



## THE NEWS IN GENRAL

"You Can Trust The General"

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### LESSONS FROM A LENDER SCORNED: NE OHIO TITLE AND MORTGAGE COMPANIES IN THE CROSSHAIRS OF MULTI-MILLION DOLLAR FRAUD CASE

On May 9, 2005, ABN-AMRO Mortgage Group, Inc. filed a multi-million dollar lawsuit against several Ohio mortgage brokers, appraisers, closing agents and national title insurers alleging that the defendants engaged in a mortgage loan scheme to defraud

ABN-AMRO and cause them millions of dollars in loan loss.

There were several aspects of the alleged scheme to defraud ABN-AMRO. One aspect of the scheme involved the allegation that the defendants represented loan transactions to be refinances, when, in reality, they were purchase money loans. These alleged misrepresentations permitted the borrowers to avoid the cash down payment required in a purchase money transaction; allegedly allowed the participants of the scheme to collect ill-begotten fees; allegedly relaxed the borrower qualifications and related paperwork; and allegedly relaxed the underwriting guidelines for the loan.

Essentially, the lender is suing the title agents because they were in the best position to protect parties such as the lender from the claimed acts. Since the alleged scheme involved the construct of real estate transactions from refinance to purchase and vice versa, the involvement of the title agent is crucial.

Another aspect of the scheme was at the appraisal phase of the transaction. The Complaint alleges that at that stage, an inflated appraisal was used to increase the loan amount, but ultimately left ABN-AMRO under- or unsecured on the mortgage.

The complaint was filed in United States District Court, Northern District of Ohio, Eastern Division, Cleveland, Ohio and is styled as ABN-AMRO Mortgage Group, Inc. v. New Partners Mortgage Company, et al.

Case No. 1:05CV1167. The defendants include New Partners Mortgage Company, Excel Appraisals, Netco Title aka National Equity Title Agency, Inc., Title Associates, Inc., Crescent Title, Advanced/Affiliated Title Agency, Inc. nka Affiliated Title Agency, Inc., Fidelity National Title Insurance Company and Lawyers Title Insurance Company.

Among the important claims contained in the Complaint are causes of action for fraud, unjust enrichment, negligence, negligent misrepresentation, and breach of fiduciary

duty. Essentially, the lender is suing the title agents because they were in the best position to protect parties such as the lender from the claimed acts. Since the alleged scheme involved the construct of real estate transactions from refinance to purchase and vice versa, the involvement of the title agent is crucial. Did the title agent actively participate in a scheme to defraud the lender where it knew that transactions were being set up to avoid underwriting requirements? This is not the first time we have heard of similar accusations.

#### What can we learn from the allegations?

First of all, a purchase money mortgage loan is not structured the same way a refinance transaction is structured no matter what your clients may want to tell you. In the New Partners case, the mortgage broker allegedly manipulated the loan application data delivered to the lender for loan approval by presenting many loans to the lender as a refinance of an existing debt when the money was actually used to purchase the property. In many instances, the borrower allegedly did not actually own the property before the loan was made, or received title to the property the same day as the loan closing. According to the



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Complaint, the title agent defendants knew or should have known that these transactions were fraudulent. The allegations in the Complaint presuppose a duty on the part of the title agent to stop transactions that are improperly structured. While it is unclear whether this duty will be enforced by the Court, title agents should be ready to closely review any transaction that has any of the following elements:

“Refinance” transactions where title vests in the borrower on the same day the loan closes; and,

Deeds that are procured by outside sources for “refinance” transactions and not submitted as part of the closing documents to the lender.

If a transaction has any of the foregoing elements, it may be wise to review the closing instructions from the lender or to advise the lender directly. Proper disclosure is the key to avoiding fraud and will keep the title agency from being dragged into a complex and potentially catastrophic legal setting.

As this case develops, we will have more updates.

## QUICK HITS...

### CERTIFICATE OF MEDICAID LIEN: WHAT TO KNOW

There has been a marked increase in the filing of Certificates of Medicaid Liens pursuant to **O.R.C. §5111.011**. (Ineligibility for assistance or services based on certain transfers of assets.) As

tax dollars for the implementation of Medicaid programs continue to be squeezed at the federal and state levels, more and more states are beginning to ramp up efforts to collect outstanding Medicaid monies to help them recover costs related to the program.

At the time of death of a Medicaid recipient who has received Medicaid monies for institutional care (nursing facility) or has received home and community-based services, the State conducts an audit of the participant’s case file. If the State determines that there was “a transfer of real or personal property for the purpose of securing medical assistance” then said property will be considered an asset of the recipient (**O.R.C. §5111.011 j(D)**). The state will determine the over payment of Medicaid monies and the recovery process will commence.

A letter will go out to the recipient, the heirs of the recipient and/or the executor of the recipient’s estate (if a probate case has been filed) stating that the monies are owed. At that time a non-judicial Certificate of Medicaid Lien is recorded. If the recipient owned property at the time of receiving Medicaid funds or if the transfer of property falls under **O.R.C. §5111.011 (D)** the legal description of the property will be at-



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tached to the lien.

A party receiving an interest in the real property for no or less than full value would be subject to the State’s lien and any recovery statutes. This would also include any property held in joint tenancy with the participant, except where a surviving spouse or a blind or totally disabled child was in title with the recipient.

When the title agent comes across these liens, it is wise to treat them as valid liens against the real estate and have them paid, regardless of whether or not a judicial proceeding has been commenced to recover the funds.

### ASSIGNMENT OF MORTGAGE DURING FORECLOSURE

You may be asked to issue a Preliminary Judicial Report in connection with the start of a foreclosure or you may be asked to issue an Owner’s Policy and/or a Loan Policy of Title Insurance in connection with the sale of property pursuant to a foreclosure proceeding and the plaintiff that filed the foreclosure proceeding is not the record holder of the mortgage. Be alert for such a situation. If you encounter such a situation, try to obtain some additional information about the relationship, if any, between the plaintiff in the foreclosure and the record holder of the mortgage. For example, consider the following questions:

1. Is the plaintiff a loan servicer?
2. Does the Complaint state that the plaintiff is the holder in due course of the note and mortgage being foreclosed?
3. Is the foreclosing entity



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(plaintiff) the successor to the record holder of the mortgage (i.e. did the foreclosing entity buy or otherwise merge with the record holder)?

(Check [www.ffiec.gov](http://www.ffiec.gov).)

After you have done this preliminary investigative work, please contact the legal department. These situations may give rise to:

### MARITAL STATUS

In an instrument of conveyance of a fee simple interest in real property, deeds, casements, and mortgages being the most common, the marital status of the grantor or grantors must be clearly stated.

A. If the grantor is unmarried, the following descriptions of marital status are acceptable:

- Single.
- Unmarried.
- Divorced and unre-married.
- Widow or widower.

The term "divorced" by itself is unacceptable. The person may have remarried since the divorce.

B. If there are two grantors and they are married to each other, the phrase "husband and wife" should follow their names in the granting clause.

If the word "married" is placed after each of the names of the husband and wife, as in John Smith, married, and Mary Smith, married, it is unsatisfactory. This does not tell us to whom they are married.

It is preferred that the marital status be set forth in both the granting clause and the acknowledgment. But if it only appears in the granting clause, we will pass it since it is included in the deed as a whole.

### CHURCHES

Churches and similar religious institutions present a series of problems to anyone doing title evidencing. The first question for the examiner is: "Is this property tax-exempt?" Even though a church owns a parcel of ground it may be exempt from real estate taxes only upon application to the County Auditor and only to the extent that it is used for charitable purposes. If a Church runs a restaurant to serve the general public out of the church basement, that portion of the building value would be taxable.

**Even if a property is tax exempt it is still subject to special assessments.** Special assessments do not run to the ownership of the land but to the improvement of the land itself.

There are two fact patterns to be aware of when a church sells or mortgages property. If the property is held by a duly registered, active Ohio non-profit corporation then you can insure the transaction upon receipt of the proper authorizing resolutions in accordance with the church's "Book of Discipline," constitution and bylaws.

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If a church is unincorporated then the agent needs to insist that an action be brought under §1715.39 of the Ohio Revised Code. This is the only way to be sure that the rights of all parties have been addressed and hence that the transaction is insurable. If the transaction occurred more than five years ago, without court challenge, then it is considered valid even if no court action was brought originally. **If you have the above fact pattern, contact the underwriting department.**

When a congregation passes out of existence, many denominational constitutions and bylaws provide that a denominational entity shall be the corporate successor to the congregation. The agent can insure the sale of the property upon receipt of proper resolutions from the denominational entity. Where the church body was independent or belonged to a denomination that does not take possession of the assets of extinct churches, then application needs to be made to common pleas court for authority to sell the property under section §1715.14 of the Ohio Revised Code.

A common problem in dealing with church property is the ancient right of reverter in a source deed. If the deed is older than forty years, that right of reverter is terminated under §5301.49 of the Ohio Revised Code, unless it has been kept effective under §5301.51 of the Ohio Revised Code.

### OIL AND GAS LEASES-PART I\* (5301.56 AFFIDAVITS)

Oil and gas leases are one of the continuing problems that plague title agents. Many agents have taken affidavits of non-production. This is not the proper way to handle the situation. There are several different fact patterns with different solutions for the problem.

Ohio Revised Code Section §5301.56 is a





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useful devise for eliminating many old oil and gas leases. If the lease is older than twenty years and no well has been drilled pursuant to the lease, or if a drilling permit was issued by the Ohio Department of Natural Resources but was surrendered more than twenty years ago, then an affidavit under this section of the Code is sufficient to terminate the lease. Use the following steps as part of your due diligence to determine the applicability of this procedure:

1. Check with the Ohio Department of Natural Resources. Give them enough information to be able to locate the premises on their maps, including: county, civil township, range, township, section, road the premises fronts on, nearest cross road, original amount of acreage in the lease, and the date of the lease. The O.D.N.R. can be contacted at: Ohio Department of Natural Resources  
1855 Fountain Square Court,  
Building 112, 113  
Columbus, OH 43224  
614-265-6633  
FAX 614-265-7998 or 614-265-7999  
[www.ohiodnr.com](http://www.ohiodnr.com) (select mineral resources)
2. Make sure that the lease has not been made part of a drilling unit or pool, and that the site is not used for a gas storage well.
3. Check with the county auditor and make sure that the gas and oil rights do not have a separate tax parcel number.
4. Most of all, be sure that your fee owner is the successor in interest to the lessor and that the gas and oil interests have not been severed from the fee.

fact pattern of the lack of exercise of rights under the lease for more than twenty years, then have an affidavit pursuant to O.R.C. §5301.56 executed and filed. This is sufficient to terminate the lease.



If all of the above are consistent with a

## November 2005

Sun	Mon	Tue	Wed	Thu	Fri	Sat
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## December 2005

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