

# Texas Department of Insurance

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## COMMISSIONER'S BULLETIN NO. B-0054-96 Title Bulletin No. 158

TO ALL INSURERS WRITING TITLE INSURANCE IN THE STATE OF TEXAS AND ALL DIRECT OPERATIONS OR AGENTS THEREOF

RE: Premium splitting and rebating.

The Texas Department of Insurance has received several recent inquiries into the legality of certain ownership and contractual arrangements whereby a title agent transacts business with an unlicensed intermediary such as a builder or realtor who is in a position to steer or refer title insurance business to the agent ("intermediary"). It has also come to the Department's attention that some title agents are engaging in marketing practices that involve gifts to intermediaries or individuals working for them.

Art. 9.30(A) of the Texas Insurance Code prohibits the giving of a rebate, discount, commission, or any thing of value directly or indirectly for soliciting or referring title insurance business. Providing legal promotional and educational activities not conditioned upon the referral of title insurance business is not prohibited. Art. 9.30(E) prohibits a person from giving any portion, split or percentage of any charge made or received for rendering a closing other than for services actually performed. Under Art. 9.30(B), a title insurance agent may only share a portion of the title insurance premium with: (1) a person owning or leasing and operating an abstract plant and dividing the premium as set by the commissioner; (2) a title insurance company, agent, or direct operation for services actually performed in connection with closing the transaction, furnishing title evidence, or title examination, within percentages allowed by the commissioner; (3) a bona fide employee for goods or services actually received; (4) an attorney for services actually performed in connection with title examination or closing the transaction, provided that the payment is reasonable; or (5) a subsidiary title insurance agent by a title insurance company.

### **Controlled Business Arrangements**

Many of the business arrangements involving unlicensed intermediaries are referred to as "controlled business arrangements," using the term coined by the Real Estate Settlement Procedures Act of 1974 ("RESPA"), 12 U.S.C. §§2601, et seq. This type of arrangement takes many forms, but it generally utilizes the participation of an unlicensed entity in a position to generate business for the title agency. While it may be difficult to provide a complete analysis of every conceivable arrangement, one thing is clear. These arrangements may not be used to circumvent the premium splitting prohibitions of Art. 9.30(A) and (E).

Business arrangements involving the participation of an unlicensed intermediary also constitute engaging in the unauthorized practice of insurance in violation of Art. 9.30(C) and(D), as well as 28 TEX. ADMIN. CODE §9.1, Rule P-22(H) and (I). This illegal purpose may not be accomplished indirectly through a contract with the title agent's attorney or representative. See, Attorney General's Opinion No. WW-879 (July 11, 1960).

It is the Department's position that Art. 9.30 is not preempted by RESPA, which permits controlled business arrangements provided there is adequate disclosure to the consumer. There is an express statement of Congressional intent in RESPA providing that it does not preempt state laws affording more protection to the consumer or to competition. See, 12 U.S.C. §2616 and 24 CFR §3500.13(b)(2). The Department takes the position that controlled business arrangements involving the participation of an unlicensed intermediary are harmful to the state's regulated title insurance market because (1) expenses associated with inducing referrals may be passed on to purchasers of title insurance; and (2) other agents and direct operations not so affiliated are unable to compete on the same terms.

### **Forms of ownership**

Any individual, corporation, association, partnership or trust may be organized to transact business as a title insurance agent. Art. 9.02 (f) and (I). However, the business form of the agent will not insulate it from the prohibition against premium splitting and rebates in Art. 9.30.

For example, a title agent may transact business though the corporate form. Art. 9.03. A builder or realtor may own stock in the title agent corporation, but

this form may not be utilized to pay dividends in any way based upon the shareholder's performance in referring or soliciting title insurance business. Likewise, a title agent may be organized as a limited partnership, with a builder or realtor serving as a general or limited partner. Nonetheless, the division of profits among the partners may not be based upon the partner's performance in referring or soliciting title insurance business. For example, a title agent general partner may not make payments to a limited partner builder in any way based upon the limited partner's performance in referring or soliciting title insurance business.

### **Rebates**

Art. 9.30(D) makes the giving or receipt of gifts (any "thing of value") to or by another person for soliciting or referring title insurance business punishable as engaging in the unauthorized practice of insurance, subjecting the violators to a monetary forfeiture of up to three times the value of the thing given. The following non-exclusive list would be considered illegal rebates and violations of Art. 9.30(A):

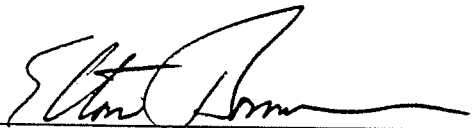
- Providing or contributing to recreational activities or vacation trips.
- Conducting, sponsoring or promoting open houses and social functions for realtors, builders or other intermediaries.
- Christmas gifts, open house gifts or gifts for other occasions.
- Providing personnel, equipment or office space for the use of an intermediary's business.
- Providing property profile reports, "farming" reports and brochures promoting the business of realtors, builders or other intermediaries.
- Renting space from an intermediary at an inflated cost.
- Providing for drawings at educational or promotional events where the winner receives a cash prize or other thing of value.
- Providing free meals to intermediaries or their employees at seminars.

Title insurance companies and agents as well as intermediaries such as builders and realtors are strongly cautioned that the Department will strictly enforce Art. 9.30(A) against all donors and recipients of such things of value found to have engaged in this illegal conduct.

**Summary**

An ownership or contractual business arrangement may not be used as a device to circumvent Art. 9.30. Payments that a title agent or direct operation makes to another entity must be commensurate with the services actually performed. Payments to attorneys must also be for services actually performed, and must be reasonable charges. Title insurance companies and agents may not make gifts to intermediary businesses or to individuals working for these businesses. It is also illegal to receive such gifts, the giving and receipt each constituting the unauthorized practice of insurance.

Please remind your employees and staff of these requirements for business in Texas. For more information, please contact the Department's Title Section of the Property & Casualty Insurance Lines Division.



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ELTON BOMER  
COMMISSIONER OF INSURANCE