



VOLUME 5, ISSUE 1

JANUARY-FEBRUARY 2006

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The News In General

"You Can Trust The General!"

CONGRESS TAKES INITIAL STEPS TO INVESTIGATE THE TITLE INSURANCE INDUSTRY

Michael Oxley, chair of the powerful House Financial Services Committee, has written a letter to Comptroller General David Walker requesting that the Government Accountability Office (GAO) examine and issue a report on the recent abuses in the industry involving RESPA, title companies, Realtors, lenders and home builders.

In the Jan. 24 letter, Oxley said, "As housing prices have soared in various parts of the country, the cost of title insurance has become an increasing burden on many consumers. Questions about the need and price of title insurance are of particular concern to those consumers who are required to buy a new policy every time they refinance their mortgage loans, a common practice in this time of historically low interest rates."

He goes on to note that the Financial Services Committee is "concerned about recent investigations by state regulators revealing that title companies have made payments for referrals to developers, mortgage lenders, and real estate agents in violation of the Real Estate Settlement Procedures Act (RESPA). Other investigations have revealed abuses of reinsurance agreements that

have forced title companies to pay millions of dollars in settlements, and have uncovered anti-competitive practices within the title industry."

Accordingly, Oxley asked that the GAO examine and address the following questions:

? Analyze the title insurance market to determine what factors impact the price of the product, including the associated claims, title search, overhead, and marketing costs;

? Determine the number of title insurers, their market share, how the product is marketed and sold, the extent to which title insurance is a nationwide business, and to what extent consumers benefit from a competitive title insurance marketplace;

? Examine the relationship between title insurers,

realtors, lenders, and home builders for anti-competitive practices and investigate potential barriers to entry in the



market.

This letter comes on the heels of a recent firestorm in California over a controversial report on the state's title industry written by Texas economist Birny Birnbaum for California Insurance Commissioner John Garamendi.

Titled, "An Analysis of Competition in the California Title Insurance and Escrow Industry," the study determined that "a reasonable degree of competition does not exist in the markets for the title insurance and escrow services in California."

It also stated that "consumers are steered to title companies by realtors, lenders and other settlement

providers, who exert no pressure on title insurance prices. 'Competition' in the title industry consists not of lower-

'Competition' in the title industry consists not of lowering prices to attract consumers, but of 'reverse competition,' in which gifts - and illegal kickbacks - are lavished on middlemen to refer business to the title company."

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CONGRESS TAKES INITIAL STEPS TO INVESTIGATE THE TITLE INSURANCE INDUSTRY (continued from page 1)

ing prices to attract consumers, but of 'reverse competition,' in which gifts -- and illegal kickbacks -- are lavished on middlemen to refer business to the title company." The California Land Title Association (CLTA) released a statement via Executive Vice President and Counsel Lawrence Green soon after Garamendi's announcement, countering his claims and calling the study "bogus" and "not worth the paper it is written on." The Escrow Institute of California followed the CLTA's lead in a Dec. 23 letter to Garamendi, calling his accusations, "ridiculous," "inflammatory" and "reckless." Both groups criticized Garamendi and Birnbaum for ignoring actual data received from title companies and failing to contact any of the state's independent escrow

officers while collecting the study's data.

A subsequent hearing was held on the report on Jan. 5, at which numerous representatives from California's title and escrow industry ripped apart Birnbaum's findings. The report also spawned a volley of negative press about the title industry, leading the American Land Title Association to plan a national campaign supporting the industry and work on public relations on the grassroots level.

Oxley is a Republican Congressman from Ohio. Thus, his interest in this issue is pertinent to the Ohio title insurance industry as well as

the rest of the country.

Whether the national events, including the recent class action suits filed in Ohio, had anything to do with his decision to seek the GAO's involvement is unknown. However, it is clear that the attention of RESPA violations is more than underway. As this investigation develops, the Company will keep you posted.



National Underwriters Involved in Michigan RESPA Class Action Lawsuit Settle for \$27.55 Million Dollars

The last shoe has finally dropped in an extensive RESPA class action case involving four consolidated suits against four title companies. Named in the lawsuit are [Lawyer's Title Insurance Corp. of Virginia](#), [Transnation Title Insurance Co. of Arizona](#), [Chicago Title Insurance Co. of Missouri](#) and [First American Title Insurance Co. of California](#). The suit claims the companies gave homebuilders, such as Pulte Homes, discounts on owner's

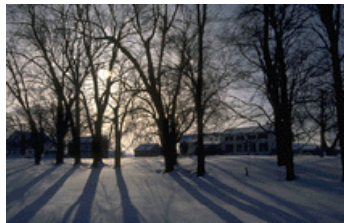
title insurance, while raising prices of loan title policies for homebuyers.

Of those four, Transnation and Lawyers Title jointly agreed to a \$10.3 million settlement in May 2005, and Chicago Title also agreed to a \$7.7 million settlement in May 2005. The lone holdout in the consolidated case was First American, who went through several

more rounds of settlement talks before agreeing to preliminary terms of \$9.6 million in September 2005. Since then, lengthy negotiations have been held to determine the non-monetary aspects of the settlement, which have culminated in a consolidated settlement agreement released on Feb. 8, 2006. U.S. District Judge Avern Cohn in Detroit tentatively approved the settlement on Feb. 10.

Background

On May 9, 2000, plaintiff Romeo Jergess filed suit in the



"The suit claims the companies gave homebuilders, such as Pulte Homes, discounts on owner's title insurance, while raising prices of loan title policies for homebuyers."

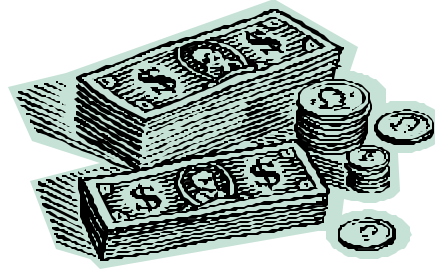
National Underwriters Involved in Michigan RESPA Class Action Lawsuit Settle for \$27.55 Million Dollars (continued from page 2)

U.S. District Court, Eastern District of Michigan, Southern Division against Transnation Title Insurance Co. On June 8, 2000, plaintiffs Michael and Glenda Diamond filed suit in the same court against First American Title Insurance Co. On April 27, 2001, plaintiff Elaine Miller filed suit against Lawyers Title Insurance Corp. and plaintiff Frederick K.A. Lewerenz filed suit against Chicago Title Insurance Corp. The cases were eventually consolidated.

The plaintiffs alleged that the companies provided a discount of the premium charged for title insurance to the builder/seller of a newly constructed home in Michigan so long as the homebuyer also purchased a loan policy of title insurance insuring their lender from the same title insurance company. The plaintiffs alleged that this discount was essentially a "kickback" and/or an illegal splitting of fees in violation of the Real Estate Settlement Procedures Act (RESPA) by engaging in an illegal pattern, practice or course of conduct of giving discounts to builders in exchange for receiving a volume of business from the builder's home purchasers, and/or by illegally splitting fees with builders.

The class action sought to recover three times the entire amount charged for the loan policies by members of the class, plus attorneys' fees and costs. Lawyers for the companies said the practice was widespread before the

law, and that they merely continued it. All four defendants have denied the allegations, but elected to settle the class action lawsuit to "recognize and acknowledge the expense and length of continued proceedings necessary to prosecute the class actions ... through trials and appeals,"



according to the tentative settlement.

The Settlement

Specifically, the agreement noted that the settlement was agreeable to both parties, in that Plaintiffs recognized that continuing the litigation would include the risk that they may not prevail, and Defendants faced the risk that a jury might find against them and award the treble damages available under RESPA, "Thus, there was risk on both



sides, and this risk is even more acute in a RESPA class action, a complex and minimally developed area of law," the agreement stated. "As this Court is well aware, this case is extremely unique, and there is scant case law covering the various issues raised in this

case."

The agreement further noted that the proposed settlements totaling \$27,550,000 in cash, and the fact that "each Defendant has, with the approval of the Michigan Insurance Commissioner, modified its Michigan Rate Manual to change its new construction rate and eliminate the alleged referral scheme from affecting all future residential real estate transactions which occur in Michigan should

be regarded as fair, reasonable, and adequate settlement."

The terms of the settlement are subject to court approval, but approval is likely. What this case means to Ohio title agents is that there is regional precedent for allegations similar to those made in the currently pending Ohio class action suits. Although the cases in Ohio do not directly involve a discount scheme between home builders and title agents, the allegations of wrongdoing under RESPA Section 8 are virtually identical. It would not be surprising to see the Plaintiffs in the Ohio cases seek similar amounts from the parties involved in those cases.



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More RESPA Updates: Tower City Title Class Action Lawsuit Turns Heated

The *Shahan v. Tower City Title* case took a dramatic spin recently when the title company outlined a “wet cake of soap” defense to illustrate what they called the plaintiffs’ slipping grasp of the case, as well as insinuated that the Shahan’s claims were sinking like the Titanic. The plaintiffs have returned fire in kind, claiming that Tower City is attempting to use “colorful language and selective facts” to obscure the truth, and that in doing so, they are “pandering” to trade publications such as the Title Report and RESPA News.

The pivotal point in the case was an Oct. 17 case management conference (CMC) held with both parties, in which they agreed to focus the case on issues that could legitimately be argued by the sellers, namely claims related to their portion of the title insurance fees and based on Tower City LLC’s agent relationship with First American.

Ensuing briefs disseminated the title agent/underwriter relationship between Tower City LLC and First American, with the plaintiffs calling the relationship an affiliated business arrangement that should have been disclosed to the Shahans, and the defendants claiming that no such disclosure was needed.

The specifics were further outlined in a Reply/Opposition brief filed by the defendants on Jan. 16, the purpose of which

was to “clear the dust and reorient the court following Plaintiff’s diversionary Opposition/Support [brief]. Another purpose is to address several novel and unsupported arguments by Plaintiffs and their rather preposterous results.”

Tower City added that “when the dust is cleared

away... it will be clear that Plaintiffs filed this lawsuit as a fishing expedition, without any basis in law or fact, in the hopes of developing through discovery some actionable claim to pursue.”

This brief took a distinctly colorful turn, as Tower City then went on to outline their “Wet Cake of Soap” claim. They said that at the CMC, plaintiffs began a “metamorphic” process, in that after the plaintiffs “realized that First Ohio Banc does not have an affiliated business relationship with Tower City LLC, Plaintiffs focus immediately shifted to First American Title Insurance Company, which does have an ownership

and change directions when one tried to grab hold. However, in choosing to focus on First American, Plaintiffs further mistakenly assumed that First American refers business to Tower City LLC, and that Tower City LLC receives improper value from First American,” the defendants stated.

Through the process of identifying the stipulations upon which further briefs could be filed, the defendants stated that the “Plaintiffs realized that their further assumptions were again mistaken. During that process, Plaintiffs requested stipulations that were inaccurate, to which Tower City declined to stipulate; and Plaintiffs declined to stipulate certain facts which Tower City was forced to present by Affidavit.”

They continued, “The cake of soap is still wet, and the metamorphosis continues. Faced with Tower City’s Motion for Summary Judgment, Plaintiffs now begrudgingly acknowledge that the insurance premium split between Tower City LLC and First American is entirely proper.”

However, Tower City said, the plaintiffs “proceed to torture the applicable law and undisputed facts beyond recognition, and to seek discovery which is not pertinent to the subject issues, all in a continuing effort to develop some actionable claim rather than abandon the sinking ship.”



interesting in Tower City LLC. “The undersigned likened Plaintiffs conduct at that time to a ‘wet cake of soap,’ as their position tended to defy grasp

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More RESPA Updates: Tower City Title Class Action Lawsuit Turns Heated (continued from page 4)

In the brief, Tower City also addressed the plaintiffs' "sham entity" claims, stating that although at the CMC the court "specifically directed" that the "sham entity" issue would not be addressed in the further proceedings and that plaintiffs acknowledged that fact in their own brief, that the Plaintiffs have nevertheless continued to address the "sham entity" issue at length.

"The reason is clear," Tower City said. "Plaintiffs realize that based on the undisputed facts in this case involving the relationship between Tower City LLC and First America, Plaintiffs will lose the cross/motions for summary judgment. Therefore, Plaintiffs inject the 'sham entity' issue in an effort to create the impression that there is some genuine issue of material fact to justify this Court's denial of Tower City's Motion for Summary Judgment."

They continued, "Plaintiffs' thinly-veiled effort is much too transparent, however, and as the Court directed (and the parties agreed) at the CMC, the 'sham entity' issue is to be completely disregarded for purposes of the subject motions. Regarding the 'sham entity' issue, however, what Plaintiffs apparently failed to recognize is that the 'sham entity' issue does not matter one iota in this case."



The Reply

In the Shahans' Jan. 27 [reply memorandum](#) to Tower City's illustrative brief, they claimed that "through the use of colorful language and selective facts, Tower City has attempted to obscure the indisputable conclusions that (1) First American Title Insurance Company paid some amount of money to Tower City Inc. and Marilyn Mannarino to 'purchase' a 17.5% share of Tower City LLC, (2) After the payment, Tower City LLC began sending virtually all title insurance business to First American, despite the fact that Tower City LLC is an agent for four title insurance companies, (3) Tower City LLC is an affiliated business arrangement, and (4) no affiliated business disclosure was given to the Shahans."

They continued, "Tower City can conjure up images of 'wet cake of soap' and 'settling dust,' but they cannot change the facts or the law which is abundantly clear on this one narrow issue that the Court has asked us to address, namely does the structure of the business that Tower City Inc., Tower City LLC and First American have concocted violate RESPA? The unequivocal answer is 'YES' and

no amount of literary exertions, or unfounded and untrue accusations can change that single conclusion."

In a footnote to that statement, the plaintiffs further claimed that "Tower City's use of such colorful language appears to be for the purpose of pandering to the national title trade publications. The publication *The Title Report* is a trade journal that reports to the title industry on RESPA litigation.

It adopts the narrowest industry-oriented interpretation of RESPA, and portions of Tower City's previous briefing in this case has appeared in recent issues of *The Title Report* over the last several months."

The plaintiffs then outlined the basis of their case with a list of eight bulleted points of which they claimed there was no dispute:

- First American paid Tower City Inc. and Marilyn Mannarino some amount of money for a 17.5% interest in Tower City LLC;
- After the payment from First American to Tower City Inc. and Marilyn Mannarino, Tower City LLC referred all title insurance business to First American, making Tower City LLC a captive title insurance agent;
- Tower City Inc. and First American each have a direct ownership interest in Tower City LLC of more than 1 percent;



"They continued, "Tower City can conjure up images of 'wet cake of soap' and 'settling dust,' but they cannot change the facts or the law which is abundantly clear on this one narrow issue that the Court has asked us to address, namely does the structure of the business that Tower City Inc., Tower City LLC and First American have concocted violate RESPA? The unequivocal answer is 'YES' and no amount of literary exertions, or unfounded and untrue accusations can change that single conclusion."

More RESPA Updates: Tower City Title Class Action Lawsuit Turns Heated (continued from page 5)

- Tower City Inc. and First American have an affiliate relationship with Tower City LLC
- Marilyn Mannarino is an “associate” of Tower City Inc., Tower City LLC and First American;
- Marilyn Mannarino, Tower City Inc. or Tower City LLC directly or indirectly refers title insurance business to First American;
- Marilyn Mannarino, Tower City Inc. and Tower City LLC receive a thing of value for referring the settlement service to First American; and

No person in the transaction gave an affiliated business arrangement disclosure to the Shahans.

Regarding this list, the plaintiffs stated that “regardless of whether First American’s relinquishment of its 17.5 percent interest constitutes giving something of value for the referral of the title insurance to it, or if First American made a referral to Tower City LLC, or any of the points stressed by Tower City, these undisputed facts establish two violations of RESPA.

“First, the undisputed facts in the first two bullet points alone establish liability under RESPA, because these bullet points – of which there can be no dispute – establish that First American paid a kickback to Tower City Inc. and Marilyn

Mannarino for the referral of title insurance business. Second, the remaining six bullet points establish that Tower City LLC is an affiliated business arrangement between Tower City Inc. and First American, and the failure to give a disclosure takes Tower City LLC outside the exception to liability for an affiliated business arrangement,” the plaintiffs said.

In furthering their argument, the plaintiffs go on to state that “Tower City has misinterpreted RESPA’s prohibition of kickbacks and referral fees,” stating that “in its opposition, Tower City argues that Plaintiff must establish an antecedent violation of Section 8 of RESPA in order to impose liability for failure to make an ABA disclosure. While that may be true, Tower City’s idea of what constitutes a violation of Section 8 of RESPA is extremely narrow and just wrong.”

After outlining their specific RESPA violation claims against the defendants, the plaintiffs conclude that “RESPA isn’t there to prevent people from investing in title companies, as Tower City would have you believe if it is enforced. RESPA is there to prevent the kinds of abuses that cause everyone to pay unnecessary

fees just to satisfy the greed of those in the real estate settlement business, who will do or pay anything for a larger share of the business. That is what this case is about.”



Real estate attorneys in Ohio have stated that the state title insurance industry is watching this case very carefully, because if the court does give credence to the plaintiffs’ claims, it could throw a serious wrench into the industry’s commonly held perceptions of what constitutes acceptable business practices. They also note that the unique circumstances in this case have set it apart for even more scrutiny than the other affiliated business cases pending in Ohio, as the plaintiffs are arguing for quite different claims.

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January 2006

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February 2006

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