

Condo Sponsor Transactions

To:

Attorneys representing purchasers of newly constructed residential units....

Are you exposing buyers to Insurance Department penalties?

If you were buying a diamond, would you accept an appraisal from the seller?

Now that the Insurance Department and the Attorney General have prohibited a seller (read sponsor or developer of new homes) from imposing monetary penalties on the purchaser if that purchaser uses his own title company, there is no reason to have an unknown title company forced down your throat.

Here are some frequently asked questions about this practice in New York.

Q. Even though there is no penalty for using my own title company, can't the sponsors company give a 30% discount on the premiums?

A. Every title company not only can, but must give this discounted premium. It is known as the Bulk Rate, and applies in every development of 10 or more units.

Q. What's the difference, all title reports are the same?

A. If you have a medical problem, wouldn't you want a second opinion? Here, you can get it free. Compare the sponsor's title report to your own. Review the matters raised in both reports. Is anything missing? It is possible the sponsor has negotiated escrows or undertakings to eliminate exceptions before they even reach the title report. These deleted (not omitted) matters can cause the buyer trouble later if he attempts to sell before the sponsor clears things up. The reason the new buyer knows about them is because he has a title report other than that provided by the sponsor.

Q. But if there's a kickback from the title company to the sponsor doesn't the law punish them?

A. No, Section 6409(d) of the Insurance Law considers the buyer the recipient of the kickback, and imposes a penalty of the greater of \$1,000 or five times the amount of the kickback. By using the sponsor's title company you could be exposing your client to a penalty.

Q. Sponsors who filed their plan prior to the Insurance Department opinion are "grandfathered in" and not subject to this rule. Is this true?

A. There is no "grandfather" provision. All sponsors are responsible to abide by the opinion regardless of when the plan was filed.

Q. If I use my own title company, can a sponsor require my client to pay his attorney for clearing exceptions?

A. No. This is also in violation of the Insurance Department opinion. You can't do indirectly what you can't do directly.

Don't take the easy way out. Due diligence is due diligence. If the seller's attorney has to deal with legitimate exceptions in your title report, your client should not have to pay that legal fee.

If you need back up to support your position including a copy of the Insurance Department memo, contact the Legal Department at Judicial Title.



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The Office of General Counsel issued the following opinion on January 20, 2005, representing the position of the New York State Insurance Department.

Re: N.Y. Ins. Law § 6409(d): Seller of Real Estate's Requirement That Purchasers Pay A Fee If They Use Title Abstract Company/Title Agent of Their Choice

Question Presented:

Is it a violation of N.Y. Ins. Law § 6409(d) (McKinney 2000) for a seller to require a purchaser of real property to pay a fee for using a title abstract company/title agent of the purchaser's own choice, while exempting a purchaser who uses the title abstract company/title agent chosen by the seller from paying such fee?

Conclusion:

Such practice constitutes a violation of the N.Y. Ins. Law § 6409(d) (McKinney 2000).

Facts:

Although the inquirer's letter was unclear, I was able to determine therefrom that the inquirer is concerned about a new home builder, as seller of real property, requiring purchasers to pay a fee for failing to use the title abstract company chosen by such seller to obtain title insurance. The seller, ABC Partners LLC ("ABC Partners"), has a contractual term in its purchase agreement that provides, in pertinent part, as follows:

Seller shall give and Purchaser shall accept such title and deed description of the Residential Unit subject to the liens, encumbrances and other matters set forth in this Purchase Agreement, as DEF Abstract Co.¹ is willing to approve and insure without additional premium. At Purchaser's sole discretion, Purchaser may obtain title insurance from any other title insurance company or abstract company or Purchaser may decline to obtain any title insurance at all. HOWEVER, SELLER SHALL NOT BE OBLIGATED TO CAUSE PURCHASER'S TITLE COMPANY (IF OTHER THAN DEF ABSTRACT CO.) TO OMIT ANY EXCEPTION TO TITLE IF DEF ABSTRACT CO. IS WILLING TO INSURE PURCHASER'S TITLE WITHOUT SUCH EXCEPTION OR AGAINST ENFORCEMENT OR SUCH EXCEPTION. Purchaser shall also pay to Seller's attorney a legal fee of \$350.00 for review of the report and clearance of any title exceptions from any company other than DEF Abstract Co., Purchaser shall be responsible to pay the title company the entire premium for Purchaser's title insurance, and shall also pay the applicable New York State transfer tax. (emphasis in original).

The inquirer would like to know if this practice by ABC Partners violates the Insurance Law.

Analysis:

N.Y. Ins. Law § 6409(d) (McKinney 2000) provides:

(d) 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.

The question presented is whether ABC Partners may require that a purchaser of its properties pay a fee (\$350.00) for using a title abstract company/title agent of the purchaser's own choice, while exempting a purchaser who uses the title abstract company/title agent chosen by the seller from paying such fee. The fee in question results from the legal fee charged by ABC Partners' attorney to review, among other things, the title report issued by any title abstract company/title agent other than DEF Abstract Company ("DEF Abstract"). However, we are unclear as to why it is necessary for a seller to hire an attorney to review the title report of other title companies.²

Section 6409(d) prohibits a title insurance corporation or any other person acting for or on behalf of it from directly or indirectly offering any applicant for insurance, among other things, any rebate of any portion of the fee, premium or charge or give any consideration or valuable thing as an inducement for, or as compensation for any title insurance business. It is the position of the Department that a person or corporation that is affiliated with a title agent or title abstract company acts, albeit indirectly, for or on behalf of the title insurance corporation that its title agent or title abstract company represents³ in situations where it requires, recommends or proposes that applicants for insurance utilize the title agent or title abstract company to obtain title insurance. Therefore, such person or corporation is prohibited from providing, among other things, any rebate, consideration or other valuable thing to, among others, an applicant for insurance as an inducement to, or compensation for any title insurance business.

While it is unclear from the information provided whether ABC Partners and DEF Abstract are formally affiliated, there is an apparent arrangement between the two companies whereby ABC Partners refers purchasers to DEF Abstract, and only DEF Abstract, to obtain title insurance. As such, ABC Partners acts for or on behalf of a title insurance corporation because it acts on behalf of DEF Abstract, which acts as an agent on behalf of the title insurance company that ultimately issues the title insurance policy.⁴ Consequently, ABC Partners is violating Section 6409(d) by requiring those purchasers who choose not to use DEF Abstract to obtain title insurance to pay a legal fee, but assesses no such fee on purchasers who choose to use DEF Abstract. This practice by ABC Partners' constitutes the giving of, among other things, a rebate, consideration or valuable thing to an applicant for insurance (those purchasers who use DEF Abstract) as an inducement for, or compensation for title insurance business. This matter will be referred to our Consumer Services Bureau for further investigation. This opinion is limited to an interpretation of the Insurance Law.

For further information you may contact Associate Attorney D. Monica Marsh at the New York City Office.

¹ [1] ABC Partner's purchase agreement states that DEF Abstract is an agent for a title company that is authorized to do business in the State of New York.

² In addition, there is ambiguous language in the provision quoted above that suggests that purchasers who use DEF Abstract would not be charged an "additional premium" but that those who fail to use DEF Abstract would be

responsible to pay the "entire premium" for title insurance. This provision is vague and ambiguous and requires further investigation by the Department.

³ [1] See OGC Op. dated November 13, 2002, authored by this writer and entitled: "Mortgage Bank's Proposal to Pay Commissions to its Employees for Making Referrals to a Title Abstract Company with which it has Entered into an Affiliated Business Arrangement. Please visit our website at www.ins.state.ny.us for additional opinions on this and similar issues.

⁴ [1] Please note that a title abstract company is not a title insurance company and may not issue title insurance policies.