

■ Title Policies

Title Agent Pleads Guilty To Mail Fraud In Connection With \$4.6 Million Embezzlement

On July 25, 2007, Jay Berger, a principal of two title agencies located in Montgomery County, Pennsylvania, pled guilty in the United States District Court for the Eastern District of Pennsylvania to mail fraud in connection with his embezzlement of over \$4,600,000 collected to pay off prior mortgages in approximately fourteen real estate closings.

According to the “Information” (i.e. indictment) and a “Guilty Plea Memorandum” filed by the United States Attorney in the case, Berger and his wife owned and operated two title agencies: Imperial Abstract and Settlement Company, LLC and United Settlement Services, Inc. Both companies maintained an address at 7 Bala Avenue, Bala Cynwyd, Pennsylvania. Imperial Abstract was a non-exclusive agent for Fidelity National Title Insurance Company of New York and United Settlement was a non-exclusive agent for both Fidelity and Stewart Title Guaranty Corporation. Berger also owned and operated a mortgage brokerage company, Unity Abstract Company t/a United Mortgage which maintained an address in Bryn Mawr, Pennsylvania, which also was Berger’s primary residence.

As an agent for Fidelity and Stewart, Berger or his assistants attended closings related to loan refinancings. In at least fourteen loan refinancings between April, 2000 and December 31, 2004, Berger received the proceeds from the new mortgage when the homeowner refinanced, but failed to pay off the existing mortgage. Instead of paying off the existing mortgage, he wrote to the existing mortgage holder, and directed that institution to change the address on file for the homeowner from the homeowner’s true address to P.O. Box 344, Bala Cynwyd, PA 19004-0344, a post office box controlled by Berger, or to Berger’s business address in Bala Cynwyd, Pennsylvania. Statements and correspondence from the existing mortgage institution would then be sent to Berger, and the homeowner would be completely unaware that the existing mortgage had not been paid off.

Berger would keep the funds obtained from the new mortgage holder and deposit those funds by check or wire transfer into a separate bank account that he maintained at United Hudson Bank. He then would send one month’s payment in the same UPS or FedEx envelope that was supposed to be used to send the loan pay off of the existing mortgage. That way, anyone reviewing the transaction would see the

UPS or FedEx receipt indicating that the loan payoff had been sent to the existing mortgage holder, and the bank statement would show a withdrawal of the exact amount shown on the settlement statement for the loan payoff.

While the homeowner would begin making payments to the new mortgage company, Berger would make payments on the old mortgage. This enabled Berger to keep almost all of the monies that were obtained from the new mortgage holder at the closing, while making the payments due monthly on the existing mortgage. If a homeowner discovered that the first mortgage was never paid off, Berger would then claim that there had been an “error”, and Berger would then make payments (sometimes with insufficient fund checks) to make the mortgage appear current. Frequently these payments would be made with monies that Berger diverted from another closing involving a different client.

One transaction involved Berger’s sister-in-law (“DS”). In November, 2001, DS sought to refinance two mortgages held by Equicredit and Countrywide Home Loans against her property located in Villanova, Pennsylvania. DS refinanced those mortgage loans on November 27, 2001, through Berger. However, Berger never paid off the existing mortgages. Records indicate that, as to the Countrywide loan, Berger requested that IndyMac Bank, the company servicing the Countrywide loan, send correspondence pertaining to that mortgage to Berger’s office in Bala Cynwyd. Berger received statements from this loan at his office until at least February 17, 2004.

In late, 2004, DS discovered from a credit report that the original loans on her home had not been paid off. She contacted Berger who told her that it was probably an “error” in the credit report. DS did not press the matter at that time. However, on January 4, 2005, she learned that her loans in fact had not been paid off. She again contacted Berger who finally admitted that he had not paid off her mortgages, that he had continued to make payments on the mortgages, and that he had retained an attorney who “would take care of the problem”. Ultimately, Stewart Title was required to pay \$239,489.13 to pay off the outstanding mortgages on the property.

Two of the transactions involved Berger’s residence in Bryn Mawr, Pennsylvania. On June 7, 2002, Berger purportedly refinanced the first mortgage against that property. However, Berger never sent the payoff check to Wells

Fargo, the original mortgage holder. Later, on August 26, 2004, Berger again purportedly refinanced the mortgage against his residence. However, Berger never sent the payoff check of \$472,931.94 to Litton Loan Servicing, the then holder of the first mortgage. Currently, there are multiple unsatisfied mortgages against Berger’s residence.

Berger was charged with, and pled guilty to, one count for “mail fraud affecting a financial institution”, a violation of 18 U.S.C. §1341 which reads in pertinent part:

“Whoever, having devised or intending to devise any scheme or artifice to fraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do . . . knowingly causes to be delivered by mail according to the directions thereon, or at the place at which is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be [guilty of a crime against the United States]”.

According to the “Guilty Plea Memorandum” filed in the case, the elements of this offense are that the defendant:

- “knowingly participated in a scheme or artifice to defraud”;
- “did so with the intent to defraud”;
- “used the mails in furtherance of the scheme”; and
- “a financial institution was one of the victims of the fraud”.

The maximum penalty for this offense is 30 years in prison, a five-year period of “supervised release”, and a \$1,000,000 fine. Berger also may be required to pay restitution in the amount of \$4,617,670.15 – the total amount that he embezzled from the fourteen loan refinancings.

Berger’s sentencing is scheduled for October 25, 2007. ■

By Michael Coughlin, Esq.

Michael P. Coughlin is the Co-Chairman of the Litigation Department of the commercial law firm Kaplin Stewart in Blue Bell, PA. The majority of his practice is devoted to representing title underwriters, title agents and insureds in title insurance claims litigation. Mr. Coughlin can be reached at (610) 941-2456 or at mcoughlin@kaplaw.com.