

# Controlled business arrangements squeeze lawyers

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Real estate brokerages and lending institutions operating in North Carolina have learned where the money is in the real estate closing business: title insurance, according to some attorneys in the state.

That realization — and the “controlled business arrangement” model that has sprung up as a result of it — has driven some longtime real estate lawyers out of the practice.

Lawyers are prohibited by state statute from having any monetary affiliation with title agencies. Lenders, loan brokers and real estate brokers have no such prohibition.

Now lenders, loan brokers and real estate brokers who do have monetary affiliations with title agencies are forcing attorneys and their clients to purchase title insurance from captive agencies, or else, several real estate attorneys told Lawyers Weekly.

“Controlled business arrangements were one factor that drove me out of real estate,” said Wilmington attorney J. Keith Calder.

“From a practical standpoint the amount of time I spent talking to people other than the client regarding the choice of title insurance company and the reasons for doing so —

arguments with folks who didn’t care about what was in the best interest of their clients — because there is some benefit to the real estate agent or the owner of the brokerage — was ridiculous.”

Calder spoke of those conversations in the past tense for a reason: he has largely withdrawn from the real estate closing practice.

Lenders including Wells Fargo, Bank of America, Fifth Third Bank and Citi Mortgage were contacted for comment. Only Wells Fargo responded by press time.

Spokesman Tom Goyda wrote that “Wells Fargo Home Mortgage is involved in a title services joint venture that allows us to establish better controls and improve support for our business needs in settlement services.”

### The business model

The controlled business arrangement model is not new. The home page of Fonville Morisey’s Guaranty Title, LLC, says the captive title agency was created in 1999 to “provide title solutions for residential and commercial customers in the Triangle.”

Calder said, “A real estate agency selling title insurance is like a candy salesman selling a turkey.”

The website also features a list of

“preferred attorneys” in Raleigh, Cary, Durham, Chapel Hill and Garner.

Some attorneys say that if they refuse to use lenders’ or brokerages’ captive agencies, they get blackballed. “The lenders say you don’t get a closing unless you use their title company,” Calder explained.

“One local principal owner/broker has directed clients to only use title insurance with a particular agency. If attorneys won’t use that agency, the owner has indicated that agents should not use that attorney,” Calder said.

Mount Holly attorney Charlene Fravel Aviles recently refinanced her mortgage.

“We shopped around,” she said. “Every single bank with which we dealt discussed having the closing done through its own captive title company. They really tried to sell it. They said it would be more convenient, less expensive, and they said they would send someone out to my house to have the documents signed.”

When Aviles told them she was going to use her own closing attorney, “some of them did not know if that was even possible.

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Others said they had to go to their superiors to check to see if I could do that.”

It was clear to Aviles that use of captive agencies had been built into the standard operating procedure of all of the lenders she contacted.

“They have been trained to guide people away from attorneys,” Aviles said.

Goyda said Wells Fargo Mortgage does “not maintain a list of approved settlement attorneys and [does] not restrict the ability of borrowers or their attorneys to choose a settlement services provider.”

FM Guaranty Title, LLC, had not returned calls for comment by press time.

### **Follow the money**

Why would lenders and brokerages go to such lengths in order to steer title premiums to captive agencies?

“Because they have figured out that they can make money doing it,” Calder said. “Why else on earth would they do it?”

Fayetteville real estate attorney Holden Reaves agreed.

“As best I can tell, the money is in the title insurance. If you control the settlement, then you can direct the title premiums. If you have an ownership interest in both the settlement agency and the title agency, then you can make some decent profit, at least as much as the market can stand.”

Reaves said he has seen this play out in the Fayetteville market over the last eight years.

He described the business model this way: The settlement agency sells shares in its affiliated title agencies to builders and brokers. In return, builders and brokers steer closings back to the settlement agency. Consequently, all title premiums flow back to title agency.

The title agency is the real profit component in the business model, with shareholders taking a 75 to 80 percent commission on the premiums. The settlement agency breaks even on the actual closing (and can even undercut fees charged by local attorneys), but it makes its money by having majority ownership in the title agency.

Reaves said the “suckers” in the mix are the attorneys who have lost closings in the process, cannot ethically make a commission on the title premium and who have lost the profit component in their profession.

“The rules as they are currently written are a checkmate in my opinion,” Reaves said. “The attorneys have simply been boxed in.”

### **Turning backs on clients**

Calder said the people directing the business in title insurance agencies have no earthly idea what title insurance is or why it is needed.

“They just know it has to be done. They understand selling houses and originating mortgages. They don’t understand the title problems that can arise. They don’t understand the significance of the opinion on title on which title insurance is issued. They don’t understand the processes within title insurance companies themselves.”

Calder added that many lenders and some real estate brokerages that are steering business to wholly owned subsidiaries are contracting with persons or companies other than N.C. attorneys to conduct closings.

“The controlled business arrangement problem dovetails with the unauthorized practice of law,” he said.

“In many of these closings, a buyer or borrower is lucky to have an attorney touch any part of the process,” Calder said. “A paralegal does a minimal abstract of title that an out-of-state agent signs off on —

which is a violation of state law — and then they send a notary to the house to have the buyer sign the documents.”

Aviles said a non-attorney would have no idea what was going on.

“It’s sad,” she said, “because in the end it is the consumer — not to mention our public records — who is really going to suffer.”

Calder said the lender or real estate agent gets involved earlier in the process with clients. Clients sign a statement saying they wish to choose the captive title agency.

“They have no idea what they are signing,” he said.

Calder and Reaves both said that some N.C.-licensed attorneys sign off on huge volumes of title work generated by paralegals and staff working for captive agencies of lenders and brokerages.

“If that’s not a conflict, I never heard it. If that’s not turning your back on the homebuyer, I never heard it,” Calder said. “I don’t care if we as attorneys control the closing business as much as I care about us just turning our backs on homebuyers.”

Aviles said there are more protections to consumers in the attorney closing system.

“The attorney can get no part of the commission and no part of the premium,” Aviles said. “As attorneys, it is in our own best interest to look out for the best interests of our clients.”

Said Calder, “Attorneys justify their fees by adding value — by making sure the title is clean, by answering questions, by conducting closing in an ethical manner.”

Aviles agreed that the control being exercised by lenders and brokerages boils down to money.

“But just because you control the financing doesn’t mean you have the power to control who does the closing and who gets to write insurance for the buyer or borrower,” she said.