REAL ESTATE

No More Title Insurance Bribes: Compliance Protocol Needed at Every Title Insurance Agency

By Andrew Lieb

The Department of Financial Services has closed the door to the good old boys' club of title insurance kickbacks. Say goodbye to free meals and beverages, tickets to entertainment events, gifts, golf outings, parties, office supplies and the like. Two new regulations, Regulations 206 and 208, respectively at 11 NYCRR 35 and 228, have ended the party.

The purpose of these regulations, as set forth at 11 NYCRR 228.0, is to address "concerns regarding certain practices that impact consumers and result in higher premiums and closing costs . . . The department's investigation of the title insurance industry found that each year millions of dollars are spent by title insurance corporations and title insurance agents, which the industry has termed 'marketing costs,' provided to attorneys and other real estate professionals involved in the purchase of title insurance to induce title insurance business . . . [further,] title insurance corporation's mark-up ancillary charges excessively . . . [and further,] consumers are often encouraged at the closing to pay gratuities and required to pay pick-up fees to title insurance closers."

In ending the party, 11 NYCRR 228.2(b) sets forth a comprehensive list of prohibited expenses that title companies cannot "provide to any person, firm or corporation acting as an agent, representative, attorney or employee of the actual or prospective owner." Conversely, subsection (c) thereof sets forth a limited list of permissible expenses, such as continuing education classes, which may remain being paid by title insurance companies.

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Setting aside the end of the party, the regulations contain certain information that must immediately be known in order to continue to practice in the transactional sphere.

Initially, the regulations at 11 NYCRR 228.5(d), have completed eliminated title closer gratuities. Further, such subsection only permits pick-up fees where such fees are charged by a closer who is a non-employee of the title insurance corporation / agent and further, where such pick-up fee was disclosed "to the seller at least three days in advance of the closing." Additionally, fees for each pick-up must be "the same amounts for the same services."

Next, 11 NYCRR 228.5(a) set forth the maximum amounts permissible for each ancillary or other discretionary fee charged by a title insurance company. The list provides express rules with respect to a Patriot search, a bankruptcy search, municipal or departmental searches, recording fees, survey inspections, overnight mail charges, and escrow services. Further, these ancillary fees and title insurance fees must be published on every title insurance corporation's website, in its place of business, in a written disclosure document and finally, at or prior to the time of closing, pursuant to 11 NYCRR 35.6.

Beyond kickback and overcharge rules, the new regulations also require that a title report be provided at least three days prior to the closing to the buyer's attorney pursuant to 11 NYCRR 35.7. Such subsection also requires a new disclosure on the report, which should read substantially similar to:

> THIS REPORT IS NOT A TITLE INSURACE POLICY. PLEASE READ IT CAREFULLY. THE REPORT MAY SET FORTH EXCLUSIONS UNDER THE TITLE INSURANCE POLICY AND MAY NOT LIST ALL LIENS, DEFECTS, AND ENCUMBRANCES AFFECTING TITLE TO THE PROPERTY. YOU SHOULD CONSIDER THIS INFORMATION CAREFULLY.

Lastly, for affiliated companies, which, for example, may offer real estate brokerage or mortgage banking coupled with title insurance, the regulations set forth separation of business management rules at 11 NYCRR 35.4(f) and disclosure requirements and exemptions at 11 NYCRR 35.5.

In all, the Department of Financial Services has put the title insurance industry on notice of its duty to protect consumers by way of these new regulations. These regulations do not only provide notice, but concreate action steps designed to curb the overcharges faced by consumers. Specifically, 11 NYCRR 228.3 is the teeth of these action steps with its six-year lookback period for improper reporting of prohibited expenses for rate setting purposes where insurers are required to affirm in writing no wrongful expenses were listed, submit "reasonable data with actuarial support for the calculations of title rates that exclude the expenditures prohibited," or provide a new rate filing with a "uniform five percent reduction in the base rate schedule for each category."

Welcome to the new era of title insurance in New York.

Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a law firm with offices in Center Moriches and Manhasset. Mr. Lieb is a past Co-Chair of the Real Property Committee of the Suffolk Bar Association and has been the Special Section Editor for Real Property in The Suffolk Lawyer.

HEALTHCARE FRAUD

Investigations Regarding Healthcare Fraud and Abuse

By Mitchell J. Birzon

Not a day goes by when the Office of the Inspector General (OIG) of the U.S. Department of Health and Human Services doesn't issue a press release regarding their successful prosecutions of fraud and abuse investigations regarding Medicare and Medicaid.

Aside from the more commonplace matters involving practitioners having billed for services that were never performed, there are a spate of investigations involving upcoding and billing separately for services that should have been billed as a single service (connotatively known as "unbundling"). Much of this activity is spurred by the fact that whistleblowers have become increasingly efficient "agents" of the government pursuant to The Federal False Claim Act, 31 USC Sec 3729-3733.

The enactment of The Affordable Care Act (ACA) brought with it additional funding, significant technology and other resources to more aggressively identify and prosecute healthcare fraud; both civilly and criminally. For instance, algorithms can readily identify practitioners that seemingly oversubscribe medication or diagnostic service orders based upon geographical and other statistical databases maintained by the Centers for Medicare and Medicaid Services (CMS).

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Historically, government investigations and prosecutions of healthcare fraud involved only matters where the government was the actual payor for the services at issue. However, it was anticipated that "test cases" would be commenced by the Department of Justice against beneficiaries of private insurer payments under the argument that coverage provided through the exchanges created pursuant to the ACA included providers subject to the ACA and its enacted rules and regulations.

At the federal level, most fraud investigations are led by the OIG, the FBI, DOJ and state Medicaid Fraud Control Units (of which 29 states, including New York, have created), which often all join in the investigatory and prosecutorial process. Not surprisingly, a significant percentage of cases that are successfully prosecuted are borne from complaints filed by whistleblowers. These insiders often have the most intimate knowledge of the fraud and how it was perpetrated upon the government. The Federal False Claims Act, and most state whistleblower statutes, allow for the whistleblower(s) to receive between 15-25 percent of the government's recovery. (see 31 USC 3730 (5)d). As an example, The Health Care Company, "HCA" paid a total of $151 million to whistleblowers as a result of HCA's admission that it engaged in extensive physician kickbacks and the submission of fraudulent reports.

The initiation of an audit or investigation can be brought to a practitioner's attention in a variety of ways. For example, a notice from CMS or a CMS contractor may inform a practitioner that they are already being investigated and that their claims are being subjected to a review by CMS or a designated contractor before any payments are made. This designation is known as "pre-payment review" and may result in innocent practices having their Medicare payments delayed for 3-6 months.

Very often the small or mid-size healthcare practice that finds itself caught in the ever-expanding web of

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