New York State Bar Association
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Memorandum in Opposition

REAL PROPERTY LAW SECTION

RPLS #14 March 6, 2014

S. 6357-B, Part V
A.8557-B, Part V

By: BUDGET
By: BUDGET
Senate Committee: Finance
Assembly Committee: Ways and Means
Effective Date: 180 days after it shall have become a law

AN ACT to amend Insurance Law, in relation to licensing of agents of authorized title insurance corporations.

LAW AND SECTIONS REFERRED TO: Sections 1 through 21 of Part V of this bill make various amendments and additions to Article 21 of the Insurance Law. Section 21 amends Section 6409 of the Insurance Law. Section 22 amends Section 107 of the Insurance Law.

THE REAL PROPERTY LAW SECTION OPPOSES THIS LEGISLATION

I. Preliminary Statement

The Real Property Law Section is in favor of the concept of licensing of title insurance agents. However, this Bill, while implementing a statutory framework for accomplishing such licensing, has two deficiencies that should be addressed. First, the Bill continues to promulgate an ambiguous section of the Insurance Law, Section 6409(d). This section of the law, which is an anti-kickback provision, has a laudable goal, but has unnecessarily been the subject of much debate and interpretation. Second, the Bill creates a new Section 2113(g) which requires certain disclosures in the event of a referral, (again a laudable goal) but would create a new ambiguity. If these two deficiencies are satisfactorily addressed, the Real Property Law Section would support the Bill.

Section 6409(d) is an anti-kickback provision prohibiting payments by a title insurer to any individual or entity for the referral of business. Certain stakeholders in the industry have advocated a position that 6409(d) either does not permit an attorney or law firm to be paid by a title insurance company a reasonable fee for services rendered and/or that 6409(d) does not permit an attorney or law firm to act as a title insurance agent or operate a title insurance agency as an adjunct to the attorney's law practice. These positions are wrong and the Bill should be amended to make that fact clear. Moreover, if strictly construed, some have argued that the language of 6409(d) would appear to prohibit other legitimate activities, such as the payment of a portion of the premium from a title insurance company to its agent for performing title insurance

services or the payment of a bona fide salary or compensation to employees or third parties for services actually rendered.

Proposed Section 2113(g) should be amended to make clear the fact that when an attorney or law firm acts as a title insurance agent directly on behalf of the attorney or firm's client, no "referral" has occurred and therefore Section 2113(g) would not apply in that instance.

II. Clarification of the anti-kickback language in Section 6409(d) of the Insurance Law.

In order to properly understand the need for clarification of Section 6409(d), it is instructive to consider the fact that the reading, certification and clearance of title is, at its very essence, the practice of law. It is also instructive to consider the statutory background and legislative history of the current version of Section 6409(d).

Attorneys at law in the state or colony of New York have been issuing written certifications of title for over 200 years before the advent of title insurance in the early twentieth century. Indeed, what is now Section 495 Subdivision 5 of the Judiciary Law (formerly Section 280 of the Penal Law) had to be enacted in 1909 to exempt title insurance corporations (not agents) from the unlawful practice of law provisions of the Penal Law. There has never been any provision of law exempting unlicensed non-lawyer title agents from the unlawful practice of law statutes. Attorney title agents have always been regulated and will continue to be regulated under the Judiciary Law. As non-lawyer title insurance agents have proliferated, it has become necessary to license title agents under the Insurance Law. While subjecting attorney title agents to additional licensing will be a burden to those attorneys, the Real Property Law Section believes that the burden will be offset by the benefit to society as a whole, by giving the Department of Financial Services jurisdiction over all title agents, including attorney title agents.

A. Statutory Background and Legislative History of Section 6409(d)

The language set forth in the present version of Section 6409(d) of the Insurance Law was enacted in 1975 to accomplish a singular objective; namely to bar "… payment of commissions to attorneys or real estate brokers by title insurers; prohibiting the receipt of any commission or rebate as an inducement for the placement of title insurance business…." (emphasis added). [1] The Assembly version of the bill, A-1978B of 1975, was introduced by Assembly Member Miller. His supporting Memorandum likewise stated that the purpose of the bill is "[t]o prohibit payment of any commission, rebate, other remuneration or consideration as compensation for the procurement of title insurance." (emphasis added).

Similarly, in his Memorandum to the Governor in support of the legislation, Acting Superintendent of Insurance, John P. Gemma, wrote: "[t]he bill would effect a flat bar on the receipt of rebates for placement of title business by anyone directly or indirectly involved in the real estate transaction. This approach, coupled with severe penalty provisions, has been adopted by the federal government in the Real Estate Settlement Procedures Act of 1974 [citations omitted] which takes effect June 20, 1975, and applies to title insurance on one to four family residential housing. The proscriptions in this bill would apply to all title business in this State.

1 Sponsor's Memorandum of Senator John R. Dunne, June 10, 1975, in support of S-4961 amending Section 440 of the Insurance Law.

This bill also has an effective date of June 20, 1975, and would, therefore, result in a flat bar against all commission and rebates effective June 20, 1975."[2]

The rich legislative history of the existing version of 6409(d) make it very clear that Section 6409(d) of the Insurance Law was intended only to prohibit payment of a rebate, commission, kickback or other fee (irrespective of how it was denominated) for simply placing or procuring the title coverage. The Legislature wanted to stop payments to lawyers, brokers and others who simply make a call to a title company to order a policy. Clearly, however, the New York Legislature never intended to prevent lawyers and others who actually perform the services of a title agent from being compensated for services actually rendered. Reading the title, preparing the title report, clearing the title objections, handling the closing for the title underwriter, recording the documents, paying off mortgages and other liens, issuing the title policies, and more, is real work. Thus, the attorney/title agent who provides the core title services in addition to representing his or her client is entitled to be paid for those additional services in the same manner as any other title agent.

Conceptually, the prohibition in Section 6409 of the Insurance Law is virtually identical to RESPA's prohibition against paying or receiving any thing of value in exchange for the referral of settlement services, unless the payment is made for services actually performed. See 12 USC 2607(a) and (b). The correlation with RESPA, so poignantly noted by the Insurance Department, is not coincidental. The Acting Superintendent's Memorandum in Support of the 1975 amendments to the Insurance Law emphasized that the enactment of the changes would create a New York statutory analog to RESPA, and would enlarge its reach so that it applies to all real estate transactions in New York, even those beyond the scope of RESPA, which is now generally limited to transactions involving mortgage loans on 1 – 6 family dwellings.

B. Proposed clarification of Section 6409(d)

In view of the foregoing, the Real Property Law Section believes that 6409(d) should be clarified in a manner consistent with RESPA, while maintaining its broad scope to all transactions (i.e. it should not be limited to certain residential transactions). Accordingly, the Real Property Law Section recommends that Section 6409(d) be further revised to clearly provide that it only applies to "referrals" of title insurance business (i.e. where there is no payment for services actually performed). In addition, it should provide that the Section should conform with 12 USCA Section 2607(c), the Real Estate Settlement Procedures Act ("RESPA") which does not prohibit the payment of a fee to attorneys for services actually rendered or by a title company to its duly appointed title insurance agent for services actually performed in the issuance of a policy of title insurance. The Rules of Professional Conduct and Opinions of the Association's Professional Ethics Committee define the fees that are permissible in these circumstances, and this provision would authorize by statute the fees so permitted. The payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed should be permitted. The Section should confirm that an attorney or law firm is permitted to represent a client in a real estate transaction and provide title insurance in the transaction as a title insurance agent or as an adjunct to his or its law practice.

[2] Memorandum to the Governor Re An Act To Amend The Insurance Law In Relation To Title Insurance, dated June 6, 1975.

III. Proposed clarification of Section 2113(g)

When an attorney or a law firm is representing a client in a real estate transaction and that client also retains that attorney or law firm to be the title insurance agent, there has been no "referral" of that client from one entity to another. The attorney or law firm has simply expanded the scope of work that it is providing for that particular client. In such a case, the attorney or law firm involved should be exempted from the proposed Section 2113(g). Language should be added to the proposed Section 2113(g) clarifying that such an expansion of the scope of services provided by an attorney or law firm on behalf of its client is not a "referral." This clarifying language would likewise be consistent with the manner in which this issue is handled in RESPA.[3]

For the foregoing reasons, the Real Property Law Section **OPPOSES** the bill in its present form.

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[3] See 12 USC 2607(c).