

STATE OF OHIO
DEPARTMENT OF COMMERCE
Division of Financial Institutions
Consumer Finance

In the matter of:

) Notice of Intent to Revoke
) Mortgage Broker Certificates of Registration
) and Notice of Opportunity for a Hearing
)

AMERICAN MORTGAGE COMPANY 1, LLC
75 East Wilson Bridge Road
Worthington, OH 43085

) Case Number: 05-0001-MBR
)
)
)

JURISDICTION

The Ohio Department of Commerce, by and through the Superintendent of the Division of Financial Institutions ("DFI"), is charged with the responsibility of administering and enforcing the Ohio Mortgage Broker Act, codified in Ohio Revised Code ("R.C.") Chapter 1322.

RESPONDENTS

AMERICAN MORTGAGE COMPANY 1, LLC is a limited liability company that holds a mortgage broker certificate of registration issued by the Division.

STATEMENT OF FACTS

American Mortgage Service Company ("AMSCo"), an S corporation held by Edward Wolterman and Elvera Bergdolt, is a mortgage banking company that originates approximately \$400 million annually in mortgage volume. AMSCo is registered with the Division as a mortgage broker. AMSCo processes, underwrites and closes its own loans in its own name and with its own credit line. In addition to its main office, AMSCo has five registered branch offices located in Ohio that are staffed to handle on-site underwriting and processing to support local originations.¹

In order to capture a larger market share, AMSCo created six limited liability companies: American Mortgage Company 1, LLC ("AMC 1"), located in AMSCo's Worthington office; American Mortgage Company 2, LLC ("AMC 2"), located in AMSCo's Worthington branch office; American Mortgage Company 3, LLC ("AMC 3"), located in AMSCo's main office in Cincinnati; American

¹ AMSCo's main office is located at 415 Glensprings Drive, Suite 203, in Cincinnati, Ohio. AMSCo has five registered branch offices located at: 75 East Wilson Bridge Road in Worthington, Ohio; 1180 Stone Drive in Harrison, Ohio; 106 West Ash Street in Piqua, Ohio; 2621 Dryden Road, Suite 203, in Dayton, Ohio; and 48 Main Street in Enon, Ohio. AMSCo also does business in the state of Kentucky as Kentucky Mortgage. Additionally, AMSCo owns 50% of Ball Mortgage, located in Lexington, KY and 49% of Housing Financial Group, an Ohio mortgage company.

Mortgage Company 5, LLC ("AMC 5"), located in AMSCo's Piqua branch office; American Mortgage Company 6, LLC ("AMC 6"), located in AMSCo's Worthington branch office; and American Mortgage Company 8, LLC ("AMC 8"), also located in AMSCo's Worthington office. (Hereinafter AMC 2, AMC 3, AMC 5, AMC 6, and AMC 8 will collectively be referred to as "LLC.") The principal office for each LLC is AMSCo's main office.

AMSCo submitted an application for a mortgage broker certificate of registration for AMC 1 on September 12, 2003. AMSCo represented that the limited liability company was an innovative joint venture between itself and real estate agents. AMSCo touted the company as a bona fide joint venture under federal mortgage and lending laws because AMC 1 would employ a person to perform the loan originations, the real estate agents would provide customers disclosures concerning their interest in the company, and the agents would only receive payment in the form of profits in proportion to their ownership interest. While the application was pending, AMSCo submitted an application for AMC 2 on October 28, 2003. The DFI issued AMC 1 a mortgage broker certificate of registration on November 21, 2003.

Noticing that AMC 1 and AMC 2 each only employed one employee and operated from the same office, which was also a branch office of AMSCo, and that each LLC restricted ownership to AMSCo and to "10 to 14 high volume real estate agents," the DFI decided to examine AMC 2 more closely. During the course of the investigation, AMSCo submitted the application for: AMC 6 on May 24, 2004; AMC 3 on June 22, 2004; AMC 8 on July 26, 2004; and AMC 5 on July 28, 2004.

The DFI concluded that AMC 2, AMC 3, AMC 5, AMC 6 and AMC 8 are not bona fide joint venture mortgage brokerage companies, but are sham arrangements created to disguise kickbacks to real estate agents for the referral of business, in violation of R.C. § 1322.071(B)(3). Accordingly, on February 18, 2005, the DFI issued notices to AMC 2, AMC 3, AMC 5, AMC 6 and AMC 8 informing them of the DFI's intention to deny their applications. This prompted the DFI to re-examine AMC 1 to determine if it too, is a sham arrangement intended to circumvent R.C. § 1322.071(B)(3), which makes it illegal for any mortgage broker or loan officer to:

Pay or receive, directly or indirectly, a referral fee or kickback of any kind to or from a bona fide third party or other party with a related interest in the transaction, such as a home improvement builder, real estate developer, or real estate broker or agent, for the referral of business.

Violation of this anti-kickback provision not only carries administrative penalties, but also constitutes a fourth degree felony. (See R.C. § 1322.99(B).) Paying or receiving, directly or indirectly, kickbacks of any kind to a party with a related interest for the referral of business constitutes improper, fraudulent, and or dishonest dealings in dereliction of R.C. § 1322.07(C).

Evidence before the DFI shows that AMC 1, like AMC 2, AMC 3, AMC 5, AMC 6, and AMC 8 is not a bona fide joint venture mortgage brokerage company, but is a sham arrangement created to disguise kickbacks to real estate agents for the referral of business, in violation of R.C. § 1322.071(B)(3)². AMC 1 was created solely by AMSCo, who has or will solicit 14 high volume real estate agents to each purchase 3.5% ownership in AMC 1 for a minimal investment. The real estate agents may refer business to AMC 1, and in turn will be paid profits from AMC 1.

The real estate agents have no right or authority to act for or to bind AMC 1. The full extent of business risk involved for the real estate agents/owners is the loss of his or her capital contribution, or being bought out by AMSCo at any time for any reason for the amount of the agent's capital contribution. AMSCo need not provide any reason for purchasing a real estate agent's share.

The only responsibilities the real estate agents have is to refer business to AMC 1 in order to generate profits, to attend a minimum of two quarterly meetings each calendar year, and not to disclose confidential information about AMC 1, such as terms, conditions and discussions regarding his/her ownership interest. Agents agree not to divert any customer or business account of AMC 1 to any competitor, but waive such restriction and any potential conflict of, for, or concerning AMSCo.

In return for their small capital contribution, at the end of each year each real estate agent is to receive a distribution, in relation to his or her ownership interest, of AMC 1's net cash flow³ for the year. Agents need not be concerned with federal income taxes because distributions will be made to each agent/owner prior to April 15th, in the amount necessary to pay the tax due by such real estate agent as the result of the allocation of AMC 1's taxable income or gain to such agent for such fiscal year.

AMSCo's majority ownership interest in AMC 1 can never be diluted. AMSCo's presence alone at a membership meeting constitutes quorum, and only AMSCo's vote is required for consent or approval of any action, decision, resolution, or other matter submitted for a vote or consent of the members. AMC 1 will be managed by AMSCo, who will have the sole authority to, *inter alia*: control AMC 1's business; to act for or to bind AMC 1; to employ, engage, subcontract, and/or release from employment any person, agent, independent contractor, business, trust, or entity; to engage the services of attorneys, accountants, financial advisors, consultants, or other professionals or advisors of any kind; to avoid, cancel, re-negotiate, or terminate any contract or obligation; to obtain lender financing on ordinary and customary commercial terms, grant security interests to lenders in and to the property and interests of the LLC; to institute and/or defend AMC 1 against any lawsuits, arbitrations, mediations; to

² All analyses and conclusions have been based solely on Ohio law.

³ "Net cash flow" is the cash received by AMC 1 for the fiscal year after the payment of all operating expenses (which includes a payment of at least \$50,000 to AMSCo for managerial services) for such fiscal year and after the establishment of appropriate reserves, if any, for AMC 1 as determined by AMSCo.

admit any person into membership. For its services as manager, AMSCo shall receive compensation as determined by AMSCo, provided that the initial compensation shall be \$50,000.00/year unless the amount is increased by the written consent of a majority of the Membership units (AMSCo owns a majority share).

The role of the "operations manager" is limited to originating loans and generating new business. AMC 1's operations managers was a former AMSCo employee that continues to perform the work she previously did for AMSCo.

The totality of the evidence before the DFI shows that the AMC 1 arrangement affords compensation to real estate agents but imposes on them no work or business risk beyond their initial \$300 investment. The substantial functions of AMC 1 are actually provided by AMSCo, who otherwise could receive the referrals of business directly. In short, AMC 1 is a disguised referral fee arrangement and violates R.C. §§ 1322.071(B)(3) and 1322.07(C).

NOTICE OF PROPOSED ACTION

Because American Mortgage Company 1, LLC is a sham arrangement created to disguise kickbacks to real estate agents for the referral of business, the DFI intends to revoke its mortgage broker certificate of registration.⁴

NOTICE OF OPPORTUNITY FOR A HEARING ON PROPOSED ACTION

Therefore, pursuant to R.C. Chapters 1322 and 119, AMC 1, is hereby notified that thirty-one (31) days from the date of the mailing of this Notice, the Superintendent intends to issue an order revoking its mortgage broker certificate of registration.

AMC 1 is further notified, pursuant to R.C. Chapter 119, it is entitled to a hearing on this matter. If the company desires to request a hearing, the request must be made in writing, and must be received in the offices of the Ohio Division of Financial Institutions within thirty (30) days of the time of the mailing of this Notice. Hearing requests should be addressed: Ohio Division of Financial Institutions, Attn: Amanda Axtell, Consumer Finance Counsel, 77 South High Street, 21st Floor, Columbus, Ohio 43215-6120.

At the hearing, AMC 1 may appear in person, by their attorney, or by such other representative as is permitted to practice before the Agency, or the applicants may present their positions, arguments, or

⁴ The Division is concurrently denying the applications of AMC 2, AMC 3, AMC 5, AMC 6, and AMC 8 for mortgage broker certificates of registration. See Consumer Finance Administrative Case Nos. 05-0001-MBD, 05-0002-MBD, 05-0003-MBD, 05-0004-MBD and 05-0005-MBD.

contentions in writing, and, at the hearing, may present evidence and examine witnesses appearing for and against them.

If the Ohio Division of Financial Institutions does not receive a written request for a hearing in its offices within thirty (30) days of the time of the mailing of this Notice, the Superintendent will issue an order revoking the mortgage broker certificates of registration of AMC 1.

Signed and sealed this 18th day of February 2005.

ROBERT M. GRIESER

Deputy Superintendent for Consumer Finance
Division of Financial Institutions
Ohio Department of Commerce

CERTIFIED MAIL: 7002 2030 0002 6804 0857