

Bad Facts Make Bad Law: Recent Judicial Expansion of Duties and Liability of Maryland Title Agents¹

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On August 13, 2009, Judge Titus, in a matter styled as Melvin J. Proctor, et al. v. Metropolitan Money Store Corp., et al., Civil Action No. RWT-07-1957 in the United States District Court for the District of Maryland, made it abundantly clear that title agents in Maryland acting beyond the scope of their licensed activities and ignoring badges of fraud will find themselves being held liable to homeowners for substantial damages. Judge Titus also appears to have been adopted as correct a number of duties many of you may not have thought a settlement officer owed to the parties in a residential closing in Maryland.

Most of you are generally familiar with the Metropolitan Money Store foreclosure prevention scheme and the resulting Federal court litigation. Two of the defendants in the case pending before Judge Titus were Alexander Chaudhry and Ali Farahpour. Those gentlemen were, in turn, part owners of Sussex Title, LLC (collectively, "Sussex") and closed a number of the allegedly fraudulent transactions. As the headline of this article suggests, bad facts can result in bad law and, in the view of this author, the allegedly outrageous acts of these particular title agents has led Judge Titus to adopt an overly broad statement of the affirmative obligations of Maryland title agents in residential real estate transactions generally.

The timing for these matters to boil up to a resolution could not have come at a worse time from Sussex' vantage point. With all the recent publicity regarding "sale-leaseback arrangements" and "credit repair" schemes, the Court took this opportunity to express its frustration with such conduct. A well-pled Second Amended Complaint (presumably true for purposes of the pending Sussex motion to dismiss) provided considerable fodder to Judge Titus in assessing the alleged conduct of Sussex.

Sussex argued that it should be dismissed from the Federal Racketeer Influenced and Corrupt Organizations Act (RICO), RESPA, PHIFA and gross negligence claims. Their motion was denied on all fronts. At this stage in the proceedings, the plaintiffs' allegations are presumed to be true and the question is whether the facts, as alleged, might result in ultimate liability.

¹ The views expressed are those of the author and do not necessarily constitute the views of the law firm of Jackson & Campbell, P.C.

As to RICO, Sussex allegedly took actions inconsistent with the final executed HUD-1 forms signed at settlements and diverted monies from those settlements. As a result of representing to the homeowners that the transactions and supporting documents were accurate and then acting contrary to the transactions and supporting documents, the Court allowed the RICO claims to proceed. The Court expressly held that one does not have to direct the criminal enterprise; proof of **participation** in the **operation** or **management** in the enterprise only is required. (emphasis supplied) [The fact that Sussex also served as the broker for certain of the offending loans did not help its cause.]

As to RESPA, the Court had no difficulty determining that the alleged actions of the title agents violated the "anti-kickback" provisions. RESPA claims, however, are subject to only a one year statute of limitations. Under the asserted facts, Judge Titus determined that the alleged deliberate misleading tactics of Sussex equitably tolled the running of the statute of limitations.²

Turning to PHIFA and the plaintiffs' argument that the settlement agents were really nothing more than foreclosure consultants, Judge Titus had an opportunity to apply the "old" exception for licensed settlement agents. In the view of Judge Titus (shared by his fellow Judge, Judge Davis), the exception only applies to those title insurance producers who are acting in accordance with their license. Those settlement agents who are performing services that are not in accordance with their license are not entitled to an exemption from PHIFA. See Massey v. Lewis, Civil Action No. AMD-08-261 (D.Md. February 2009) (Davis, J.). (Note that both Judge Davis and Judge Titus in their respective recent decisions held that settlement agents and their settlement companies were subject to PHIFA because they performed services beyond the scope of their license when they misappropriated funds.) From a closer's perspective, it is a little scary that both Judges found that the settlement agent and the settlement company in their cases were "foreclosure consultants" merely because they provided the settlement services for a sale of a property in foreclosure in which they arranged for the plaintiff to reside in her home as a tenant and they participated in the crafting of the documentation that "clogged the equity of redemption" in the borrower's (and plaintiff's/former owner's) home.

² The Court did not even require that there be any affirmative proof or allegation of any wrongful conduct by the defendants in applying the Doctrine of Equitable Tolling. Having determined that the statute of limitations was not a bar to the RESPA claim, the Court further opined that the qualified defense for an affiliated business arrangement would not apply because Sussex waived its right to make such an argument by engaging in (allegedly) fraudulent activities including the preparation of inaccurate HUD-1's containing misrepresentations.

Once Judge Titus made that PHIFA determination, then, of course, certain recorded encumbrances (i.e., insured liens) became vulnerable to attack because the "right to rescind" provisions of PHIFA had been violated.

Underscoring Judge Titus' view of the alleged conduct by these title agents and the damage they created, the Court also denied their motion to dismiss the claims alleging gross negligence.

The Second Amended Complaint asserted multiple tort duties owed by Sussex to the homeowners. According to the plaintiffs, Sussex had the duty "to review the settlement and title documents that contain inconsistencies that should have put [Sussex] on notice of the illegal nature of the transactions".

Further, Sussex had "...a duty stemming from their status as the owner/supervisor of a Maryland licensed title company to not engage in illegal settlement transactions."

Plaintiffs also alleged that Sussex had "a duty to exercise due diligence to determine that the transactions of [the plaintiffs] were not illegal in violation of PHIFA, in violation of other law or otherwise irregular".

Further alleged duties included:

1. To inquire into the nature of the transactions once Sussex knew the residences were in foreclosure and that the other principals involved were repeatedly using straw purchasers to obtain interests in properties;
2. To conduct due diligence inquiries into the transactions to determine the legitimacy of the transactions; (Yes, you read that right.)
3. To "flag the transactions" as violative of PHIFA due to their knowledge that the residences were in foreclosure; (I'm sure this duty will be of particular interest to our non-attorney closing agents.)
4. To refuse to settle the transactions when they had "actual and/or constructive notice of the irregularities and illegalities in the transaction"; and
5. To terminate a Sussex employee after becoming aware that the employee was engaged in transactions where he allegedly took unearned fees, provided false information, and failed to notice that persons were making false statements in connection with loan applications and other documents to obtain loans.

While Judge Titus did not formerly adopt this list of duties, he did cite it with approval in denying the motion to dismiss.

As I stated at the outset of this article, bad facts can make bad law, and, in the view of this author, Judge Titus' understandable outrage and frustration with this alleged conduct in the Metropolitan Money Store case may have inadvertently led to establishing a set of standards and duties that will haunt Maryland closing and settlement officers for some time to come.