New York State Bar Association
One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org
NYSBA

Memorandum in Opposition

REAL PROPERTY LAW SECTION

RPLS #13 March 6, 2014

S. 5923 By: Senator Seward
A.8202 By: M of A Cahill
Senate Committee: Insurance
Assembly Committee: Insurance
Effective Date: 180 days after it shall have become a law

AN ACT to amend Insurance Law, in relation to licensing of agents of authorized title insurance corporations.

LAW AND SECTIONS REFERRED TO: Sections 1 through 18 of this bill make various amendments and additions to Article 21 of the Insurance Law. Section 19 amends Section 2314 of the Insurance Law. Section 20 amends section 2324 of the Insurance Law. Section 21 amends Section 6409 of the Insurance Law. Section 22 amends Section 107 of the Insurance Law.

THE REAL PROPERTY LAW SECTION OPPOSES THIS LEGISLATION

The Real Property Law Section is in favor of the concept of licensing of title insurance agents. However, this Bill, while implementing a statutory framework for accomplishing such licensing, has some deficiencies that should be addressed. First, the Bill contains an over broad prohibition against payments made by one title insurance agent to another title insurance agent, even when such a payment is a reasonable fee for services rendered. Second, the Bill continues to promulgate an ambiguous section of the Insurance Law (Section 6409). The Real Property Law Section believes that this Bill should include clarifying language to make the Bill consistent with existing federal law, specifically, the Real Estate Settlement Procedures Act (hereinafter "RESPA"). Each of these issues will be addressed below.

I. Overbroad prohibition of legitimate payments for necessary services actually rendered.

Section 12 of the Bill seeks to add a new Section 2113 to the Insurance Law which would prohibit any title insurance agent from paying "any percentage of the title insurance premiums or fees collected to any other title insurance agent or such title insurance agent's representative." This prohibition is anti-competitive and would prohibit any arrangement whereby one title insurance agent might want to subcontract with another title insurance agent. For example, if a small title insurance agent were to receive a surge of business that it was not equipped to handle in the short term, this provision would make it illegal for that title insurance agent to temporarily engage another title insurance agent, for a reasonable fee, to work cooperatively in a legitimate fashion. For example, the overburdened title insurance agent might

want to subcontract out any one of the discrete functions which title insurance agents perform (e.g. searching the public records, "reading" titles, producing title reports, "clearing" titles, attending closings, handling recordings, etc).

It appears that this Section of the Bill is an overly broad attempt to eliminate "sham" title insurance agencies or arrangements, which often serve as a subterfuge to enable illegal kickbacks. While the Real Property Law Section certainly agrees that sham title insurance arrangements and disguised kickbacks should be outlawed, this provision is entirely too broad and unnecessarily prohibits completely legitimate activities. Moreover, it should be kept in mind, that if a licensing Bill were to pass, the Department of Financial Services would have jurisdiction over the licensed title insurance agents and would be able to take appropriate enforcement action against any parties engaging in sham title insurance arrangements.

This Section of the Bill should be remedied by providing at the end of proposed Section 2113(a) that it does not prohibit a title insurance agent from paying any third party (including another title insurance agent) a reasonable fee for goods or facilities actually furnished or for services actually performed.

II. Clarification of the anti-kickback language in Section 6409(d) of the Insurance Law.

Section 22 of the Bill adds title insurance agent as a class of persons bound by Section 6409(d) of the Insurance Law. It also increases the penalty for a violation of Section 6409(d).

While the Real Property Law Section has no objection to the changes made by the Bill, it believes that the Bill should add clarifying language to Section 6409(d). In this regard, some stakeholders in the industry have advocated a position that 6409(d) does not permit an attorney or law firm to be paid by a title insurance agent a reasonable fee for services rendered and/or that 6409(d) does not permit an attorney or law firm to operate a title insurance agency as an adjunct to the attorney's law practice. Moreover, if strictly construed, the language of 6409(d) would appear to prohibit other legitimate activities, such as the payment of a portion of the premium from a title insurance company to its agent for performing title insurance services or the payment of a bona fide salary or compensation to employees or third parties for services actually rendered. Because of the foregoing issues, the Real Property Law Section believes that Section 6409(d) should be clarified.

In order to properly understand the need for clarification of Section 6409(d), it is instructive to consider the statutory background and legislative history of the current version of Section 6409(d).

A. Statutory Background and Legislative History

The language set forth in Section 6409 of the Insurance Law was enacted in 1975 to accomplish a singular objective; namely to bar "… payment of commissions to attorneys or real estate brokers by title insurers; prohibiting the receipt of any commission or rebate as an inducement for the placement of title insurance business…." (emphasis added). [1] The Assembly version of the bill, A-1978B of 1975, was introduced by Assembly Member Miller. His supporting Memorandum likewise stated that the purpose of the bill is "[t]o prohibit payment of

1 Sponsor's Memorandum of Senator John R. Dunne, June 10, 1975, in support of S-4961 amending Section 440 of the Insurance Law.

any commission, rebate, other remuneration or consideration as compensation for the procurement of title insurance." (emphasis added).

Similarly, in his Memorandum to the Governor in support of the legislation, Acting Superintendent of Insurance, John P. Gemma, wrote: "[t]he bill would effect a flat bar on the receipt of rebates for placement of title business by anyone directly or indirectly involved in the real estate transaction. This approach, coupled with severe penalty provisions, has been adopted by the federal government in the Real Estate Settlement Procedures Act of 1974 [citations omitted] which takes effect June 20, 1975, and applies to title insurance on one to four family residential housing. The proscriptions in this bill would apply to all title business in this State. This bill also has an effective date of June 20, 1975, and would, therefore, result in a flat bar against all commission and rebates effective June 20, 1975."[2]

The rich legislative history of the existing version of 6409(d) make it very clear that Section 6409(d) of the Insurance Law was intended only to prohibit payment of a rebate, commission, kickback or other fee (irrespective of how it was denominated) for simply placing or procuring the title coverage. The Legislature wanted to stop payments to lawyers, brokers and others who simply make a call to a title company to order a policy. Clearly, however, the New York Legislature never intended to prevent lawyers and others who actually perform the services of a title agent from being compensated for services actually rendered. Reading the title, preparing the title report, clearing the title objections, handling the closing for the title underwriter, recording the documents, paying off mortgages and other liens, issuing the title policies, and more, is real work. Thus, the attorney/title agent who provides the core title services in addition to representing his or her client is entitled to be paid for those additional services in the same manner as any other title agent.

Conceptually, the prohibition in Section 6409 of the Insurance Law is virtually identical to RESPA's prohibition against paying or receiving any thing of value in exchange for the referral of settlement services, unless the payment is made for services actually performed. See 12 USC 2607(a) and (b). The correlation with RESPA, so poignantly noted by the Insurance Department, is not coincidental. The Acting Superintendent's Memorandum in Support of the 1975 amendments to the Insurance Law emphasized that the enactment of the changes would create a New York statutory analog to RESPA, and would enlarge its reach so that it applies to all real estate transactions in New York, even those beyond the scope of RESPA, which is now generally limited to transactions involving mortgage loans on 1 – 6 family dwellings.

B. Proposed clarification of Section 6409(d)

In view of the foregoing, the Real Property Law Section believes that 6409(d) should be clarified in a manner consistent with RESPA, while maintaining its broad scope to all transactions (i.e. it should not be limited to certain residential transactions). Accordingly, the Real Property Law Section recommends that Section 6409(d) be further revised to provide that it only refers to "referrals" of title insurance business. In addition, it should provide that the Section does not prohibit the payment of a fee to attorneys for services actually rendered or by a title company to its duly appointed title insurance agent for services actually performed in the issuance of a policy of title insurance. The Rules of Professional Conduct and Opinions of the Association's Professional Ethics Committee define the fees that are permissible in these circumstances, and this provision would authorize by statute the fees so permitted. The payment to any person of a

[2] Memorandum to the Governor Re An Act To Amend The Insurance Law In Relation To Title Insurance, dated June 6, 1975.

bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed should be permitted. The Section should confirm that an attorney or law firm is permitted to represent a client in a real estate transaction and provide title insurance in the transaction as a title insurance agent or as an adjunct to his or its law practice.

For the foregoing reasons, the Real Property Law Section **OPPOSES** the bill in its present form.

Preparer of memorandum: Thomas J. Hall, Esq.

Section Chair: Benjamin Weinstock, Esq.