New York opinions clarify state law, support RESPA

The Office of General Counsel of the New York State Insurance Department released two opinions regarding the relationship between real estate brokers and title insurance industry members, helping to level the playing field for title agents trying to get business. Read on to find out more about the opinions and how they line up with RESPA.

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The Office of General Counsel of the New York State Insurance Department released two opinions regarding the relationship between real estate brokers and title insurance industry members, helping to level the playing field for title agents trying to get business.

The opinions were prompted by discussions title agents and the New York State Land Title Association (NYSLTA) had with the department, explaining that real estate brokers have entered into quid pro quo arrangements with attorneys in the state, telling them they will refer business to them if they refer the title business to their affiliates.

Industry members asked the department to write an opinion explaining exactly what the rules were in New York in regard to this issue, said **Paul Bugoni**, of Stewart Title Guaranty Co., president of NYSLTA. **Richard Giliotti**, chairman of the NYSLTA Abstracters and Agents Section and principal of The Judicial Title Insurance Co., said he had received many complaints from his fellow agents, as well as attorneys, who felt they could not give business to whomever they wanted because of these arrangements.

The department clarified the law by writing two opinions over the course of the summer. In opinion **OGC Op. No. 11-05-04**, the question presented was, "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?"

The conclusion was no. "If the facts are as alleged, and there is *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," the opinion stated.

The opinion pointed out that Insurance Law § 6409(d) states that a title insurance corporation — or any other person acting for or on behalf of it — is prohibited from providing a rebate or any other inducement in compensation for title insurance business.

"Accordingly, no title insurance corporation, or any person acting 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," the opinion stated. "Further, 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."

In the scenario the inquirer presented, the real estate company, 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 the real estate company's affiliate title agent. If the facts are as alleged, and there is a *quid pro quo*, then the real estate company may not refer its clients to attorneys on an approved list in return for referrals to the real estate company's affiliate title agency.

In opinion **OGC Op. No. 11-06-05**, the question posed was "May a real estate broker provide to a title insurance agent marketing services and be paid, at a market rate, a fee for actual services rendered?"

The answer was yes. "As long as the real estate broker and the title insurance agent are not affiliated entities, and there is no *quid pro quo* or any other arrangement that would violate N.Y. Ins. Law § 6409(d) or any other provisions of the insurance law, the real estate broker may provide to a title insurance agent the marketing services that are set forth in the facts herein, and be paid, at a market rate, a fee for the actual services rendered."

The opinion noted that title insurance agents are not licensed under the insurance law. Therefore, the provisions of the insurance law that address the marketing arrangements of insurance agents and brokers generally do not apply to title insurance agents. However, Section 6409(d) prohibits any person acting for a title insurance corporation from paying an inducement for title insurance business.

"Therefore, as long as there is no affiliate relationship between the real estate broker and the title insurance agent, and no quid pro quo or any other arrangement that would violate N.Y. Ins. Law § 6409(d) or any other provisions of the insurance law, a real estate broker may provide to a title insurance agent in the marketing services that the inquirer sets forth in the facts and be paid, at a market rate, a fee for the actual services rendered," the opinion stated. "Pleased be advised that, any advertisement should not be deceptive, false or otherwise misleading."

Giliotti and others noted that while these opinions are helpful in clarifying the parameters that agents and their real estate broker clients should be operating under, the substance of each opinion is nothing new because RESPA and Section 6409(d) already regulate them.

Vincent Danzi, general counsel for Equity Settlement Services, agreed, noting that he did not believe any truly new compliance ground was broken by those opinions. In particular, ne noted, Opinion 11-05-04, treads upon well-trodden RESPA ground.

"Essentially the question presented was whether an unwritten agreement whereby attorneys would refer their clients' title insurance business to a title agency owned by a real estate broker, which real estate broker had, in turn, referred its clients to the title-referring attorney, would violate New York law," Danzi said. "The answer, which was that it would violate the law, was the same under New York law as it would have been under RESPA in that the form of the agreement is not important, but rather the substance is at issue. The fact that the 'understanding,' or 'informal arrangement' was that a title referral be made in exchange for another referral, was the relevant aspect of the agreement, not that the agreement itself was not formalized and documented."

Danzi also noted that while the other opinion, Opinion 11-06-05, held essentially identical reasoning as one that would be used to analyze the situation under RESPA and Regulation X, the possible problem with this opinion is that this question begs the question of, "What constitutes 'market rate?'"

"I think it would be a real mistake for an aggressive title agent to take this opinion too far and apply a subjective test as to what they feel would be 'market rate' for these marketing services," he said. "In reality, this opinion does not create a new referral carve out, nor does it allow anything more than is allowed under

RESPA. It might have been helpful had the question offered some examples of intended compensation for such marketing efforts."

Sue Johnson, executive director of the Real Estate Services Providers Council Inc. (RESPRO), also noted that the opinions reiterated what is already stated under RESPA and that these opinions won't change the way affiliated businesses operate in New York. She did note, however, that she did not feel the qualifier to 11-06-05 needed to be placed in opinion.

"[Affiliated businesses] are subject under federal law to the same rules under that exemption so there is no reason whatsoever to have that qualifier for affiliated businesses," she said. "Particularly when you consider the fact that affiliated businesses are subject to requirements under RESPA that unaffiliated title agents are not subject to."