



**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 2, 2001, representing the position of the New York State Insurance Department.

Re: Conflict Between N.Y. Insurance Law § 2502(a)(2) (McKinney 2000) and the federal Real Estate Settlement Procedures Act of 1974 (RESPA)

Questions Presented:

May a mortgage lender or its attorney require a borrower to purchase title insurance from a specific title company, agent or agency, as a condition for securing a mortgage commitment?

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?

Conclusions:

No. N. Y. Ins. Law § 2502(a)(2) (McKinney 2000) prohibits banks, trust companies, savingsbanks, 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.

Real Estate Settlement Procedures Act of 1974, 12 U.S.C.A. § 2616 (West 2001) provides that a determination may not be made that a state law is inconsistent where such law gives more protection to consumers. 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.

Facts:

The inquirer seeks clarification of the Department's opinion dated June 22, 2001 as to whether N.Y. Ins. Law § 2502(a)(2) (McKinney 2000) prohibits a lender from requiring a borrower to obtain title insurance from a specific title company as a condition for securing a mortgage commitment. In addition, the inquirer questions whether RESPA preempts N.Y. Ins. Law § 2502(a)(2) (McKinney 2000).

Analysis:

N. Y. Ins. Law § 2502(a)(2) (McKinney 2000) provides:

(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.

We continue to hold that pursuant to the above section, banks, trust companies, savings banks, savings and loan associations, 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 the inquirer is correct that N. Y. Ins. Law § 2502(a)(2) (McKinney 2000) does not specifically address other mortgage lenders or their attorneys, 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:

(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 uses the broad term "lender" and seems to permit lenders and their attorneys to require that a borrower obtain title insurance from a particular title insurance provider, we believe there is no preemption issue between the above state laws and RESPA because these state laws give greater protection to consumers. Specifically, Section 2616 of the Real Estate Settlement Procedures Act of 1974 (West 2001) 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.

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