



## Ohio sham AfBA hunt continues

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Is Ohio a breeding ground for sham AfBAs? With the recent influx of class action lawsuits alleging RESPA violations, you might think so.

That number just grew last week as a new class action suit was filed in Toledo alleging that a joint title company set up between Chicago Title and a local real estate services firm was a sham and performed no bona fide title work.

The plaintiffs are suing the realty company's title and mortgage ventures, as well as Chicago Title and parent company Fidelity National Financial, for allegedly using the AfBA as an avenue for kickbacks.

The lawsuit was filed on Nov. 9 in The United States District Court for the Northern District of Ohio, Western Division by plaintiffs **Erick C. Carter** and **Whitney A. Hayes-Carter**. The defendants listed on the complaint include Welles Bowen Realty, Welles Bowen Title Agency, Welles Bowen Investors LLC, Welles Bowen Mortgage, Fidelity National Financial and Chicago Title Insurance Co.

According to the suit, Welles Bowen Investors is an Ohio LLC that "owns 49.9 percent of Welles Bowen Title. The function of Welles Bowen Investors LLC is to funnel kickbacks from Welles Bowen Title to Welles Bowen Realty. Defendant Welles Bowen Mortgage is an Ohio corporation which refers title work to Welles Bowen Title. Welles Bowen Mortgage shares a common interest with Welles Bowen Realty."

### What's the deal with Ohio?

According to plaintiffs' attorney **John T. Murray** of Sandusky, Ohio-based Murray & Murray, the impetus behind the lawsuit was simply that "these folks were rather upset with the way they were treated and wanted to take action."

Another attorney representing the plaintiffs, John Huffman of Toledo-based Mickel & Huffman, has previously gone on the record to voice his concerns over the number of sham AfBAs cropping up in the marketplace.

In mid-May of 2005, we reported that several independent title agencies in the Toledo area were organizing a coalition to oppose joint ventures that they believed represented a conflict of interest. The coalition was reportedly a response to the captive reinsurance investigations going on at that time, and the agencies expressed concern about the competitive disadvantages stemming from JVs between large underwriters and Realtors, lenders and homebuilders. In that story, Huffman was reportedly considering filing a class action lawsuit over the issue, but did not name the potential client.

While at first glance, this current case may appear to have its roots in that anti-JV movement, Murray denied any connection, and said that the lawsuit was filed independently of that. Nevertheless, it is clear that there is a great deal of anti-AfBA sentiment radiating from the northern half of the state, as there are now three separate cases pending in the District Court over alleged RESPA-violating sham AfBAs.

So what's the deal with Ohio? Why are so many RESPA cases being filed in the state? Is the industry just more corrupt there, or are other states just not as concerned about sham AfBAs?

Murray believes that it isn't so much an "Ohio thing" as it is "concentration in markets where they've been doing this. These schemes enter certain markets, and the Realtors in that market jump on board with those companies. So I don't know that it's so much 'Ohio' as compared to the various markets in Ohio and other places as well."

### Conflicting messages

In listing their claims under RESPA, the plaintiff states in the lawsuit that "Welles Bowen is a sham title company, in which defendants Welles Bowen Realty, Fidelity National Financial and Chicago Title Insurance have an ownership interest. Welles Bowen receives referrals for real estate settlement services from real estate agents employed by, or associated with, Welles Bowen Realty.

"Upon receiving referrals from Welles Bowen Realty, Welles Bowen Title refers all title work and settlement services to Chicago Title of Northwest Ohio and Southeast Michigan. Welles Bowen does not perform any of the work necessary to the settlement process. Instead, all of the title work and settlement services are performed by Chicago Title."

This allegation is bolstered by the fact that, as of press time, Welles Bowen Title's Web site stated, "The experienced staff of Chicago Title provides the title searches and the closing services for Welles Bowen Title Agency."

Further, the lawsuit alleges that "Welles Bowen Title does not maintain independent offices," a claim again bolstered by the company's own Web site which states, "Closings can be scheduled at any of the convenient Chicago Title Offices or the Welles Bowen Realtors Offices." The title agency does appear to have its own address, however.

Regarding these claims, Kevin Smith and David Browning, the brokers and owners of Welles Bowen Realty, told the Toledo Blade that the title company has two employees who handle the title business, and that it is compliant with federal laws.

We called the Welles Bowen Title office to clarify who performs the title services and were given a mixed message by the woman who answered the phone. At first her response was "no comment," but when we asked if she could clarify who performs the title services for customers, she said, "I do."

We then asked about the message on their Web site concerning Chicago Title providing the "title searches and the closing services," and she responded, "Well, they do that part of it." So we are still unclear as to what title services Welles Bowen actually performs and what they refer to Chicago Title.

According to Murray, however, making that distinction is not the real issue. "The issue is not over if they had employees to do title work, but if the work they did added value to the service or if they could have saved the consumers money," he said.

The suit goes on to allege that the "sole purpose for the creation of Welles Bowen Title was to enable Fidelity and/or Chicago Title to provide Welles Bowen Realty with kickbacks and other improper or illegal payments in exchange for Welles Bowen Realty referring real estate settlement work to Chicago Title."

In the case of the Carters, the complaint states that they were referred to Welles Bowen Title for settlement services by their Welles Bowen Realty agent. Their settlement statement listed Welles Bowen Title as receiving \$946.28 from the Carters for title insurance, \$644 from the seller for title insurance and \$25 from the seller for a title examination.

"Although Welles Bowen did not conduct the title search, provide any closing services or provide office space for the closing, it received approximately 70 percent of the funds applied to title charges on the Carters' HUD settlement statement. The funds that Welles Bowen received in connection with the Carters' purchase of their home were unearned," the suit alleges.

It further states that, "As part owner of Welles Bowen Title, Chicago Title is willing to permit Welles Bowen Title to collect unearned fees because most of those unearned fees ultimately flow back to Chicago Title and its owner, Fidelity. The portion of the unearned fees collected by Welles Bowen Title that is not directed to Chicago Title is provided to Welles Bowen Realty and/or its owners as a payment for the referral of title work to Chicago Title."

The suit seeks class action status on the questions of "whether Welles Bowen is a bona fide or sham provider of settlement services, and whether Welles Bowen Realty, or any other Welles Bowen entity received kickbacks from Chicago Title in return for title work being referred directly or indirectly to Chicago Title by Welles Bowen Realty."

#### **The HUD test for sham AfBAs**

Regarding the RESPA rules, the case states that Welles Bowen Title "is not a bona fide provider of settlement services as set forth in HUD's Statement of Policy 1996-2, Regarding Sham Controlled Business Arrangements," and specifically alleges that the company is not "staffed with its own employees," is not "independently capable of performing the essential functions involved in providing real estate settlement services," and is "entirely dependent on Chicago Title and/or Fidelity to perform those functions."

The complaint further alleges that Welles Bowen Title "does not actively compete in the marketplace to provide settlement services," that it "relies entirely on referrals from agents of Welles Bowen Realty to generate business," that "Chicago Title permitted Welles Bowen Title to collect fees for title insurance in connection with the Carter's purchase ... that were not earned by Welles Bowen Title" and that "a portion of the fees collected by Welles Bowen Title is to permit Chicago Title and its owner, Fidelity, to pay kickbacks to the Welles Bowen defendants in exchange for referrals of real estate settlement work."

The plaintiffs are seeking a jury trial and treble damages in an amount equal to three times the amount of any charge paid by the Carters and class members for settlement services provided by Welles Bowen Title and/or Chicago Title, along with attorney fees and other expenses.

#### **Sharks in the water**

We'll be watching this case to see how it plays out. According to Murray, the defendants have approximately 20 days to respond to the complaint. But regardless of what happens, this case should serve as yet another warning to real estate service providers engaged in affiliated business arrangements to check their operations for compliance with RESPA, because even if HUD doesn't come after you, a plaintiffs' attorney might.

Furthermore, Ohio operations should be paying especially close attention, as this is the third such case to be filed there in a matter of months.

It is also worthwhile to note that while the first two cases, *Pettrey v. Enterprise Title* and *Shahan v. Tower City Title*, were filed by the Baltimore-based law firm of Quinn Gordon & Wolf LLP, that this case was filed by a different law firm and, thus, seems to indicate that this area of RESPA is gaining more attention among class action litigators.

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