BEFORE THE DIRECTOR OF THE DEPARTMENT OF INSURANCE

STATE OF IDAHO

In re the Application for Title Insurance Agent License of:	)	Docket No. 18-2429-07
TITLEONE OF BOISE COUNTY, LLC, an Idaho limited liability company	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER ON PETITION FOR REHEARING

I. Introduction, Procedural Background, and Issue Presented

A. Introduction

Titleone of Boise County, LLC (Titleone or the Company) applied to the Department of Insurance (Department) for a title agent license in Boise County but was effectively denied a license on the basis that two of its members were producers of title business, i.e. in a position to steer business to a title agency, namely, an attorney and a real estate licensee. Titleone (and/or its majority owner, TitleOne Corporation) objected to the denial, and it requested a hearing be afforded on an expedited basis. The parties worked efficiently and cordially towards presenting the issue to a hearing officer appointed serving in the stead of the Director based primarily on stipulated facts.

B. Procedural History

The Company informed the Department in November 2007 that it was interested in applying for a title agency license. In December 2007 the Department informed the Company that the proposed transaction where the Company would be licensed as a title

agency, yet owned in part by individuals in a position to produce title business, would be prohibited by Rule 39. By stipulation, the Company and Department agreed to present the matter to a hearing officer appointed by the Director. The parties presented a Stipulation of Undisputed Facts on January 7, 2008, and a hearing was held before the hearing officer on January 9, 2008. The parties presented post-hearing briefing and also supplemented the record with an additional stipulation on January 22, 2008. The hearing officer issued his Preliminary Order on January 31, 2008 declaring Rule 39 to be beyond the bounds of statutory authority and directing the Department to grant the Company a title agent license.

On February 13, 2008, the Department filed its motion for reconsideration (titled Petition to Review of the Preliminary Order). Following the denial of the Department's motion for reconsideration by order dated February 29, 2008, the Department filed its Petition to Director for Review of the Preliminary Order on March 11, 2008 (petition for review). Additional pre-hearing memoranda were filed. A hearing was held on the petition for review before the undersigned Director on June 6, 2008, who was assisted by Deputy Attorney General Thomas Donovan. At this hearing the Department staff appeared through its counsel, Deputy Attorney General John Keenan, and the Company appeared through its counsel, Thomas Dvorak of Givens Pursley. Each party presented oral argument, and the Department presented two exhibits marked Exhibit 1 and Exhibit 2, consisting of underscored illustrative quotations of Idaho Code §§ 41-1314 and 41-2078, respectively. I wish to note thanks to counsel for both parties for presenting their positions in a timely, cogent, and professional manner as shown throughout the record.

C. Issues Presented

The petition for review asserts first that the hearing officer construed Idaho Code § 41-1314 and 41-2708 too narrowly and results in not only an attack and dismantling of IDAPA 18.01.039 (Rule 39), but also IDAPA 18.01.056 (Rule 56). Second, the Department urges that the hearing officer erred in construing Idaho's illegal inducement statutes in partial reliance on precedent from another state. In its response, the Company asks that the Director adopt the Preliminary Order.

The substantive issue can be framed as follows. Does an ownership interest in a title agency held by one in a position to produce business for the title agency, where the interest was obtained through an arms length transaction for fair value, nevertheless constitute an illegal inducement in violation of either Rule 39 or Idaho Code §§ 41-1314 or 41-2708. A secondary issue is if such an ownership interest violates Rule 39 but not the code on its face, is the rule beyond the proper scope of the statutes such that it should be struck down or not enforced.

II. Factual Findings & Legal Analysis and Conclusions

A. Factual Findings

The facts are not in dispute and set forth by the parties in their stipulations and recited by the hearing officer in his Preliminary Order and supplemented based on testimony and further developments. They are repeated with only slight modification, such as nomenclature, here.

1. TitleOne Corporation[1] is an Idaho corporation.

2. TitleOne Corporation primarily does business in Ada County and Canyon

[1] Although identified as TitleOne, Inc. in the Stipulation of Undisputed Facts, according to Department records and as identified in Exhibit B to the Stipulation of Undisputed Facts, the proper name of this entity appears to be TitleOne Corporation.

County, Idaho. It previously was licensed to do limited business in Boise County in association with a small development of property that was just over the Boise County border from Ada County in the vicinity of Bogus Basin Ski Resort.

3. Ian Gee ("Gee") is a member of the Idaho State Bar and a resident of Boise County, Idaho.

4. Martin Weldon "Marty" Justus ("Justus") is a resident of Boise County, Idaho, and holds an associate broker license to sell real estate from the Idaho Real Estate Commission, and is actively engaged in the sale of residential real estate in Boise County, Idaho.

5. At the present time, several title insurance companies sell policies for property in Boise County.

6. At the present time, none of these companies has a physical office for escrow and closing functions within the confines of Boise County, Idaho.

7. Boise County residents closing on property must travel to Ada County, Idaho, or other parts of Idaho to close on any real estate transaction.

8. Recognizing this need, in approximately August of 2006, Mr. Gee and Mr. Justus together determined to investigate the possibility of opening a new title insurance company in Boise County, Idaho.

9. In the course of these discussions, they contemplated and researched what it would take to set up a new title plant facility themselves in Boise County, Idaho.

10. Upon discovering the capitalization requirements to set up such a plant and the effort required, they determined it would be necessary to bring other persons into the venture, both with capital and expertise.

11. In December of 2006, Mr. Justus and Mr. Gee began discussions with Stewart Title towards the end of jointly constructing a title insurance plant and opening a new title insurance company.

12. The discussions with Stewart Title were terminated in the first quarter of 2007.

13. In April of 2007, Justus and Gee contacted TitleOne Corporation and began similar discussions with TitleOne Corporation.

14. These discussions ultimately culminated in a meeting and discussions with TitleOne Corporatino which culminated in the establishment of a new limited liability company, TitleOne of Boise County, LLC, an Idaho limited liability company (referred to in this order as Titleone or the Company), by the filing of Articles of Organization with the Idaho Secretary of State on November 1, 2007, and the execution of an Operating Agreement by all members, effective that same date. They were attached to the parties' Stipulation of Undisputed Facts as Exhibits A and B respectively. As developed from testimony, Titleone applied for a title agency license and not a certificate of authority as an insurer.

15. The profits of this limited liability company are to be distributed to the owners of the Company in the manner that is usual and customary for limited liability companies. Likewise, the income, gains, losses, deductions and credits of the Company are allocated to the members on a pro rata basis.

16. The prices charged for any particular unit of ownership in this new entity are not based on, nor have any relationship to, any promise of or potential for referrals by the subscribing member to the entity.

17. The Operating Agreement for the Company does not provide for any scheme or device to tie the compensation of any owner to the number of title insurance polices that are a result of that owner's actions.

18. TitleOne Corporation is the majority owner of the Company. Gee and Justus also own a membership interest along with seven (7) others.

19. There is no agreement requiring any owner of the Company[2], to steer title insurance work to the Company and preventing them from taking such work to any other title insurance company that serves Boise County.

20. As a matter of practice, Titleone intends to require any member owners who are persons engaged in the active business of constructing residences to use a disclosure form in any written contracts they have with their clients, which discloses that member's interest in Titleone. Exhibit C to Stipulation of Undisputed Facts.

21. On or about November 16, 2007, Bo Davies, Vice President and General Counsel of TitleOne Corporation, provided a copy of the Operating Agreement to the State of Idaho, Department of Insurance, and advised the Department of the formation of the new limited liability company, and the intent to seek licensure in Boise County.

22. On or about December 5, 2007, Mr. Dale Freeman of the Department contacted Bo Davies by phone and indicated the Department had concerns with the Operating Agreement.

23. On December 7, 2007, Mr. Davies, sent a clarification letter to the Department. Exhibit D to Stipulation of Undisputed Facts.

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[2] The parties' Stipulation of Undisputed Facts and the Preliminary Order refer to "TitleOne" in this paragraph and paragraph 20, i.e. the majority owner of Titleone/Company. I presume this was a typo, and the intent was to focus on the owners of the Company/Titleone, or "the Applicant" as defined in the stipulation.

24. On December 11, 2007, the Department of Insurance responded to Mr. Davies' letter. Exhibit E to Stipulation of Undisputed Facts.

25. As developed from testimony, the Department's concern with the Company's Operating Agreement simply is that a producer of title is prohibited from having an ownership interest in a title company.

26. Titleone has elected for tax purposes to be treated as a partnership.

27. TitleOne Corporation surrendered its license as a title entity to conduct business in Boise County when it became a member of Titleone, or from and after January 1, 2008.

28. As developed from testimony, the Department granted a license to Kootenai Title to conduct title insurance business approximately one year ago notwithstanding that investors in the investment company, which holds the interest in the title entity, are producers of title.

29. As developed from testimony, a third party underwriter or insurer would act as the insurer for the title policies to be written.

30. A copy of the January 11, 1973 Business Committee Minutes, which is attached to the Pre-Hearing Memorandum of the Applicant, may be treated as Exhibit "F".

31. Line 24 on page 64 of the Transcript of the January 9, 2008 hearing should read: "... equitable. Acquiring an equitable interest'?" (Correction by Hearing Officer - question mis-heard).

32. Additionally, the Director takes official notice of the record of the Department in the following regard. After the issuance of the Preliminary Order, Titleone was

granted a title agent license for Boise County effective February 19, 2008 pursuant to the Stipulation Re: Issuance of License filed February 13, 2008, which is the same day the motion for reconsideration was filed. The Company currently holds title agent license No. 278486 for Boise County.

B. Legal Analysis and Conclusions

1. Rule 39

The primary contention of the Department was and is that the Company's structure, namely equity ownership interests held by an attorney and a real estate licensee, is prohibited by Rule 39. *See* Exhibit E to Stipulation of Undisputed Facts. The Department also asserts that the ownership structure of the Company violates Idaho Code §§ 41-1314 and 41-2708 outright, but the threshold inquiry focuses on Rule 39.

Rule 39 lists goals consistent with the ideals reflected in the anti-rebate/illegal inducement statutes, including, fostering a competitive and consumer-oriented marketplace where title insurance business is selected based on "the best product in terms of cost and service" rather than one's "own enrichment." The main prohibition in Rule 39 is stated as follows:

> It shall be an unlawful inducement or rebate scheme for any title entity, including but not limited to any title insurer or title agency, to sell to, exchange with or offer to sell or exchange with any licensed [real estate licensee] or mortgage lender, attorney, or person engaged in the active business of construction of residences, within the state of Idaho, any shares of stock in any title entity or any other business concern owned by, or affiliated with, a title entity, or interest in such title entity, including but not limited to any title insurer or title agencies, regardless of the price or relative value except for purchases, sales or exchanges made through a registered general public offering.

IDAPA 18.01.39.011.

The Company defends on the basis that either: (1) its formation and ownership structure do not come within the scope of Rule 39 because it is not a stock company involving shares of stock being transferred and/or that it is a new entity rather than an existing title agent, and (2) even if the ownership interests held by the attorney and real estate licensee are within the proscription of the rule, Rule 39 is beyond the proper scope of the anti-rebate / inducement statutes.

Rule 39 is not particularly well-crafted, however, it is clear that the undisputed facts of this case are covered by the language of Rule 39 quoted above because the only apparent exception for enumerated persons in a position to direct title insurance business to hold an equity interest in a title agency or company affiliated with a title agency is through a registered general public offering, which did not occur here. Whether the Company is viewed as affiliated with a licensed title agency, Titleone Corporation, or a title agency in its own right even though it was licensed after the Preliminary Order, the Company's first defense fails, and the ownership structure for the Company falls within the prohibited conduct set forth in Rule 39 on its face. This conclusion must be considered in light of the additional arguments and issues raised in this case.

2. Idaho Code §§ 41-1314 and 41-2708(3) and Validity/Applicability of Rule 39

The Company's second defense is that Rule 39 is inconsistent with and not reasonably related to the authority under which it was promulgated, Idaho Code §§ 41-1314 and 41-2708(3). This defense dovetails with the allegation of the Department that the Company's ownership by two producers of title business also violates these statutes outright in addition to violating Rule 39.

Only the Legislature has the power to make law. *Mead v. Arnell*, 117 Idaho 660, 664, 791 P.2d 410, 414 (1990) (citing Idaho Const. art. 2, § 1 and art. 3, §§ 1, 15). While administrative rules promulgated by executive agencies are given the force and effect of law, they do not rise to the same level as statutes, rather they are designed to implement statutes. *Mead v. Arnell*, 117 Idaho at 664. Rules are promulgated by executive agencies through authority delegated by the legislature and thus are something less than statutes. Rules that "do not carry into effect the legislature's intent as revealed by existing statutory law, and which are not reasonably related to the purpose of the enabling legislation" are invalid. *Mason v. Donnelly Club*, 135 Idaho 581, 583, 21 P.3d 903, 905 (2001) (*quoting Holly Care Center v. State, Dept. of Employment*, 110 Idaho 76, 78, 714 P.2d 45 (1986)).

The principle of judicial review of legislative language is fundamental, and that principle extends to the court's responsibility to determine the validity of administrative rules. *Mason v. Donnelly Club*, 135 Idaho 583. Thus statutory construction guidelines such as the following also apply to the construction of administrative rules.

> If the statutory language is unambiguous, we merely apply the statute as written. If it is ambiguous, then we attempt to ascertain legislative intent. When doing so, we may examine the language used, the reasonableness of proposed interpretations, and the policy behind the statute.

Sumpter v. Holland Realty, Inc., 140 Idaho 349, 351, 93 P.3d 680, 682 (2004) (*quoting Waters Garbage v. Shoshone County*, 138 Idaho 648, 650, 67 P.2d 1260, 1262 (2003)).

The court has also noted that a statute should be interpreted to mean what the legislature intended, and further, that a statute's plain meaning should not be applied if that will yield an absurd result. *In the Matter of Application for Permit No. 36-7200*, 121 Idaho 819, 822, 828 P.2d 848 (1992). Further the court has stated:

> In construing a statute, it is the duty of this court to ascertain the legislative intent, and give effect thereto. In ascertaining this intent, not only must the literal wording of the statute be examined, but also account must be taken of other matters, `such as the context, the object in view, the evils to be remedied, the history of the times and of the legislation upon the same subject, public policy, contemporaneous construction, and the like.'

Messenger v. Burns, 86 Idaho 26, 29-30, 382 P.2d 913 (1963) (*quoting In re Gem State Academy Bakery*, 70 Idaho 531-541, 224 P.2d 529, 535).

It is appropriate for the Director to determine the proper scope, validity, and application of rules promulgated by the Director. In the first instance, a rule is defined as an "agency statement of general applicability that has been promulgated in compliance with" chapter 52, title 67, Idaho Code. It stands to reason that an agency head who has the authority to promulgate rules also has the authority to determine their validity and applicability in light of governing statutes. This sentiment is clearly implied by Idaho Code § 67-5278. In addition to expressly recognizing the district court declaratory judgment process concerning rules in subsection (1), Idaho Code § 67-5278 also indicates in subsection (3) that prior to seeking redress in court, an agency may, but is not required to, pass on those same questions. Consistent with this idea, Idaho Rule of Administrative Procedure 416 indicates that the director of an agency may determine by order whether a particular rule is within the agency's substantive rulemaking authority. IDAPA 04.11.01.416.

Keeping in mind the standards when applying or interpreting statutes and rules, let us focus on the specific language at issue. Idaho Code § 41-1314 provides in part most pertinent to this case as follows:

> (1) . . . no person shall . . . directly or indirectly . . . allow as inducement to such insurance or annuity, or in connection therewith, and whether or not specified or to be specified in the policy or contract, any agreement of any form or nature

> promising returns and profits, or any stocks, bonds or other securities, or interest present or contingent therein or as measured thereby, of any insurer or other person, or any dividends or profits accrued or to accrue thereon; or offer, promise or give anything of value whatsoever not specified in the contract.
> * * *
> (2) nothing in this section shall be construed as prohibiting the payment of commissions or other compensation to duly licensed agents, solicitors, or brokers, or as prohibiting any insurer from allowing or returning to its participating policyholders, members or subscribers, the usual and ordinary dividends, savings, or unabsorbed premium deposits.

Nothing in Idaho Code § 41-1314 creates an outright ban on ownership interests in insurance licensees by agents, policyholders, or other persons. It is clear from the language quoted from subsection (1) that the prohibited benefit or thing of value can be a direct benefit or an indirect benefit, yet it still must have been given as an inducement to the insurance or in connection therewith.

The Idaho Court of Appeals had occasion to interpret Idaho Code § 41-1314 in a case where the Department asserted that an agent had made an illegal rebate of premium to a consumer, although not in the context of an ownership interest in an insurance licensee or in the title insurance context. *Cox v. Department of Insurance*, 121 Idaho 143, 823 P.2d 177 (1991). The Court of Appeals noted that Idaho Code § 41-1314 was, if not ambiguous, at least a "confusingly-worded" statute. *Cox*, 121 Idaho at 148.

The facts in *Cox* indicated that consumers surrendered life insurance policies with another carrier and bought new policies working through Cox as their agent. As a convenience, the consumers wanted to pre-pay the premium for a number of years. Cox informed the consumers of the amount necessary to prepay the policies for the requisite number of years, which the consumers paid. Thereafter, Cox provided consumers with a letter indicating that the amount of the prepayment was insufficient, and thus the premium paid was for a lesser amount of time. The consumers were upset with this

information and threatened the insurer and Cox with legal action. Despite Cox's efforts to have the insurer accept the amount of premium for the desired number of years, the insurer refused. To effect a compromise of the dispute, Cox paid one half of the additional premium, and the consumers paid the other half.

Similar to the intent expressed in Rule 39, the court in *Cox* stated: "The intent of the insurance code is to prohibit unfair business practice and cut-throat competition in the insurance business in order to maintain a healthy and viable industry." *Cox*, 121 Idaho at 146. Even though it is beyond dispute that the payment by Cox to the consumers was relative to a specific and identifiable insurance policy, the court concluded that "[u]nder no reasonable view of the facts" could it be concluded that payment "was an inducement" to the consumers. *Cox,* 121 Idaho at 147. This was in large part because prior to the payment by Cox for half of the additional premium, the policies had already been put in force with premium paid for a number of years. Of perhaps more significance was the conclusion that there was another logical explanation for the payment by Cox, namely, the resolution of a dispute. Indeed the court stated its holding as follows: "We hold that the payment made by Cox on behalf of the [consumers] was the settlement or compromise of the disputed claim . . . not an unfair trade practice prescribed by" Idaho Code § 41-1314. *Cox,* 121 Idaho at 147.

Idaho Code § 41-2708(3) aids in application and guidance of the general anti-rebate and illegal inducement statute, in the title insurance context by noting specific types of consideration that arise in and persons who are involved in title insurance, but the statute does not appear to significantly alter the meaning of Idaho Code § 41-1314 by its application. The various types of benefits enumerated in Idaho Code § 41-2708(3) as

types of things that might be "illegal inducements" or paid "in connection therewith" such as, underwriting premium, commission, and various fees, are all legitimate items in a title insurance transaction. The illegal nature of these items can arise when for example, an underwriter pays a larger commission to an agent or waives part of the premium, or when an agent charges less than the proper amount or returns such amounts in some other form. In other words there must be something out of the ordinary in the manner or how that benefit or item is paid or conferred. Similarly, an ownership interest may or may not amount to an illegal inducement depending on additional facts.

The specific penalty contained within Idaho Code § 41-2708(3) imposing liability of three times the amount of the rebate or illegal inducement for a violation indicates that the illegal inducement should be quantifiable. The fact that the record indicates that the attorney and real estate licensee paid the same proportionate value for their ownership interests in the Company as other non-producers of title business leads to the clear inference that they paid fair value. The Department does not dispute this, nor does the Department attempt to quantify the amount of the alleged illegal inducement.

Rather the Department characterizes the inducement as a logical extension from holding an ownership interest that the attorney and real estate licensee will refer clients to the Company and thereby recover profits attributable to those referrals in the future. While this is likely true, the same would be true of a producer of title business holding an ownership interest obtained through the expressly permitted registered public offering process. Disparate treatment by Rule 39 of these functionally equivalent ownership interests reveals an inconsistency within Rule 39 itself, and likely an inconsistency with and unreasonable nexus to the purpose of Idaho Code §§ 41-1314 and 41-2708(3). In this

regard Rule 39 fails to meet the test discussed in *Holly Care Center* by not carrying into effect the intent of the legislature as apparent from the statute. Therefore Rule 39, at least in part, is not reasonably related to the purpose of the statute.

Based on the language of Idaho Code §§ 41-1314 and 41-2708(3) and with the aid of the analysis in *Cox,* it appears clear that where there exists a plausible legitimate explanation for some benefit being afforded by a licensee to a consumer or other person such as a producer of title business apart from the purchase of insurance, such benefit will not amount to an illegal rebate or inducement under Idaho Code § 41-1314 and 41-2708(3). On the other hand, where there is no legitimate explanation or other equivalent quid pro quo for a benefit received, even where the benefit is indirect, an illegal inducement or rebate would likely exist. Further, even where there is a plausible explanation or consideration for the conferring of a benefit, other facts may still show a direct or indirect illegal inducement.

In this manner, where an ownership interest in an entity licensed by the Director is obtained, it is conceivable under the code and consistent with *Cox* that such interest could be deemed an improper or illegal rebate or inducement depending on additional facts. Where as here, however, there are no facts to show that the ownership interest is worth more than the legitimate consideration paid therefor or there exist no facts disclosing any other arrangement or benefit flowing such as disproportionately high profits to be passed on to the producer of title business, it would seem that no violation under the code arises.

The Department specifically takes issue with the hearing officer's reliance on the conclusion reached in a case cited by Titleone, *Lawyers Title Insurance Corp. v. Chicago*

Title Insurance Co., 409 N.W.2d 774, 778 (Mich. App. 1987) ("Construing the statutory scheme as a whole, we can only conclude that 'inducement to insurance' means inducement to the insured to purchase insurance."). While the case is helpful to the inquiry, the Director does not believe that Idaho's statutes are limited only to inducements to insureds or that the inducement must be directly tied to a specific policy or title insurance transaction.

The effect of this order is that when there is a legitimate and full or fair consideration paid in exchange for some benefit, then it cannot be presumed that the benefit conferred was "as inducement to such insurance" or "in connection therewith" in violation of Idaho Code § 41-1314 or 41-2708(3). Of course, the determination must be made based on all relevant facts. It is conceivable that facts can change or develop in any particular case that would lead to a change in conclusion that a particular transaction made to appear at arms length and for full value was really a hidden illegal inducement or rebate.

To the extent the hearing officer's Preliminary Order indicates that in order for an illegal inducement to occur any benefit must be tied to a specific identifiable insurance transaction, that view is too restrictive. Where there is an implication or inference that arises that an item of value or benefit is attributable to an improper inducement, that set of facts may support a violation of Idaho Code §§ 41-1314 and 41-2708(3). On the other hand, the Department's view, that the mere existence of an ownership interest creates an illegal inducement, *ipso facto,* even where fair value for the equity interest was paid and absent other facts supporting an improper inducement, is too broad. The legislature

intended to prohibit improper inducements, but not necessarily all potential inducements however remote, or all relationships that might also support an inducement.

This case does not present the issue of where there is a disproportionate or no consideration made supporting a benefit conferred upon a producer of title business by a title agent or insurer. It would seem consistent with the code to infer an indirect and illegal inducement even where a particular identifiable transaction may not be expressly tied to the benefit conferred, where there is no other logical explanation for the benefit flowing from the licensee. However, where there is a reasonable and identifiable fair value consideration paid in return for the benefit (in this case the same proportionate amount as all owners paid in return for the ownership interest), then absent other evidence pointing to an improper inducement, an illegal inducement cannot be presumed. Consistent with the code in one respect, Rule 39 explicitly acknowledges this by providing a safe harbor for ownership interests obtained through registered general public offerings.

It is not necessary to conclude that Rule 39 is wholly inconsistent with the applicable statutes and completely invalidate it. Indeed, the safe harbor for ownership interests obtained through registered general public offerings, absent other extraneous facts, is consistent with the code and need not be stricken. Also supporting the Company's position is the fact that the Department has permitted similar ownership interests by producers of title business held via an intervening third party. Rather than attempt to strike down Rule 39 in its entirety as invalid, I will apply it in a manner consistent with the code, and to the extent it has provisions inconsistent with the code and other provisions within the rule, I will seek to amend the rule.

The Department expresses concern regarding the validity of Rule 56 should the hearing officer's Preliminary Order stand. While the Preliminary Order is replaced and superseded by this order, the effect of this order appears more narrow than the Preliminary Order, and it is doubtful that Rule 56 is negated as feared by the Department. In any event, the validity of Rule 56 or whether a particular situation violates Rule 56 is not before the Director.

C. Conclusion

The record reflects that producers of title business purchased ownership interests in the Company, which sought but was effectively denied a title agent license. Subsequent to the hearing officer's Preliminary Order, the Company was granted a title agent license. The ownership interests held by the producers of title business, an attorney and a real estate licensee, were purchased at the same proportionate cost as all other ownership interests in the Company. There are no facts in the record that the attorney and real estate licensee owners will be favored, in terms of the distribution of profits or otherwise, by the Company. While the Department's position that one's ownership interest in a title agency will likely lead one to refer business to the title agency is logical, that alone, absent other facts which do not appear in this record, does not amount to an illegal inducement. This is especially true where the Company has indicated that those producers of title business will use a disclosure form with their customers concerning their ownership interests.[3]

[3] Actually, paragraph 20 of the parties' Stipulation of Undisputed Facts, repeated in essence above, confirms that Titleone will require Company members engaged in the business of constructing residences to disclose their interest in Titleone. It is implied, and the Director presumes, that other producer of title business members, such as Mr. Gee and Mr. Justus, will also utilize the disclosure form.

Rule 39 does not reasonably or consistently implement, interpret, or prescribe Idaho Code §§ 41-1314 and 41-2708(3) where on one hand it prohibits ownership of a title agency by producers of title business even where fair value was paid and on the other hand permits title agency ownership by producers of title business through a registered general public offering.

III. Order

Rather than simply adopt or reject the hearing officer's Preliminary Order, this order replaces and supersedes the hearing officer's Preliminary Order and is final. Based upon the findings, conclusions, and discussion above, and for good cause shown, IT IS HEREBY ORDERED THAT:

- Titleone of Boise County LLC is not precluded from holding a title agency license based on Rule 39 or Idaho Code §§ 41-1314 and 41-2708(3), and therefore no action is taken against its license No. 278486 for Boise County that was issued after the above contested case was commenced; and
- to the extent that provisions of Rule 39 are internally inconsistent and/or inconsistent with and not reasonably related to Idaho Code §§ 41-1314 and 41-2708(3), the inconsistent and unreasonable provision does not apply to the facts presented in the record, or alternatively, as a matter of fairness it will not be enforced, or alternatively it is determined to be invalid; and
- in effort to remedy this and to aid future cases, I declare that I plan to ask Department staff to propose revisions to Rule 39 with the input of industry representatives and any other interested persons as may be appropriate under the circumstances.

NOTIFICATION OF RIGHTS

This is a final order of the agency. Any party may file a motion for reconsideration of this final order within fourteen (14) days of the service date of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. *See* section 67-5246(4), Idaho Code.

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by this final order or orders previously issued in this case may appeal this final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

i. A hearing was held

ii. The final agency action was taken,

iii. The party seeking review of the order resides, or operates its principal place of business in Idaho, or

iv. The real property or personal property that was the subject of the agency action is located.

An appeal must be filed within twenty-eight (28) days (a) of this final order, (b) of an order denying any petition for reconsideration, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. *See* section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

DATED and EFFECTIVE this 1ST day of July 2008.

WILLIAM W. DEAL, Director
Idaho Department of Insurance

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 1ST day of July 2008, caused a true and correct copy of the foregoing to be served upon the following by designated means:

Thomas E. Dvorak Givens Pursley, LLP PO Box 2720 Boise, Idaho 83701-2720 ted@givenspursley.com	__x__ via U.S. Mail ____ via hand delivery ____ via facsimile __x__ via email
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Thomas A. Donovan
Deputy Attorney General