



Representing

*Chicago Title Insurance Company
Commonwealth Land Title Insurance Company
Fidelity National Title Insurance Company
First American Title Insurance Company
Stewart Title Insurance Company
Westcor Land Title Insurance*

MEMORANDUM

TO: Clients
FROM: Jean Partridge, Chief Counsel
RE: Insurance Law §6409 (d)
DATE: June 8, 2011

Dear Valued Client,

In the interest of keeping our clients informed of recent developments in the law we are enclosing a recent opinion issued by the New York State Insurance Department. In summary:

*On May 31, 2011, the New York State Insurance Department opined that a violation of Insurance Law §6409 (d) occurs when a residential real estate broker refers its clients to attorneys on an "approved" or "recommended" list and the attorneys, in turn, refer those clients to the broker's affiliate title agent under common control. Pursuant to the opinion, such a quid pro quo is violation of Insurance Law Sec. 6409 (d). The Department further states than even "an informal quid pro quo, whereby attorneys that do not make the referral quota are removed from the list" would be a violation of the law. The opinion further states that any person or entity that **accepts or receives** such a quid pro quo is subject to a penalty equal to the greater of \$1,000 or five times the amount thereof.*



STATE OF NEW YORK
INSURANCE DEPARTMENT
25 BEAVER STREET
NEW YORK, NEW YORK 10004

Andrew M. Cuomo
Governor

James J. Wrynn
Superintendent

May 31, 2011

Richard Morris
Herrick, Feinstein LLP
2 Park Avenue
New York, NY 10016

Re: Real Estate Broker Referral to Affiliate Title Agent

Dear Mr. Norris:

I write in response to your inquiry, which asks whether a residential real estate broker may refer its clients to an attorney on a list of "pre-approved" or "recommended" attorneys, if the attorneys have an informal arrangement with the real estate broker's affiliate title agent to refer all of their clients to the real estate broker's affiliate title agent.

Question presented:

May a residential real estate broker refer its clients to a list of "pre-approved" or "recommended" attorneys if the attorneys have an informal arrangement with the real estate broker to refer all of their clients to the real estate broker's affiliate title agent?

Conclusion:

No. If the facts are as alleged, and there is a quid pro quo, then a residential real estate broker may not refer its clients to attorneys on an "approved" or "recommended" list if the attorneys, in turn, refer those clients to the broker's affiliate title agent.

Facts:

You state that your firm represents a title insurance corporation (the "insurer"). The insurer uses many title agents for the the sale and distribution of its title insurance policies. One of those title agents ("ABC Title Agent") is an affiliate of a licensed real estate broker ("DEF Real Estate"). You state that the insurer has been informed that DEF Real Estate refers its clients (buyers and sellers of real estate) to attorneys by providing to the clients a list of local "approved" or "recommended" attorneys. Although there is no formal agreement between DEF

Real Estate and the attorneys, you state that the attorneys understand that inclusion on the “approved” or “recommended” list is subject to the condition that they refer all or substantially all of their real estate clients’ applications for title insurance to ABC Title Agent – even in instances where the attorneys’ clients did not use DEF Real Estate. Furthermore, DEF Real Estate’s clients are not required to use the attorneys that are on the “approved” or “recommended” list. However, you are uncertain about whether the attorneys derive any fees from participating in this arrangement. Before investigating further, your client wishes to know whether such an arrangement would violate Insurance Law § 6409(d).

Analysis:

Insurance Law § 6409(d) is relevant to your inquiry. That provision states:

No title insurance corporation or any other person acting for or on behalf of it, shall make any rebate of any portion of the fee, premium or charge made, or pay or give to any applicant for insurance, or to any person, firm, or corporation acting as agent, representative, attorney, or employee of the owner, lessee, mortgagee or the prospective owner, lessee, or mortgagee of the real property or any interest therein, either directly or indirectly, any commission, any part of its fees or charges, or any other consideration or valuable thing, as an inducement for, or as compensation for, any title insurance business. Any person or entity who accepts or receives such a commission or rebate shall be subject to a penalty equal to the greater of one thousand dollars or five times the amount thereof.

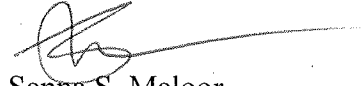
Accordingly, no title insurance corporation, or any person acting for or on behalf of it, may pay or give any insurance applicant or a buyer’s or seller’s representative or attorney, any commission or any part of its fees or charges, or any other consideration or valuable thing as an inducement for, or as compensation for, title insurance business. Furthermore, any person or entity that accepts or receives such a commission or rebate is subject to a penalty equal to the greater of \$1,000 or five times the amount thereof.

An Office of General Counsel (“OGC”) Opinion dated October 24, 2004 addressed similar facts. In that opinion, a seller of real estate provided a monetary inducement to any purchaser that used the seller’s affiliated title insurance agent. Applying Insurance Law § 6409(d) to the transaction, the OGC opined that a person or corporation that is affiliated with a title agent or title abstract company acts for or on behalf of the title insurance corporation that its title agent or title abstract company represents. See also OGC Opinion dated November 13, 2002. Accordingly, the seller of real estate was prohibited from providing to an applicant for insurance any consideration or valuable thing as an inducement to, or compensation for, any title insurance business.

In the scenario you present, DEF Real Estate, by placing attorneys on the “approved” or “recommended” list, could be providing consideration or other valuable thing by way of client referrals to the attorneys, who in turn, would refer all of their clients to DEF Real Estate’s affiliate title agent. However, that conclusion assumes that DEF Real Estate and ABC Title

Agent are affiliates under common control whereby DEF Real Estate stands to benefit from the referral and that there is an informal quid pro quo, whereby attorneys that do not make the referral quota are removed from the list. Accordingly, if the facts are as alleged, and there is a quid pro quo, then DEF Real Estate may not refer its clients to attorneys on an "approved" or "recommended" list if the attorneys, in turn, refer those clients to ABC Title Agent.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Sapna S. Maloor', with a long horizontal flourish extending to the right.

Sapna S. Maloor
Senior Attorney