decision not to use more frequent interest calculation was arbitrary and capricious). Where an agency's decision is so conclusory as to show disregard for facts and circumstances, it is arbitrary and capricious. *See Hayes v. City of Seattle*, 131 Wn.2d 706, 717-18, 934 P.2d 1179 (1997), *opinion corrected* 943 P.2d 265 (Wash. 1997).

The OIC Judge conducted a wholesale rewrite of the ALJ's Order so as to reach the OIC's proposed result based on legal theories the OIC Judge advocated for in her capacity as Deputy Insurance Commissioner. *See* App. B (copy of redlined order); AR 417-20; *see also* CTIC Op. Br. at 48-50. For example, disregarding undisputed testimony from Land Title's President that CTIC did not pay any of Land Title's expenses, AR 499, ¶ 9, the OIC Judge found, without citing any contrary evidence, that "[i]t cannot be found that [CTIC] does not pay any of the business expenses of Land Title," AR 136. Similarly, disregarding the provision in the Agreement forbidding Land Title from naming CTIC in its advertising or printing, AR 520, ¶6(G), the OIC Judge found that the Agreement gave Land Title "the right to name [CTIC] in its advertising and printing," AR 135. Moreover, although the OIC Judge's Order relied on the Agreement between CTIC and Land Title to support numerous findings and conclusions, it also inexplicably found that the Agreement "is not relevant to a determination of the relationship between the parties." *See* AR 134.

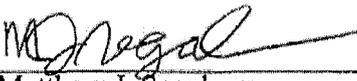
The OIC Judge deleted nearly all of the ALJ's well-supported findings and conclusions and replaced them with erroneous and unsupported findings and conclusions. *See* App. B. Accordingly, the ALJ's Initial Order should be reinstated pursuant to RCW 34.05.570(3)(e) & (i) because the OIC Judge's Order is arbitrary and capricious and not supported by substantial evidence.

V. CONCLUSION

The Court of Appeals properly held that the OIC cannot hold an insurer vicariously liable for the acts of a UTC absent a proper showing under common law. This does not mean the OIC will be unable to make such a showing in other cases, nor does it preclude the OIC from pursuing a UTC directly, or passing a rule establishing a form of vicarious liability. In the present case, however, CTIC did nothing wrong, and there is no legal basis to hold it responsible for acts of Land Title that were outside of CTIC's control. CTIC respectfully requests that this Court affirm the Court of Appeals decision.

RESPECTFULLY SUBMITTED this 10th day of September, 2012.

PACIFICA LAW GROUP LLP

By 
Matthew J. Segal, WSBA #29797
Jessica A. Skelton, WSBA #36748
Attorneys for Respondent Chicago
Title Insurance Company

Appendix A

APPENDIX A

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

(1) RCW 48.30.140 and 48.30.150, pertaining to “rebating” and “illegal inducements,” are applicable to title insurers and their agents. Because those statutes primarily affect inducements or gifts to an insured and an insured’s employee or representative, they do not directly prevent similar conduct with respect to others who have considerable control or influence over the selection of the title insurer to be used in real estate transactions. As a result, insureds do not always have free choice or unbiased recommendations as to the title insurer selected. To prevent unfair methods of competition and unfair or deceptive acts or practices, this rule is adopted.

(2) It is an unfair method of competition and an unfair and deceptive act or practice for a title insurer or its agent, directly or indirectly, to offer, promise, allow, give, set off, or pay anything of value exceeding twenty-five dollars, calculated in the aggregate over a twelve-month period on a per person basis in the manner specified in RCW 48.30.140(4), to any person as an inducement, payment, or reward for placing or causing title insurance business to be given to the title insurer.

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

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

Former RCW 48.17.010 (2006) – “Agent” defined.

“Agent” means any person appointed by an insurer to solicit applications for insurance on its behalf. If authorized so to do, an agent may effectuate insurance contracts. An agent may collect premiums on insurances so applied for or effectuated.

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

- (1) Each insurer on appointing an agent in this state shall file written notice thereof with the commissioner on forms as prescribed and furnished by the commissioner, and shall pay the filing fee therefor as provided in RCW 48.14.010. The commissioner shall return the appointment of agent form to the insurer for distribution to the agent. The commissioner may adopt regulations establishing alternative appointment procedures for individuals within licensed firms, corporations, or sole proprietorships who are empowered to exercise the authority conferred by the firm, corporate, or sole proprietorship license.
- (2) Each appointment shall be effective until the agent’s license expires or is revoked, the appointment has expired, or written notice of termination of the appointment is filed with the commissioner, whichever occurs first.
- (3) When the appointment is revoked by the insurer, written notice of such revocation shall be given to the agent and a copy of the notice of revocation shall be mailed to the commissioner.
- (4) Revocation of an appointment by the insurer shall be deemed to be effective as of the date designated in the notice as being the effective date if the notice is actually received by the agent prior to such designated date; otherwise, as of the earlier of the following dates:
 - (a) The date such notice of revocation was received by the agent.
 - (b) The date such notice, if mailed to the agent at his last address of record with the insurer, in due course should have been received by the agent.
- (5) Appointments expire if not timely renewed. Each insurer shall pay the renewal fee set forth for each agent holding an appointment on the renewal date assigned the agents of the insurer by the commissioner. The commissioner, by rule, shall determine renewal dates. If a staggered

system is used, fees shall be prorated in the conversion to a staggered system.

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

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

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

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

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

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

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

(5) If the commissioner has cause to believe that any person is violating any such regulation, the commissioner may order such person to cease and desist therefrom. The commissioner shall deliver such order to such person direct or mail it to the person by registered mail with return receipt requested. If the person violates the order after expiration of ten days after the cease and desist order has been received by him or her, he or she may be fined by the commissioner a sum not to exceed two hundred and fifty dollars for each violation committed thereafter.

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

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

Appendix B

MIKE KREIDLER
STATE INSURANCE COMMISSIONER

STATE OF WASHINGTON



Phone: (360) 725-7000
www.insurance.wa.gov

OFFICE OF
INSURANCE COMMISSIONER
HEARINGS UNIT
Fax: (360) 664-2782

2008 APR 24 P 1:55

Patricia D. Petersen
Chief Hearing Officer
(360) 725-7105

Wendy Galloway
Chief Hearing Officer
Paralegal
(360) 725-7002
Wendyg@oic.wa.gov

BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

In the Matter of:)	
)	OIC No. D07-308
CHICAGO TITLE)	OAH Docket No. 2008-INS-0002
INSURANCE COMPANY,)	
)	FINAL FINDINGS OF FACTS,
)	CONCLUSIONS OF LAW AND ORDER
An Authorized Insurer,)	ON CHICAGO TITLE INSURANCE
)	COMPANY'S MOTION FOR SUMMARY
)	JUDGMENT (PHASE I OF HEARING)

To: David C. Neu, Esquire
K&L/Gates
925 Fourth Avenue, Suite 2900
Seattle, Washington 98104-1158

Chicago Title Insurance Company
601 Riverside Ave.
Jacksonville, Florida 32204

Copy To: Mike Kreidler, Insurance Commissioner
Mike Watson, Chief Deputy Commissioner
Jim Odiome, Deputy Commissioner for Company Supervision
Carol Sureau, Deputy Commissioner, Legal Affairs
Alan M. Singer, Staff Attorney, Legal Affairs
Post Office Box 40255
Olympia, Washington 98504-0255

On January 25, 2008, the Office of the Insurance Commissioner (OIC) entered a Notice of Hearing, and on March 27, 2008 an Amended Notice of Hearing, in this matter to impose

penalties upon Chicago Title Insurance Company (Chicago) for seventeen alleged violations committed by Land Title Company of Kitsap County, Inc. (Land Title). In the Notice of Hearing and Amended Notice of Hearing, the OIC asserts that Chicago, through its duly appointed title insurance agent, Land Title, violated WAC 284-30-800, the Illegal Inducement Regulation, and for these violations the OIC seeks to impose a fine of \$155,000 against Chicago pursuant to RCW 48.05.185.

On February 29, 2008, this matter was referred to the Office of Administrative Hearings (OAH) and the administrative hearing was held before Administrative Law Judge Cindy L. Burdue (ALJ), with the OIC's instructions to hear the case and enter Initial or Recommended Findings of Facts, Initial Conclusions of Law and Initial Order. During the course of that proceeding, the ALJ entered a First Pre-Hearing Order, and later an Amended First Pre-Hearing Order, bifurcating the issues in this case: Phase I involves *the preliminary issue of the legal responsibility of [Chicago] for the actions of Land Title ... being determined first*. Depending on the outcome of Phase I, the ALJ proposes to hear argument on, and enter an Initial or Recommended Order relative to, Phase II, which is the issue of *whether the expenditures of the Kitsap County company [Land Title] violate the law*. In accordance with this plan, on October 30, 2008, the ALJ entered Initial Findings of Facts, Initial Conclusions of Law and Initial Order Granting Summary Judgment (Initial Order) in Phase I, recommending that the undersigned enter Final Findings of Facts, Final Conclusions of Law and Final Order (Final Order) ruling that Chicago is not liable for the illegal acts of Land Title in violating the Inducement Regulation and statute. (It is noted that in Initial Finding of Fact No. 2, the ALJ states that for purposes of *this Motion [for Summary Judgment] only*, it is stipulated that Land Title did commit the alleged violations of the Illegal Inducement Regulation.)

On November 10, 2008, the entire hearing file was transferred to the undersigned Review Judge for review and entry of a Final Order in Phase I, which, as above, the ALJ in her First Pre-Hearing Order, states *whether Chicago is legally responsible for the actions of Land Title ... in this matter*. Therefore the Final Findings of Facts, Final Conclusions of Law and Final Order herein relate only to the afორerenced Phase I.

On November 18, 2008, pursuant to established procedure, Wendy Galloway, Paralegal to the undersigned, wrote a letter to all parties outlining the procedure for review and indicated

that the undersigned requested presentation of oral argument from the parties for her consideration prior to entry of a Final Order in Phase I.

On November 19, 2008, the OIC filed the OIC's Brief in Support of Review of Initial Order and Declaration of Alan Michael Singer with the undersigned. Further, during that time 1) Chicago requested, and was granted by the undersigned, permission to file its Reply to the OIC's Brief in Support of Review of Initial Order on or before December 10, 2008; and 2) Chicago requested, and was granted by the undersigned, permission to file said brief by e-mail. On December 10, 2008, Chicago filed its Response to OIC's Brief In Support of Review of Initial Order. On December 10, 2008, Chicago also filed its Limited Motion to Strike Declaration of Alan Michael Singer. On January 22, 2009, the undersigned heard and granted Chicago's Limited Motion to Strike the November 19, 2008 Declaration of Alan Michael Singer (not the Declaration of Alan Michael Singer executed and filed on September 24, 2008), ruling that the statements of Alan Michael Singer therein would be considered only as argument in support of the OIC's Petition for Review of Initial Order and not as evidence. Finally, on February 5, 2009, the parties presented oral argument on review of the ALJ's Initial Order in person before the undersigned.

NATURE OF PROCEEDING

In her Initial Order Granting Summary Judgment entered October 30, 2008, the ALJ stated the issue as being *Whether Respondent [Chicago] is entitled to summary judgment on the issue of its liability for the regulatory violations committed by its issuing agent, Land Title Company [sic], under WAC 284-30-800 and/or RCW 48.30.150, because no genuine issue of material fact exists and, as a matter of law, Respondent is entitled to judgment in its favor?* In her Initial Conclusions of Law, the ALJ recommends that the undersigned Review Judge enter, among others, a Final Conclusion of Law that *no genuine issue of material fact exists as to the relationship between [Chicago] and [Land Title] and the actions of the parties within that relationship. Based on the findings and legal analysis above, the illegal acts of [Land Title] cannot be imputed to [Chicago], and that Summary Judgment is granted to [Chicago] on the issue of imputed liability for the illegal acts of [Land Title] in violating the inducement statute and regulation.* The ALJ further recommends the undersigned Review Judge enter a Final Order that *[Chicago's] Motion for Summary Judgment is GRANTED on the issue [of] whether it can be*

held vicariously liable for the illegal acts of the underwritten title company [Land Title] with whom it contracts.

REVIEW JUDGE'S CONSIDERATION

1. Review. This matter has properly come before the undersigned Review Judge to review the Initial Order entered by the ALJ on October 30, 2008, with the parties submitting briefs and presenting oral argument on review. In the OIC's Brief in Support of Review of Initial Order, p. 4, the OIC contended, and at the outset of this oral argument Chicago agreed, that review of the Initial Order by the undersigned Review Judge is de novo.
2. Record of Proceeding. The record of this proceeding, including the entire hearing file and a recording of the proceeding before the ALJ, was presented to the undersigned Review Judge for her review and entry of Final Findings of Facts, Final Conclusions of Law and Final Order.
3. The Insurance Commissioner's Petition for Review. In addition to the automatic review which is required to be given to all Initial Orders entered relative to appeals of OIC actions, in the proceeding herein on November 19, 2008, the OIC filed its OIC's Brief in Support of Review of Initial Order and its Declaration of Alan Michael Singer in Support of Petition for Review of Initial Order with the undersigned and on December 10, 2008, Chicago filed its Chicago Title Insurance Company's Response to OIC's Brief in Support of Review of Initial Order. On February 5, 2009, at the request of the undersigned, the parties presented oral argument in person to the undersigned.
4. Revision of Initial Order on Review: Issue Presented: in Initial Order: The OIC contemplates that the ALJ's statement of the issue may be a finding of fact and argues that as such it is not based on the evidence, and that it misapprehends the issue presented and is in error. First, the ALJ's statement is not presented as a finding of fact, but as a statement of the issue, providing the framework for the Initial Findings of Fact and Initial Conclusions of Law, as follows:

Whether [Chicago] is entitled to summary judgment on the issue of its liability for the regulatory violations committed by its issuing agent, Land Title Company, under WAC 284-30-800 and/or RCW 48.30.150, because no genuine issue of material fact exists and, as a matter of law, [Chicago] is entitled to judgment in its favor?

Second, while not particularly inaccurate, the statement of the issue could be more concise. Therefore *Issue Presented*: in the Initial Order is replaced by the following:

Can the Insurance Commissioner hold Chicago Title Insurance Company responsible for the illegal acts of Land Title Insurance Company of Kitsap County, Inc. in violating WAC 284-30-800, the Illegal Inducement Regulation?

5. Revision of Initial Order on Review: *Undisputed Findings of Fact* in Initial Order: In the ALJ's Initial Order Granting Summary Judgment, the ALJ titles all of her findings of fact as *Undisputed Findings of Fact*. While it is not entirely clear what is meant by this title, normally "undisputed findings of fact" are facts the verity of which no party disputes. However, in this Initial Order, many of the facts that are labeled by the ALJ as *Undisputed Findings of Fact* are actually disputed by the OIC in this proceeding, as summarized in the OIC's Brief in Support of Review of Initial Order and Declaration of Alan Michael Singer in Support of Petition for Review of Initial Order executed and filed November 19, 2008. For this reason, the undersigned replaces the title *Undisputed Findings of Fact* with Initial Findings of Fact, to clarify that while the facts at issue may have been disputed by the parties, the ALJ determined, by the weight of the evidence, the facts to be as stated in each of her Initial Findings of Fact.

6. Comment on Review: Admission of Evidence in Hearing before ALJ: It appears that the evidence presented by the OIC and Chicago was not actually admitted as evidence by the ALJ during the proceeding before the ALJ, and no Exhibit List was created during that proceeding. For this reason, because the undersigned has determined that the evidence presented would have been admitted if that process had been followed (see possible exceptions discussed immediately below), in the below Final Findings of Facts, the undersigned has identified the evidentiary documents by their names instead of by their exhibit numbers as is customarily done. Most significantly, this evidence includes the original and amended Notices of Hearing issued by the OIC; Chicago's Demand for Hearing; the ALJ's Order and Amended Order on First Pre-Hearing Conference, and other preliminary documents; Declaration of D. Gene Kennedy in Support of Chicago Title Insurance Company's Motion for Summary Judgment RE: Agency Liability; Declaration of Don Randolph in Support of Chicago Title Insurance Company's Motion for Summary Judgment Re: Agency Liability with Ex. A, which is the "Issuing Agency Agreement" executed by Chicago and Land Title; Declaration of Madeline Barewald in Support of Chicago Title Insurance Company's Motion for Summary Judgment Re: Agency Liability;

Declaration of Brad London in Support of Chicago Title Insurance Company's Motion for Summary Judgment RE: Agency Liability; Declaration of Alan M. Singer executed September 24, 2008 with attached Exhibits A through P (designated hereafter as Decl. of Singer; not to be confused with Declaration of Alan Michael Singer in Support of Petition for Review of Initial Order executed and filed on November 19, 2008); and Declaration of Carol Sureau.

On March 5, 2009, the OIC filed a Motion RE: Necessity to Bring a "Motion to Strike." In this Motion to Strike, the OIC advised that it had objected to admission of certain pieces of evidence during the hearing before the ALJ, that the ALJ had never ruled on the OIC's objection and that the ALJ had improperly considered this evidence. In its Motion to Strike, the OIC further argued that it was not also required to bring a motion to strike this evidence before the ALJ or thereafter. On March 16, 2009, Chicago filed Chicago Title Insurance Company's Response to OIC's Motion RE: Necessity to Bring a Motion to Strike, asserting generally that it was not raising this argument, that the briefing on the Petition for Review was closed and therefore the necessity of filing a motion to strike is not an issue before the undersigned. The undersigned advises that while indeed in order for a party to have objections to evidence presented at hearing considered by the presiding officer it is generally not also necessary under Title 34 RCW to bring a motion to strike this evidence, the briefing on review of this case is, as Chicago argues, closed. Additionally, as Chicago states, Chicago is not making the argument that such a motion to strike is required. The parties are advised that those pieces of evidence upon which the OIC objected during hearing and identified in its OIC's Petition for Review are noted and are dealt with in this Final Order if they have been considered by the undersigned to be of any evidentiary significance to the review herein.

7. The undersigned has reviewed each Initial Finding of Fact against the evidence presented at hearing before the ALJ and has set forth the Final Findings of Fact based upon the evidence presented during hearing before the ALJ, addressing each of the ALJ's *Initial Findings of Fact* number by number. Likewise, the label *Conclusions of Law* in the Initial Order is substituted with Initial Conclusions of Law, and the undersigned has reviewed each Initial Conclusion of Law based upon the Final Findings of Fact and legal authority argued by the parties, addressing each of the ALJ's Initial Conclusions of Law number by number. While the undersigned recognizes that this method results in a less than easy-to-read Final Order, it is understood that this is a more comprehensive method of review in that the reader is assured that each Initial

Finding of Fact and Initial Conclusion of Law is specifically considered and, if changed, the reason for such changes are set forth. Further, this Final Order is even less easy-to-read, as many of the Initial Findings of Fact and Initial Conclusions of Law are redundant and therefore, the Final Order contains a plethora of redundant Final Findings of Fact and Final Conclusions of Law.

As above, the undersigned recognizes that this number-by-number review is often considered to be the more comprehensive means of displaying review as it indicates specific analysis of each Initial Finding and Initial Conclusion in addition to setting forth the Final Findings of Facts and Final Conclusions of Law. For this reason, and also because of the complexity and importance of the issue herein, the undersigned has followed this number-by-number format. However, should the parties agree to request an easier-to-read format, the undersigned is willing to enter Final Findings of Facts, Final Conclusions of Law and Final Order which would certainly be consistent with the Final Findings, Final Conclusions and Final Order herein, but would simply eliminate recitation of the Initial Findings and Initial Conclusions – and their substantial redundancy – and would eliminate the undersigned's analyses of each. Said easier-to-read Final Order would not replace the document herein, and the document herein would be the subject of any appeal which might ensue, but would be attached hereto simply for ease of reference.

8. The undersigned Review Judge has reviewed the entire hearing file, including all documents and exhibits filed therein, the recording of the proceeding, the OIC's Brief in Support of Review of Initial Order and Declaration of Alan Michael Singer in Support of Petition for Review of Initial Order assigning error to the Initial Findings of Fact, Initial Conclusions of Law and Initial Order, Chicago's response to OIC's Brief in Support of Review of Initial Order Supporting the Initial Findings of Fact, Initial Conclusions of Law and Initial Order and the oral arguments of the parties on review.

FINDINGS OF FACTS

Having considered the evidence and arguments presented at the hearing before the ALJ, the documents on file herein, the Initial Findings of Fact, Initial Conclusions of Law and Initial Order, the subsequent briefs filed by both parties on review and the oral argument presented by both parties on review before the undersigned, the undersigned duly appointed Review Judge

makes the following Final Findings of Fact, first quoting the ALJ's Initial Findings of Fact number by number, and then revising the ALJ's Initial Findings of Fact number by number as appropriate.

1. *The Office of the Insurance Commissioner (OIC) alleges that the Respondent, Chicago Title Insurance Company (Chicago) is liable for violations of the inducement regulation, WAC 284-30-800, committed by Land Title Insurance Company (Land Title) with whom Chicago has an "Issuing Agency" contract. Chicago has been, for some years, the only company authorized by law to underwrite the title insurance policies issued by Land Title. (Decl. Alan Singer, and Exhibits) Respondent Chicago is a Missouri Corporation and Land Title is a Washington Corporation (Decl. of Brad London) Chicago is paid a percentage of the total fee charged by Land Title for each title policy Chicago underwrites.*

- First sentence: This Initial Finding is an incorrect statement of the OIC's allegation. The OIC has never included the fact that Chicago has an "Issuing Agency" contract with Land Title at all in its enforcement action, which was issued in the Notice of Hearing format. [Notice of Hearing; Amended Notice of Hearing.] In fact, as early as the filing of its Opposition to Chicago's Motion for Summary Judgment before the ALJ, the OIC has asserted that the fact that Chicago has an "Issuing Agency Agreement" with Land Title is irrelevant. [OIC's Opposition to Chicago's Motion for Summary Judgment, pgs. 27 and throughout; Transcript of oral argument on Chicago's Motion for Summary Judgment before ALJ, 1:18:16.] Therefore, to correct the statement of the actual allegation that the OIC is making against Chicago, as stated in its enforcement action, substitute first sentence with: The Office of the Insurance Commissioner (OIC) alleges that the Respondent, Chicago Title Insurance Company (Chicago), violated WAC 284-30-800, by and through the acts of its agent, Land Title Company of Kitsap County, Inc. (Land Title), which Chicago had legally appointed as its title insurance agent pursuant to RCW 48.17.160 to act on Chicago's behalf to solicit and effectuate Chicago's title insurance. [Notice of Hearing; Amended Notice of Hearing.]

- Second and third sentences: Adopt statements, but clarify and supplement by replacing with: Chicago is a domestic Missouri title insurance corporation which has been authorized by the OIC since 1977 as a title insurer to underwrite and sell title insurance in Washington and elsewhere. [Ex. A to Decl. of Singer; Decl. of London.] Land Title is a Washington

corporation, incorporated in 1967, which is licensed by the OIC as a title insurance agent as defined in RCW 48.17.010. [Exs. A, B to Decl. of Singer; Decl. of Kennedy.] Since March 5, 1993, Chicago, as an insurer, has filed an Appointment with the OIC as required by RCW 48.17.160, on forms prescribed by the OIC, and paid the proper Appointment fee therefore, formally appointing Land Title to act as a title insurance agent to act on Chicago's behalf in Mason, Kitsap, Clallum and Jefferson counties (although Land Title is not undertaking these activities in Clallum and Jefferson counties). [Decl. of Randolph; Ex. C to Decl. of Singer.] Pursuant to specific authority given to appointed insurance agents under RCW 48.17.010 and 48.17.160, Land Title has at all times pertinent hereto had the authority to solicit, specifically on behalf of Chicago, applications for Chicago's title insurance, without the requirement of any further authority needed from the appointing insurer. Further, as specifically allowed under RCW 48.17.010 and 48.17.160, Chicago may authorize Land Title to act on Chicago's behalf to effectuate Chicago title insurance policies and to collect premiums on insurances so applied for or effectuated (on forms prescribed by Chicago and using rates prescribed by Chicago as required by the OIC). In fact, since May 1, 1992, Chicago has additionally authorized Land Title to effectuate Chicago title insurance policies on Chicago's behalf and to collect premiums therefore. [Decl. of Randolph; Exs. C, D, E, and G of Decl. of Singer; "Issuing Agency Agreement" entered into between Chicago and Land Title May 1, 1992 and included as Ex. A to Decl. of Randolph.] At all times pertinent hereto, Land Title was not appointed as an agent to represent, including solicit or effectuate insurance policies for, any other title insurance company [Exs. E, F of Decl. of Singer] and under its contract with Chicago, Land Title was prohibited from acting on behalf of any other title insurer. ["Issuing Agency Agreement."] Likewise, Chicago appointed Land Title as its exclusive agent to act on its behalf in these counties. If Land Title were not appointed to represent Chicago in these counties, Land Title would have no title insurance to market or sell to consumers. Further, because Chicago does not operate directly in these counties, the only way Chicago can solicit for and effectuate its title insurance there is through Land Title. [Exs. A-P of Decl. of Singer; "Issuing Agency Agreement."] Finally, Land Title collects the Chicago title insurance premiums, pays 12% of the gross premium for each title policy effectuated to Chicago and retains the balance for itself. [Decl. of Randolph; "Issuing Agency Agreement."] Approximately 28% of Land Title's total revenue comes from escrow services

[Decl. of Kennedy at 5; Initial Finding 25]; all the rest of its revenue – 72% - comes from selling Chicago’s title insurance policies.

2. *Land Title is a title and escrow company that does business in at least two Washington counties, Mason and Kitsap. It is not a party to this action. Rather, for Land Title’s violations of the above-cited regulation limiting inducements, the OIC seeks to impose fines of \$155,000 on Chicago, based on the “Issuing Agent” [sic] contract; the relationship between the two companies, and the broad enforcement and regulatory authority of the OIC. For the purposes of this motion only, it is stipulated that Land Title did commit the alleged violations of the inducement regulation.*

- First and second sentences: Correct and clarify. Replace with: As found above, Land Title is licensed by the OIC as a title insurance agent. Land Title also conducts escrow services, which are not considered part of its business as an insurance agent. While not relevant, Land Title is not a party to this action.

- Third sentence: This is an incorrect statement of the basis for the OIC’s disciplinary action against Chicago: as above under “Issue Presented,” the fact of the “Issuing Agency Agreement” is not a basis for the OIC’s action against Chicago and it has never even been mentioned in the OIC’s enforcement action. (The agreement referred to is not entitled “Issuing Agent” contract; it is entitled “Issuing Agency Agreement” and will hereinafter be referred to as such.) [Notice of Hearing and Amended Notice of Hearing.] Indeed, consistently throughout its briefing and oral argument before the ALJ and in its briefing and oral argument before the undersigned on review, the OIC argues that the existence of the “Issuing Agency Agreement” is irrelevant to the issue herein. Replace with: The OIC seeks to impose fines against Chicago, based upon the illegal acts of its appointed agent, Land Title acting on Chicago’s behalf in soliciting Chicago’s title insurance.

- Fourth sentence: Adopt.

3. *The stipulated violations of the inducement law by Land Title include “winning and dining” of real estate agents, builders, and mortgage lenders with meals, golf tournaments, advertising for one real estate agent, purchases at a Board of Realtors auction; and professional football championship game tickets, in amounts over the \$25.00 limit allowed by WAC 284-30-800. [Amended Notice of Hearing.]*

• Adopt, but change *inducement law* to more properly identify the relevant rule as WAC 284-30-800, the Illegal Inducement Regulation, and add sentence: Because the Illegal Inducement Regulation provides limitations on title insurers and their agents on giving things of value in excess of \$25.00 to producers of title business, such as the above-referenced real estate agents and others who are in a position to direct the purchase of title insurance to certain title insurers over others, the act of either title insurers or their agents giving such inducements to such producers is clearly a form of solicitation for the purchase of title insurance.

4. *Land Title is known as an "underwritten title company," or "UTC."* *Land Title cannot issue title insurance policies on its own, without an underwriter like Chicago, who has the legal authority in Washington to underwrite the policies, as granted by the OIC. Chicago is required by law to "appoint" any UTC whose title policies it writes, and Land Title has been properly appointed by Chicago with the OIC for that purpose. (Decl. Stinger and Exhibit F.)*

• First sentence: Randolph declares that Land Title is an independent title company *known in title insurance literature as "independent agents" or "underwritten title companies" ("UTCs")*. [Decl. of Randolph.] While the identity of "UTCs" might be designations developed in title literatures, "UTCs" are not designations recognized in the Insurance Code, and are certainly not designations which would somehow differentiate a title insurance agent from a title insurance agent which is also called a "UTC." Otherwise stated, the label of "UTC" does not alter Land Title's status as a title insurance agent, which acts on behalf of its appointing insurer, Chicago, with all the rights and responsibilities of an insurance agent under the Insurance Code and regulations. Therefore the fact that Land Title may also hold a title industry designation of "UTC" is irrelevant to the issue herein. Replace with: Land Title is licensed as a title insurance agent by the OIC, and is formally appointed by Chicago to solicit for Chicago's title policies on Chicago's behalf. Although title insurance literature might also informally designate it as a "UTC," whether a title insurance agent is also referred to as a "UTC" is irrelevant; its nature as a title insurance agent, with the ensuing rights and responsibilities of a title insurance agent which acts on behalf of its appointing insurer(s), remains the same.

• Second sentence: Land Title cannot and does not "issue" a title insurance policy in any case, with or without an underwriter like Chicago. It is Chicago, as the insurer, which issues

its own Chicago title insurance policies in every situation; Chicago may choose to appoint a title insurance agent to act on its behalf, but it is never Land Title, the agent, which "issues" the policy. Correct sentence by replacing with: In those counties where it wishes to sell Chicago title policies, Chicago may appoint a title insurance agent, such as Land Title, to act on Chicago's behalf to solicit for itself directly and/or to solicit and effectuate issuance of Chicago title policies. However, it is Chicago, as the insurer, which is the entity authorized by the OIC to write and issue Chicago title policies and to serve as the underwriter of those title policies.

- Third sentence: Statement not supported by the evidence, Chicago does not "write" Land Title's title policies; Chicago "writes" Chicago's title policies. Land Title works on Chicago's behalf to simply effectuate, i.e. help, Chicago in the solicitation for and sales of Chicago title policies which are underwritten by Chicago. Also, Land Title has not been appointed by Chicago "with the OIC for that purpose." Replace with: Chicago, as an insurer, is required by law to legally appoint any entity which it authorizes to act on its behalf. This requires that Chicago file a formal Appointment form with the OIC, formally appointing Land Title, an insurance agent, to act as a title insurance agent representing Chicago. Chicago complied with this requirement beginning on March 5, 1993 and continuing during all pertinent times hereto and continuing currently. [Exs. A-P to Decl. of Singer.] Under the Insurance Code, agents which are legally appointed by insurers may solicit applications for insurance on the insurer's behalf and, if authorized so to do, the appointed agent may effectuate insurance contracts. Agents may also collect premiums on insurances so applied for or effectuated. As found above, in the case of Chicago's appointment of Land Title as an insurance agent, in addition to having the right to solicit applications for insurance on Chicago's behalf solely by virtue of its appointment, Land Title has also since 1993 been authorized by Chicago, as provided for under the Insurance Code, to effectuate Chicago's title policies [Decl. of Randolph: "Issuing Agency Agreement"] and to collect premiums for the Chicago title policies from purchasers (as required by the OIC, on forms prescribed by Chicago and premium rates as prescribed by Chicago). (Issuing Agency Agreement.)

5. *Chicago also conducts its own insurance and escrow business in eight Washington counties, and maintains or subscribes to title plants in these counties as required by law. In these geographic areas, Chicago has its own employees and agents, and maintains its own*

branch offices. In the counties where it does direct business, Chicago conducts marketing to sell its services.

- Adopt, but add citation to evidence: (Decl. of Randolph; Decl. of London.)

6. Chicago conducts no marketing activities in Kitsap and Mason counties, however. Chicago relies entirely on the efforts of Land Title to market the title insurance policies in these geographic areas. (Decl. London) Land Title is the only title company appointed by Chicago to sell its title insurance policies in Kitsap, Mason, Clallam, and Jefferson Counties. (Decl. Singer, Ex. E) However, Land Title operates and has offices only in Kitsap and Mason counties. (Decl. Kennedy)

- Either unclear or incorrect statement and if read one way then not supported by the evidence. To clarify/correct, replace with: Chicago conducts no direct marketing activities in Kitsap, Mason, Clallam and Jefferson counties. (Decl. of London.) Chicago relies solely on the efforts of Land Title, (Decl. of London; Decl. of Kennedy.) as its exclusive appointed insurance agent, to act, on behalf of Chicago, to solicit for and effectuate Chicago title policies in these counties and to collect Chicago's established premiums for these title policies (although Land Title does not actually operate in Clallam and Jefferson counties). (Ex. E to Decl. of Singer.)

7. A minority share of Land Title stock (45%) is owned by Security Union Title Insurance Company (Security Union), which is a subsidiary of Chicago Title and Trust Company (CT Trust). CT Trust is a subsidiary of Fidelity National Title Group, Inc., which is, in turn, a subsidiary of Fidelity National Financial, Inc. Chicago is also a subsidiary of CT Trust. Thus, Land Title and Chicago are each subsidiaries of or partly owned by separate companies who share the same parent company, Fidelity National Financial, Inc. [Ex. 5, Decl. of Barewald.]

- Adopt, although relevancy is questionable.

8. Between 33 and 44% of the board members of Land Title, since 2002, work or have worked for the shared parent company, Fidelity National Financial, Inc., or one of its subsidiaries. [Ex. 9, Decl. of Singer, Ex. D, E] Other than the shared parent company identity, Chicago has no corporate affiliation with Land Title.

- First sentence: Adopt, although relevancy is questionable.
- Second sentence: Delete. Insufficient evidence presented to support this finding.

9. *In Washington, there are a number of UTC's [sic] or "Independent title companies" that provide title insurance, typically in counties where national companies do not sell this directly. (Decl. Randolph) Chicago contracts with eleven UTC's [sic] in Washington state, to underwrite the risk that the title search was not done properly by the UTC, and hence, Chicago assumes liability to the ultimate consumer for any loss caused by the bad title search. The UTC's [sic] involved own or subscribe to a title plant in the counties where they operate, by law.*

- First sentence: Not supported by the evidence: "UTCs" do not "provide title insurance." "UTCs" are a designation found in title literature which has been applied to some title insurance agents. These title insurance agents, like Land Title, help their appointing insurers to provide that insurer's title insurance by, acting on the insurer's behalf, soliciting and effectuating the appointing insurer's title insurance. This sentence appears to recognize "UTCs" as something different than title insurance agents. Land Title is a title insurance agent under the Insurance Code, and as such, its actions in solicitation and effectuation of insurance policies on behalf of its insurer, Chicago, are governed by the Insurance Code; whether Chicago or Land Title choose to call Land Title a "UTC" or any other name. Replace with: In Washington, there are a number of title insurance agents which also are called in title insurance literature, "UTCs"; these "UTCs," such as Land Title, are title insurance agents appointed by a title insurer(s), such as Chicago, to solicit for and effectuate title insurance policies issued and underwritten by the title insurer, mainly in counties where national title insurers do not solicit and effectuate their title policies directly. [Decl. of Randolph; Exs. A-P of Decl. of Singer.]

- Second sentence: Unclear. UTCs do not "underwrite the risk that the title search was not done properly by the UTC." If duly appointed as insurance agents, they are authorized by the OIC only to solicit for and in the Chicago/Land Title situation effectuate and collect premiums for, the insurer's title insurance. In addition, in the Chicago/Land Title situation, Land Title performs the title search and, based on its findings, is authorized by Chicago -- again on behalf of Chicago - to determine whether to effectuate a Chicago title policy in each specific case. Therefore replace with: In Washington, title literature has informally designated certain entities, such as Land Title, as "UTCs" or "independent title companies." Whether they are designated as "UTCs" or not, these entities, like Land Title, are only recognized by the Insurance code -- and only authorized to represent title insurers -- if they

are licensed as title insurance agents by the OIC and are duly appointed by title insurer(s) to act on behalf of the title insurer to solicit for and, if authorized by the insurer, effectuate title policies on the insurer's behalf and collect premiums therefor. This arrangement occurs typically in counties, such as Mason and Kitsap counties, where title insurers do not solicit for and effectuate their title insurance policies directly, and Chicago has appointed some eleven of these entities to represent it in various counties throughout Washington state. [Decl. of Randolph.] As with any appointed insurance agent, whether the agent is designated a "UTC" or not, it derives its authority from being licensed by the OIC as a title insurance agent and then being appointed by a title insurer to act on the insurer's behalf; thereby Chicago has so appointed Land Title to solicit for Chicago's title insurance and is further authorized by Chicago, as permitted by the OIC, to effectuate Chicago's title insurance policies and to collect the premiums therefor, all on behalf of Chicago. In the situation at issue herein, Land Title also conducts the title search and, on behalf of Chicago, determines whether to effectuate a Chicago title policy in each specific case. If the title search was bad and there is a defect in title, then Chicago, as the insurer and underwriter of the title policy, must assume liability to the purchaser/policyholder for any loss as a result.

- Third sentence: Clarify, by replacing with: Additionally, Land Title conducts title searches in specific counties, where, as required by the OIC, it owns or subscribes to title plants in those counties where it operates. [Decl. of Randolph.]

10. *Chicago has no involvement in the title search with these contracted UTC's [sic], including Land Title. (Decl. Randolph) The UTC's [sic], including Land Title, market their own services without the involvement or financial contribution of Chicago; conduct the title searches using their own title plant; issue preliminary commitments for title insurance; address exceptions to the title identified in the preliminary commitment; and issue the title policies, all without Chicago's participation. (Decl. Randolph.)*

- First sentence: Adopt, although relevancy is questionable.
- Second and following sentences: Evidence does not support this finding. Replace with:
- UTCs, including Land Title, may market their own services, such as escrow services which are not part of Land Title's duties as an appointed insurance agent of Chicago, without the involvement or financial contribution of Chicago. As with other UTCs similarly situated to Land Title, as the only appointed agent of Chicago in the relevant counties and on behalf

of the only insurer it is authorized to represent, Land Title also, all on behalf of Chicago, solicits for Chicago's title insurance, issues preliminary commitments for Chicago's title insurance, addresses exceptions to the title identified in the preliminary commitment; and effectuates the issuance of Chicago's title policies, all without Chicago's participation. [Decl. of Randolph; Exs. A-P of Decl. of Singer.] Whether or not Chicago chooses to be involved or otherwise participate in these activities which are conducted on its behalf does not affect the relationship of Chicago as the appointing insurer and Land Title as its appointed agent. In addition, as is typical of many insurer-agent relationships, for each Chicago title policy which Land Title effectuates, Land Title is required to pay 12% of the gross premium charged for each Chicago Title policy to Chicago and retains the balance for itself, thereby receiving financial remuneration from Chicago. [Decl. of Randolph; "Issuing Agency Agreement.]"

11. *Chicago receives specific information from Land Title when it is called upon to insure a title policy: a policy number; the UTC's internal file number; the effective date of the policy; the type of policy; the premium paid; and the amount of liability. (Decl. Randolph) Unless the need arises, Chicago does not receive a copy of the preliminary commitment or any of the documents associated with the closing. (Decl. Randolph) The only function Chicago undertakes with Land Title is to insure the risk of later-discovered title imperfections.*

- First and second sentences: Adopt, although relevance is questionable except as to show the agency relationship between Chicago and Land Title.
- Third sentence: Clarify summary of the evidence by replacing with: Unless the need arises, Chicago does not receive a copy of the preliminary commitment or any of the documents associated with the closing. [Decl. of Randolph.] Other than receiving this specific information, Chicago has chosen to normally exercise little control or supervision over Land Title in the solicitation and effectuation of Chicago title insurance conducted by Land Title on Chicago's behalf. Instead, Chicago has chosen to allow Land Title as its appointed insurance agent to act on Chicago's behalf somewhat independently, even though as the appointing insurer Chicago could have exercised more control over the solicitation and effectuation activities of Land Title acting on Chicago's behalf. In fact, the only function Chicago has chosen to undertake in the insurance transaction in these counties is to insure the risk of later-discovered title imperfections (which it must do, as the insurer) and to receive

the pertinent details of each Chicago policy sold, and to examine certain specified information on a regular basis or if it chooses to do so. However, the fact that Chicago chose to be uninvolved in all of these other aspects of the insurance transaction being conducted by Land Title on Chicago's behalf does not relieve Chicago for responsibility for Land Title's solicitation or other activities conducted on Chicago's behalf.

12. *The "Issuing Agent" [sic] contract between Chicago and Land Title spells out specifically the relationship between the two companies. (Decl. Randolph, Ex. A) Chicago is the "principal" and Land Title is the "issuing agent" in the contract. The contract requires Land Title to use Chicago to underwrite its title insurance, although an addendum allows Old Republic Insurance to underwrite for Land Title as well. However, Land Title has used only Chicago for this function for some years and Old Republic has never accomplished the legal requirements to be able to underwrite for Land Title. (Decl. Stinger, and Ex. F) Pursuant to the contract, Land Title pays Chicago 12% of the fee charged for each title insurance policy written. (Decl. Randolph, Ex. A)*

- First and second sentences: Incorrect finding, not supported by the evidence. Replace with: The fact that Chicago and Land Title have a private "Issuing Agency Agreement" between them is not relevant to a determination of the relationship between the parties. The OIC's disciplinary action taken against Chicago which is the subject of this appeal is an administrative, regulatory action, not a civil or criminal action. By virtue of Chicago's appointment of Land Title to act as its agent, it is the Insurance Code which determines the relationship of Chicago as insurer/principal and Land Title as appointed agent/agent. The Insurance Code defines the parties to a title insurance transaction including what entity may act on behalf of the insurer and what types of activities that entity may perform. A private contract between the insurer and the appointed insurance agent does not alter the rights and responsibilities set forth in the Insurance Code.

- Third and fourth sentences: Adopt.

- Fifth sentence: Clarify by replacing with: Pursuant to the "Issuing Agency Agreement," and as is fairly common in insurer-agent transactions, Land Title collects the premium for the title insurance, in the amounts set by Chicago, and then pays a percentage of the gross premium charged for each title policy – here it is 12% by agreement - over to Chicago. [Decl. of Randolph; "Issuing Agency Agreement."]

13. *The Issuing Agent [sic] contract gives Land Title no authority to advertise or market for Chicago, and the contract specifically forbids Land Title from using Chicago's name in any advertising or printing, except to indicate that Chicago is the underwriter for the title insurance policies. (Decl. Randolph, Ex. A) Land Title employs its own sales personnel to market its services to potential customers in Kitsap County. (Decl. Kennedy) The marketing materials used by Land Title do not mention its relationship to Chicago. (Decl. Kennedy, Ex. A-E) However, the website of Land Title does have a hyperlink to "National Website" which takes the user to Chicago's website. (Decl. Singer, Ex. H) Otherwise, the Land Title website makes no mention of its underwriter or any connection to Chicago.*

- First sentence: Finding not supported by the evidence. Replace with: As Chicago's duly appointed agent under the Insurance Code, Land Title is given the specific right, without also being required to have specific authorization from the appointing insurer elsewhere, to solicit on behalf of Chicago. Further, as specifically allowed under the Insurance Code if the appointing insurer authorizes the appointed agent, Land Title was in fact given the authority to effectuate Chicago's title policies and also to collect the premiums therefor (in the amounts prescribed by Chicago and as Chicago has had to file with the OIC) in the "Issuing Agency Agreement." While not a requirement, it is noted that a review of the situation between these parties and the "Issuing Agency Agreement" shows that, as Chicago's exclusive agent and as the only insurer for whom Land Title can solicit and effectuate title policies, the private "Issuing Agency Agreement" does in fact give Land Title the right to solicit for Chicago's title insurance – by having the right to name Chicago in its advertising and printing, among other activities. Without Chicago, Land Title would have no title insurance to sell and without Land Title, Chicago, because it has chosen not to solicit directly in these counties, Chicago would have no one to solicit for its title policies.

- Second through fifth sentences: Adopt, although not relevant to the issue herein.
- Add sixth sentence: Therefore, while the marketing materials used by Land Title may not always indicate its relationship to Chicago [Decl. of Kennedy], under the terms of the "Issuing Agency Agreement" Land Title may use the name of Chicago in its advertising and printing. ["Issuing Agency Agreement".] Further, since Chicago is the only insurer which Land Title is appointed to solicit for (Finding No. 12 above) - and is allowed to represent under its "Issuing Agency Agreement" - Land Title is clearly advertising for Chicago's title

insurance. In fact, only about 28% of Land Title's total revenue comes from escrow services [Decl. of Kennedy at 5; Initial Finding of Fact 25]; all the rest of its revenue, 72% - comes from selling Chicago's title insurance policies. Further, while the Land Title website may not mention its underwriter or any connection to Chicago, it does include a hyperlink to "National Website" which takes the user to Chicago's website. [Decl. of Singer, Exs. A-P.] Such activities clearly constitute solicitation by Land Title for Chicago's title insurance. All solicitation of title insurance by Land Title was done on behalf of Chicago, as Land Title's only appointing insurer.

14. *Chicago does not pay any of the business expenses of Land Title, nor pay for any of its services.*

- Delete as misleading. Replace with: It cannot be found that Chicago does not pay any of the business expenses of Land Title, nor pay for any of its services: under the terms of the "Issuing Agency Agreement," Land Title collects the premiums for each Chicago title policy it effectuates, then sends just 12% of the gross premium for each policy to Chicago. [Decl. of Randolph; Issuing Agency Agreement.]

15. *In the contract, Chicago retains the right to examine the records of Land Title "which relate to the title insurance business carried on by Land Title for Chicago," including accounts, books, ledgers, searches, abstracts, and other related records." (Decl. Randolph, Ex. A) The contract also requires that Land Title preserve for ten years the documents upon which "title assurances and underwriting decisions were made, including searches, worksheets, maps, and affidavits." (Decl. Randolph, Ex. A) Although permitted by the contract, Chicago has not reviewed any of the records of Land Title during the period at issue here.*

- First two sentences: Adopt. Although not necessary for this analysis, this shows the great control Chicago had over Land Title (whether or not it was exercised).
- Third sentence: Delete. This sentence is irrelevant to the issue herein; if Chicago has not chosen to review any of the records created relative to applications for Chicago title insurance that fact does not affect Chicago's status as the appointing insurer. Revise by replacing with: Therefore Chicago had the right during the period at issue herein to review the records created preliminary to sales of Chicago's title policies and at other times, solely by virtue of its position as the appointing insurer of Land Title. While irrelevant to the issue herein, Chicago was also permitted under the "Issuing Agency Agreement" to review those

records and to exercise other significant controls over Land Title. However, Chicago chose not to review any of these records or conduct many of the other activities of control it could have exercised over Land Title, either as its appointing insurer or in the "Issuing Agency Agreement" during the period at issue here. [Decl. of Randolph; "Issuing Agency Agreement."]

16. *Land Title is required by the contract to comply with all laws and regulations, and to notify Chicago of any alleged violations or complaints about Land Title's compliance with such laws and regulations. The OIC did not notify or include Chicago in its investigation of Land Title for the inducement violations at issue, but Land Title notified Chicago of the investigation and its results, as called for in the contract.*

- Adopt, although of questionable relevance to the issue herein. Add sentence: Simply because in the "Issuing Agency Agreement" Land Title has committed to comply with all laws and regulation and to notify Chicago of any alleged violations or complaints about Land Title's compliance with them does not affect Chicago's status as the appointing insurer and Land Title its appointed agent. Although not required in the analysis herein, in fact this provision supports the principal/agent relationship created under the Insurance Code, evidencing the principal's concern that its agent comply with applicable laws and regulations (which are imposed upon Land Title by the Insurance Code based upon its status as an insurance agent) and requiring that its agent notify the principal of any significant occurrences with regard to the agent's compliance.

17. *In the contract, loss is allocated between the two companies, with Chicago liable to the customers of Land Title for any failures of the title search, and Land Title liable for everything else. (Decl. Randolph, Ex. A) The contract requires Land Title to indemnify Chicago against loss from Land Title's actions of fraud, conspiracy, or failure to comply with all Federal and State laws. (Decl. Randolph, Ex. A Sec. 9(B)(8)).*

- First sentence: Incorrect recitation of the actual wording of the "Issuing Agency Agreement." Replace with: The insurance customers are those of Chicago, which sells, through Land Title, Chicago title policies to those customers. In the "Issuing Agency Agreement," loss is allocated between Chicago and Land Title, with the insurer being liable, as the insurer, to its policyholders for any failures of the title search, and Land Title being "responsible to [Chicago] for all loss, cost or damage, ... caused by ... 9.B(1) Failure of

Issuing Agent [Land Title] to comply with the ... rules, regulations or instructions given to Issuing Agent [Land Title] by Principal [Chicago] and nearly all of Land Title's other activities ... and also for (8) Allegations, against either [Chicago] or [Land Title] by reason of the activities of [Land Title] ... or failure to comply with any Federal or State Law or regulation ... [Decl. of Randolph: "Issuing Agency Agreement at 9(B)(1)-(8)."] Therefore, while not necessary to the analysis of the issue herein, the wording of the "Issuing Agency Agreement" clearly indicates that Chicago - exercising control over its agent - requires that Land Title comply with instructions given by Chicago to Land Title, and applicable laws, or face liability to Chicago for that failure. Further, as indicated, Chicago provides for the possibility that allegations might be made against Chicago for the acts of Land Title in violating federal or state laws or regulations including the Illegal Inducement Regulation. ["Issuing Agency Agreement at 9.B(8)."]

- Second sentence: Adopt, although relevance is questionable, and add: However, the fact that Chicago may be attempting in its "Issuing Agency Agreement" to somehow evade responsibility to the OIC or others for the acts of Land Title by requiring that Land Title indemnify Chicago against loss from Land Title's fraud, conspiracy or "failure to comply with Federal or State Law or regulation," including the Illegal Inducement Regulation, is irrelevant.

18. *Land Title's authority under the contract is limited to accepting and processing applications for title insurance in accordance with prudent underwriting practices, and issuing the title insurance policies underwritten by Chicago. Land Title is required to use forms provided by Chicago for these functions.*

- First sentence: Delete as not supported by the evidence presented. In earlier findings, the ALJ finds that Chicago conducts no activities at all in solicitation of its own title insurance and now she finds that Land Title does not solicit for Chicago's title insurance either. Someone has to solicit for Chicago's title insurance, and it has been found above that in fact Land Title does have the authority under the Insurance Code (and indeed under the "Issuing Agency Agreement" as well) to solicit for Chicago's insurance. Also, Land Title does not "issue" the title policies; rather, Chicago issues its own title policies but has appointed Land Title to issue those title policies on Chicago's behalf. Replace with: Land Title is authorized by the Insurance Code, as the appointed agent of Chicago, to solicit on behalf of Chicago for

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

- Second sentence: Adopt, although relevant only to show that Chicago exercises control over Land Title in requiring Land Title to use Chicago's forms in effectuating Chicago's title policies.

19. *The contract specifically provides that Land Title, "...shall not be deemed or construed to be authorized to do any other act for principal not expressly authorized herein." (Decl. Randolph, Ex. A)*

- First sentence: Adopt, although this finding is not particularly relevant, and change citation to [Decl. of Randolph; "Issuing Agency Agreement".]

20. *Chicago has no right to control the actions of Land Title other than as specified in the contract, directly relating to Land Title's title search activity. Further, there is no evidence that Chicago did control the actions of Land Title, especially the marketing practices of Land Title. The President of Land Title denies that Chicago controlled or could control its actions in any area other than the issuing of title insurance.*

- First sentence: This finding is entirely erroneous, not supported by the evidence and misconstrues the evidence necessary to consider when determining a principal-agent relationship and ensuing responsibility of the principal for acts of its agent. Again, as found above, the insurer-agent relationship was created by the voluntary acts of Chicago and Land Title in Chicago appointing Land Title as its insurance agent with the OIC, with the resulting ability of Chicago to control virtually all of the actions of Land Title concerning Chicago's insurance. Further, while not particularly relevant, this finding is clearly not even supported by the wording of the "Issuing Agency Agreement". Even if it did govern therein, Chicago clearly retains the right to control many of Land Title's activities including terminating Land Title as its agent. See Finding 17 above. Replace with: Chicago, as the appointing insurer, had the right to control the actions of Land Title, as its appointed insurance agent, in all activities conducted by Land Title on behalf of Chicago, most specifically, solicitation and effectuation of Chicago title policies including Land Title's compliance with the Illegal Inducement Regulation in its solicitations. See Finding 17 above. Moreover, while not necessary to find herein, even under an analysis of common law agency and under the

"Issuing Agency Agreement", Chicago had a clear right to control the actions of Land Title in solicitation and effectuating of Chicago's title insurance. ["Issuing Agency Agreement"]. Further, Chicago could have terminated Land Title's agreement appointment at any time.

- Second sentence: Irrelevant statement. Replace with: The evidence shows that Chicago may have chosen not to oversee or otherwise control Land Title's acts, conducted on behalf of Chicago, in solicitation of Chicago's title insurance either as the appointing insurer or as a common law principal. However, the fact that Chicago may have chosen to look the other way and not participate or control its agent's activities in this area does not relieve Chicago from being accountable for the acts of its appointed agent.

- Third sentence: Delete. Not supported by the evidence, and conclusory. As mentioned in preliminary comments above, it is noted that the OIC moved to strike all statements in the Kennedy Declaration and others based upon cited statutory and case law, before the ALJ [OIC's Response Brief to Chicago's Motion for Summary Judgment, pg. 13] but, as discussed above, the ALJ's Initial Order fails to show that she considered this motion. The statements which were the subject of the OIC's motion to strike are now reflected as findings in Findings in this sentence and in parts of Findings 21, 23 and 24. While there is, indeed, no initial decision on the OIC's motion to strike and therefore no initial decision to review, in this situation it is of no consequence for the reason that this third sentence, and the parts of the later findings, are to be given no weight: it has been found above that the relationship between Chicago and Land Title as appointing insurer and appointed agent, along with their statutory rights and responsibilities, does not support this statement. (Additionally, although not particularly relevant except to lend support to the fact that Chicago as the insurer had control over Land Title, in the "Issuing Agency Agreement" Chicago could also have controlled many of Land Title's acts on Chicago's behalf.)

21. *The OIC has presented no evidence that Chicago pays for any of the expenses of Land Title, or is involved in its marketing or other business conduct. There is no evidence to counter the declarations offered by Chicago which show it does not have any control or right to control the operational conduct or decisions of Land Title.*

- First sentence re expenses: Erroneous finding not based on the evidence. Replace with: As found in Finding 14 above, it cannot be found that Chicago does not pay any of the business expenses of Land Title, nor pay for any of its services: under the terms of the

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

- First sentence re Chicago's involvement in Land Title's "marketing or other business conduct." Delete as redundant and an incorrect statement of the clear weight of the evidence. See Findings 17 and 20 above.
- Second sentence: Delete as redundant and an incorrect statement of the clear weight of the evidence. See Findings 17 and 20 above.

22. *Extensive discovery has been undertaken in this matter, with large numbers of interrogatories answered by Chicago. (See Exhibits, Decl. Singer) Further, the OIC has authority to demand records from Chicago and Land Title, so there should be no evidence exclusively in the hands of Chicago or Land Title, to which the OIC has not had full access. A pre-hearing conference was held in this matter March 31, 2008, with discovery on-going since that time. No motions have been made to compel discovery of documents or other evidence about the involvement of Chicago in the business of Land Title.*

- Adopt, although relevance of this finding is questionable.

23. *The uncontested evidence shows that Chicago has no control, input in, or oversight of Land Title's business or marketing practices or procedures. Chicago does not provide any advice to Land Title about compliance with the laws, including the inducement laws. (Decl. Kennedy.)*

- First sentence: Delete. This finding is redundant and is an incorrect statement of the clear weight of the evidence. Replace with: As found above, Chicago, as the appointing insurer, had at all pertinent times, the right to control Land Title, its appointed agent, in all activities conducted on behalf of Chicago. These activities include, as found above, all solicitation and effectuation of Chicago title insurance policies. This right to control the activities of Land Title in soliciting on its behalf specifically includes Chicago's right to control Land Title's compliance with the Illegal Inducement Regulation and statute, a well known problem which had been occurring for some time in the title industry and had been addressed many times by the OIC in its efforts to advise title insurers and their agents for whom they were responsible, of the need for strict compliance with that regulation. [Decl. of Tompkins, with Bxs.] The fact that Chicago and Land Title entered into a private "Issuing

Agency Agreement" which appears to attempt to transfer responsibility from Chicago to Land Title for compliance with all applicable statutes and regulations, and many other activities, does not relieve Chicago of its responsibility for the acts of Land Title's and certainly for Land Title's violations of the Illegal Inducement Regulation and statute.

- Second sentence: Adopt, although relevance is questionable.

24. *Land Title does not market "on behalf" of Chicago, but only for itself. Chicago does not pay Land Title's expenses, nor play any role or exercise any control over Land Title's business practices. Chicago does not provide any advice to Land Title regarding compliance with the inducement laws. Chicago has no oversight of any of the marketing practices or procedures of Land Title. (Decl. Kennedy)*

- First sentence: Not based upon a correct statement of the weight of the evidence. Replace with: As set forth in the Insurance Code, as Chicago's appointed insurance agent, Land Title markets for Chicago's title insurance on behalf of Chicago.

- Second sentence: Redundant and is an incorrect statement of the clear weight of the evidence. See Findings 14 and 17 above.

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

Washington involved in widespread violations of the Illegal Inducement Regulation. [Decl. of Tompkins, w/ Exs.] See Findings 26 – 30 below.

25. *In a typical year, about 28% of Land Title's revenue comes from the provision of escrow services, which are independent of its relationship with Chicago. Land Title keeps 100% of its earnings from escrow services. (Decl. Kennedy)*

- Adopt, although relevancy of this finding is questionable.

26. *The OIC undertook a study of the title insurance business in Washington in 2006, and found widespread violations of the inducement laws by the major companies operating in Washington. Chicago was a violator, although the OIC's report notes that Chicago made "attempts" to comply with the law. (Decl. Tompkins, and Ex. A) The investigation and report focused on four major companies providing title insurance in Washington, including Chicago. Land Title was not one of the title companies investigated or mentioned in the report.*

- First three sentences; Adopt.
- Fourth sentence: Delete. Not relevant. Having not had its agent named or investigated in an investigation report does not relieve Chicago from responsibility for this agent.

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

- Adopt, and add: Thereby, although it was not a precondition to the OIC taking enforcement action against title insurers for violations of the Illegal Inducement Regulation by their agents, the OIC attempted to ensure that both title insurers and their agents were fully aware of the Illegal Inducement Regulation and the liability of title insurers for violations by their agents. [Decl. of Tompkins, Ex. B.]

28. *The Advisory does not state that the underwriting insurance companies (insurers) will be liable for the violations of separately owned and operated underwritten title companies (UTC's), by virtue of the contracts between the two companies for underwriting services by the underwriting insurance company. No mention is made of the UTC's, and the relationships between these underwritten title companies and the insurers, in the Advisory letter.*

- First sentence: Delete. Sentence incorrectly assumes that a "UTC" or "underwritten title company," which label is not even recognized under the Insurance Code, is to be treated differently than any other title insurance agent. Once again, Land Title is a duly appointed insurance agent of Chicago, and thereby authorized to solicit and effectuate insurance contracts on Chicago's behalf. Per Findings 24 and 27 above, said Advisory was issued simply to assist all Washington insurers and their title insurance agents. Replace with the following: The Advisory was issued simply to assist title insurers and their agents with compliance with the illegal inducement laws and further advised title insurers and their agents that title insurers would be liable for violations of the inducement laws committed by their agents. [Decl. of Tompkins, w/ Exs.] The fact that Chicago and Land Title might choose to refer to Land Title as a "UTC" or any other chosen designation makes no difference: Land Title is an appointed insurance agent of Chicago and, as advised in the OIC's communications with Chicago and other title insurers, title insurers would be held responsible for the acts of their agents in violating the Illegal Inducement Regulation. Chicago cannot possibly understand itself not to be a title insurer, or Land Title not to be Chicago's appointed title insurance agent. [Decl. of Tompkins, incl. Technical Assistance Advisory attached as Ex. B thereto.] The existence of private contracts between title insurers and their agents, and/or the parties' designation of a title insurance agent as a "UTC," does not change the identity of the "UTC" as an appointed title insurance agent acting on behalf of the appointing title insurance company, nor does the designation of "UTC" affect the liability of title insurers for their agents' violations of the Illegal Inducement Regulation and statute, or of any other statutes and regulations found in the Insurance Code.

29. In 1989, the OIC also sent a letter to Chicago in Tacoma, Washington, stating specifically that the letter was to be given to "each of your branch offices and to each of your agents." The letter further elaborated that, "Title insurers are liable for any activity conducted by their agents regarding this regulation whether the title insurers have knowledge of the activity or not." The regulation being referred to is the inducement regulation, limiting the amount that can be spent on "items of value" given to middle-persons such as builders and real estate agents/brokers, as inducements for their business. (Decl. Singer, Ex. M.) This letter makes no mention of the UTC's that Chicago might be using for title business in Washington.

- First two sentences: Adopt, and add sentence: Therefore, in 1989 Chicago was directly

advised by the OIC that title insurers are liable for any acts of their agents relative to compliance with the Illegal Inducement Regulation whether the title insurer has knowledge of the activity or not. [Ex. M to Decl. of Singer.] Even so, in 2006 the OIC investigation and report [Decl. of Tompkins, w/ Exs.] found that Chicago was one of four title insurers found to be committing widespread violations of the Illegal Inducement Regulation. [Decl. of Tompkins, w/ Exs.]

- Third sentence: substitute “middle-persons” with accepted designation and clarify sentence, by replacing sentence with: The regulation being referred to is the Illegal Inducement Regulation, which limits the amount that a title insurer or title insurance agent can spend on “items of value” given to potential producers of title insurance business such as builders and real estate agents/brokers, as inducements for referring title insurance business to those title insurers. [Ex. M to Decl. of Singer.]

- Fourth sentence: Delete. Once again, this sentence indicates an incorrect understanding of the Insurance Code and regulations, and makes an assumption that for some reason the label of “UTC” or “underwritten title company” privately assigned to Land Title changes the insurer-agent relationship. This is not a correct assumption: even if warning by speeches and correspondence were a precondition to the OIC’s enforcement action, in the 1989 letter which OIC sent to Chicago in Tacoma, Washington, there is no need to differentiate between Chicago’s branch offices, Chicago’s agents and “UTCs.”

- Replace with: Contrary to the assertions of Chicago in this proceeding, there are no such different entities as “UTCs” or “underwritten title companies.” Land Title and other similar entities exist as they were created by their voluntary compliance with the Insurance Code: since March 5, 1993, and because it chooses not to solicit and effectuate Chicago title policies directly in Mason, Kitsap, Jefferson and Clallam counties, Chicago has chosen to appoint Land Title as a title insurance agent to act on Chicago’s behalf to solicit and effectuate Chicago title policies in those counties. Because Chicago has appointed Land Title to act on its behalf in solicitation of Chicago’s title insurance in these counties, Chicago is responsible to the OIC as if Chicago had itself committed the subject violations of the Illegal Inducement Regulation, no matter what other label Chicago or Land Title, or others, or the private “Issuing Agency Agreement” may assign to Land Title.

30. *The OIC also addressed the Washington Land Title Association in September, 1989,*

about the on-going violations of the inducement laws, to put the title companies and agents present on notice that further violations would not be tolerated. (Decl. Singer, Ex. M) Chicago is not a member of that organization.

- First sentence: Adopt.
- Second sentence: Delete, as whether or not Chicago was a member of the Washington Land Title Association is irrelevant. Replace with: The OIC's efforts, through letter to Chicago, by extensive investigation of Chicago and ensuing report of Chicago's violations of the Illegal Inducement Regulation, Technical Assistance Advisory, and by presentation before Washington Land Title Association were voluntary efforts by the OIC to further inform title insurers and agents -- including Chicago - of the Illegal Inducement Regulation and the consequences of their or their agents' violations of that Regulation. Performance of these efforts by the OIC was not a precondition to enforcement action against title insurers or their agents. [Decl. of Tompkins, w/ Exs.] Even so, Chicago had been aware of the Illegal Inducement Regulation and its liability for its agents' violation of the Regulation for many years before the time period at issue herein. [Decl. of Tompkins, w/ Exs.]

31. In August 2005, Chicago issued a letter to the OIC accepting liability up to \$200,000 for any "fraudulent or dishonest acts by Land Title," specifying this was to meet the requirements of RCW 48.29.155, and was limited, "only in connection with those escrows for which [Land Title] issues a title insurance commitment or policy of Chicago." (Decl. Singer, Ex. I)

- Adopt.

32. After the 2007 investigation of Land Title was completed, the OIC sent a proposed Consent Decree to Chicago to sign, agreeing that Chicago would pay a fine, and monitor and control the future behavior of Land Title in regard to the inducement regulation. Because Chicago and Land Title agree that Chicago has no control over Land Title's actions or business conduct, and never has had, Chicago declined to enter into the proposed Consent Decree, believing it would be legally unable to fulfill the terms of that agreement.

- First sentence: Adopt.
- Second sentence: Delete. There is insufficient evidence in the record to support this finding.

33. Add new finding: It has been found in the Final Findings of Fact above that, based on the weight of the evidence presented, in order to market its title insurance policies in Mason,

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

CONCLUSIONS OF LAW

1. *The Office of Administrative Hearings and the undersigned Administrative Law Judge have jurisdiction over the parties and subject matter herein pursuant to RCW 48.04.010(5), Chapter 34.05 RCW, and Chapter 34.12 RCW. The provisions of Chapter 48 RCW, the Insurance Code, are applicable here.*

- Adopt, but clarify and update by replacing with Following Receipt of Demand for Hearing from Chicago, on request of Chicago and using discretion pursuant to RCW 48.04.010(5), the OIC referred this matter to the Office of Administrative Hearings, where Administrative Law Judge Cindy L. Burdue (ALJ) was assigned. The Office of Administrative Hearings and the assigned ALJ had jurisdiction over the parties and subject matter herein pursuant to RCW 48.04.010(5), Chapter 34.05 RCW and Chapter 34.12 RCW

and regulations applicable thereto. The ALJ properly conducted prehearing activities, presided over the hearing and entered Initial Findings of Facts, Initial Conclusions of Law and Initial Order (Initial Order). Pursuant to Chapter 34.05 RCW and regulations applicable thereto, said Initial Order, along with the transcript of the proceedings and the entire hearing file, was transferred to the undersigned Review Judge for review and entry of Final Findings of Facts, Final Conclusions of Law and Final Order (Final Order). As stated above, on November 19, 2008, the OIC filed OIC's Brief in Support of Review of Initial Order and Declaration of Alan Michael Singer with the undersigned; on December 10, 2008, Chicago filed its Reply to the OIC's Brief in Support of Review of Initial Order; and at the request of the undersigned, on February 5, 2009, the parties presented oral argument on review before the undersigned, presenting detailed argument as to whether the Initial Order Granting Summary Judgment should be upheld or set aside. Further, at the outset of the parties' oral argument on review before the undersigned the parties agreed that the undersigned's review of the Initial Findings of Facts, Conclusions of Law and Initial Order should be de novo; said review is indeed de novo as provided for as provided for in RCW 34.05.464, WAC 284-02-080.

2. *Summary judgment may be granted if the written record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as matter of law. WAC 10-08-135. The evidence presented, and all reasonable inferences from the facts, must be viewed in the light most favorable to the nonmoving party. Herron v. King Broadcasting, 112 Wn.2d 762, 776 P.2d 98 (1989). Where reasonable minds could reach but one conclusion from the admissible facts and evidence, summary judgment should be granted. White v. State, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).*

- Adopt.

3. *The initial burden of showing the absence of material fact rests with the moving party. Young v. Key Pharmaceuticals, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Only if the moving party meets this initial showing will the inquiry shift to the non-moving party. Herron v. King Broadcasting, 112 Wn.2d 762, 776 P.2d 98 (1989). In that case, the non-moving party must "counter with specific factual allegations revealing a genuine issue of fact. . ." Int'l. Union of Bricklayers v. Jaska, 752 F.2d 1401, 1405 (9th Cir. 1985).*

- Adopt.

4. *The existence of a principal-agent relationship is a question of fact unless the facts are undisputed. O'Brien v. Hades, 122 Wn. App 279, 93 P.3d 930 (2004). Where there is no dispute as to the facts, and no genuine issue of material fact exists, the question of agency is a matter of law that may be decided on summary judgment. Airborne Freight v. Str. Paul Marine Insurance Co., 491 F. Supp.2d 989 (W.D. WA 2007).*

- Delete. This Conclusion relies on case law describing the principles of common law agency. This Conclusion ignores the overriding means of creating a principal-agent relationship in the insurance industry, namely, the existence of a statutory designation of the insurer-insurance agent relationship set forth in the Insurance Code. Replace with the following: RCW 48.17.160(1) provides: (1) Each insurer on appointing an agent in this state shall file written notice thereof with the commissioner on forms as prescribed and furnished by the commissioner, and shall pay the filing fee therefore as provided in RCW 48.14.010. The commissioner shall return the appointment of agent form to the insurer for distribution to the agent. (2) Each appointment shall be effective until the agent's license expires or is revoked, the appointment has expired or written notice of termination of the appointment is filed with the commissioner, whichever occurs first.

Further, RCW 48.17.010 provides: "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.

Land Title has been licensed by the OIC as an insurance agent for many years. Further, per Finding No. 4, on March 5, 1993 Chicago voluntarily and properly filed an Appointment form with the OIC, as prescribed and furnished by the OIC, legally appointing Land Title as its appointed title insurance agent. Pursuant to RCW 48.17.010, by virtue of Chicago's appointment of Land Title as its appointed agent, Land Title was specifically authorized by Chicago to solicit applications for insurance on [Chicago's] behalf. It has been further found above that, as not only Chicago's appointed agent but Chicago's exclusive agent in these counties, and being only appointed to solicit on behalf of Chicago, Land Title did, in fact and at all times pertinent hereto, solicit on behalf of Chicago including committing the acts which the parties herein have stipulated for purposes of this motion to be violations of the Illegal Inducement Regulation and statute.

5. *The burden of proving that an agency relationship exists falls on the party asserting that relationship. Id.*

- Adopt.

6. *Insurance Code, Chapter 48 RCW: Title 48 RCW constitutes the Insurance Code.*

Several definitions in the Code may be useful in the analysis which follows.

RCW 48.01.020 states, "All insurance and insurance transactions in this State, or affecting subjects located wholly or in part or to be performed within the state, and persons having to do therewith are governed by this code."

RCW 48.01.050 defines "insurer" as every person engaged in the business of making contracts of insurance. (Omitting exceptions that do not apply here)

RCW 48.17.010 defines "agent" as 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.

Chapter 48.29 RCW pertains specifically to title insurers. The provisions of this statute are not in controversy here.

RCW 48.11.100 defines title insurance. Title insurance is insurance of owners of property or other having an interest in real property, against loss by incumbrance [sic] or defective titles, or adverse claim to title, and associated services.

- Entire Conclusion 6: Delete. Not a Conclusion of Law.

7. *The Inducement statutes and regulation at issue: RCW 48.30.150 is a statute prohibiting or limiting inducements paid or given for the purpose of soliciting insurance business, and it states:*

No insurer, general agent, agent, broker, solicitor, or other person shall, as an inducement to insurance, or in connection with any insurance transaction, provide in any policy for, or offer, or sell, buy, or offer or promise to buy or give, or promise, or allow to, or on behalf of, the insured or prospective insured in any manner whatsoever:

(1) Any shares of stock or other securities issued or at any time to be issued on any interest therein or rights thereto; or

(2) Any special advisory board contract, or other contract, agreement, or understanding of any kind, offering, providing for, or promising any profits or special returns or special dividends; or

(3) Any prizes, goods, wares, or merchandise of an aggregate value in excess of twenty-

five dollars.

This section shall not be deemed to prohibit the sale or purchase of securities as a condition to or in connection with surety insurance insuring the performance of an obligation as part of a plan of financing found by the commissioner to be designed and operated in good faith primarily for the purpose of such financing, nor shall it be deemed to prohibit the sale of redeemable securities of a registered investment company in the same transaction in which life insurance is sold.¹

- Delete. Not a Conclusion of Law.

8. *Unfair practices applicable to title insurers and their agents. The regulation at issue is WAC 284-30-800, which states, in part:*

(1) RCW 48.30.130 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. . .

(2) It is an unfair method of competition and an unfair and deceptive act or practice for a title insurer or its agent, directly or indirectly, to offer, promise, allow, give, set off, or pay anything of value exceeding twenty-five dollars, calculated in the aggregate over a twelve-month period on a per person basis in the manner specified in RCW 48.30.140(4), to any person as an inducement, payment, or reward for placing or causing title insurance business to be given to the title insurer.

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

¹ RCW 48.29.210 is a similar statute, making reference directly to title insurers and title agents and their employees, representatives, or agents, and forbidding the giving of any direct or indirect kick backs, fees, or other thing of value as an inducement, payment or reward for title insurance business; the statute also prohibits these persons from giving such things of value to a "person in a position to refer or influence the referral of title insurance business to either the title company, title insurance agent, or both."

- Delete. RCW 48.29.210 did not become effective until June 12, 2008; therefore because the illegal acts were done between December 1, 2006 and March 31, 2007 [Notice of Hearing; Amended Notice of Hearing] this statute is irrelevant.

(4) This section does not affect the relationship of a title insurer to 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 thestatutes, RCW 48.30.130 and 48.30.150.

- Delete. Not a Conclusion of Law.

9. **The parties' positions:** *The OIC urges that traditional principles of agency law do not apply in this case. Rather, the inducement statute and regulation, along with the broad regulatory powers of the OIC, are sufficient to authorize the OIC to hold Chicago liable for the illegal actions of Land Title. In the alternative, the OIC urges that Chicago can be held liable for the actions of its agent, Land Title, even applying traditional agency principles, on the theory of apparent authority. The issue whether Chicago had any "control" over Land Title is not relevant to the analysis, according to the OIC.*

- First sentence: Adopt, although not a Conclusion of Law.
- Second sentence: Delete. This sentence is not a correct statement of the OIC's position: a reading of the OIC's briefs filed both before the ALJ and before the undersigned⁶ on review indicates that the OIC is not arguing that *the inducement statute and regulation, along with the broad regulatory powers of the OIC, are sufficient to authorize the OIC to hold Chicago liable for the illegal actions of Land Title.* Rather, the OIC has argued in its briefs before the ALJ and before the undersigned that the traditional, or common law, principles of agency law do not apply in this case because, specifically in the insurance industry, the Legislature, in RCW 48.17.160, has set forth a statutory means of creating principal-agent relationships. Therefore replace with: The OIC argues that traditional, or common law, principles of agency law do not apply in this case. Rather, the OIC argues that many years ago, in enacting RCW 48.17.160, the Legislature created a specific statutory means of creating principal-agent relationships between insurance companies and their agents, and the Legislature also defined the specific activities which the agent may perform on behalf of the insurer once the principal-agent relationship is created. (The Legislature also provided for specific means to notify the insurer and agent of the perfection of the principal-agent relationship and specific means of terminating the principal-agent relationship.) All insurers, whether title insurers or other types of insurers, must comply with these specific statutory requirements in order to create the principal-agent relationship and thereby authorize the agent to act on the insurer's behalf.

- Third sentence: Adopt.
- Fourth sentence: Adopt.

10. *To the contrary, Chicago argues that traditional agency law principles apply, and that under these principles Chicago is not liable for the actions of Land Title. Chicago argues that the primary hallmark of an agency relationship is the principal's right to control the actions of the agent, and as that right is absent here, Chicago is not liable for the actions of Land Title. Those actions cannot be imputed, and Chicago is not "vicariously liable" for the illegal acts of Land Title, according to Chicago Title:*

- Adopt, although not a Conclusion of Law.

11. *After careful review of the law and thorough review of the memoranda and Exhibits submitted by each party, I conclude that there is no genuine issue of material fact in dispute as to the parties' relationship or the parties' actions within that relationship, and as a matter of law, Chicago is entitled to summary judgment. The OIC has not shown it has the legal authority to hold Chicago liable for the illegal conduct of Land Title, an underwritten title company agent which Chicago contracted with for the purpose of issuing title policies. Of note, the violation of any provision of the Insurance Code is a gross misdemeanor, RCW 48.01.080.*

- First sentence: Delete. Conclusion is not based upon either correct Findings of Facts or a correct application of the correct Facts to the correct laws. Replace with: The undersigned has carefully reviewed the briefs of the parties filed with the ALJ, the evidence presented by the parties at hearing before the ALJ, the transcript of the hearing before the ALJ, the briefs and oral arguments of the parties before the undersigned on review and the entire hearing file. The undersigned concludes that, based upon Finding of Fact No. 4 above, and pursuant to RCW 48.17.160, on March 5, 1993, and continuing during all times pertinent hereto, Chicago voluntarily chose to appoint Land Title as its exclusive agent to act on Chicago's behalf soliciting Chicago policies in those four counties where Chicago does not solicit directly.

Specifically, pursuant to the requirements set forth in RCW 48.17.060 and 48.17.010, as cited in Conclusion 4 above, Chicago properly complied with the legal requirements set forth in RCW 48.17.060 by filing the required written Notice of Appointment with the OIC on forms prescribed and furnished by the OIC, paid the filing fee therefore, received the filed Notice of Appointment back from the OIC and retained said perfected appointment at all

times pertinent hereto. Thereafter, RCW 48.17.010 provides that "Agent" means any person appointed by an insurer to solicit applications for insurance on its behalf [and] [if] authorized to do so, an agent may effectuate insurance contracts. An agent may collect premiums on insurances so applied for or effectuated. Therefore, at the time Chicago appointed Land Title as its agent, pursuant to the facts found above and pursuant to RCW 48.17.060 and 48.17.010, as a matter of law a principal-agent relationship was created between Chicago and Land Title and continuing at all times pertinent hereto. As Chicago's agent, Land Title was specifically authorized by RCW 48.17.010 to solicit applications for insurance on [Chicago's] behalf and, as found in Finding No. 4 above, solicitation for insurance includes making payments to producers of title business as contemplated by the Illegal Inducement Regulation, WAC 284-30-800. Further as found above, by virtue of this principal-agent relationship, Land Title was authorized to solicit for Chicago's insurance on behalf of Chicago, and did in fact solicit for Chicago's insurance on behalf of Chicago, including making gifts of things of value to producers of title business as contemplated by the Illegal Inducement Regulation, WAC 284-30-800.

• Second sentence: Delete. This sentence is not based upon correct findings of facts. As found in Finding of Fact No. 4 above, there is no distinction between a title insurance agent and a "UTC" or other label which might be attached to Land Title or any other insurance agent. Further, as found in Finding of Fact No. 4 above, Chicago did not "contract with Land Title for the purpose of issuing title policies." Chicago was acting as the insurer and Land Title was acting as an appointed agent on behalf of that insurer. In addition, this sentence fails to recognize RCW 48.17.060 and 48.17.010 which creates the principal-agent relationship in this area and defines the activities which an agent is authorized to undertake and fails to recognize the fact that said statutes make it clear that the agent's actions are taken "on behalf of the insurer." Replace with: Based on the Conclusion directly above, there exists a clear principal-agent relationship between Chicago and Land Title created by statute; it is not necessary to apply a common law analysis to determine the existence of a principal-agent relationship between an insurer and insurance agent. By virtue of RCW 48.17.060 and 48.17.010 and by the acts of Chicago in complying with the requirements of RCW 48.17.060 in appointing Land Title to act on behalf of Chicago to solicit for Chicago's title insurance. Because, as found above, Land Title was soliciting on Chicago's behalf, as set forth in RCW

48.17.010, the acts of Land Title in violating the Illegal Inducement Regulation and statute, which are acts of solicitation, are properly considered to be the acts of Chicago. Decades, a century, of well established case law in the insurance area repeatedly confirm that a principal-agent is created between the insurer and its appointed agent, and the means of statutorily creating the principal-agent/insurer-agent relationship are as set forth in the Insurance Code, that the relationship is defined by statute and need not be analyzed based on common law, and, finally, that appointing insurers are responsible for the act of their insurance agents. See the plethora of cases cited in the OIC's briefs, significantly *Paulson v. Western Life Ins. Co.*, 292 Or. 38, 636 P.2d 935 (1980) which construes a similar Oregon insurer-agent statute and was adopted by the Washington Supreme Court in *National Federation of Retired Persons v. Insurance Commissioner*, 120 Wn.2d 101, 838 P.2d 680 (1992) and even where the insurer is ignorant of the violation e.g. *Ellis v. William Penn Life Assurance Co.*, 124 Wn.2d 1, 873 P.2d 19985 (1994); *American Fidelity and Casualty Company v. Backstrom*, 47 Wn.2d 77, 287 P.2d 124 (1955); *Miller v. United Pacific Casualty Company*, 187 Wn. 629, 60 P.2d 714 (1936). Therefore, it is hereby concluded that the OIC has shown that it has the legal authority to hold Chicago responsible for the acts of Land Title in violating the Illegal Inducement Regulation and statute.

- Third sentence: Delete. This conclusion is irrelevant.

12. *Principal-Agent Status between Chicago and Land Title, by statute and contract: The entities' characterization of their relationship is not controlling as to the nature of their relationship as an agency. The fact of a contract between the entities which identifies these parties as "agent" and "principal" is not determinative of their status vis-à-vis each other. Even industry or popular usage does not determine that an "agency relationship" exists. See, Restatement of Law (Third) Agency §§1.01, 1.02 (2006).*

- First sentence: Adopt.
- Second sentence: Delete, as conclusion is overly broad and appears to relate to an analysis of common law agency laws which are inapplicable here.
- Third sentence: Delete, as conclusion is unclear and appears to relate to an analysis of common law agency laws which are inapplicable here.
- Second and third sentences: Correct, replacing with: While it is somewhat relevant and helpful, the characterization which two parties may give to their relationship is not finally

controlling as to the actual nature of their relationship as principal and agent. (It should be noted, however, that if one were to apply the common law theory of agency instead of the correct statutory creation of agency herein, given the wording of the "Issuing Agency Agreement" and the actual behavior of Chicago and Land Title as exclusive agent and exclusive appointing insurer, all as set forth in the Findings above, it is most likely that Conclusions of Law would determine that the traditional common law of agency analysis would also support a determination that a principal-agent relationship exists between Chicago and Land Title.")

13. *In general, an "agent," under traditional agency principles, is a person authorized to act for another and under that party's control. The relationship may arise through employment, contract, or by apparent authority. It has long been the law that an agent can bind a principal while acting within the scope of the agency. See, Restatement (Third) Agency (2006).*

- First and second sentences: Delete. Irrelevant, as common law principles of the principal-agent relationship are irrelevant to the proper determination of the issue herein and, further, the principal-agent relationship can be created between appointing insurer-appointed insurance agent by statute. Replace with: A principle-agent relationship may be created either by the Insurance Code in the appointing insurer-appointed insurance agent situation, or by the dictates of traditional common law. Here, it is concluded that a principal-agent relationship was created by the Insurance Code.

- Third sentence: Adopt, but supplement by replacing with: Decades of well established insurance and other case law have determined that an agent can bind a principal while acting within the scope of the agency, whether the principal-agent relationship has been created by statute or the common law of agency. Per Findings above, Land Title clearly had the authority specifically given to it by RCW 48.17.010 to solicit applications for insurance on [Chicago's] behalf.

14. *Here, an agency relationship is suggested by the contract between Chicago and Land Title. These entities executed a contract which uses the term "Issuing Agent" for Land Title and "Principal" for Chicago, to describe their relationship to each other. The substance of that contract (as discussed below) creates the relationship if it exists, not the mere labels of "principal" and "agent."*

- Entire Conclusion: Because common law principles of principal and agent do not apply

herein, this Conclusion is irrelevant. Replace with: In this matter, as concluded above, an agency relationship was created statutorily between Chicago and Land Title by virtue of Chicago's compliance with RCW 48.17.060 and 48.17.010 and Land Title's acceptance of that appointment, and both parties maintenance of that agency appointment since 1993; the parties designation of the appointed agent, Land Title, as a "UTC" makes no difference under the Insurance Code. (It should be noted, however, while not relevant herein because this issue is determined under statutory agency analyses, because OIC argues as an alternative that Land Title was also an agent of Chicago under common law, an agency relationship is indeed suggested by the contract between Chicago and Land Title.) These entities executed a contract which uses the term "Issuing Agent" for Land Title and "Principal" for Chicago to describe their relationship to each other, but in addition the actual substance of that contract together with the activities of Land Title in soliciting and effectuating contracts on behalf of Chicago as found above, do indeed, appear to also create a common law agency relationship between Chicago and Land Title. Additionally, in the "Issuing Agency Agreement" which gives Chicago significantly more control than found by the ALJ, and under analyses of both strict common law agency and also - although not necessary - the theory of apparent authority.)

15. *Land Title is designated as an "agent" of Chicago under the Insurance Code. RCW 48.17.010 defines "agent" as:*

"Agent" means any person² 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.

Land Title is a "person," as is Chicago, under the Insurance Code. (See FN 1)

- Delete. Not a Conclusion of Law.

16. *The Insurance Code, however, does not specifically define the "agency relationship" or the parties' rights or responsibilities vis-à-vis each other. That is left to the parties to determine, to the extent their agreement is not in conflict with the Insurance Code or the OIC's regulations.*

- First sentence: Delete. This sentence is an incorrect interpretation of the applicable Insurance Code and decades of applicable principal-agent case in the appointing insurer-

² "Person" is defined as any individual, company, insurer, association, organization . . . partnership, business trust, or corporation. RCW 48.01.070.

Delete. Not a Conclusion of Law.

appointed insurance agent area. As found and concluded above, RCW 48.17.060 and 48.17.010 clearly define the procedures for creating a principal-agent relationship between insurer and the agents they appoint to act on their behalf.

- Second sentence: Delete. This sentence is an incorrect interpretation of the Insurance Code and the decades of applicable principal-agent case law in the insurer-insurance agent area. The Insurance Code does not leave to the parties the right to determine whether they are engaged in a principal-agent relationship or not, or what kind of relationship, rights and responsibilities they have as parties in a principal-agent relationship as insurer and appointed agent.

- Replace entire Conclusion with: The Insurance Code, at RCW 48.17.010 and 48.17.060, specifically defines the requirements and procedures for insurers and insurance agents in order for them to create a principal-agent relationship as insurer-appointed insurance agent. Thereafter, decades of applicable case law analyzes the principal-agent relationship and dictates the rights and responsibilities of an insurer in its relationship with its appointed agent - and most significantly dictates that an insurer is liable for the acts of the insurer's appointed insurance agent, which agent is, pursuant to RCW 48.17.010, specifically acting on the insurer's behalf. A title insurer and its appointed agent may not enter into an agreement, which Chicago appears to have attempted (albeit unsuccessfully as, as found above, even in the "Issuing Agency Agreement" Chicago retains control over Land Title) in conflict with the Insurance Code or regulations: i.e Chicago may not enter into a private "Issuing Agency Agreement" with Land Title which attempts to somehow restrict Chicago's right to supervise the activities of its legally appointed insurance agent, which agent has been specifically authorized by RCW 48.17.160 and 48.17.010 to conduct solicitation for Chicago on Chicago's behalf, and Chicago may not simply look the other way concerning acts of its legally appointed agent specifically authorized by RCW 48.17.160 and 48.17.010 to conduct solicitation for Chicago on Chicago's behalf, and thereby succeed in escaping its liability to the OIC and others for the acts of solicitation conducted by its appointed agent, Land Title, acting on Chicago's behalf. Further, "solicitation" for purposes of RCW 48.17.160 is given an extremely broad interpretation. In the landmark *National Federation of Retired Persons v. Insurance Commissioner*, 120 Wn.2d 101,110-111,838 P.2d 680 (1992), the Washington Supreme Court held that "solicitation" in the insurance industry includes the solicitation for

the return of "cold lead" cards from consumers for later sale to insurance agents, even when no insurance company was identified. The giving of things of value to producers of title insurance business, with which the Illegal Inducement Regulation is concerned, clearly constitutes a form of "solicitation" which appointed agents are authorized to conduct, on behalf of their appointing insurers, pursuant to RCW 48.17.010. Therefore, Land Title was an appointed agent operating within the scope of its authority given to it by Chicago in appointing it as its agent pursuant to RCW 48.17.010 and 48.17.160.

17. *The Legislature could have included in the Insurance Code a clear description of the agency relationship, setting forth the rights and obligations of the principal and agent as between title insurer and title company. The Code is reasonably more concerned with third parties (the public) than the principals' and agents' rights and obligations to each other. As neither the OIC nor Chicago has identified a statute or regulation that clearly defines the relationship between the principal (CTIC) and agent (LT), the traditional agency law principles apply.*

- Entire Conclusion. Delete. This Conclusion is an incorrect interpretation and application of the Insurance Code, ignores RCW 48.17.160 and 48.17.010 in creating a specific principal-agent relationship between insurers and their appointed insurance agents.

18. *CTIC's lack of control in the relationship defeats the "agency relationship:" The relationship between CTIC and LT, to meet the definition of an "agency" relationship in the common law, and as adopted by Washington courts, must have several elements. The Restatement of Law (Third) Agency, §1.01 (2006), defines agency as a relationship in this way:*

Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents to act.

- Delete. As above, the common law definitions of a principal-agent relationship are irrelevant here. The principal-agent relationship between Chicago and Land Title is created by the Insurance Code at RCW 48.17.010 and 48.17.060.

19. *That definition is not in conflict with the definition of "agent" in the Insurance Code. The Restatement and Washington law on the subject go further than the Code in setting out the elements of an agency relationship.*

- Delete. Irrelevant conclusion, as, per Conclusion No. 16 and others above, the common

law definitions of a principal-agent do not apply.

20. *In Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 153 P.3d 10 (2007), the court stated that "right to control [by the principal over the agent] is indispensable to vicarious liability." (Citations omitted). *In Omni*, the issue was whether an insurance company, *Omni*, could be held liable for the illegal acts of its agent, a collection company hired by *Omni*, for violations of the Washington Consumer Protection Act. *Omni* took no part in the collection practices at issue and had no right to control the methods or means used by its agent to collect monies for *Omni* on subrogated claims.

- *Stephens v. Omni Ins. Co.*, 138 Wn.App. 151, 153 P.3d 10 (1007), review accepted, 180 P.3d 1289 (2008) is unresolved as it is still on appeal to the Washington Supreme Court. *Omni* held that a debt collection firm to which insurers assigned subrogation claims was not the insurers' agent and that its unfair collection practices therefore could not be imputed to the insurers. This case, while also unresolved currently, is clearly distinguishable from the facts herein: the collection agency was not an appointed insurance agent of the insurer as is Land Title, and was therefore not subject to RCW 48.17.010 and 48.17.160. For this reason, and various others concerning its contract and activities, the situation in *Omni* cannot remotely be compared to the situation herein.

21. *The Omni court refused to impute the agent's bad acts in violation of the Consumer Protection Act to the principal, on the basis that the principal had nothing whatever to do with the collection company's business practices or behavior. Nor did the court impose any "obligation" on the principal to monitor or know the behavior of the agent vis-à-vis the Consumer Protection Act, based on the public interest or the contract between the agent and principal.*

- Delete. See Conclusion 20 above.

22. *Omni is squarely on point here. Certainly, the State's Consumer Protection Act is equally as important as the Insurance Code in terms of protecting the public interest. The Legislative statement of purpose for the Consumer Protection Act is a strongly stated public interest ideal, as is the Legislative purpose of the Insurance Code:*³

³ Cf. RCW 48.01.030: "Public Interest: The business of insurance is one affected by the public interest, requiring all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. . . ."

The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition. . . . To this end this act shall be liberally construed that its beneficial purposes may be served.

RCW 19.86.920; See also, Hangman Ridge, 105 Wn.2d at 778, 719 P.2d 531 (1986).

- Delete. See Conclusion 20 above.

23. *Despite the strong public-interest of the Consumer Protection law, and the regulatory nature of that Act, the Omni court would not impute the illegal acts of the agent to the principal where the principal had no right to control the means and methods of agent's business practices.*

- Delete. See Conclusion 20 above.

24. *The principle of agency law which was applied in Omni applies equally in this matter. CTIC had no right to control, and did not in fact control, any of the actions of LT in conducting marketing of title insurance. Whether CTIC benefitted from the bad acts at issue is not the question, and does not change the application of the general legal principles.*

- Delete. See Conclusion 20 above. Also, this Initial Conclusion applies the wrong theory of agency law, the common law theory, and applies a completely distinguishable case, in support of this Conclusion. See Conclusion No. 16 and others above. Also, as found in Findings of Facts above, Chicago had wide sweeping control over Land Title as the appointing insurer under RCW 48.17.060 and 48.17.010. (It is noted that Chicago also had much more control over Land Title in the "Issuing Agency Agreement" than it claims, apparently in an attempt to escape liability for the acts of its agent on its behalf even under the inapplicable common law of agency than it chose to exercise.) Replace with: As found in Findings of Facts above, Chicago had the right to control, but chose not to control, all of the actions of Land Title in the marketing and solicitation of Chicago's title insurance on behalf of Chicago under either 1) the proper analysis of insurer-appointed agent under RCW 48.17.060 and 48.17.010 or under, although it is not relevant here, 2) the common law agency analysis. Chicago cannot not escape liability for the acts of its appointed agent, which agent was clearly as authorized by statute (and was even allowed under the "Issuing

-
- Delete. Not a Conclusion of Law.

Agency Agreement" even if the inapplicable common law of agency were to apply) soliciting for Chicago insurance on Chicago's behalf, by claiming to have had no control and/or have exercised no control and/or was unaware of its agent's acts on its behalf.

25. *In the contract, CTIC manifested an assent to have LT act as its agent for the purpose of writing the title insurance policies and binding CTIC to the risk of a bad title search. LT likewise manifested its assent, via the contract, to act on behalf of CTIC in issuing the title insurance policies. Thus, CTIC and LT entered into a traditional agency relationship, which specifically limited the control by the principal to those items specifically set out in the contract. No specific authority was granted for CTIC to control the general business of LT, including how it conducted its marketing.*

- Entire Conclusion: Delete. As set forth in Findings of Fact above, the evidence does not support this Conclusion under either the applicable statutory creation of principal-agent or under the inapplicable common law theory of principal-agent. Further, this Conclusion applies the theory of common law agency, albeit incorrectly as it ignores both the correct Findings of Facts above and ignores the common law theory of apparent authority, instead of the proper statutory agency analyses. Further, this Conclusion would enable insurers to simply undue the affect, and public policy behind, the principal-agent relationship created under the Insurance Code. Replace with: Per RCW 48.17.160 and 48.17.010, Land Title was specifically appointed by Chicago as an agent to act on behalf of Chicago in soliciting for Chicago's title insurance, among other activities.

26. *The agency relationship created is therefore not "universal," but is for limited purposes, as specified in the contract. The terms of the contract are not in dispute and the contract speaks for itself. The parties to the contract, LT and CTIC, have submitted undisputed evidence to show how they proceeded, in fact, under that contract.*

- Entire Conclusion: Delete. Conclusion applies the incorrect common law theory of agency instead of the correct statutory creation of agency in the insurance arena, applies incorrect findings of fact and incorrectly assumes that, even under the common law theory of agency, the principal and agent can privately limit the principal's liability for acts of its agent. Replace with: Under a determination of the existence of the principal-agent relationship under the proper statutory analysis set forth in the Insurance Code (or the inapplicable common law analysis of agency including apparent authority), a secret, private

contract between principal and agent cannot limit the liability of the principal for acts of its agent. Pursuant to the Finding of Fact above, Land Title conducted all activities involving solicitation and effectuation of Chicago's title policies, on behalf of Chicago, and Chicago chose to be uninvolved. Simply because Chicago chose to be uninvolved in its agent's activities does not exonerate Chicago from liability under the Insurance Code (or under the inapplicable common law theory of agency).

27. *Of note, there is no evidence that CTIC knew of the misbehavior by LT. That issue is not in dispute, as the OIC has not brought forth any evidence that shows this to be an issue in dispute. The undisputed facts are that CTIC had no participation in, or information about, the marketing or business dealings of LT which would have informed it that LT was violating the inducement law. CTIC did not participate in the marketing or other business dealings of LT, and had only limited rights to do so, under the contract.*

- Delete. It is irrelevant whether or not Chicago chose to exercise control over the solicitation activities conducted by Land Title on its behalf, or whether Chicago knew about Land Title's solicitation activities on its behalf. See Conclusions 24 and 26 above. This Conclusion involves a clearly incorrect interpretation of RCW 48.17.160 and 48.17.010 and, indeed even of the inapplicable common law of agency including the theory of apparent authority. Per Conclusion No. 26 above, Chicago cannot escape liability for the acts of its appointed agent in soliciting for Chicago's insurance on behalf of Chicago simply because it chose to not become involved in overseeing these acts and chose to remain uninformed of these acts. Further, an assumption of a finding of fact – which fact is stated for the first time in this Conclusion rather than properly in a finding of fact – that Chicago was simply unaware of Land Title's violations of the Illegal Inducement Regulation is not credible.

28. *In sum, the agency relationship is defeated by the fact that CTIC did not have the right to control the marketing actions or business procedures of LT, and therefore, the OIC cannot impute the illegal acts of LT to CTIC.*

- Entire conclusion: Delete. See Conclusion 24 and others above. Further, there is insufficient evidence to support this Conclusion. Further, per Conclusion 24 and 26 and others above, this Conclusion involves an application of the wrong legal theory of principal-agent relationship. Replace with: Land Title is a duly appointed insurance agent of Chicago, which relationship was created by their voluntary acts under RCW 48.17.160 and 48.17.010,

with the specific statutory right therein to solicit for Chicago title insurance policies on behalf of Chicago. For these reasons, the OIC may hold Chicago responsible for the acts of Land Title in violating the illegal inducement statutes and regulation.

29. *CTIC is not obligated by law to monitor its UTC agent's compliance with law: There is nothing in the contract which obligates CTIC to monitor the behavior of LT at risk of having LT's illegal actions imputed to CTIC. Neither has there been any showing in the law of such a requirement.*

- Entire Conclusion: Delete. Per Findings above, and concluded here, "UTC," "underwritten title company" or other such designations may be used within the title agency but make no difference under the Insurance Code: "UTCs" which are appointed insurance agents have the rights and responsibilities – and the principal-agent relationship with their appointing insurer – as if they were not informally designated as "UTCs" or other terms. Also, the wording of the "Issuing Agency Agreement" is irrelevant in applying the correct statutory analysis in determining the existence of a principal-agent relationship.

30. *Whether CTIC could have reviewed LT's financial records under the contract is not the point: the provision allowing such review was not interpreted by either of the parties to the contract to obligate CTIC to monitor how LT spent its monies, or whether it violated the law by spending too much for inducements.*

- Delete: Conclusion is a dramatic misinterpretation of the applicable statutes contained in the Insurance Code, cited above, and of applicable case law. (Further, although inapplicable as the common law theory of agency does not apply to the situation herein, as above, it has been found that Chicago had significant right to control Land Title but chose not to do so.)

31. *The OIC does not have authority to impute bad acts of a title policy "issuing agent" to a title insurer where no provision exists for this in the law: The OIC attempts to show that its authority for this specific action against CTIC is within the "broad authority" the Commissioner has under the Code. The "broad authority," while clearly very broad, must still be exercised within the parameters of the Insurance Code or the OIC's regulations.*

- Entire Conclusion: Delete. As found above, this is a misstatement of the OIC's position.

32. *The cases cited by the OIC indicate that the courts give deference to the OIC's interpretation of the Code when a provision of that Code or an OIC regulation is at issue. Here, there is no provision of the Code or regulation which directly addresses the issue, and none*

which directly gives the OIC authority to hold a title insurer liable for the illegal acts of UTC agents.

- First sentence: Adopt.
- Second sentence: Delete. Incorrect interpretation of insurance statutes and regulations. See Findings of Fact and Conclusions of Law above.

33. *There is no question that the Code and regulations amply authorize the OIC to take action against a title insurer directly for its own violations, or directly against the title company for its violations. CTIC readily concedes this to be the law. Absent in the Insurance Code and regulations cited by OIC is the authority for OIC to hold the insurer liable for the illegal acts of another company, with whom it contracted for limited purposes, specifically to underwrite title policies. The "broad authority" of the OIC stops short of being quite that broad; it must have an underpinning of law. I cannot find authority for the OIC's actions in the "penumbra" of the Insurance Code, although this is what the OIC seems to urge.*

- Entire Conclusion: Delete. This is a misstatement of the OIC's position. Further, per Conclusions of Law above, this is an application of the wrong theory of principal-agent law (common law) and entirely ignores the specific statutory authority as provided for in the Insurance Code and as argued by the OIC.

34. *I understand the OIC's policy arguments. While these are attractive from a public policy standpoint and would be expeditious, these arguments cannot legally prevail. The OIC, despite its broad regulatory authority, must have some statutory or specific regulatory authority to take action against an insurer under the Code. Advisory letters and other communications with the insurer, some 20 years ago, cannot substitute for the necessary statutory or specific regulatory authority required for the OIC's current actions. The 2006 Advisory letter, the 2006 OIC report, and the 10 to 20 year old communications to the insurer are not law.*

- Entire Conclusion: Delete. Per Conclusion 34 above and others, this is a misstatement of the OIC's position. Further, per Conclusions above, this is an application of the wrong theory of law (common law theory) and entirely ignores the specific statutory authority provided for in the Insurance Code and as argued by the OIC.

35. *Whether, as a policy matter, CTIC should have more control over the acts of the UTC's with whom it contracts, or should be obligated by law to undertake a more active role in monitoring its agents for compliance with the inducement laws, is not the issue. Such*

responsibility or obligation on the principal is not the status of the law.

- Delete. As concluded above, this is an application of the wrong theory of law, entirely ignores the correct theory of law and also is an incorrect interpretation of even the incorrect theory of law (the common law theory).

36. *Accordingly, no genuine issue of material fact exists as to the relationship between CTIC and LT, and the actions of the parties within that relationship. Based on the findings and legal analysis above, the illegal acts of LT cannot be imputed to CTIC.*

- Delete. As concluded above, this Conclusion is based upon the wrong theory of law and ignores the correct theory of law. Replace with: Based upon the above Findings of Facts and Conclusions of Law, Chicago is not entitled to summary judgment as a matter of law. Based on the above Findings of Facts and Conclusions of Law, Chicago, as the appointing insurer of Land Title, granting Land Title specific statutory authority to conduct solicitation of title insurance pursuant to RCW 48.17.160 and 48.17.010, specifically, under RCW 48.17.010 as an appointed agent acting on behalf of Chicago, OIC may impute the acts of Land Title in this area to Chicago. Therefore, the OIC may hold Chicago liable for the acts of Land Title for Land Title's alleged violations of the Illegal Inducement Regulations and statutes in its solicitation, on behalf of Chicago, of Chicago's title insurance.

37. *Summary judgment is granted to CTIC on the issue of imputed liability for the illegal acts of LT in violating the inducement statute and regulation.*

- Delete. This is not a Conclusion of Law. However, this statement of decision is based upon Initial Findings of Facts which were based on insufficient evidence and also simply misinterpreted; failure to apply the correct statutory analysis of insurer-agent liability; misapplication of the theory of common law agency and misapplication of facts to that theory even if it did apply. Replace with: Based upon the above Final Findings of Fact and Final Conclusions of Law, Chicago is not entitled as a matter of law to summary judgment herein. Chicago's Motion for Summary Judgment on the issue of imputed liability for the allegedly illegal acts of Land Title in violating the Illegal Inducement Regulations and statutes is denied.

ORDER

IT IS HEREBY ORDERED that the ALJ's Initial Order Granting Chicago Title Insurance Company's Motion for Summary Judgment is not adopted. Chicago Title Insurance Company's Motion for Summary Judgment is DENIED on the issue of whether it can be held responsible for the allegedly illegal acts of Land Title of Kitsap County, Inc., which it has legally appointed as its exclusive title insurance agent in the relevant counties since March 5, 1993. It is determined herein that the OIC can hold Chicago Title Insurance Company responsible for the illegal acts of its legally appointed insurance agent, Land Title, in violating WAC 284-30-800, the Illegal Inducement Regulation and statute. The OIC may take action against Chicago for the illegal acts of Land Title in the manner it has done in its Notice of Hearing and Amended Notice of Hearing herein. This being the decision of the undersigned Review Judge,

IT IS FURTHER ORDERED that the hearing file should be transferred back to the Office of Administrative Hearings for commencement of Phase II of this proceeding as detailed above.

THIS ORDER IS ENTERED at Tumwater, Washington, this 24th day of April, 2009, pursuant to Title 48 RCW and particularly RCW 48.17.010, 48.17.160, 48.17.010 and 48.17.160, Title 34 RCW and regulations applicable thereto.

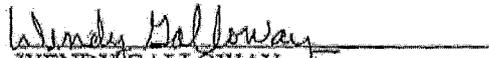


PATRICIA D. PETERSEN
Review Judge

Declaration of Mailing

I declare under penalty of perjury under the laws of the State of Washington that on the date listed below, I mailed or caused delivery through normal office mailing custom and procedure, a true copy of this document, Final Findings of Facts, Conclusions of Law and Order on Chicago Title Insurance Company's Motion for Summary Judgment (Phase I of Hearing), to all interested parties at their respective addresses listed on page one of this document.

DATED this 24th day of April, 2009.


WENDY GALLOWAY

No. 87215-5

RECEIVED BY E-MAIL

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, OFFICE
OF THE INSURANCE
COMMISSIONER,

Petitioner,

v.

CHICAGO TITLE INSURANCE
COMPANY,

Respondent.

PROOF OF SERVICE

I, Bill Hill, under penalty of perjury of the laws of the State of Washington, declare as follows:

1. I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, and competent to be a witness in the above action, and not a party thereto.

2. On the 10th day of September, 2012, I delivered a true and correct copy of **Supplemental Brief of Respondent Chicago Title Insurance Company** via U.S. Mail and email delivery to the following:

Stephen J. Sirianni Esq.
Sirianni Youtz Meier &
Spoonemore
999 Third Avenue, Suite 3650
Seattle WA 98104
Email: ssirianni@sylaw.com

David C. Neu
K&L Gates LLP
925 4th Avenue
Suite 2900
Seattle WA 98104-1158
Email: david.neu@klgates.com

Co-Counsel for Fidelity

Attorney for Amici

Jean Wilkinson
Marta Deleon
Assistant Attorney General of
Washington
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504-0100
Email: JeanW@ATG.WA.GOV
Email: martad@atg.wa.gov

*Attorneys for State of Washington
Office of Insurance Commissioner*

Signed at Seattle, Washington this 10th day of September, 2012.

PACIFICA LAW GROUP LLP

By 

Bill Hill, Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Bill Hill
Cc: Matthew Segal; Jessica Skelton
Subject: RE: State of WA v Chicago Title Insurance Co, Cause No. 87215-5

Rec. 9-10-12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Bill Hill [<mailto:Bill.Hill@pacificallawgroup.com>]
Sent: Monday, September 10, 2012 4:51 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Matthew Segal; Jessica Skelton
Subject: RE: State of WA v Chicago Title Insurance Co, Cause No. 87215-5

Attached for filing in the above referenced case please find the following:

1. Supplemental Brief of Respondent Chicago Title Insurance Company; and
2. Proof of Service

Please let me know if you have any difficulty receiving either of these documents.

Bill Hill
Legal Assistant to Jessica A. Skelton and Assisting Matthew J. Segal



T 206.245.1700 D 206.245.1730
1191 Second Avenue, Suite 2100 Seattle, WA 98101
Bill.Hill@PacificaLawGroup.com