

Lien on Me: The UDAAP Story of NTRAPS

Description

The American Land Title Association (ALTA) has been leading the title industry in pushing back against Non-Title Recorded Agreements for Personal Services (NTRAPS). The prototype for NTRAPS is an agreement reserving a right to list real estate in the future. The right is secured by a filing in the local land records that effects constructive notice to future parties seeking an interest in the subject land. Homeowners, who enter an NTRAPS agreement, find themselves subject to liquidated damages of 3% of their property's value when they sell (or, in some circumstances, upon death or refinance). Advertising of NTRAPS has been done by telemarketing, and other high-pressure techniques, often impacting elderly and lower income groups disproportionately. Unwinding or preventing NTRAPS is a current priority for ALTA and state land title associations, including the VLTA.

I. The Problem

Beginning in Florida in 2017, MV Realty marketed a precursor to its current Homeowner Benefit Program (MVR Program). Documentation for the MVR Program include the Homeowner Benefit Agreement (HBA), Memorandum or MVR Homeowner Benefit Agreement (Memorandum), and several forms of online and hard print advertising pieces. MV Realty is a licensed real estate broker in Florida, and, through affiliates, in most other states.^[1] MV Realty is not a licensed mortgage broker.

A residential homeowner becomes embroiled with an NTRAPS when answering an online or telephone solicitation for immediate cash in exchange for a future listing of their property if they should sell their home. Marketed as an alternative to a home loan or HELOC, the cash offered does not even come with an obligation to repay it. As described in a *HousingWire.com* article (Feb. 14, 2023), this appears to be the free lunch posited in the fable, *Rumpelstiltskin*. MVR Program offers \$300.00 to \$5,000.00, in exchange for the future right to list the property through MV Realty or an assignee realtor. Definitely not a free lunch, as the right to list is protected for forty (40) years. Assuming that MV Realty does perform real estate brokerage services, it would earn at least the then current listing broker's commission. While that might be a reasonable exchange for the upfront payment, early termination of the HBA (without MV Realty providing any brokerage services) will cost the homeowner three percent (3%) of the home's value at the day of termination. The valuation of the property will be reasonably determined by (MV Realty).^[2]

MV Realty also reserves the right to record the Memorandum among land records constituting constructive notice. While not styled as a lien, the Memorandum does state that "the obligations of Property Owner under the Agreement constitute covenants running with the land and shall bind future successors-in-interest to title to the Property."^[3] Including such language assures that a title searcher will disclose the Memorandum and underlying HBA as an encumbrance on the title to the property.

The MVR Program raises many issues:

- Advertising before the HBA accentuates the loan alternative and not the back end 40-year term and the hefty early termination fee.

- Securitization of the right to list by a Memorandum recorded among the land records.
- Similarity to a mortgage without the protections afforded by laws governing consumer mortgages.
- Possible usury.
- Three days to rescind the HBA (not three business days).
- Disclosure of the full terms of the MVR Program after the HBA is signed.[\[4\]](#)

These issues became known to state regulators as consumer complaints were filed. Although complaints began soon after MV Realty and others began marketing the right to list programs, by early 2022, such programs were gaining national awareness as a consumer problem. Before filing a complaint against MV Realty alleging unfair, deceptive, or abusive acts and practices (UDAAP) in the fall of 2022, the Florida Attorney General investigated MV Realty for more than a year.

ALTA's analysis of the NTRAPS problem was coordinated by a NTRAPS Task Force within the State Legislative and Regulatory Committee.[\[5\]](#) A succinct overview of the problem is ALTA's NTRAPS FAQs. The FAQs addressed are:

- What are Non-Title Agreements for Personal Services (NTRAPS)?
- Are NTRAPS currently being used in the marketplace?
- What financial incentive is offered to consumers for signing NTRAPS?
- How do NTRAPS impact consumers?
- Why are NTRAPS harmful to consumers?
- Has there been regulatory action on NTRAPS?
- What does the model bill seek to accomplish?
- Why is this legislation drafted broadly?
- Are there any exemptions in the model bill?
- Can legislators and regulators work collaboratively to protect consumers?[\[6\]](#)

ALTA had detected the growing trend of NTRAPS. To highlight the national scope of the issue, ALTA compiled a list of newspaper and television articles from several states that dates to January 2021.[\[7\]](#)

II. The Response

Complaints

As a result of consumer complaints, state Attorneys General began looking at MV Realty. There had been enough Memoranda filed that by August 2022, Stewart Title had issued an Underwriting Bulletin advising policy issuing agents to require release of same.[\[8\]](#)

Advocacy

By the fall of 2022, ALTA's NTRAPS Task Force was fully engaged on the issue. The Task Force developed the FAQs mentioned above. It also produced a Model Act which is discussed further below. It then produced a Principles and Policy Statement on NTRAPS for ALTA.[\[9\]](#) ALTA's Position Statement on NTRAPS reads:

The American Land title Association (ALTA), which represents the real estate services, abstract and title insurance industry, supports efforts to protect consumers by prohibiting the filing of unfair real estate fee agreements in property records, a practice that creates impediments and increases the cost and complexity of selling, refinancing or transferring real estate. ALTA advocates for state laws and

regulations preventing enforcement of Non-Title Recorded Agreements for Personal Services.

ALTA announced its Principles as to NTRAPS in the same document. The list of Principles are talking points for discussions with legislators:

- Agreements should be equitable.
- Property rights should not be unreasonably restrained.
- Real property covenants should touch and concern the land.
- Non-Title Recorded Agreements for Personal Services (NTRAPS) should not involuntarily bind future Homeowners.
- The reliability of property records should not be negatively impacted by the filing of Non-Title Recorded Agreements for Personal Services (NTRAPS).

In the explanation of these Principles, ALTA makes several quotable points pertinent to the title industry and the impact of NTRAPS on the industry: As to real property covenants, ALTA says that NTRAPS “do not create a valid interest in real estate” and that treating them as covenants “erodes the certainty of property rights.” About binding future owners by these agreements, ALTA stated that attempting to enforce them “without the consent or knowledge of a future homeowner are unfair or deceptive.” And, as to reliability of land records, ALTA points out that land records should be restricted “to documents legitimately affecting the title to real estate.”

ALTA pursued advocacy as a counterattack against NTRAPS. An early ally of ALTA was AARP. The senior citizen advocate led industry groups before Philadelphia’s City Council Committee on Housing, Neighborhood Development and the Homeless in December 2022, outlining in testimony and by letter the impact of MV Realty and others on the city’s aged population and persons of color.^[10] Also, AARP has volunteers in Tallahassee to lobby legislators in Florida on NTRAPS during the current session.^[11] ALTA enlisted support from the Mortgage Bankers Association and the National Association of Realtors. The NAR, particularly, has somewhat cooled in its support as the actions of one of its members (MV Realty) has not (so far) been shown to be clearly unlawful. NAR has supported compromise on the problem, advocating sundown provisions on NTRAPS. At the federal level, ALTA has brought the problem to the Senate Banking Committee. Three members of Banking (Sens. Sherrod Brown, Tina Smith, and Ron Wyden) wrote to the Chair of the Federal Trade Commission and the Director of the Consumer Financial Protection Bureau in December 2022, concluding:

Recent reporting raises serious concerns about potentially predatory and coercive practices by real estate firms, like MV Realty, and several state attorneys general are taking action, (citation omitted) We urge the CFPB and FTC to work with state attorneys general to review whether these listing agreements and business practices violate federal consumer protection laws, including prohibitions against unfair, deceptive, or abusive acts and practices, and to take appropriate action where violations are found.^[12]

Legislation/Regulations

In January of this year, the Federal Communications Commission issued a Public Notice that outlined suspected robocall violations of the national Do Not Call registry by MV Realty and PhoneBurner Inc.^[13]

As a means of resolving the problem of NTRAPS, ALTA's Task Force drafted and ALTA presented for consideration by lawmakers a Model Act prohibiting the use of NTRAPS and related unfair service agreements seeking to impact real property rights of consumers/citizens.^[14] ALTA's Prohibition of Unfair Service Agreements (Model Act) defines a "service agreement" as "a contract under which a person agrees to provide services in connection with the maintenance of or purchase or sale of residential real estate." • §101. An unfair service agreement is one that will not be performed within one year and (1) that runs with the land or binds future owners, or (2) allows assignment of the personal service without notice to the property owner, or (3) purports to create a lien, security interest or other encumbrance on the real property. § 201.(a).

The Model Act does exempt common interest homeownership regimes, home warranty contracts, insurance on the home, utility services, and other groups of services. § 201.(b). An unfair service agreement is both unenforceable and a deceptive act *per se* under applicable UDAAP laws. §§ 202 and 203. The Model Act prohibits the recording of an unfair service agreement and empowers the local recorder to refuse to record such an agreement. § 204.

The Model Act does not provide a mechanism to remove previously recorded unfair service agreements. To do so might create a due process issue for the holder of rights under a service agreement. Nevertheless, this provision in § 204.(d). may help: "If an unfair service agreement is recorded in this state, it shall not provide actual or constructive notice against an otherwise bona fide purchaser or creditor." • A title insurance underwriter will still require a service agreement that is recorded to be listed for release and/or as an Exception in a title insurance commitment or policy.

New Jersey has legislation pending before its current Assembly that differs from the ALTA Model Act in its approach to the issue of NTRAPS. First, it limits itself to "right-to-list home sale agreement(s)". Such an agreement is unenforceable if it exercisable after five years and it does not contain a provision allowing for early termination by the homeowner upon payment of the original cash in hand plus six percent per year. The NJ act also provides that a realtor may be violating his/her licensure if he/she enters into a right-to-list agreement that is not lawful pursuant to this statute. Assembly, No.4962 (2023).

Effective in May 2023, Utah has adopted the first legislation in the country to prohibit service agreements that are executable after more than one year from signing and that may be binding on a future owner of affected real estate. Such agreements are unenforceable. The law does provide a mechanism for removal of existing agreements from the land records.^[15]

Litigation

There is anecdotal evidence that MV Realty has filed suits to enforce existing NTRAPS and other information that a few property owners have tried to eliminate the agreements through litigation. No litigation by either side has had much impact to date. What has been impactful are filings by Attorneys General from Pennsylvania, Florida, Massachusetts, and Ohio against MV Realty alleging violations of the state's UDAAP laws.

The Florida suit was filed in November 2022 (*State of Florida, etc. v. MV Realty PBC, LLC, et al.*, 13th Jud. Cir., Hillsborough County, Case No. 22-CA-009958) and the Pennsylvania action (*Commonwealth of Pennsylvania v. MV Realty PBC, LLC, et al.*, Philadelphia County, Case ID no. 221201288) began in December 2022. Both suits allege violations of the state's UDAAP law. Among the cited violations are unlawful telephone contacts under telemarketing laws, failure to disclose key elements of the right-

to-list agreement (including length of time, probable filing of the document, possible lien upon the property), and an improper timeframe for the right to rescind. The AGs seek injunctions to end the alleged unlawful conduct, to void the agreements, and to return impacted citizens to the status quo before execution of the agreements. A current review of the PA and FL litigation shows that both cases are pending briefing and argument on motions to dismiss or for some form of summary judgment. Given the large scale of these suits, it is unlikely that there will be resolution before the end of 2023.

III. An Opinion

Resolution of the four AG suits by trial is not likely in the near future. Legislation that is pending in several states will be adopted during the current legislative cycle but will only have prospective effect. Federal legislation is unlikely as this issue does not seem to impact interstate commerce. Nevertheless, the growing public pressure from adverse publicity, the AG suits, and legislation, has caused MV Realty to pause the continuing marketing of its Homeowner Benefit Program.

A probable outcome to the right-to-list agreement as an encumbrance upon real estate is a settlement of the four AG suits among the AGs and MV Realty, *et al.* The terms of the settlement will include some or all the following items:

- A cease-and-desist order ending the MVR Program.
- No admission of guilt by MV Realty.
- A sum payable to the four states as a fine and contribution toward the costs of investigation and litigation.
- Due diligence by MV Realty to contact homeowners enrolled in the MVR Program and offer termination, satisfaction, and release of any HBA or Memorandum, upon payment by the homeowner of the previously advanced sum and interest at the lawful rate. MV Realty would also agree to extend favorable "refinance" terms to a homeowner incapable of handling immediate repayment, but release of any recorded document would still occur. Enforcement of a breach of the refinance agreement would be by traditional civil suit to seek a money judgment.
- Perhaps included would be the appointment of an impartial arbiter or mediation group to oversee the workout of individual cases with MV Realty paying for same.

What is not covered by such a settlement is what happens in the states other than the four subject to AG suits. In the end, though, a bankruptcy filing by MV Realty for corporate reorganization (of which there is no rumor) would both complicate and order things.

[1] MV Realty of Virginia, LLC is a Virginia limited liability company, and MV Realty LLC is a Delaware limited liability company. Both are licensed in Virginia to transact business by the SCC. MV Realty of Virginia LLC has a current real estate brokerage license in Virginia per DPOR.

[2] HBA, ¶ 3.a.

[3] Memorandum, ¶ 3.

[4] Good descriptions of the MVR Program can be found at "Real Estate, Right to List Agreements, and Rumpelstiltskin," • *HousingWire.com*, Feb. 14, 2023, and "MV Realty Is under Fire Again," • *HousingWire.com*, Feb. 21, 2023.

[5] The ALTA documents referenced in this article are available to the public on ALTA's website at this URL: <https://www.alta.org/advocacy/ntraps.cfm>.

[6] <https://www.alta.org/advocacy/ntraps-faqs.cfm>.

[7] Access to this list is limited.

[8] STGC Bulletin SLS2022007.

[9] <https://www.alta.org/media/pdf/advocacy/alta-non-title-recorded-agreements-for-personal-services-position-and-principles.pdf>.

[10] https://www.alta.org/media/PDF/advocacy/221213-AARP-Philadelphia-resolution_220819_Letter.pdf.

[11] <https://floridapolitics.com/archives/579938-aarp-unveils-2023-agenda-and-a-corps-of-trained-volunteers-to-help-get-it-passed/>.

[12] https://www.banking.senate.gov/imo/media/doc/mv_realty_letter.pdf.

[13] [file:///C:/Users/28266/Downloads/DA-23-65A1%20\(1\).pdf](file:///C:/Users/28266/Downloads/DA-23-65A1%20(1).pdf).

[14] <https://www.alta.org/media/pdf/advocacy/prohibition-of-unfair-service-agreements-model-act.pdf>.

[15] <https://www.realtrends.com/articles/utah-becomes-first-state-to-ban-right-to-list-agreements/>.



R. Michael Smith

Michael serves as National Agency Counsel and MidAtlantic Regional Counsel for AmTrust Title Insurance Company. A member of the Virginia State Bar, he graduated from the University of Virginia with a B.A. in 1970 and a J.D. from its in 1973. He has been an underwriting counsel for Chicago Title, Stewart Title, LandAmerica, and Conestoga Title. Mr. Smith has participated extensively in teaching and writing within the title industry, including articles on access to public roads, liability for title search errors, and affiliated business arrangements, and has served as an expert witness on real estate and title insurance issues. In 2007, he coordinated a special program for the VLTA honoring the 400th Anniversary of the Jamestown Settlement and wrote or edited a series of articles for the VLTA Examiner around the theme of real property and the Sesquicentennial of the Civil War. In 2020, he received the Distinguished Service Award from the VLTA. He serves on the Forms Committee of the American Land Title Association.

Category

1. Featured
2. Legislative
3. Settlements
4. Underwriting

Tags

1. featured

Date Created

2023/03/22

Author

vltaexaminer

VLTA Examiner