

August 7, 2019

NEW YORK STATE SUPREME COURT INVALIDATES STATE TITLE INSURANCE REGULATIONS

To Our Clients and Friends:

On August 2, 2019, the Manhattan Supreme Court invalidated as unconstitutional New York State Insurance Regulation 208—a sweeping regulation adopted in late 2017 by the New York State Department of Financial Services (DFS)—on First Amendment and due process grounds.

The case involved an administrative challenge by the New York State Land Title Association (NYSLTA) to DFS’s Regulation 208, which would have barred the entire title insurance industry in New York State from engaging in traditional industry marketing and advertising practices ranging from a title insurance agent taking a real estate attorney to lunch to hosting an office party. The regulation also would have imposed an across-the-board, industry-wide 5% rate reduction on title insurance premiums.

In an earlier phase of the litigation, Gibson Dunn successfully petitioned the trial court to invalidate the regulation in its entirety on non-constitutional grounds. DFS appealed and on January 15, 2019, the Appellate Division reversed the finding of invalidity as to the statute as a whole—permitting its restrictions on marketing and advertising activities to go into effect—and affirmed the invalidity of certain subsections which dealt with fees for ancillary searches like Patriot Act and similar title searches, and which restricted payments to in-house title insurance closers as opposed to independent closers. The Appellate Division then remanded for the Supreme Court to consider NYSLTA’s remaining causes of action.

On remand, in a thorough, well-reasoned opinion, Justice Rakower again invalidated the Regulation in full, this time on constitutional grounds.

First, Justice Rakower found that the Regulation’s restrictions on title insurance marketing—and in particular, the ban on political donations, charitable contributions, and advertising that are not “reasonable and customary” or are “lavish and excessive”—were unconstitutionally vague under the Due Process Clause. As Justice Rakower explained, the statute “does not define what would constitute ‘reasonable and customary’ yet not ‘lavish and excessive’ political donations, charitable donations, or advertising activity” and does not sufficiently put businesses on notice of prohibited conduct to ensure that they “can conform their conduct to the dictates of the law.”

Second, Justice Rakower found that the Regulation violated the First Amendment. She explained: “The statute imprecisely prohibits constitutionally protected speech without narrowly tailoring the regulation to fit the state’s needs, which invites arbitrary enforcement and chills corporations from engaging in these forms of constitutionally protected speech under the First Amendment.”

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Finally, Justice Rakower recognized that the constitutionally impermissible provisions are “at the core of Insurance Regulation 208” and cannot be severed. Accordingly, Justice Rakower invalidated the Regulation in its entirety.

Gibson Dunn & Crutcher LLP partners Mylan Denerstein and Akiva Shapiro and associate Lee Crain represented NYSLTA in this action and are available to answer questions regarding the decision.



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