DFS Wins New York State Appeal Reinstating Portions of Regulation Aimed at Controlling Title Insurance "Marketing" Expenses

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On January 15, 2019, a New York appellate court reinstated portions of Insurance Regulation 208, which was promulgated by the Department of Financial Services (DFS) in December 2017. The regulation prohibited title insurers from "wining and dining" attorneys and other agents in the real estate market in exchange for business referrals, while passing those costs through to the consumers. The appellate court decision overturned a 2018 New York lower court ruling that annulled Insurance Regulation 208 in its entirety on the grounds that its provisions were arbitrary and capricious and that the regulation exceeded DFS' regulatory authority in violation of separation of powers.

The enactment of Insurance Regulation 208 followed a DFS investigation into the business practices of licensed title insurers in New York State. The DFS report concluded that title insurance company spending was "replete with excessive entertainment," which often included "wining and dining...of real estate professionals." The DFS report estimated that during the period from 2008-2012, on average, 5.3% of premiums charged statewide violated the existing statute, Insurance Law § 6409(d). Based on the findings of the investigation, DFS enacted Insurance Regulation 208 to provide for an increase in legislative protection for consumers who were bearing the pass-through costs in the form of excessive title insurance policy premiums resulting from "lavish gifts" given to intermediaries in exchange for a steady source of business referrals. Of note, Insurance Regulation 208 specifies both impermissible and permissible practices in a lengthy list, which "should not be considered as exclusive or exhaustive."

In reaching its decision, the appellate court determined that, contrary to the trial court's opinion, (i) the meaning of the phrase "other consideration or valuable thing" as written in Insurance Law § 6409(d) is unambiguous when interpreted within the statutory text; and (ii) the provisions of Insurance Regulation 208 have a rational basis as the investigation covering the five-year period compelled DFS to enact new legislation aimed to curb "ethically dubious" business practices that caused actual economic harm to the title insurance consumer.

The appellate court affirmed two portions of the lower court's annulment of Insurance Regulation 208. First, the appellate court agreed that there is no rational basis for DFS to impose an absolute ban on the collection of certain fees by in-house closing agents, while permitting independent closing agents to collect the same fees. Second, the appellate court also agreed that there is no rational basis for capping fees for certain ancillary searches at 200% of the out-of-pocket costs of the search.

The effects of this decision have already impacted the industry, as title insurance company event cancellations are circulating to comply with the new regulations. If you have questions or would like further information, please contact Steven Ostrow (ostrows@whiteandwilliams.com; 212.714.3068), Steven Coury (courys@whiteandwilliams.com; 212.631.4412) or Patrick Haggerty (haggertyp@whiteandwilliams.com; 215.864.6811).