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

The Office of General Counsel issued the following informal opinion on October 19, 2001, representing the position of the New York State Insurance Department.

RE: **Title Insurance N.Y. Ins. Law § 6409(d)(McKinney 2000)**

Questions Presented:

1. Does New York Law prohibit mortgage lenders from requiring that borrowers in a real estate transaction obtain title insurance from a specific title insurer, agent or broker as a condition precedent to securing a mortgage commitment?

2. If the federal Real Estate Settlement Procedures Act of 1974 ("RESPA"), as amended, 12 U.S.C. §§ 2601-2617 (West 2001) permits the above activity, is state law preempted?

3. Does New York Law prohibit title insurance companies from compensating any person or entity for the referral of title insurance business?

Conclusions:

1. Yes. N. Y. Ins. Law § 2502(a)(2) (McKinney 2000) prohibits banks, trust companies, savings banks, savings and loan associations and national banks from requiring a borrower to obtain title insurance, from a specific title agent or insurer as a condition to, among other things, securing a mortgage commitment. While N. Y. Ins. Law § 2502(a)(2) (McKinney 2000) does not specifically address other mortgage lenders or their attorneys, N.Y. Banking Law § 595-a(4) (2001) prohibits a mortgage banker or a mortgage broker from requiring a borrower to purchase title insurance from a specific title company, agency or agent as a condition for securing a mortgage commitment.

2. No. RESPA provides that a determination may not be made that a state law is inconsistent where such law gives more protection to consumers then the federal law. N. Y. Ins. Law § 2502(a)(2) (McKinney 2000), as well as N. Y. Banking Law § 595-a(4) (2001), give greater protection to New York consumers by allowing those consumers to obtain title insurance from providers of their choice.

3. Yes. N.Y. Ins. Law § 6409(d) specifically prohibits title insurers from engaging in such activity.

Facts:

The inquirer requests an advisory opinion not related to any specific fact situation. Particular circumstances could alter the responses set out above. Accordingly, the inquirer may wish to contact this Department in the future with the details of any specific matter that may arise.

Analysis:

N.Y. Ins. Law § 2502(a)(2)(McKinney 2000), as amended by section 7 of Chapter 48 of the Laws of 2000, prohibits certain mortgage lenders from requiring that borrowers in a real estate transaction obtain title insurance from a specific title insurer, agent or broker as a condition precedent to securing a mortgage commitment. It reads as follows:

(2) Banks, trust companies, savings banks, savings and loan associations, and national banks shall not extend credit, lease or sell property of any kind, or furnish any services, or fix or vary the consideration for any of the foregoing, on the condition or requirement that the customer obtain insurance from the bank, trust company, savings bank, savings and loan association, or national bank, its affiliate or subsidiary, or a particular insurer, agent or broker, provided, however, that this prohibition shall not prevent any bank, trust company or national bank from engaging in any activity described in this subdivision that would not violate Section 106 of the Bank Holding Company Act Amendments of 1970, as interpreted by the Board of Governors of the Federal Reserve System. This prohibition shall not prevent a bank, trust company, savings bank, savings and loan association, or national bank from informing a customer that insurance is required in order to obtain a loan or credit, that loan or credit approval is contingent upon the customer's procurement of acceptable insurance, or that insurance is available from the bank, trust company, savings bank, savings and loan association, or national bank; provided, however, that the bank, trust company, savings bank, savings and loan association, or national bank shall also inform the customer in writing that his or her choice of insurance provider shall not affect the bank, trust company, savings bank, savings and loan association, or national bank's credit decision or credit terms in any way. Such disclosure shall be given prior to or at the time that a bank, trust company, savings bank, savings and loan association, national bank or person selling insurance on the premises thereof solicits the purchase of any insurance from a customer who has applied for a loan or extension of credit.

Pursuant to the above section, banks, trust companies, savings banks, savings and loan associations and national banks may not require a borrower to obtain insurance from a particular insurer, agent or broker, as a condition to receiving a loan. While N. Y. Ins. Law § 2502(a)(2) (McKinney 2000) does not specifically address other mortgage lenders, on August 29, 2001, Governor George Pataki signed into law Chapter 212 of the Laws of 2001, which added new subdivision (4) to N. Y. Banking Law § 595-a (2001) to prohibit mortgage brokers, mortgage bankers and exempt organizations from requiring that borrowers use a particular title insurance company, title insurance agency or title insurance agent as a condition for securing a mortgage commitment. That amendment, entitled "Restrictions On Tying" states in relevant part, as follows:

(4)(a) No mortgage banker, mortgage broker or exempt organization shall, as a condition for the approval of a mortgage loan, require the use of a particular title insurance company, title insurance agency or title insurance agent or, for any other type of insurance, require the use of a particular insurer, agent or broker.

(b) A bank, trust company, savings bank, savings and loan association or national bank which operates in compliance with the provisions of subdivision eight of section fourteen-g of this chapter and paragraph two of subdivision (a) of section two thousand five hundred two of the insurance law shall be deemed to be in compliance with this subdivision.

The federal Real Estate Settlement Procedures Act § 2607(c)(4) (West 2001) states, in relevant part:

(c) Nothing in this section shall be construed as prohibiting … (4) affiliated business arrangements so long as (A) a disclosure is made of the existence of such an arrangement to the person being referred and, in connection with such referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred … (B) such person is not required to use any particular provider of settlement services…. For purposes of the preceding sentence, the following shall not be considered a violation of clause (4)(B): (i) any arrangement that requires a buyer, borrower, or seller to pay for the services of an attorney, credit reporting agency, or real estate appraiser chosen by the lender to represent the lender's interest in a real estate transaction, or (ii) any arrangement where an attorney or law firm represents a client in a real estate transaction and issues or arranges for the issuance of a policy of title insurance in the transaction directly as agent or through a separate corporate title insurance agency that may be established by that attorney or law firm and operated as an adjunct to his or its law practice.

While RESPA seems to permit "lenders" and their attorneys to require that a borrower obtain title insurance from a particular title insurance provider, there is no preemption issue between RESPA and New York Law because the State law gives greater protection to consumers. Specifically, § 2616 of RESPA provides, in relevant part, that:

This chapter does not annul, alter or affect, or exempt any person subject to the provisions of this chapter from complying with, the laws of any State with respect to settlement practices, except to the extent that those laws are inconsistent with any provision of this chapter, and then only to the extent of the inconsistency. The Secretary is authorized to determine whether such inconsistencies exist. *The Secretary may not determine that any State law is inconsistent with any provision of this chapter if the Secretary determines that such law gives greater protection to the consumer*. (emphasis added).

Accordingly, the Department continues to maintain the position that a lender may not, as a condition to securing a mortgage commitment, require that a borrower obtain title insurance from a specific title insurer, agent or agency.

The inquirer also asks when is it permissible for a title insurer to compensate a party for the referral of title insurance business. N.Y. Ins. Law § 6409(d) (McKinney 2000) states as follows:

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 above quoted prohibition on rebates was added to the Insurance Law by 1975 N.Y. Laws c. 255, to subject title insurance transactions to similar prohibitions in then existing provisions of the Insurance Law which applied to other kinds of insurance. See N.Y. Ins. Law § 2324 (property/casualty insurance) and § 4224 (life, accident and health insurance). The conduct prohibited by the statute is the payment, directly or indirectly, of a fee, commission or other thing of value to an owner of an interest in real estate, or the representative, agent or attorney of such owner or prospective owner, which would reduce the cost of title insurance that is paid to induce the placement of title insurance business, or which is paid to a person who is not an agent of a title insurer for the production of title insurance business.

Payment of commissions by the title insurer to its agent for the usual and customary services performed by title insurance agents is not within the activities prohibited by the statute. Nor does § 6409(d) prohibit legitimate payments to individuals (such as title closers and abstract companies) who perform substantial service on behalf of a title insurance company or to an attorney who renders the usual and customary services like supervision of a closing, marking up the title policy and providing the curatives to the title insurer. If the lender's attorney merely obtains the title insurance, any consideration or valuable thing given to the lender or its attorney is not for services rendered but is an inducement or compensation for the title insurance business he refers to the title company. Such compensation is an improper referral fee that is specifically prohibited by § 6409(d).

This analysis is limited to an interpretation of the Insurance Law. However, please note that N.Y. Banking Law § 14-g(8) (McKinney 2001) has the same prohibition. In addition, sections of the federal Real Estate Settlement Procedures Act (RESPA), as amended, 12 U.S.C.A. §§ 2601-2617 (West 1989 & Supp. 2000), may be relevant to the activities described, as well as the Code of Professional Responsibility with respect to licensed attorneys.

For further information you may contact Associate Attorney Sam Wachtel at the New York City Office.