The Ohio Association Of Independent Title Agents Heads To The Ohio Supreme Court
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Mandamus: *A command by order or writ issuing from a court of law of competent jurisdiction, in the name of the state or sovereign, directed to some inferior court, tribunal, or board, or to some corporation or person, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law. (Ballentine's Law Dictionary)*

The Ohio Association of Independent Title Agents ("OAITA") has filed a Petition For Writ Of Mandamus with the Ohio Supreme Court asking the court to force the Ohio Department of Insurance ("ODI") to enforce laws that it has been ignoring. Quite simply stated, the OAITA believes that the existing laws prohibit affiliated business arrangements ("AfBA") in Ohio, but the ODI has been lax in its enforecement and it has allowed many sham operations to become licensed and receive a share of title insurance premiums through a split of "profits."

In a press release, the OAITA stated:

> The suit is the first of its kind in the United States and is an important step towards reducing the overreaching power and influence a bank, realtor and mortgage broker has over a homeowner's real estate transaction and, in particular, a homeowner's statutorily protected choice of title insurance provider.

This is a novel suit and brilliant in its simplicity. There have been laws on the books for a long time prohibiting banks, Realtors and mortgage brokers from engaging in the title insurance business. But, powerful lobby groups have been trying to find creative ways around them for years. The Department of Housing and Urban Development ("HUD") carved out exceptions to the Real Estate Settlement Procedures Act ("RESPA") to allow for AfBA's, effectively evicerating the anti-kickback provisions of Section 8. Everyone seems to have forgotten about the state laws... until now. The OAITA has put this issue center-stage in Ohio and I'm sure it will draw national interest, especially from the lobby groups that have been successful in obtaining a share of the title revenue for doing nothing more than directing their customers to purchase their title insurance from an affiliated title agency.

Since the mid-1970's, Section 8 of RESPA was the main provision that prevented affiliated business arrangements, along with a host of other kickback schemes in the title industry. The main provision states:

> **No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.**

This is pretty clear. However, there is some fee-sharing that happens by necessity. Thus, the statue clarifies that it is acceptable for an underwriter and its agent to split the premium, real estate brokers and their Realtors to split the sales commissions, to pay salaries and compensation to those who actually perform services, etc. In 1983, another major exception was created for controlled business arrangments (in 1996, "affiliated business arrangements" was substituted in place of "controlled business arrangements").

> **Nothing in this section shall be construed as prohibiting... affiliated business arrangements** so long as (A) **a disclosure is made** of the existence of such an arrangement to the person being referred and, in connection with such referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred..., (B) **such person is not required to use any particular provider** of settlement services, and (C) **the only thing of value that is received from the arrangement, other than the payments permitted under this subsection, is a return on the ownership interest**...

Well... that certainly seemed to be the end of the prohibition on kickbacks. Now, there is a very elaborate, legally sanctioned loophole that allows banks, Realtors, and mortgage brokers to insist on getting a piece of the title insurance action. To HUD's credit, it did require these new ventures to be bona fide settlement service providers; they set forth a list of 10 factors that they would look at to determine if the AfBA was a sham. However, due to the vague nature of the "factors," and HUD's lack of ability to enforce them, they aren't really worth mentioning further.

But, there was another change in the 1983 amendments that nobody seemed to notice... or conveniently ignored.

> **No provision of State law or regulation that imposes more stringent limitations on affiliated business arrangements shall be construed as being inconsistent with this section.**

It seems rather clear that that the statute was not intended to preempt state law when the state afforded more protections to consumers than did RESPA. Thus, contrary to the belief of many proponents of AfBA's, the analysis does not end with the federal statute; *the state law must also allow for AfBA's*. The OAITA makes a very strong case that Ohio law does not. Ohio's laws provide more stringent limitations, but the ODI has not enforced them.

> **§ 3953.25. Payment of commissions to agents**
> A title insurance company may pay a commission *only to a title insurance agent*...
>
> **§ 3953.21. Annual certification of agents**
> ...
> (B) *No bank, trust company, bank and trust company, or other lending institution, mortgage service, brokerage, mortgage guaranty company, escrow company, real estate company or any subsidiaries thereof or any individuals so engaged shall be permitted to act as an agent for a title insurance company*.

A title agency's profits are mainly derived from premiums earned by issuing title insurance. When a bank, Realtor or mortgage broker is the referring partner in an AfBA, they are receiving a share of the agency's profits - consisting of title insurance premiums. Ohio law prohibits these entities from being agents for a title insurance company, thus it prohibits them from sharing in the premiums.

> **§ 3953.26. Payment to induce title insurance business; prohibition**
> *No title insurance company and no title insurance agent shall pay or give [to] any applicant for insurance, or to any person, firm, or corporation who is 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 any interest therein, ***either directly or indirectly***, *any commission or 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.* Nothing in this

> section shall preclude the payment by a title insurance company of a commission to any attorney, if said attorney is also a licensed title insurance agent of such title insurance company, or the payment by such title insurance company or its agent of a fee to an attorney for services rendered in the examination of title or certification thereof.

Again, this seems pretty clear to me. When one of the afforementioned parties, who is prohibited from acting as a title insurance agent, is the referring partner in an AfBA they are clearly receiving part of the agent's commission from title insurance premiums and other fees. **Though this is done indirectly through a share of the profits, it is still prohibited by the statute.** And, why are these referring partners getting a share of the profits? Is it merely because they happen to own an interest in the AfBA? I'm sure that is what the AfBA proponents would have us all believe. However, we all know that they are brought in specifically because of their ability to refer work to the AfBA. In practice, that is exactly what happens nearly all of the time - the work from that referrer is locked up by the AfBA and no longer available through competition in the marketplace.

They may provide the necessary disclosures to comply with RESPA, though from my experience even this is rare, but **under Ohio law disclosures are irrelevant.** Ohio law, though similar to RESPA, does not contain the exception for AfBA's. Thus, Ohio law provides more stringent laws and are not preempted by the federal statute.

The ODI recently released an administrative ruling, OAC 3901-7-07 to establish ownership and licensing standards for title insurance agents and agencies in accordance with § 3953.21(B), which prohibits certain persons from acting as agents for a title insurance company.

> **No business entity may be licensed as a title insurance agency where one or more prohibited persons *control* the business entity.**

However, they defined "control" as directly or indirectly owning or controlling 50% or more of the AfBA. There is no control test in the Ohio law - rather the Ohio law focuses on whether the prohibited parties, i.e. banks, Realtors, and mortgage brokers, are getting a part of the agent's premium and fees. If they are, they are not permitted to act as title insurance agents, and they may not be licensed by the DOI. The DOI's interpretation of the law exceeds its authority.

OAC 3901-7-07 further states:

> A business entity **may not become licensed *or remain licensed*** where the entity is merely a sham arrangement used as a conduit for inducements or compensation for business payments...

They go on to adopt the same "sham-test" established in RESPA, which not even HUD is capable of enforcing. The DOI does no better. Though its own ruling indicates that an existing sham AfBA will have its license revoked, it is not actively pursuing them.

While the DOI is attempting to promulage rules that are more consistant with RESPA, allowing for AfBA's to operate legally, there is a crucial difference - *the changes to RESPA were enacted by Congress; they changed the federal statutes. The Ohio legislature has not made any such changes* and AfBA's are not legal under Ohio law.

This lawsuit is a bold move by the OAITA. The theory is very simple - Ohio law on this issue has not changed since it was adopted in 1967, long before RESPA was adopted at the federal level. It provides more protections than does RESPA and, therefore, is not preempted. The DOI is ignoring the Ohio

statutes and promulgating rules inconsistant with the letter of the law. Further, the DOI is refusing to enforce the laws as they apply to AfBA's and continuing to allow prohibited entities to engage in the title insurance business. Thus, the OAITA lawsuit seeks to have the Ohio Supreme Court order the DOI to properly construe and enforce the laws as they currently exist.

If successful, the DOI would be forced to cancel all of the AfBA's it has licensed and prevent them from licensing new AfBA's. This will surely attract attention nationwide. The National Association of Realtors, the Mortgage Banker's Association, and RESPRO will most certainly be getting involved to attempt to salvage what they have been fighting for on the federal level for years - their members' ability to obtain a lucrative piece of the title insurance business, that they contribute to by directing their clients' settlement services.

The traditional land title agencies must be furious! For a long time, they have been able to play in the middle of the road. Now that a big truck is coming, they will have to run to one side or the other. This is probably one of the biggest issues ever taken to court in our industry - how will they be able to sit this one out? They have a tough decision ahead. One one hand, they have to contend with their largest supporters, the underwriters who have quietly supported AfBA's, and their large agency members that have been setting up AfBA's. On the other, they have many independent agents that despise what AfBA's have done to our industry. Of all the amicus breifs that will undoubtably be filed, it is those from the land title associations that I am most eager to see.

Robert A. Franco
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