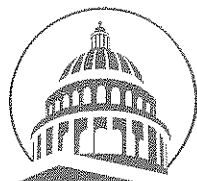


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July 02, 2009

Honorable Lou Correa
Room 5052, State Capitol

TITLE INSURANCE: ASSOCIATIONS OF REALTORS - #0910501

Dear Senator Correa:

You have asked whether a title company is prohibited from purchasing advertising in a medium that is owned or controlled by an association of Realtors if the association is not acting as a party in a real estate transaction or as an agent of a party, and is neither a customer nor prospective customer for title insurance services.

According to the facts presented, many associations of Realtors either publish, or control an entity that publishes, a trade publication that sells advertising space to interested businesses, including title companies. Like newspapers of general circulation and their electronic equivalents, they sell advertising and the revenue supports the entity as a whole. With the enactment of certain legislation in 2008 (S.B. 133 (Ch. 280, Stats. 2008; hereafter Chapter 280)), the question has arisen as to whether this business practice may continue.

The question presented concerns language contained in Section 12404 of the Insurance Code,¹ which was amended by Chapter 280. Section 12404 provides as follows:

"12404. (a) It is unlawful for any title insurer, underwritten title company or controlled escrow company to pay, directly or indirectly, any commission, compensation, or other consideration to any person as an inducement for the placement or referral of title business. Actual placement or referral of title business is not a precondition to a violation of this section, whether the violation is or is not a per se violation pursuant to subdivision (c).

"(b) For purposes of this section, the following definitions are applicable:

"(1) 'Compensating balance' is a balance maintained in a lending institution by any title insurer, underwritten title company, or controlled escrow company for the express or implied purpose of influencing the extension of credit to a third

¹ All further section references are to the Insurance Code, unless otherwise indicated.

party or the provision of goods, services, or benefits to a third party as an inducement for the placement or referral of title business by a third party.

“(2) ‘Person’ means any individual or entity who is any owner or prospective owner, lessee or prospective lessee of real property or any interest therein, any obligee or prospective obligee of an obligation secured or to be secured either in whole or in part by real property or any interest therein, or any person who is acting or who is in the business of acting as agent, representative, attorney, or employee of those persons.

“(3) ‘Title business’ means the ‘business of title insurance’ as defined in Section 12340.3, and includes, but is not limited to, the offering of title insurance, escrow, or other services by a title insurer, underwritten title company, or controlled escrow company.

“(c) The following activities, whether performed directly or indirectly, are deemed per se inducements for the placement or referral of title insurance business by any person and are unlawful:

“(1) Paying or offering to pay, furnishing or offering to furnish, or providing or offering to provide assistance with the business expenses of any person, including, but not limited to, rent, employee salaries, furniture, copiers, facsimile machines, automobiles, telephone services or equipment, or computers.

“(2) Providing or offering to provide any form of consideration intended for the benefit of any person, including cash, below market rate loans, automobile charges, or merchandise or merchandise credits.

“(3) Placing or offering to place on behalf of any person, compensating balances.

“(4) Advancing or paying or offering to advance or pay money on behalf of any person into an escrow to facilitate the closing thereof, other than any sum which represents the proceeds of a loan made in the ordinary course of business; or an advance not to exceed 2 percent of the sales price of the real property being sold or exchanged through the escrow or the amount of any loan secured by real property involved in the escrow, whichever is greater; or the extension of credit or an advance for the costs, fees and expenses of the escrow or of the title insurance issued or to be issued in connection therewith.

“(5) Disbursing or offering to disburse on behalf of any person escrow funds held by a title insurer, underwritten title company or controlled escrow company before the conditions of the escrow applicable to that disbursement have been met, or in a manner which does not conform to Section 12413.1, including disbursing or offering to disburse before the expiration of the appropriate period established in Section 12413.1.

“(6) Furnishing or offering to furnish all or any part of the time or productive effort of any employee of the title insurer, underwritten title company, or controlled escrow company to any person for any service unrelated to the title business.

“(7) Advertising or paying for the advertising in any newspaper, newsletter, magazine, or publication that is produced by, or on behalf of, a person, or that results in a direct, or indirect, subsidy to a person.

“(8) Expenditures for food, beverages, and entertainment for a person.

“(d) Expenditures for the following are not deemed to be unlawful or in violation of this section:

“(1) Promotional items with a permanently affixed company logo of the underwritten title company, title insurer, or controlled escrow company, with a value of not more than ten dollars (\$10) each. ‘Promotional item’ does not include a gift certificate, gift card, or other item that has a specific monetary value on its face, or that may be exchanged for any other item having a specific monetary value.

“(2) Furnishing education or educational materials exclusively related to the business of title insurance for a person if continuing education credits are not provided.

“(3) Other expenditures for a person, as permitted by the Department of Insurance by regulation.

“(e) The provision or payment of any form of consideration as an inducement for the placement or referral of title business not specifically set forth in this section shall not be presumed lawful merely because they are not specifically prohibited.

“(f) The Insurance Commissioner may determine compliance and enforce the provisions of this section by written order, regulation or written consent which may take into consideration standards, conditions, guidelines, principles, or definitions utilized by other states or federal agencies but those standards, conditions, guidelines, principles, or definitions shall not be determinative.

“(g) It is the intent of the Legislature that the enactment of this section shall have no effect on the applicability of other sections of the Insurance Code that are in existence prior to the enactment of this section and which specifically, or by implication, refer to this section. The Legislature hereby intends that this section, including the specific terms employed within it, shall be liberally construed for the purpose of protecting consumers of title business.” (Emphasis added.)

Thus, Section 12404 makes it unlawful for a title insurer, title company, or controlled escrow company (collectively hereafter a “title company”) to pay a person any commission, compensation, or other consideration as an inducement for placing or referring title business (subd. (a), Sec. 12404).

Generally, whether any particular course of conduct results in a violation of Section 12404 is a question of fact in each case (see *Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 323; 58 Ops.Cal.Arty.Gen. 316 (1975)). However, specified activities, whether performed directly or indirectly, are identified as per se inducements for the placement or referral of title insurance business and are unlawful (subd. (c), Sec. 12404).

Chapter 280 revised the activities that are listed as unlawful per se violations (subd. (c), Sec. 12404). In particular, Chapter 280 added to the list of prohibited activities for a title company, “[a]dvertising or paying for the advertising in any newspaper, newsletter, magazine, or publication that is produced by, or on behalf of, a person, or that results in a direct, or indirect, subsidy to a person” (para. (7), subd. (c), Sec. 12404; emphasis added).

For these purposes, a “person” is an “individual or entity who is any owner or prospective owner, lessee or prospective lessee of real property or any interest therein, any obligee or prospective obligee of an obligation secured or to be secured either in whole or in part by real property or any interest therein, or any person who is acting or who is in the business of acting as agent, representative, attorney, or employee of those persons” (para. (2), subd. (b), Sec. 12404).

Section 12404 does not further define what it means to be an owner or lessee or a prospective owner or a prospective lessee of real property or an interest in real property, and there has been no regulatory or other administrative interpretation of this particular language by the Insurance Commissioner. An owner or lessee could refer to anyone who owns or rents property. Additionally, the term “prospective” means “of the future” (Webster’s Third New International Dictionary, Unabridged. Merriam-Webster, 2002. <http://unabridged.merriam-webster.com> (13 April 2009)). Whether these terms are used in their absolute sense, which would mean that a title company could not advertise with any individual or entity that owns or rents any property or that might at any time “in the future” rent or own real property, or whether these terms are limited in some fashion by their context must be resolved to determine whether a title company may advertise in a publication of an association of Realtors.

Where the language of a statutory provision is susceptible of two constructions, one of which, in application, will render it reasonable, fair, and in harmony with its manifest purpose, and another that would result in absurd consequences, the former construction will be adopted. Stated differently, where uncertainty exists, consideration should be given to the consequences that will flow from a particular interpretation. A court should not adopt a statutory construction that will lead to results that are contrary to the Legislature’s apparent purpose (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 305).

If we interpret the term “owner” or “lessee” without referencing a particular parcel of property, anyone who owns or leases any property, even if that property is not at all related to the transaction at question, would be deemed a “person” under Section 12404. Moreover, if we read the term “prospective” without implying a temporal or circumstantial limitation, a prospective owner or a prospective lessee of real property could be any person who may buy or rent property at any point in the future. Essentially, this interpretation would render meaningless the substantial detail contained in the definition of “person.” We do not think that this could be what the Legislature intended, since the purpose of Section 12404 is to protect against the specific harms caused by unlawful inducements for the placement of title insurance, and the details in the definition of “person,” read with appropriate limitation, can aid in that protection by focusing on real estate transactions that may yield profitable title insurance business (subds. (a) and (b), Sec. 12404). Thus, it would appear that some limitation on the use of the terms “owner,” “lessee,” and “prospective” is appropriate in this instance. In light of the

fact that the context here is the legislative effort to prohibit unlawful inducements for the placement of title insurance business, we believe that the prohibition on advertising by title companies should be read to apply to owners and lessees and prospective owners and lessees in regard to specific real estate transactions being contemplated by the parties, which we think is consistent with the language and purpose of Chapter 280. Therefore, it is our belief that the term “person,” as used in the first part of paragraph (2) of subdivision (b) of Section 12404, would be interpreted to apply under those circumstances.

A separate issue is raised by the fact that, as discussed above, the term “person” also includes those who are in the business of acting as agents, representatives, attorneys, or employees of those persons (para. (2), subd. (b), Sec. 12404). In this contextual framework, the phrase “those persons” seems to refer to owners or lessees, or prospective owners or lessees, of specific real property. Thus, “person” also includes individuals who are acting as agents, representatives, attorneys, or employees of owners or lessees, or prospective owners or lessees, in particular real property transactions.

Clearly, an association of Realtors is comprised of individuals who act in the real estate business as agents and representatives. Thus, on an individual basis, the real estate agents who are members of an association would constitute “persons” under Section 12404 because their business ensures that they will, in some cases, continuously serve as agents in particular real estate transactions, and the purpose of that provision is to prevent title insurers from paying inducements to interested persons for the placement of title insurance. In contrast, an association of Realtors is organized not to provide that agency service, but to act as a unified voice regarding real estate matters for its members, in addition to providing other services to those members that are not germane to this analysis. If, as provided in the question presented, an association of Realtors is not involved in a pending real estate transaction, and is not a customer or prospective customer for title insurance services, it does not appear to fall into one of the categories of individuals or entities defined as “persons” in Section 12404. Although an association of Realtors may act as a “representative” for Realtors in the context of general business interests, it typically does not do so in regard to pending real estate transactions.² Thus,

² The question presented concerns only the scenario in which an association of realtors is not acting as a party in a real estate transaction, or as an agent of a party, or as a customer or prospective customer. Although outside the scope of this question, we note that there may be circumstances in which an association of realtors might represent itself in a real estate transaction, such as in renegotiating its own lease. In that situation, the association of realtors would fall within the term “person” as a prospective lessee and an agent thereof, and consequently a title company would be restricted from advertising in a publication that is owned by or produced on behalf of that association (para. (7), subd. (c), Sec. 12404). Even given those circumstances, we believe that this restriction on advertising would likely be interpreted narrowly by a court in order to withstand constitutional challenges relating to free speech and due process protections (see *Lorillard Tobacco Co.*

(continued...)

determining that the association is a “person” that is subject to the per se ban on advertising contained in this section because it is a “representative” of Realtors would be inconsistent with the reading we have determined is appropriate for the term “person” as used in this section generally.

As discussed above, the per se violations under Section 12404 include advertising in any publication that is produced by, or on behalf of, a person, or that results in a direct or indirect subsidy to a person (para. (7), subd. (c), Sec. 12404). Although not defined in the section, the term “subsidy” means “a grant or gift of money or property made by way of financial aid” (Webster’s Third New International Dictionary, Unabridged. Merriam-Webster, 2002. <http://unabridged.merriam-webster.com> (11 March 2009)). Arguably, an indirect benefit could flow to individual Realtors if a title company purchases advertising space in a trade publication that is published by an association of Realtors. However, we do not think that any such slight, indirect benefit to individual Realtors that could result from the purchase of advertising space is what is contemplated by the term “subsidy.” Otherwise, all title companies would be barred from placing advertising with any membership organization that includes Realtors, or prospective renters or purchasers. Moreover, presumably the revenues generated from advertising in a trade publication of an association of Realtors support the goals of the organization as a whole, and do not result in grants or gifts to the individual members. For these reasons, although the real estate agents who are members of an association may be deemed “persons” under Section 12404 when they have an interest in specific real estate transactions, we do not believe that an association of Realtors comes within the term “person” as used in those provisions if it is not a party to a specific real estate transaction.

Consequently, because we believe that an association of Realtors does not ordinarily meet the definition of a “person,” as used in Section 12404, we think that a title company is not categorically prohibited from placing an advertisement in any publication that is either produced by, or on behalf of, an association of Realtors.³

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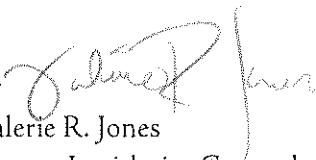
v. Reilly (2001) 533 U.S. 525, 553-566 (discussing First Amendment rights in the context of advertising regulations)).

³ The Insurance Commissioner is responsible for determining compliance with and enforcing the provisions prohibiting inducements for the placement or referral of title insurance business, which he or she may do by written order, regulation, or written consent (subd. (f), Sec. 12404). Furthermore, an agency’s interpretation of the meaning of a statute is entitled to certain consideration and respect by the courts (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7). Therefore, while we are informed that the Insurance Commissioner has not issued an interpretation in this respect, such an interpretation would be entitled to some deference by the courts.

To summarize, it is our opinion that a title company is not prohibited from purchasing advertising in a publication that is owned or controlled by an association of Realtors if the association is not acting as a party in a real estate transaction or as an agent of a party, and is neither a customer nor prospective customer for title insurance services.

Very truly yours,

Diane F. Boyer-Vine
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By 
Valerie R. Jones
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