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## New York Appellate Court Upholds Title Insurance Kickback Regulation

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Last summer, a New York state motion court granted a petition by the title insurance industry challenging a [New York State Department of Financial Services \(“DFS”\) regulation](#) promulgated to prohibit certain practices affecting title insurance costs. That order has now been modified by an appellate court and the petition has been denied except for two subsections of the regulation.

In [In re New York State Land Title Association, Inc. v. New York State Department of Financial Services](#), No. 151562/18 (N.Y. App. Div. 1st Dep’t, Jan. 15, 2019), the title insurance industry challenged the validity of [Regulation 208](#), 11 NYCRR 228. Reg. 208 is a set of regulations of the title insurance industry promulgated after an investigation found that, according to the DFS, certain practices resulted in higher premiums and closing costs for consumers in violation of Insurance Law § [6409\(d\)](#). The regulation addressed payments, whether direct or indirect, being made by title insurers or their agents to attorneys and real estate brokers and prohibited certain activity. The regulation also prohibited certain closer fees and fees for certain government searches.

The title insurance industry challenged the regulation as arbitrary and capricious and exceeding the DFS’s regulatory authority. The motion court agreed and annulled the regulation. On appeal, the court upheld the motion court’s findings on the two subsections of the regulations prohibiting certain closer fees and fees for certain government searches, but vacated the order for the remainder (the bulk) of the regulation.

The court concluded that Insurance Law § 6409(d) was unambiguous as to the term “other consideration or valuable thing,” which was found by the motion court to be ambiguous. The court held that the plain text of § 6409(d) unambiguously prohibited an insurer from offering or making directly or indirectly any changes or any other consideration or valuable thing as an inducement or compensation for any title insurance business. The court found that Reg. 208’s ban on certain practices was harmonious with the legislative language and intent to prevent consumers from being required to subsidize “unscrupulous exchanges of valuable things for real estate professionals.”

The court concluded that although it found “that some of the provisions of Insurance Regulation 208 lack a rational basis, we cannot conclude that DFS simply created policy on a clean slate to balance conflicting interests in the absence of legislative guidance.” In the court’s view, “Insurance Regulation 208 represents a valid exercise of the DFS’s general legislative authority and an appropriate elaboration of Insurance Law § 6409(d).”

It is likely that the title insurance industry will attempt to have the New York Court of Appeals review this ruling.

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