

IN THE SUPREME COURT
OF OHIO

STATE OF OHIO EX RELATOR, OHIO)
ASSOCIATION OF INDEPENDENT) CASE NO.
TITLE AGENTS)
1940 E. 6th Street)
Cleveland, Ohio 44114)
)
Relator,)
)
vs.) **PETITION FOR WRIT OF**
) **MANDAMUS**
)
MARY JO HUDSON, DIRECTOR of)
OHIO DEPARTMENT OF INSURANCE)
50 West Town Street)
Third Floor - Suite 300)
Columbus, Ohio 43215)
)
Also serve:)
)
NANCY HARDIN ROGERS,)
OHIO ATTORNEY GENERAL)
30 E. Broad Street)
17th Floor)
Columbus, Ohio 43215)
)
Respondent.)

PARTIES

1. Relator, State of Ohio ex relator, Ohio Association of Independent Title Agents (“OAITA”) is an Ohio non-profit corporation consisting of members who are independent Ohio title insurance agents without affiliation to banks, mortgage brokers, and/or realtors.
2. Respondent, the Honorable Mary Jo Hudson, Director of the Ohio Department of Insurance (“ODI”) is the duly appointed Director of the

Ohio Department of Insurance and is authorized in said capacity by Title 39 of the Ohio Revised Code and the Ohio Constitution.

3. Nancy Hardin Rogers is the interim Ohio Attorney General and is being provided a copy of the within Complaint pursuant to Ohio law.

JURISDICTION AND VENUE

4. Jurisdiction and venue are proper in this Court pursuant to Ohio Rule of Civil Procedure 3. Further, under Ohio Rev. Code § 2731.02 and pursuant to Article IV, Section 2(B)(1) of the Ohio Constitution, this Court has the authority to issue a determination of the propriety of a writ of mandamus and to advance on the trial list the hearing of a writ of mandamus.

BACKGROUND FACTS

a. The Factual History

5. The following request for a writ of mandamus seeks to compel the Director of ODI from construing certain rules promulgated by the ODI in a manner that conflicts with Ohio statutory law, as codified under Title 39 of the Ohio Revised Code.
6. At the heart of the current matter is the business of title insurance in Ohio. Title insurance facilitates homeownership by mitigating the risks related to the transfer of real estate ownership for both the buyers and the lenders that finance their purchase. Title insurance is also a critical component of a homeowner's ability to participate in the mortgage refinance process.

7. Title insurance services are designed to afford the homeowners, lenders and others with interests in real estate the maximum degree of protection from adverse title claims or risks.
8. The business of title insurance is principally conducted by three distinct groups: (1) licensed title insurance agents; (2) title insurance companies/underwriters; and, (3) the title agencies appointed by the title insurance companies/underwriters.
9. The title insurance industry is highly concentrated, with only five insurer-underwriter groups controlling about 93 percent of the market nationwide. In Ohio, the same five insurer-underwriter groups control over 96 percent of the market statewide.
10. Title insurance companies/underwriters, title insurance agencies and title insurance agents market their products to real estate professionals – banks, mortgage brokers and realtors -- who, because of their position in the real estate transaction, are able to direct or control the homeowner who is actually paying for the product and steer them to a particular title insurance agent, title insurance agency or title insurance company/underwriter.
11. Unlike commercial real estate transactions where the buyers and sellers are typically more sophisticated and are more often represented by legal counsel, residential real estate transactions involve buyers and sellers who typically lack sophistication and counsel and therefore exercise little or no market power in the selection of a title insurance agent, title insurance

agency or title insurance company/underwriter in a title insurance transaction.

12. In residential real estate transactions, it is the banks, mortgage brokers and realtors, who are prohibited by Ohio law from acting as a licensed title insurance agent or being appointed a title insurance agency by a title insurance company underwriter, who, because of their position in the real estate transaction, are able to direct or control the homeowner who is actually paying for the product and steer them to a particular title insurance agent, title insurance agency or title insurance company/underwriter.
13. Banks, realtors and mortgage brokers have formed subsidiaries known as controlled business arrangements (CBAs) with title insurance agents and title insurance agencies for their own title insurance transactions.
14. Banks, realtors and mortgage brokers are prohibited from acting as “agents” of title insurance companies/underwriters. Ohio Rev. Code § 3953.21(B).
15. Only licensed title insurance agents may sell, solicit or negotiate title insurance business. Ohio Rev. Code § 3905.01(D).
16. Ohio statutory law defines the term “solicit” as the attempt to sell insurance, or to **ask** or **urge** a person to apply for a particular kind of insurance from a particular insurer. Ohio Rev. Code § 3905.01 (O). (Emphasis added).

17. Title insurance companies/underwriters are prohibited from paying title insurance commissions to anyone other than “licensed” title insurance agents. Ohio Rev. Code § 3953.25.
18. Title insurance companies/underwriters and title insurance agents are prohibited from paying or giving any commission or any part of its fees or charges as an inducement for title insurance business. Ohio Rev. Code § 3953.26.
19. Upon information and belief, banks, mortgage brokers and realtors which are otherwise prohibited under Ohio statutory law from being agents of title insurance companies/underwriters have, through their ownership interests in Ohio title insurance agencies, (1) received and are receiving money or other consideration in exchange for the referral of title insurance business; (2) received and are receiving title insurance commissions; and (3) asked or urged and are asking and urging persons to apply for a particular kind of insurance from a particular insurer.
20. Upon information and belief, controlled business arrangements are created for the primary purpose of sharing profits from the title insurance venture between title insurance agents and agencies and the referral partners of those title agencies -- including banks, realtors and mortgage brokers.
21. In addition to controlled business arrangements, the various parent companies of banks, mortgage brokers and realtors have also established their own subsidiary title insurance agencies.

22. Banks, realtors and mortgage brokers are not authorized under Ohio statutory law to function as *de facto* title insurance agents by allowing them to own or control title insurance agencies.
23. Ohio statutory law prohibits controlled business arrangements, however, the federal Real Estate Settlement Procedures Act (“RESPA”), makes certain controlled business arrangements permissible if such arrangements can qualify under 12 U.S.C. § 2607, et seq. (See also 24 C.F.R. § 3500.15(b).

b. The Statutory History

24. The Director of ODI is mandated to see that the laws relating to insurance are executed and enforced under Ohio Rev. Code § 3901.011.
25. Ohio Rev. Code § 3901.011 provides:

The superintendent of insurance shall be the chief executive officer and director of the department of insurance and shall have all the powers and perform all the duties vested in and imposed upon the department of insurance. The superintendent of insurance shall see that the laws relating to insurance are executed and enforced. When a violation of a law relating to insurance is reported to him, he shall take the testimony under oath of all persons supposed to have knowledge of such violations, and cause such testimony to be reduced to writing. If the superintendent decides that there is sufficient evidence, he shall cause the person suspected of such violation to be arrested and charged with such offense, and he shall furnish the proper prosecuting attorney with all the information obtained by such superintendent, the names of witnesses, and a copy of all material testimony taken in the case.

26. On December 12, 1967, Governor James A. Rhodes signed a bill into law which created what is now known as the Ohio Insurance Act and enacted

Chapter 3953 which authorizes and limits the issuance of “Title Insurance” in Ohio.

27. Ohio Rev. Code § 3953.01, (A) defines “Title insurance” as follows:

"Title insurance" means insuring, guaranteeing, or indemnifying owners of real property or others interested in real property against loss or damage suffered by reason of liens or encumbrances upon, defect in, or the unmarketability of the title to the real property, guaranteeing, warranting, or otherwise insuring by a title insurance company the correctness of searches relating to the title to real property, or doing any business in substance equivalent to any of the foregoing.

28. Ohio Rev. Code § 3953.01 (B) defines “The business of title insurance” as follows:

"The business of title insurance" means the following: (1) The making as insurer, guarantor, or surety, or proposing to make as insurer, guarantor, or surety, any contract or policy of title insurance; (2) The transacting, or proposing to transact, any phase of title insurance, including solicitation, negotiation preliminary to execution, execution of a contract of title insurance, insuring, and transacting matters subsequent to the execution of the contract and arising out of it, including reinsurance; (3) The doing or proposing to do any business in substance equivalent to any of the foregoing.”

29. An underwriter of title insurance is referred to in Chapter 3953 of the Ohio Revised Code as a “Title insurance company.” A “Title insurance company” is defined in Ohio Rev. Code § 3953.01 (C) as follows:

“Title insurance company" means any of the following: (1) Any domestic title guaranty company and domestic title guarantee and trust company to the extent that they are engaged in the business of title insurance; (2) Any domestic company organized under this chapter for the purpose of insuring titles to real property; (3) Any title insurance company organized under the laws of another state or foreign government.”

30. Ohio Rev, Code § 3953.01 (H) defines “Title insurance agent” as follows:

"Title insurance agent" means a person, partnership, or corporation **authorized in writing by a title insurance company to solicit insurance and collect premiums and to issue or countersign policies on its behalf.** "Title insurance agent" does not include officers and salaried employees of any title insurance company authorized to do a title insurance business within this state.
(Emphasis added).

31. Ohio Rev. Code§ 3953.02 provides that:

Chapter 3953 of the Revised Code applies to all title insurance companies, title insurance rating organizations, title insurance agents, applicants for title insurance, policyholders, **and to all persons and business entities engaged in the business of title insurance.**
(Emphasis added)

32. Ohio Rev. Code § 3953.21 (titled as “Certification of Title Agents”) states as follows:

(A) Every title insurance company authorized to transact business within this state shall certify annually to the Director of insurance the names of all title insurance agents representing it in this state in accordance with section 3905.20 of the Revised Code.

(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.**
(Emphasis added)

33. Ohio Rev. Code § 3953.25 provides:

A title insurance company **may pay a commission only to a title insurance agent** as defined in division (H) of section 3953.01 of the Revised Code.
(Emphasis added)

34. The legislative intent of Ohio Rev. Code § 3953.25 was to insure that only licensed title insurance agents received commissions from title insurance companies and to prevent unlicensed parties from receiving commissions from title insurance business.

35. Ohio Rev. Code. § 3953.26 provides:

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. (Emphasis added).

36. Ohio Rev. Code § 3953.26 precludes payment of kickbacks, fee-splits and any other inducements or things of value to parties interested in the real estate process.

37. In 2000, several members of the Ohio Senate attempted to enact S.B. 281 which contained a provision that would have removed the phrase “**or any subsidiaries thereof,**” from Ohio Rev. Code § 3953.21(B), thereby eliminating the prohibition with respect to “subsidiaries” of the specified prohibited persons. See Ohio Rev. Code §3953.21(B) and S.B. 281, 123rd General Assembly (As Reported by S. Finance & Financial Institutions).

38. Proposed S.B. 281 never passed and never became law.
39. “Subsidiary” is not defined in Ohio Rev. Code § 3953.01, *et seq.* However, “subsidiary” is defined in Ohio Rev. Code § 3901.32(F) as follows:

“Subsidiary” of a specified person is an affiliate controlled by such person, directly or indirectly, through one or more intermediaries.

40. On January 1, 2007, the Ohio Department of Insurance, pursuant to rule making authority under Ohio Rev. Code § 3901.041, adopted an administrative rule known as, “Title insurance controlled business arrangements,” OAC 3901-7-04.
41. OAC 3901-704 provides as follows:

3901-7-04 Title insurance controlled business arrangements.

(A) Purpose. The purpose of this rule is to establish ownership and licensing standards for title insurance agents and agencies in accordance with division (B) of section 3953.21 of the Revised Code, which prohibits certain persons from acting as agents for a title insurance company.

(B) Authority. This rule promulgated pursuant to the authority vested in the superintendent under section 3901.041 of the Revised Code.

(C) Definitions. As used in this rule:

(1) Beneficial ownership means the effective ownership of any interest in a title insurance agency or the right to control an ownership interest even though legal ownership may be held in another persons name.

(2) Control, including controlling, controlled by, and under common control with means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or non-management

services, or otherwise. Control shall be presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing fifty percent or more of the voting securities or interests of any other person. Control shall also be presumed to exist between a natural person and an immediate family member. These presumptions may be rebutted by showing that control does not exist in fact. The superintendent of insurance may determine that control exists if the facts support such a determination notwithstanding the absence of a presumption to that effect.

(3) Immediate family member includes a persons father, mother, stepfather, stepmother, brother, sister, stepbrother, stepsister, son, daughter, stepson, stepdaughter, grandparent, grandson, granddaughter, father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, the spouse of any of the foregoing, and the persons spouse.

(4) Person means any natural person or any business entity as defined in division (A) of section 3905.01 of the Revised Code.

(5) Prohibited person means a person prohibited from acting as an agent for a title insurance company pursuant to division (B) of section 3953.21 of the Revised Code, and includes builders and developers.

(6) RESPA means the Real Estate Settlement Procedures Act, 12 U.S.C. 2601 et seq., as amended, and all rules, regulations and interpretations issued under RESPA, as amended, including but not limited to 24 C.F.R. Part 3500 and the Statement of Policy 1996-2 Regarding Sham Controlled Business Arrangements found at 61 Fed. Reg. 29258 et seq.

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

(E) 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 in violation of section 3953.26 and/or section 3933.01 of the Revised Code. In determining whether an entity is a sham arrangement, the superintendent may consider factors similar to those used to determine whether a controlled business arrangement is a

sham arrangement under RESPA, including, but not limited to:

(1) Does the new entity have sufficient initial capital and net worth, typical of the industry, to conduct the title insurance business for which it was created or is it undercapitalized to do the work it purports to provide?

(2) Is the new entity staffed with its own employees to perform the services it provides or does the new entity have loaned employees of one of the parents?

(3) Does the new entity manage its own business affairs or is the new entity being run by one of the parents?

(4) Does the new entity have a office for business which is separate from any of the parents? If the new entity is located at the same business address as one of the parents, does the new entity pay fair market value rent for the facilities actually furnished?

(5) Is the new entity providing substantial services, i.e., the essential functions of the real estate settlement service, for which it receives a fee?

(6) Does the new entity perform all of the substantial services itself or does it contract out part of the work? If so, how much work is contracted out?

(7) If the new entity contracts out some of its essential functions does it contract services from an independent third party or from a parent or affiliate of a parent? If the new entity contracts out work to a parent or to an affiliate of a parent, does the new entity provide any functions that are of value to the settlement process?

(8) If the new entity contracts out work to another party, is the party performing any contracted services receiving a payment for the services or facilities that bears a reasonable relationship to the value of the goods or services received?

(9) Is the new entity actively competing in the marketplace for business or does it provide services solely for one or more of the parents?

(F) Where a person has a direct or beneficial ownership interest in a business entity title insurance agent, the only thing of value that can flow from such an arrangement,

other than permissible payments for services rendered, is a return on ownership interest.

(1) Under this rule, a return on ownership interest may not include any of the following:

(a) Any payment which has, as a basis of calculation, no apparent business motive other than distinguishing among recipients of payments on the basis of the amount of their actual, estimated or anticipated referrals;

(b) Any payment which varies according to the relative amount of referrals by different recipients of similar payments; or

(c) A payment based on an ownership, partnership or joint venture share which has been adjusted on the basis of previous relative referrals by recipients of similar payments.

(2) In determining whether a payment is a return on an ownership interest or an impermissible payment for the referral of title insurance business, the superintendent may consider factors similar to those used to determine whether a payment is an impermissible payment for a referral under RESPA.

(G) A prohibited person may not serve as a partner, officer, director, or managing member of a title insurance agency, nor may a prohibited person be involved in the day-to-day operations of the title agency.

(H) Paragraph (D) of this rule applies to all persons applying for a business entity title insurance agent license on or after the effective date of this rule and to all business entity title insurance agents having a change in ownership on or after the effective date of this rule.

(I) Severability. If any section, term or provision of this rule be adjudged to be invalid for any reason, such judgment shall not affect, impair, or invalidate any other section, term, or provision of this rule, but the remaining sections, terms and provisions shall be and continue in full force and effect.

COUNT ONE

**PROHIBIT THE OHIO DEPARTMENT OF INSURANCE AND THE
DIRECTOR OF INSURANCE FROM CIRCUMVENTING THE STRICT PROHIBITIONS
ESTABLISHED BY OHIO REV. CODE § 3953.25**

42. Relator for its first claim for a writ of mandamus, restates and re-alleges, as if re-typed herein, paragraphs one (1) through forty-one (41) written above and additionally alleges the following:
43. This is a petition for a writ of mandamus against the Director of Ohio Department of Insurance (herein “ODI”), pursuant to Ohio Rev. Code § 2731.01, *et seq.*, compelling the ODI Director to act in accordance with existing Ohio law, particularly Ohio Rev. Code § 3953.25.
44. A title insurance company/underwriter is prohibited by Ohio Rev. Code § 3953.25 from paying or giving a commission for the sale of title insurance except to “title insurance agents,” or persons who are appointed by the title insurance company/underwriter.
45. The ODI’s construction of OAC 3901-07-04, which allows those persons identified in Ohio Rev. Code § 3953.21(B) to own an interest in a title insurance agency, so long as such persons do not “control” the title insurance agency, permits the payment of title insurance commissions to statutorily prohibited persons in violation of Ohio Rev. Code § 3953.25.
46. Relator and homeowners in Ohio are adversely impacted by the ODI’s construction of Ohio Rev. Code § 3953.21(B) and OAC 3901-7-04, in a manner which nullifies Ohio Rev. Code § 3953.25.
47. Relator has no adequate remedy at law.

48. Relator has a clear legal right to seek a writ of mandamus from this Court directing the Director of Insurance and the ODI to refrain from circumventing the prohibitions of Ohio Rev. Code § 3953.25.

COUNT TWO

**PROHIBIT THE OHIO DEPARTMENT OF INSURANCE AND THE
DIRECTOR OF INSURANCE FROM CIRCUMVENTING THE STRICT PROHIBITIONS
ESTABLISHED BY OHIO REV. CODE §3953.26**

49. Relator for its second claim for a writ of mandamus, restates and re-alleges, as if re-typed herein, paragraphs one (1) through forty-eight (48) written above and additionally alleges the following:
50. This is a petition for a writ of mandamus against the Director of Ohio Department of Insurance (herein “ODI”), pursuant to Ohio Rev. Code § 2731.01, *et seq.*, compelling the ODI Director to act in accordance with existing Ohio law, particularly Ohio Rev. Code § 3953.26.
51. A title insurance company/underwriter is prohibited by Ohio Rev. Code § 3953.26 from paying or giving 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.
52. Those persons and any subsidiaries thereof prohibited in Ohio Rev. Code § 3953.21(B) from acting as an agent of a title insurance company/underwriter are, likewise, persons prohibited by Ohio Rev. Code § 3953.26 from receiving any payments or gifts from a title insurance company/underwriter or title insurance agent.

53. The ODI's construction of OAC 3901-07-04, which allows those persons and any subsidiaries thereof identified in Ohio Rev. Code § 3953.21(B) to own an interest in a title insurance agency, so long as such persons do not "control" the title insurance agency, permits Ohio Rev. Code § 3953.21(B) "prohibited persons" and any subsidiaries thereof to receive indirect payments or gifts from a title insurance company or title insurance agent in direct violation of Ohio Rev. Code § 3953.26.
54. Relator and homeowners in Ohio are adversely impacted by the ODI's construction of Ohio Rev. Code § 3953.21(B) and OAC 3901-7-04, in a manner which nullifies Ohio Rev. Code § 3953.26.
55. Relator has no adequate remedy at law.
56. Relator has a clear legal right to seek a writ of mandamus from this Court directing the Director of Insurance and the ODI to refrain from circumventing the prohibitions of Ohio Rev. Code § 3953.26.

COUNT THREE

PROHIBIT THE OHIO DEPARTMENT OF INSURANCE AND THE DIRECTOR OF INSURANCE FROM EXEMPTING A CLASS OF PROHIBITED PERSONS FROM THE PROHIBITIONS ESTABLISHED BY OHIO REV. CODE §3953.21(B)

57. Relator for its third claim for a writ of mandamus, restates and re-alleges, as if re-typed herein, paragraphs one (1) through fifty-six (56) written above and additionally alleges the following:
58. This is a petition for a writ of mandamus against the Director of Ohio Department of Insurance (herein "ODI"), pursuant to Ohio Rev. Code §

2731.01, *et seq.*, compelling the ODI Director to enforce existing Ohio law, particularly Ohio Rev. Code § 3953.26.

59. ODI's Director of Insurance's construction of OAC 3901-7-04 and Ohio Rev. Code § 3953.21(B), as precluding entities from participating in title insurance fees and commissions only where the "prohibited persons" and any subsidiaries thereof "control" the business entity, exceeds the authority granted the ODI Director by Ohio Rev. Code § 3901.041.
60. ODI's construction of OAC 3901-07-04 impermissibly allows those persons and any subsidiaries thereof identified in Ohio Rev. Code § 3953.21(B) to engage in the "business of title insurance," as defined in Ohio Rev. Code § 3953.01(B), by owning an interest in, when not "controlling," a title insurance agency.
61. Relator and homeowners in Ohio are adversely impacted by the ODI's construction of Ohio Rev. Code § 3953.21(B) and OAC 3901-7-04, in a manner which nullifies Ohio Rev. Code § 3953.21(B).
62. Relator has no adequate remedy at law.
63. Relator has a clear legal right to seek a writ of mandamus from this Court directing the Director of Insurance and the ODI to refrain from circumventing the prohibitions of Ohio Rev. Code § 3953.21(B).

COUNT FOUR

**PROHIBIT THE OHIO DEPARTMENT OF INSURANCE AND THE
DIRECTOR OF INSURANCE FROM CIRCUMVENTING THE STRICT PROHIBITIONS
ESTABLISHED BY OHIO REV. CODE § 3953.21(B)**

64. Relator for its fourth claim for a writ of mandamus, restates and re-alleges, as if re-typed herein, paragraphs one (1) through sixty-three (63) written above and additionally alleges the following:
65. This is a petition for a writ of mandamus against the Director of Ohio Department of Insurance (herein “ODI”), pursuant to Ohio Rev. Code § 2731.01, *et seq.*, compelling the ODI Director to act in accordance with existing Ohio law, particularly Ohio Rev. Code § 3953.21(B).
66. OAC 3901-07-04 (H) has been construed as exempting an existing class of persons and any subsidiaries thereof who were and continue to be in violation of Ohio Rev. Code § 3953.21(B), from the prohibition of OAC 3901-07-04 (D).
67. OAC 3901-07-04 (H) exempts an existing class of persons and their subsidiaries, from the prohibition of OAC 3901-07-04 (D), and is in conflict with the statutory prohibitions of Ohio Rev. Code § 3953.21(B).
68. Relator and homeowners in Ohio are adversely impacted by ODI’s construction of the exemption permitted by OAC 3901-7-04 (H).
69. Relator has a clear legal right to seek a writ of mandamus from this Court directing the Director of Insurance and the ODI to refrain from circumventing the prohibitions of Ohio Rev. Code § 3953.21(B).

COUNT FIVE

**PROHIBIT THE OHIO DEPARTMENT OF INSURANCE AND THE
DIRECTOR OF INSURANCE FROM CIRCUMVENTING THE STRICT PROHIBITIONS
ESTABLISHED BY OHIO REV. CODE § 3953.21(B)**

70. Relator for its fifth claim for a writ of mandamus, restates and re-alleges, as if re-typed herein, paragraphs one (1) through seventy (70) written above and additionally alleges the following:
71. As adopted OAC 3901-7-04 (E), Subparagraphs 1-9 list nine factors under RESPA, (24 C.F.R. Part 3500 and the Statement of Policy 1996-2 Regarding Sham Controlled Business Arrangements¹ found at 61 Fed. Reg. 29258 et seq.), that the Director may consider in determining whether or not a title insurance agency is a “sham business arrangement” which is used as a conduit for inducements or compensation for business payments in violation of Ohio Rev. Code § 3953.26 .
72. As adopted, the nine factors listed in OAC 3901-7-04 (E) purport to be applicable prospectively to “new” entities and not to both existing and new title insurance agencies.
73. The ten factors set forth in RESPA, (24 C.F.R. Part 3500 and the Statement of Policy 1996-2 Regarding Sham Controlled Business Arrangements found at 61 Fed. Reg. 29258 et seq.), are not solely applicable to “new” entities but are equally applicable to existing title insurance agencies.
74. OAC 3901-07-04 (E) unequivocally states that “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

¹ HUD’s Statement of Policy 1996-2 includes ten factors. Unlike OAC 3901-7-04, HUD’s ten-part test includes the following factor: “Is the new entity sending business exclusively to one of the settlement service providers that created it (such as the title application for a title policy to a title insurance underwriter or a loan package to a lender)? Or does the new entity send business to a number of entities, which may include one of the providers that created it?”

business payments in violation of Ohio Rev. Code § 3953.26 and/or Ohio Rev. Code § 3933.01.” (Emphasis added).

75. The rule applies to both “new” entities and existing title insurance agencies.
76. Upon information and belief, the ODI Director has not applied and refuses to apply OAC 3901-7-04 (E) against existing title insurance agencies.
77. The ODI Director has construed OAC 3901-07-04 (E) to exempt existing title insurance agencies from the statutory prohibitions of RESPA, (24 C.F.R. Part 3500 and the Statement of Policy 1996-2 Regarding Sham Controlled Business Arrangements found at 61 Fed. Reg. 29258 et seq.) and thereby the provisions of Ohio Rev. Code § 3953.26.
78. Relator and homeowners in Ohio are adversely impacted by ODI’s construction of OAC 3901-7-04 (E), subparagraphs 1-9.
79. Relator has no adequate remedy at law.
80. Relator has a clear legal right to seek a writ of mandamus from this Honorable Court directing the Director of Insurance and the ODI to refrain from circumventing the prohibitions of Ohio Rev. Code § 3953.26.

WHEREFORE, Relator demands judgment on each of its counts as follows:

1. On Count One that the Court issue a writ of mandamus ordering the Director of Insurance to construe and enforce OAC 3901-07-04 in conformity with Ohio Rev. Code § 3953.21 by prohibiting those persons, and any subsidiaries thereof, identified in Ohio Rev. Code § 3953.21(B) from receiving a portion of a title insurance commission in violation of

Ohio Rev. Code § 3953.25, even if such “prohibited persons” do not “control” the “title insurance agency.”

2. On Count Two that the Court issue a writ of mandamus ordering the Director of Insurance to construe and enforce OAC 3901-7-04 OAC in conformity with Ohio Rev. Code § 3953.21 by prohibiting those persons, and any subsidiaries thereof, identified in Ohio Rev. Code § 3953.21(B) from receiving “any part of the fees or charges, or any other consideration or valuable thing, as an inducement for, or as compensation for, any title insurance business” in violation of Ohio Rev. Code § 3953.26, even if such “prohibited persons” do not “control” the “title insurance agency.”
3. On Count Three that the Court issue a writ of mandamus ordering the Director of Insurance to construe and enforce OAC 3901-7-04 in conformity with Ohio Rev. Code § 3953.21 by prohibiting those persons, and any subsidiaries thereof, identified in Ohio Rev. Code § 3953.21(B) from participating in the “business of title insurance,” as defined in Ohio Rev. Code § 3953.01(B), even if the “prohibited persons” do not “control” the title insurance agency.
4. On Count Four that the Court issue a writ of mandamus ordering the Director of Insurance to enforce Ohio Rev. Code § 3953.21 and OAC 3901-7-04 irrespective of whether a prohibited person or persons, and any subsidiaries thereof, were participating in the business of a title insurance agency prior to January 1, 2007.

5. On Count Five that the Court issue a writ of mandamus ordering the Director of Insurance to review all licensed title insurance agencies utilizing all the factors set forth in OAC 3901-07-04 (E) and ordering the Director of Insurance to cancel the license of any title insurance agency that is found to be a “sham” entity pursuant to those powers enumerated under Ohio Rev. Code § 3905.14.
6. That Relator be awarded attorneys fees and costs of this action, and such other and further relief whether legal or equitable as the court deems just and proper.

Respectfully submitted,

E. Bruce Hadden, Esq. (0031753)
HADDEN CO., LPA
132 Northwoods Boulevard
Columbus, Ohio 43235
Phone (614) 431-2000
Fax (614) 436-4500
E-Mail: EBHadden@aol.com

Gregory W. Happ, Esq. (0008538)
ATTORNEY-AT-LAW
238 W. Liberty Street
Medina, Ohio 44256
Phone (330) 723-7000
Fax (330) 725-8804
E-Mail: gregoryhapp@msn.com

Robert B. Holman, Esq. (0072480)
HOLMAN, FRANK & MCDONALD
P.O. Box 46390
Cleveland, Ohio 44146
Phone (440) 232-9911
Fax (440) 439-2308
E-Mail: rholman@hfm-law.com

Counsels for Relator
State of Ohio Ex Relator,
Ohio Association of Independent Title
Agents (OAITA)