



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

George E. Pataki
Governor

Howard Mills
Acting Superintendent

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 <http://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.