

How vulnerable are AfBA's? Local plaintiff's attorney goes after Minnesota "sham" title companies...

Is it an affiliated business arrangement (AfBA) or is it a sham? The answer may rest with a Minnesota federal district court. A lawsuit (*Mark Gardner, et al. v. First American Title Insurance Company, et al.*) filed last September by Minnesota residents **Danielle Baker** and **Mark Gardner** alleges that First American Title Insurance Co., Universal Title Co. and Universal Partnerships Inc. created sham title companies, structured as limited partnerships, to bypass the Real Estate Settlement Procedures Act (RESPA) and offer referral fees to the partners, most of whom are Realtors.

Any orders issued by the Federal District Court in Minnesota could have *persuasive* authority, but they would *not* set a binding legal precedent other courts would have to follow, explains plaintiff attorney **Hart Robinovich** of Zimmerman Reed PLLP.

"We believe that if this suit were to be decided adversely to Universal, it would mean that a legitimate and affiliated business, despite government approval of this form in HUD guidelines, could not be operated in the Minneapolis area," says **James Dufficy**, regulatory counsel for The First American Corporation.

Robinovich suggests that the impact would be far greater. "I would think that if plaintiffs were to prevail, industry participants engaging in similar activities would stand up and take notice of this case and think long and hard about whether similar affiliated business arrangements they may be operating are actually in compliance with RESPA or rather circumvent RESPA's purpose."

Watching, waiting, maneuvering

The case isn't expected to reach Paul A. Magnuson, Chief Judge of the United States District Court for the District of Minnesota, for months – maybe not even this year. Meanwhile, the defendants have filed a motion to dismiss; according to Robinovich, it is scheduled to be heard on or around March 30, but no one knows when a decision will be rendered.

"We have filed a motion to dismiss and are waiting for all of the necessary pleadings to be filed to place the motion before the judge," Dufficy said. "It is impossible to estimate when the judge might rule on the motion, but we would typically expect to see a ruling within two to three months after argument."

Robinovich said that, after conducting some initial discovery, the plaintiffs plan to apply for class-action status. The class would include anyone who, in the six years prior to the date of filing, was party to any loan settlement transaction where title or settlement service was referred to the defendants.

Sham or legitimate business?

The partnerships, according to the lawsuit, are sold to real-estate agents, loan officers, builders and others for about \$500. They are not, according to the suit, bona fide settlement-service providers with a legitimate business purpose, but shams organized for the sole purpose of attempting to bypass prohibitions against the payment of referral fees.

The complaint alleges that the defendants could have received title referrals directly – there was no business purpose to refer business to the limited partnerships rather than to First Universal and Universal Title other than to facilitate the exchange of referral fees.

The complaint contains several other allegations, including

- that the title work received is not at the lowest price in the market, and that real-estate professionals are breaching fiduciary duties to their clients.
- that the firms violate RESPA rules governing fees as well as RESPA rules and Minnesota laws regarding directing of business, interference with contractual relations between Realtors and clients, unfair and deceptive trade practices and unjust enrichment.

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According to the complaint, there is no legitimate reason why First American and Universal have formed these title-partnership companies; the arrangements exist only to bypass RESPA.

"As the complaint makes clear, plaintiffs have no problem with a genuine, legitimate affiliated business arrangement," Robinovich says. "But plaintiffs do have a problem with an arrangement that has no legitimate business purpose other than to provide payments for referrals through the back door that RESPA won't allow through the front door. Plaintiffs allege that that is exactly what is occurring here."

Not surprisingly, Dufficy disagrees with this assessment. The partnerships, he contends, conduct the business of title insurance as lawful, affiliated businesses. "The mere fact that the partnership group includes persons within the real estate industry, such as real estate brokers and agents, means that the profit generated by the enterprise will be distributed to those persons, along with all of the other owners of the entity," he notes.

Similar arguments are presented in the motion to dismiss. Congress has authorized such affiliated business arrangements, the defense argues, and the partnerships in question meet many of the statutory conditions:

- that the title agency provide some actual bona fide settlement services;
- that the buyer receive written disclosure of the realtor's relationship with the title agency;
- that the realtor not require the buyer to use the title agency; and
- that the investors in the title agency receive only a return on their partners' interests rather than any referral fee.

So for Dufficy, the suit is groundless, since the arrangements are legal and legitimate. "These partnerships were all carefully reviewed and structured to comply with all federal and state requirements, and they do in fact comply."

State Bill Track

