SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 151562/2018
NEW YORK STATE LAND TITLE
vs
NEW YORK STATE DEPARTMENT OF
Sequence Number : 001
ARTICLE 78

PART 6

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. 1+2

The following papers, numbered 1 to ____, were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | No(s). ______

Answering Affidavits — Exhibits ______ | No(s). ______

Replying Affidavits ______ | No(s). ______

Upon the foregoing papers, it is ordered that this motion is

decided in accordance with the accompanying decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______
FOR THE FOLLOWING REASON(S): ______

Dated: 7/5/18

______, J.S.C.
HON. EILEEN A. RAKOWER

1. CHECK ONE: .... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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In the Matter of the Application of,

NEW YORK STATE LAND TITLE ASSOCIATION, INC.; THE GREAT AMERICAN TITLE AGENCY, INC.; and VENTURE TITLE AGENCY, INC.,

Petitioners,

Index No. 151562/2018

For Judgment Pursuant to CPLR Article 78

DECISION and ORDER

- against -

Mot. Seq. #001 & #002

THE NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES; and MARIA VULLO, in her official capacity as Superintendent of the New York State Department of Financial Services,

Respondents.

---X

HON. EILEEN A. RAKOWER, J.S.C.

In this Article 78 Proceeding, the Petitioners, New York State Land Title Association, Inc., The Great American Title Agency, Inc., and Venture Title Agency, Inc. (collectively "Petitioners") move for an Order annulling Insurance Regulation 208 promulgated by Respondents The New York State Department of Financial Services ("DFS") and Maria Vullo ("Vullo") as DFS' Superintendent (collectively "Respondents"). Insurance Regulation 208 regulates *inter alia* title insurance corporations, title agents, and closers as addressed below. By Order dated March 23, 2018, this Court granted New York State Closers Association, Inc., (the

"Amicus") leave to file a brief[1] as *amicus curiae* in support of this petition. Oral argument was held on June 14, 2018 and this Court granted Petitioners a stay pursuant to CPLR § 7805. For the following reasons, this Court now annuls Insurance Regulation 208 in favor of Petitioners.

A. Title Insurance Industry

Title Insurance means "insuring owners of . . . real property . . . against loss by reason of defective titles and encumbrances and insuring the correctness of searches for all instruments, liens or charges affecting the title to such property . . ." (Insurance Law § 1113 [a][18]) Accordingly, title insurance corporations *inter alia* "make and guarantee the correctness of searches for all instruments affecting titles to real property", "issue title insurance policies" and "examine titles to real property." (Insurance Law §§ 6403 [b][1];[2];[3]) A title insurance agent is "any . . . agent of a title insurance corporation . . . who . . . for commission . . . sells, or negotiates the sale of a title insurance policy" among other things. (Insurance Law § 107[a][54]; Insurance Law § 2101[y][1]) A title insurance policy is "a contract by which the title insurer agrees to indemnify its insured for loss occasioned by a defect in title." (*L. Smirlock Realty Corp. v Title Guarantee Co.*, 52 NY2d 179, 188 [1981].)

Every title insurance corporation must file with the superintendent of insurance its rate manual, its basic schedule of rates, and its rating plan in connection with the issuance of policies of title insurance. (1 NY Jur. 2d Abstracts § 64) When "making" these rates or premiums, consideration is given "to past and prospective expenses both country-wide and those specifically applicable" to New York among other things. (Insurance Law § 2304 [a]) Once these rates are filed and approved by the superintendent, no title insurance corporation may deviate from the practices set out in their schedules without first filing any changes with the superintendent. (Insurance Law § 6409 [b])

B. Insurance Regulation 208

DFS adopted Insurance Regulation 208 on October 18, 2017 and the regulation became effective on December 18, 2017. According to the "Scope and purpose" of Insurance Regulation 208, DFS "identified . . . certain practices that impact consumers and result in higher premiums and closing costs, including those that violate Insurance Law section 6409 (d)." (11 NYCRR 228.0 [a]) DFS "found that each year millions of dollars are spent by title insurance corporations and title

[1] The Amicus filed a proposed brief on March 15, 2018. (Amicus' exhibit A)

insurance agents, which the industry has termed 'marketing costs' . . . examples of which include meals, entertainment, gifts, vacations and free classes to select individuals." (11 NYCRR 228.0 [b]) These expenses are then included in "the calculation of future rates." (11 NYCRR 228.0 [b]) DFS additionally "found that certain title insurance agents and title insurance corporations mark up ancillary charges excessively." (11 NYCRR 228.0 [c]) Further, "consumers are often encouraged at the closing to pay gratuities and required to pay pick-up fees to title insurance closers." (11 NYCRR 228.0 [d]) Accordingly, Insurance Regulation 208 "addresses such practices and provides specific requirements." (11 NYCRR 228.0 [a].) These specific requirements are now addressed.

C. Section 228.2. Prohibition on Inducements for Future Title Insurance Business; Permitted Expenses

Preliminarily, Respondents promulgated Section 228.2 under the auspicious of Insurance Law § 6409 (d)[2]. Section 228.2 (a) provides that "Pursuant to Insurance Law section 6409 (d) . . . no title insurance corporation [or] title insurance agent . . . shall offer or make any rebate . . . or pay or give any consideration or valuable thing . . . as an inducement for . . . any title insurance business . . . regardless of whether provided as a quid pro quo for specific business." (11 NYCRR 228.2 [a]) Section 228.2 (b) further provides that no title insurance corporation or title insurance agent shall *inter alia* provide any payment or benefit associated with meals and beverages, entertainment including tickets to sporting events, gifts, outings including golf, parties including cocktail parties and holiday parties among other things. (*see* 11 NYCRR 228.2 [b]) Section 228.2 (c) is an exception stating that "the following

[2] Insurance Law § 6409 (d) provides, "No title insurance corporation, title insurance agent, or any other person acting for or on behalf of the title insurance corporation or title insurance agent, shall offer or make, directly or indirectly, any rebate of any portion of the fee, premium or charge made, or pay or give to any applicant, 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, nor shall any applicant, or any person, firm, or corporation acting as agent, representative, attorney, or employee of the owner, lessee, mortgagee or of the prospective owner, lessee, or mortgagee of the real property or anyone having any interest in real property knowingly receive, directly or indirectly, any such rebate or other consideration or valuable thing. Any person or entity who violates this section shall be subject to a penalty of (1) five thousand dollars; or (2) up to ten times the amount of any compensation or rebate received or paid in the case of a title insurance corporation or title insurance agent; or (3) up to five times the amount of any compensation or rebate received or paid; or (4) in the case of an applicant for title insurance that covers real property used predominantly for residential purposes, and which consists of not more than four dwelling units, other than hotels and motels, an amount not to exceed the compensation or rebate received or paid, when such applicant knew that it was a violation to receive such rebate, or other consideration or valuable thing; provided, however, if such applicant did not know that it was a violation to receive such rebate, or other consideration or valuable thing, he or she shall not be assessed a penalty under this subdivision."

expenses shall be permissible provided that they are without regard to insured status or conditioned . . . on the referral of title business, and offered with no expectation of . . . to refer, apply for or purchase insurance." (11 NYCRR 228.2 [c]) Section 228.2 (c) then enumerates acceptable expenses such as "continuing legal education events including complementary food and beverages that are open to any member of the legal profession" or "advertising and promotional items of a de minimums value that include a permanently affixed logo of a title insurance agent or title insurance corporation." (11 NYCRR 228.2 [c] [4]; [2])

Petitioners argue *inter alia* that Section 228.2's restrictions on ordinary, non-*quid pro quo* business marketing expenses are inconsistent with Insurance Law § 6409(d) and are an arbitrary and capricious reversal of agency precedent. Petitioners assert that the plain meaning of Insurance Law § 6409 (d) prohibits only *quid pro quo* inducements given in exchange for title insurance business. Without the thing of value being exchanged for title insurance business, Petitioners posit that there can be no impermissible inducement or compensation. Accordingly, they maintain that § 6409 (d) permits ordinary marketing and entertainment expenses so long as there is no *quid pro quo* arrangement. (Petition at 29)

Respondents argue *inter alia* that Section 228.2 (a) and (b) are valid exercises of the Superintendents authority to implement Insurance Law § 6409. Specifically, they assert that these sections clarify that Insurance Law § 6409 (d) prohibits inducement expenditures whether or not incurred as *quid pro quo* for specific business. (Respondents' memorandum of law at 30) According to Respondents, Section 228.2 (a) and (b) are consistent with the language of Insurance Law § 6409 (d) because the statute does not limit the term "inducement" or even mention "*quid pro quo.*" Respondents also argue that the plain meaning of "inducement" is incentive and therefore broader than the definition advanced by Petitioners – payment provided in return for the receipt of a specific identified piece of business. Respondents allege that regardless of Insurance Law §6409 (d), numerous other provisions of the Insurance Law and Financial Services Law grant the Superintendent broad regulatory power over the insurance industry. Specifically, Financial Services Law § 201 empowers the Superintendent to take such actions as she deems necessary "to ensure the continued solvency, safety, soundness and prudent conduct of the providers of financial products and services," to encourage high standards of honesty . . . fair business practices and public responsibility" and to "eliminate financial fraud . . . and unethical conduct." (Respondents' memorandum of law at 46)

An agency "may adopt only rules and regulations which 'are in harmony with the statute's over-all purpose." (*General Elec. Capital Corp. v New York State Div. of Tax Appeals*, 2 NY3d 249, 254 [2004].) "In so doing, an agency can adopt regulations that go beyond the text of that legislation, provided they are not inconsistent with the statutory language or its underlying purposes." (*id.*) However, a regulation must fail "if it contravenes the will of the Legislature, as expressed in the statute." (*State Division of Human Rights on Complaint of Valdermarsen v Genesee Hospital*, 50 NY2d 113, 118 [1980].) "That being said, where an agency adopts a regulation that is consistent with its enabling legislation and is not 'so lacking in reason for its promulgation that it is essentially arbitrary, the rule has the force and effect of law.'" (*General Elec. Capital Corp,* 2 NY3d at 254.) Accordingly, "[i]t is well-settled that a State regulation should be upheld if it has a rational basis and is not unreasonable, arbitrary, capricious or contrary to the statute under which it was promulgated." (*Kuppersmith v Dowling*, 93 NY2d 90, 96 [1999].)

"When interpreting a statute, 'our primary consideration is to discern and give effect to the Legislature's intention.'" (*Avella v City of New York*, 29 NY3d 425, 434 [2017].) "Guided by the familiar canon of construction of *noscitur a sociis,* we ordinarily interpret the meaning of an ambiguous word in relation to the meanings of adjacent words." (*Kese Indus. v. Roslyn Torah Found.*, 15 N.Y.3d 485, 491, [2010].) Stated otherwise, "words employed in a statute are construed in connection with, and their meaning is ascertained by reference to the words and phrases with which they are associated." (McKinney's Cons Laws of NY, Book 1, Statutes § 239)

Additionally, "[t]he title of a statute may be resorted to as an aid in the ascertainment of the legislative intent only in case of ambiguity in meaning." (McKinney's Cons Laws of NY, Book 1, Statutes § 123) "If the interpretation to be attached to a statute is doubtful, the courts may utilize legislative proceedings to ascertain the legislative intent." (McKinney's Cons Laws of NY, Book 1, Statutes § 125) "The courts in construing a statute should consider the mischief sought to be remedied by the new legislation, and they should construe the act in question so as to suppress the evil and advance the remedy." (McKinney's Cons Laws of NY, Book

1, Statutes § 95) "A construction which would make a statute absurd will be rejected." (McKinney's Cons Laws of NY, Book 1, Statutes § 145)

In reviewing Section 228.2, this Court must first discern the intent of the Legislature with respect to Insurance Law § 6409 (d). (*Avella v City of New York*, 29 NY3d 425, 434 [2017].) Although Petitioners and Respondents focus on whether § 6409 (d) mandates a *quid pro quo* for title insurance business, the threshold inquiry is whether Insurance Law § 6409 (d) was intended to prohibit marketing and entertainment expenses. Petitioners and the Amicus argue that it was not, although Respondents argue that the statute's ambit reaches these expenses. Accordingly, the parties draw this Court's attention to an ambiguity within the language of Insurance Law § 6409 (d). This ambiguity pertains to the provision "*other consideration or valuable thing*" and whether the provision embraces marketing and entertainment expenses. (Insurance Law § 6409 [d])

Preliminarily, the legislative materials indicate that the Insurance Law was amended to prohibit *rebates* and *commissions*, not ordinary marketing and entertainment expenses. (McKinney's Cons Laws of NY, Book 1, Statutes § 125) Specifically, a memorandum by Senator John R. Dunne states that the subject and purpose of the bill was to "permit reduction in the cost of title coverage by *barring 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." (Respondents' exhibit 1) Similarly a letter from the Secretary of State Mario Cuomo to the Honorable Judah Gribetz, counsel to the Governor, indicates that the bill amended the Insurance Law to "eliminate the provisions permitting a title insurance company to pay a *commission* to a licensed real estate broker or attorney for procuring title insurance business." (Respondents' exhibit 1) Lastly, a memorandum to the governor indicates that the amendment "prohibits the receipt by anyone of any *commission* or *rebate*, as an inducement or compensation for the placement of title insurance business." (Respondents' exhibit 1)

Canons of statutory construction also indicate that Insurance Law § 6409 (d) was not intended to prohibit ordinary marketing and entertainment expenses. Insurance Law § 6409 (d) provides in pertinent part that, "No title insurance corporation [or] title insurance agent . . . shall offer . . . any *rebate* of any *portion of the fee*, *premium* or *charge made*, or pay or give . . . 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 . . . nor shall any applicant . . . . receive . . . any such *rebate* or other *consideration* or *valuable thing*." To clarify whether the terms "consideration or valuable thing" embrace ordinary marketing and entertainment expenses, *noscitur a sociis* guides the Court's analysis. (*see Kese Indus. v. Roslyn Torah Found.*, 15 N.Y.3d 485, 491, [2010].) Under *noscitur a socis*, "other consideration or valuable thing" is construed in connection with the terms "rebate", "fee", "premium", "charge" and "commission." (McKinney's Cons Laws of NY, Book 1, Statutes § 239) Accordingly, "other consideration or valuable thing" cannot embrace ordinary marketing and entertainment expenses because ordinary marketing and entertainment expenses are not akin to "rebate", "fee", "premium", "charge" and "commission." Indeed, "rebate", "fee", "premium", "charge" and "commission", when construed together, indicate that the Legislature sought to remedy the mischief of *kickbacks*, not marketing and entertainment expenses. (McKinney's Cons Laws of NY, Book 1, Statutes § 95) Even the title of Insurance Law § 6409 bolsters the conclusion that the Legislature did not intend to prohibit ordinary marketing and entertainment expenses because the statute is entitled "Filing of policy forms; rates; classification of risks; *commissions and rebates prohibited*." (McKinney's Cons Laws of NY, Book 1, Statutes § 123)

Furthermore, construing "other consideration or valuable thing" to embrace marketing and entertainment expenses would make § 6409 (d) absurd and therefore is rejected. (McKinney's Cons Laws of NY, Book 1, Statutes § 145) It is common sense that marketing is an inducement for business. Therefore, if marketing is within the ambit of "other consideration or valuable thing," and the statute prohibits any inducement for title insurance business, the statute prohibits title insurance corporations from marketing for title insurance business. To construe § 6409 (d) in this manner is to hold that the Legislature intended to prohibit title insurance corporations from marketing themselves for business – an absurd proposition. Moreover, if marketing is within the ambit of "other consideration or valuable thing" and therefore prohibited, then Respondents do not have the authority to delineate what types of marketing are permissible as set out in 228.2 (c). Stated otherwise, DFS cannot interpret Insurance Law § 6409 (d) to pertain to and prohibit marketing and entertainment expenses, but then promulgate 228.2 (c) delineating what marketing and entertainment expenses are permissible e. g. "continuing legal education events including complementary food and beverages that are open to any member of the legal profession." These positions are irreconcilable and irrational.

Additionally, the jurisprudence developed with respect to Insurance Law § 6409 (d) accords with this Court's conclusion. Specifically, in *Dolan v Fidelity Nat. Title Ins. Co.*, (365 Fed Appx 271, 275 [2d Cir 2010]), the United States Court of Appeals for the Second Circuit examined § 6409 (d) and stated, quite plainly, "That subsection *bans the payment* of *commissions*."

Insofar as Respondents contend that Financial Services Law § 201 enables them to promulgate the contested regulations notwithstanding Insurance Law § 6409 (d), they advance another specious argument. Although Financial Service Law § 201 (5) and (6) empower the Superintendent to take such actions as she deems necessary "to encourage . . . fair business practices" and "eliminate . . . unethical conduct", Insurance Law § 6409 (d) is the statute wherein the Legislature specifically addressed the kinds of conduct that a title insurance corporation or agent may not engage in for title insurance business. Because "courts must read statutes so as to give effect to all their parts", these statutes must be read such that Financial Service Law § 201 is operative except with respect to prohibiting conduct in the context of inducing title insurance business as that is the province of Insurance Law § 6409 (d). (*Brown v Wing*, 93 NY2d 517, 523 [1999].) Indeed, "[i]t is not the function of the court to declare one statute the victor over another if the statutes may be read together, without misdirecting the one, or breaking the spirit of the other." (*In re Goodman*, 95 NY2d 15, 21 [2000].)

Accordingly, Section 228.2 must fail because it contravenes the will of the Legislature, as expressed in Insurance Law § 6409 (d). (*State Division of Human Rights on Complaint of Valdermarsen v Genesee Hospital*, 50 NY2d 113, 118 [1980].) Section 228.2 is inconsistent with the statutory language and the statute's underlying purpose to prohibit kickbacks. (*General Elec. Capital Corp. v New York State Div. of Tax Appeals*, 2 NY3d 249, 254 [2004].) Stated simply, Section 228.2 is not "in harmony with the statute's over-all purpose." (*id.*) Because Section 228.2 is unreasonable, arbitrary, and contrary to § 6409 (d), Section 228.2 will not be upheld. (*Kuppersmith v Dowling*, 93 NY2d 90, 96 [1999].) Therefore, Section 228.2 is annulled.

To the extent that the Legislature seeks to enable Respondents to regulate marketing and entertainment expenses, the Legislature may pass new legislation. Indeed, the Legislature is in the best position to balance any social and economic ramifications purportedly created by certain practices in the Title Insurance Industry, not DFS.[3] Although not dispositive for this instant analysis, it bears noting as the parties have alluded that legislation on this matter has recently been introduced. Specifically, 2017 Bill Text NY S.B. 6704 clarifies that nothing in Insurance Law § 6409 (d) "*SHALL PROHIBIT ANY TITLE INSURANCE CORPORATION OR TITLE INSURANCE AGENT . . . FROM UNDERTAKING ANY USUAL AND CUSTOMARY MARKETING ACTIVITY AIMED AT ACQUAINTING PRESENT AND PROSPECTIVE CUSTOMERS WITH THE ADVANTAGES OF USING A PARTICULAR TITLE INSURER OR TITLE INSURANCE AGENT* . . ." (2017 NY Senate-Assembly Bill S6704) The underlying reasoning for this amendment, as provided in the legislative history of the bill, is that "the title insurance industry does not engage in direct to consumer advertising, insurers and agents need to be able to market themselves and their services to their clients . . . and they should be able to do this in a way similar to others in the . . . general economy . . .'" (Senate Introducer Mem in Support, Bill Jacket, S6704)

D. Section 228.3 Expense reporting and rate filings

Section 228.3(a)(1) provides *inter alia* that "A title insurance corporation or title insurance agent shall not include any expenditure that is prohibited or exceeds any expenditure permitted under the Insurance Law or this Part in its expense schedules reporting title expenses for underwriter direct operations." (11 NYCRR 228.3 [a][1]) Because Section 228.3 prohibits the inclusion in expense schedules of the prohibited expenditures delineated in Section 228.2, Section 228.3 is irrational and also annulled.

E. Section 228.5 Ancillary or other discretionary fee

[3] The Court need not engage in a separation of powers analysis.

I. Section 228.5 (d)

Section 228.5 (d) (1) and (2) provide the following:

> **"(1)** *A title insurance corporation or title insurance agent shall be responsible for payment of the title insurance closer* and shall prohibit the closer from receiving any compensation . . . from the applicant . . .
>
> **(2)** *If a closer engaged by the title insurance corporation or title insurance agent will be remitting a payoff to a lender following the closing, the title insurance corporation or title insurance agent that engaged the closer shall provide notice to the seller at least three days in advance of the closing of any fee to be charged by the closer for remitting the payoff . . . If the closer is an employee of the title insurance corporation or title insurance agent, no separate fee may be charged . . .*"
>
> (11 NYCRR 228.5 [d][1]; [2])

Petitioners argue that Section 228.5 (d) is arbitrary and capricious because it "singles out in-house closers" and denies them the opportunity to receive reasonable compensation for their services. (Petition at 51) Specifically, Petitioners argue that Section 228.5 (d) "permits independent title closers to receive reasonable pick-up fees from consumers for their services while prohibiting in-house closers from doing so, a distinction that is illogical and inconsistent with the requirement of Section 228.5 (d)(2) itself that 'sellers should be charged the same amounts for the same services.'" (Petition at 47) According to Petitioners, pick up fees are compensation for services provided outside the scope of the issuance of a title policy and therefore, pick up fees are not encompassed within title insurance premiums. In misapprehending this model, DFS allegedly assumes that title insurance corporations should pay in-house closers out of their revenue for premiums. (Petition at 47) Additionally, Petitioners allege that if title insurance corporations and agents are required to pay significantly more to closers in refinance transactions to replace closers' lost compensation from pick-up fees, title agents may no longer break even on refinance transactions, and exit the business. Ultimately, title insurance corporations will allegedly need to raise premiums to be compensated for the entirety of services provided, thereby harming customers. Until then, in-house closers will allegedly exit the business because they will not be adequately compensated in the absence of such pick-up fees.

Respondents argue that prohibiting in-house closers from collecting pick-up fees under Section 228.5 (d)(2) is a valid exercise of regulatory authority. Allegedly, DFS determined that entities hiring in-house closers should be responsible for their own closers' fees to ensure *inter alia* that the closer is not charging the applicant for work relating to the insurance policy in excess of the premium charges. Respondents aver that DFS also reasonably determined based on public comments that the elimination of pick-up fees for independent closers would have a significant and disparate impact on independent closers. It allegedly "could result in additional fees being charged by requiring additional parties to attend the closing to ensure the payoff" such as attorneys. (Respondents' memorandum of law at 68) Accordingly, Respondents claim that DFS carved out an exception permitting independent closers to charge a reasonable fee for the remittal of a loan payoff, but which requires that any such fees be disclosed prior to closing and that they are not unreasonable or excessive. Respondents further argue that Section 228.5 (d)(2) is consistent with DFS's broad statutory authority under the Financial Services Law to ensure *inter alia* the prudent conduct of insurers and encourage fair business practices and public responsibility. (Respondents' memorandum of law at 69) Respondents therefore maintain that Section 228.5 (d)(2) is not arbitrary and capricious.

"[A]n administrative regulation will be upheld only if it has a rational basis, and is not unreasonable, arbitrary or capricious." (*New York State Ass'n of Counties v Axelrod*, 78 NY2d 158, 166 [1991]) "Administrative rules are not judicially reviewed pro forma in a vacuum, but are scrutinized for genuine reasonableness and rationality in the specific context." (*id.*)

Respondents' justifications for the provision are unreasonable and irrational. According to Nancy Ruskin, Deputy Director of the Financial Frauds and Consumer Protection Division, the genesis of Section 228.5 (d)(2) was rooted in the finding that "[C]onsumers were not advised that the gratuities and pick up fees were for services that were included in the title insurance rate that they already were paying." (aff of Ruskin at 5) In addition, the affidavit of Cassandra Lentchner ("Lentchner"), the Deputy Superintendent for Compliance in the New York State Department of

Financial Services, provides that "The premium rate charged by a title insurance company, and the compensation paid to a title insurance agent, already reflect the expenses of a closer, a person hired by the insurer or agent to be the insurer/agent's representative at the closing." (aff of Lentchner at 15) However, Lentchner also avers that,

> "Pursuant to Insurance Law Section 2314, the title insurance applicant should be required to pay only the title insurance premium rate that has been filed with the Superintendent and approved by the Department. The title insurance corporation and all employees involved with the transfer of title should be paid for through the premium. As a result, the 2017 proposed regulation would have prohibited all pick-up fees. *In response to comments received from title closers, however, the Department included an exception in the Final Regulation for independent closers who were not paid (or paid a very small amount) by the title insurance company that hired them.* These independent closers claimed that the regulation would have a significant and disparate impact on them. *Accordingly, in the Final Regulation the Department made an exception to the outright ban on closer pick-up fees to permit independent closers to charge a pick-up fee to the seller, provided that the fee is reasonable and disclosed sufficiently in advance of the closing."*
>
> (aff of Lentchner at 16)

The record here is internally inconsistent. If the premium accounts for pick-up fees and the expenses of a closer, then any distinction based on the closer's status as in-house or independent is arbitrary because the closer should be paid out of the premium regardless. If the premium does not account for pick up fees, as Petitioners and the Amicus assert, then Section 228.5 (d)(2) is not rationally based. Either way, the regulation is unreasonable and therefore must be annulled. (*New York State Ass'n of Counties v Axelrod*, 78 NY2d 158, 166 [1991].)

Having annulled numerous sections of Insurance Regulation 208, it would be "jurisprudentially unsound . . . to attempt to identify and excise particular provisions while leaving the remainder of [Insurance Regulation 208] intact, since the product of such an effort would be a regulatory scheme that neither the Legislature nor . . . [Respondents] intended. (*Boreali v Axelrod*, 71 NY2d 1, 14 [1987].) This holds true especially with respect to the other provisions of Section 228.5. However, even if this Court were to consider Section 228.5 (a), the result would be the same.

II. Section 228.5(a)

Section 228.5 (a) (1) and (2) provides *inter alia* that

> "A title insurance corporation or title insurance agent shall not charge an applicant in connection with a residential real property closing an ancillary or other discretionary fee more than those amounts set forth herein: (1) for a Patriot search, 200 percent of the out-of-pocket cost paid for the search . . . (2) for a bankruptcy search, 200 percent of the out-of-pocket cost paid for the search."

Petitioners assert that Section 228.5 (a) imposes arbitrary limitations on the fees title insurance corporations and agents may charge for ancillary services in connection with residential real property closings. Specifically, they argue that DFS has not offered any economic or other analysis substantiating the specific caps selected. However, these caps are allegedly so low that they will likely drive companies out of business.

Respondents argue that Section 228.5 (a) capping amounts charged by insurers and agents for certain ancillary services is a valid exercise of regulatory authority to protect insureds from excessive fees. Respondents allege that they issued Section 228.5 (a) after determining from their 2012 investigation that certain title insurers and agents were supplementing their already high profit margin by marking up or overcharging for ancillary services. For instance, Respondents allegedly found that consumers were routinely billed $25 for "Patriot" searches which cost approximately $2.00 to $3.00 per search. Additionally, consumers were charged $40 for bankruptcy searches that cost only $0.10 to $5.00 per name search. Accordingly, Respondents posit that they issued Section 228.5 (a) to limit the fees that the title insurers and agents may charge for ancillary services "to allow for a reasonable return but not more." (Respondents' memorandum of law at 72) Indeed, Respondents maintain that Section 228.5 (a) is a reasonable regulatory response following DFS' investigation.

"An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts." (*Testwell, Inc. v New York City Dept. of Bldgs.*, 80 AD3d 266, 276 [1st Dept 2010].)

The 8 affidavits submitted by Respondents including that of Superintendent Vullo are, at the very least, devoid of any economic or other analysis justifying the 200% caps imposed. For instance, the affidavit of J. Robert Hunter, Director of Insurance at the Consumer Federation of America, provides, "The definitions of and caps for charges and fees in the DFS rules are reasonable and necessary to ensure that consumers get full value from the title insurance premium they pay and are not charged multiple times for the same activity." (aff of Hunter at 3) Accordingly, it remains unclear to this Court how Respondents determined that these 200% caps "allow for a reasonable return but not more." (Respondent's memorandum of law at 72) Indeed, the record provided is without any formulas or explanation begging the question as to whether 200% is just as arbitrary a figure as 300% or 150%. (*see New York State Ass'n of Ctys. v Axelrod*, 78 NY2d 158, 167–68 [1991]) (finding that the blanket percentage reduction selected was not based on a rational, documented, empirical determination but the result of compromise and estimation.) Accordingly, this Court finds that these figures were taken without sound basis in reason or regard to the facts. Therefore, Section 228.5(a) is annulled.

Wherefore, it is hereby,

ORDERED that New York State Land Title Association, Inc., The Great American Title Agency, Inc, and Venture Title Agency, Inc.'s Article 78 Petition to annul Insurance Regulation 208 is granted.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: ~~JUNE~~ July 5, 2018

Eileen A. Rakower, J.S.C.