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RECENT LEGISLATION

THE REAL ESTATE SETTLEMENT PROCEDURES ACT OF 1974, AS AMENDED IN 1975

The Real Estate Settlement Procedures Act of 1974\(^1\) (hereinafter cited as RESPA I) and the Real Estate Settlement Procedures Act Amendments of 1975\(^2\) (hereinafter cited as RESPA II), although of controversial value to the home-buying consumer for whom they were intended, increase the obligations of an attorney representing parties involved in certain mortgaged home closings. This article will briefly review the legislative history of both RESPA I and II and discuss and clarify several of the more amorphous sections of both Acts as related to each other, their interpretations, HUD regulations, and the realities of settlement closings.

**LEGISLATIVE HISTORY**

A longstanding, widespread complaint among home-buying consumers is that mortgage and home closings are confusing, expensive and generally unfair.\(^3\) It was not until 1970\(^4\) that Congress enacted substantial consumer legislation in this area. The Emergency Home Finance Act of 1970,\(^5\) though far ranging in its effect,\(^6\) dealt specifically with settlement procedures and the closing costs involved therein. Section 701(a) of this Act authorized the Administrator of Veterans Affairs and the Secretary of HUD to set limits on settlement

4. The Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 was passed in 1968. Title I of this Act, the Truth in Lending Act, dealt with the disclosure of the cost of credit to consumers, but was not concerned with real property closing costs. 15 U.S.C. § 1601 et seq. (1970).
6. The general purpose of the Act was “to increase the availability of mortgage credit for the financing of urgently needed housing.” Congress authorized a $250 million appropriation to be used by the Federal Home Loan Bank Board for disbursement to banks to adjust mortgage interest rates. Id.
costs imposed in FHA and VA assisted mortgage transactions.\textsuperscript{7} In 1972, the VA submitted to Congress its proposed regulations which would have reduced some settlement charges on federally assisted loans by an average of 30 percent in designated metropolitan areas.\textsuperscript{8} These regulations were never instituted.\textsuperscript{9} Presumably, until 1974, Congress felt reported abuses in settlements did not warrant the immediate imposition of direct control and regulation.\textsuperscript{10}

In 1974, Senator William Proxmire submitted a bill\textsuperscript{11} that utilized the concept of regulating settlement costs through the "lender-pay" approach, in which the lender is required to pay settlement costs. Because of the lender's superior bargaining power, settlement costs would be reduced. Competition among lending institutions would eventually result in passing such savings to the borrower.\textsuperscript{12} No action was taken on this bill.

In May of 1974, a bill adopting a different approach to the settlement costs problem was introduced.\textsuperscript{13} This bill, in amended form, became RESPA I. RESPA I adopted the view that the abuses and high cost of settlement services can best be solved by regulation of the underlying business practices of the industry. This would be done in three ways: 1) attempting to eliminate kickbacks, fee splitting and referral fees; 2) requiring disclosure of costs to the buyer prior to closing; and 3) promulgating improved methods of recording.\textsuperscript{14}

The effective date of RESPA I, June 20, 1975,\textsuperscript{15} fell during what is

\textsuperscript{7} "With respect to housing built, rehabilitated, or sold with assistance provided under the National Housing Act... the Secretary of Housing and Urban Development and the Administrator of Veterans' Affairs are... authorized and directed to prescribe standards governing the amounts of settlement costs allowable in connection with the financing of such housing in any such area." Id. at 461.

\textsuperscript{8} HUD-VA REPORT ON MORTGAGE SETTLEMENT COSTS 119 (1972); See also, S. REP. No. 866, 93d Cong., 2d Sess. 14 (1974) (additional views of Sen. Proxmire).

\textsuperscript{9} Congress feared the implementation of these regulations for three reasons: 1) Lack of comprehensive data on what criteria settlement costs were based, 2) Effect of federal regulation and bureaucracy on the settlement industry, and 3) A desire to avoid federal regulation in an area which had traditionally been under the control of the states.

\textsuperscript{10} Senator Proxmire submitted S. 2775, 92d Cong., 1st Sess. (1971). No action was taken. In addition, the Senate passed S. 3248, 92d Cong., 2d Sess. (1972). Although this bill was similar to RESPA I, it failed to pass in the House. S. REP. No. 866, 93d Cong., 2d Sess. 2 (1974).

\textsuperscript{11} S. 3232, 93d Cong., 2d Sess. (1974).

\textsuperscript{12} S. REP. No. 866, 93d Cong., 2d Sess. 16 (1974); Hearings on H.R. 9989, 11183, 11460, and 12066, Before the Subcomm. on Housing of the House Comm. on Banking and Currency, 93d Cong., 1st & 2d Sess. 676 (1973-74).

\textsuperscript{13} S. 3164, 93d Cong., 2d Sess. (1974).

\textsuperscript{14} 120 CONG. REC. 12,636 (daily ed. July 16, 1974) (remarks by Sen. Brock, sponsor of the bill). Included in S. 3164 at this point was a proposal to repeal Section 701(a) of the Emergency Home Finance Act of 1970, which authorized HUD to prescribe maximum amounts for settlement costs.

During the debate of S. 3164, Senator Hathaway recommended a provision that would not only require advance disclosure of the settlement costs but also a statement of the customary range of such costs in that area. Id. at 12,639. This idea was adopted in RESPA II.

\textsuperscript{15} RESPA I was approved Dec. 22, 1974, and was to be effective 180 days thereafter. 12 U.S.C. § 2601 (Supp. IV, 1974).
customarily the peak season in home purchasing. To prepare for the somewhat radical changes that would be brought about by the Act, seminars were held throughout the country in an effort to explain and clarify the new procedures. These seminars were directed at real estate sales agents to make them aware of the provisions in the law that would affect them as agents for the parties.\textsuperscript{16} Widespread criticism resulted from the implementation of RESPA I, not only from real estate agents but also from lenders, attorneys and the home-buying public in general.\textsuperscript{17}

Reaction to this criticism was quick. A month after the effective date of RESPA I, bills were introduced into the House calling for the repeal of the Act.\textsuperscript{18} Shortly thereafter, HUD gave notice of its intent to amend the regulations implementing Sections 2603, 2604 and 2605 of RESPA I.\textsuperscript{19}

Finally, on September 10, 1975, RESPA II was introduced.\textsuperscript{20} Most significantly, it called for the repeal of those sections of RESPA I that required a uniform settlement statement, advance disclosure of settlement costs, and prior disclosure to the buyer of the previous selling price of the property in certain instances.\textsuperscript{21} These three provisions were originally considered to be the heart of RESPA I.\textsuperscript{22} In practice, these provisions seemed to please no one, including the home-buyer. The substance of the complaints is that RESPA I engulfed the parties in red tape while affording them little substantial protection.\textsuperscript{23}

Specific complaints were directed at three areas:

1) COST. Additional paperwork and duplication of existing paperwork caused increased operating costs to banks. This especially affected banks that operated on a smaller profit margin. Increased costs were passed directly to the home-buyer.\textsuperscript{24}

\textsuperscript{16} As an example, RESPA I required a lender to deliver advance disclosure of settlement costs at least 12 calendar days prior to settlement. 12 U.S.C. § 2605 (Supp. IV, 1974).


\textsuperscript{18} H.R. 8923, 94th Cong., 1st Sess. (1975). H.R. 9627, 94th Cong., 1st Sess. (1975) was introduced by such diverse representatives as Ichord and Railsback. H.R. 9855, 94th Cong., 1st Sess. (1975) was introduced by Representative Flowers. These bills, however, were never reported out of committee.

\textsuperscript{19} 40 Fed. Reg. 32,370 (daily ed. Aug. 1, 1975). Section 2603 of RESPA I, requiring uniform settlement statements, was implemented in 24 C.F.R. § 82.6, 82.8 (1974). Section 2604 required special information booklets to be prepared by the lender, and was implemented by 24 C.F.R. § 82.5 (1974). Section 2605, requiring advance disclosure of settlement costs was implemented by 24 C.F.R. § 82.6 (1974).

\textsuperscript{20} S. 2327, 94th Cong., 1st Sess. (1975). This bill was reported by Senator Proxmire, the leader of the opposition to RESPA I as it was originally drafted. S. REP. No. 866, 93d Cong., 2d Sess. 141 (1974) (additional views of Sen. Proxmire).


2) DELAY. RESPA I dramatically increased the work load for banks resulting in delays of loan processings and home closings.25

3) INCONVENIENCE. This complaint emanated from all quarters.26 Naturally, the banks faced dramatic changes in loan processing because of RESPA I. But consumers also were displeased with the effects of the Act. The twelve day minimum required between loan commitment and advance disclosure of settlement, and settlement itself27 was not enough time to shop around for another loan or closing company, but was often too great a delay for a buyer in need of immediate settlement.28 The time required to complete settlements increased from as little as ten minutes29 to an hour or more.30

The goal of RESPA I was to promote and encourage home ownership.31 Congress, for all its efforts, appeared to have created a law that had the opposite effect.32

As a result of the criticism and the bills introduced in response to it, both the House and the Senate held hearings to consider the effect of RESPA I on the home-buying and closing process.33 The final result of these hearings was RESPA II, signed into law on January 2, 1976.34 Less than six months after the effective date of RESPA I, significant portions of this Act were altered by RESPA II.

25. Id. Senator Hruska had printed in the Record a letter from a Nebraska banker attributing an almost 50% decline in July, 1975 loan closings over those of June, 1975 (just prior to implementation of RESPA I) solely to the increased work load imposed by RESPA I. 121 CONG. REC. 15,703 (daily ed. Sept. 10, 1975) (remarks by Sen. Hruska).


27. 12 U.S.C. § 2605(a) (Supp. IV, 1974). This minimum time period was for all practical purposes eliminated in RESPA II. Pub. L. No. 94-205 § 5, 89 Stat. 1157 (1976).

28. Unresolved problems included the lender's requirement that the buyer settle with a certain closing company or law firm. But see S. 2349, 94th Cong., 2d Sess. (1975). Senator Proxmire introduced a bill which would have provided incentives to lenders who allowed the borrower to choose a closing company independently. S. 2349, 94th Cong., 2d Sess. (1975); Hearings on S. 2327 and S. 2349 Before the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 1st Sess. (1975).

29. A simple residential "lot and block" transaction requires little time.


31. The enacting clause of RESPA I reads: "To further the national housing goal of encouraging homeownership by regulating certain lending practices and closing and settlement procedures ... to the end that unnecessary costs and difficulties of purchasing housing are minimized...." Pub. L. No. 93-533, 88 Stat. 1724 (1974).


APPLICATION AND INTERPRETATION OF RESPA AS AMENDED

Kickbacks and Unearned Fees

RESPA poses initial questions concerning what, if any, conflicts exist between it and state law. RESPA I stated that a preemption of state law was intended only when inconsistencies existed. When the Secretary of HUD determined that a state law gave greater protection to the consumer, that law could not be deemed inconsistent with RESPA. Maryland has no statutes with provisions similar to RESPA, though it does have a criminal statute dealing with kickbacks to real estate brokers or agents. RESPA prohibits kickbacks and splitting of charges for settlement referrals. It provides for maximum criminal penalties of up to a $10,000 fine, one year imprisonment or both. Unlike Maryland’s statute, RESPA further provides a civil remedy to the home-buyer of up to treble the amount of the kickback or split charge and court costs and attorney’s fees.

The most glaring deficiency of the kickback provision of RESPA I was its lack of specificity as to what constituted a “kickback.” Three specific practices not covered by the anti-kickback provision were:
1) Payment of a fee to attorneys for services actually rendered;
2) Payment of a fee by a title company to an agent for the issuance of a title insurance policy; or
3) Payment of a fee by a lender to its agent for services performed in the making of a loan.

Because these exceptions have never been considered a form of kickback, this provision led some to believe that other, unspecified types of real estate practices were also prohibited. For example, no reference was made to the commonly used multiple listings practice, nor was any reference made about the legality of out-of-town referral fees. Mortgage lenders also had difficulty with this provision. Some took the position that RESPA I barred waiver of prepayment penalties. This resulted in increased rather than decreased costs to the consumer. This interpretation seemed to violate the intent of Congress in enacting RESPA I, yet the vagueness of this Section lent itself to such readings.

RESPA II clarifies many of these ambiguities. It adds further exemptions to the anti-kickback provisions of RESPA I: “(3) payments pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and brokers, or (4) such other

35. 12 U.S.C. § 2616(a) (Supp. IV, 1974). RESPA II made no substantial change in this provision.
38. Id. § 2607(d)(1).
39. Id. § 2607(d)(2).
payments or classes of payments or other transfers as are specified in regulations prescribed by the Secretary of HUD . . . ."42 This provision appears to clarify most, if not all, of the questions raised above. Most significant is Section (4), which gives HUD broad and flexible powers to exempt other fee arrangements as it deems proper.

Scope of RESPA

RESPA I applied to almost all residential sales transactions financed by federally related mortgage loans.43 A federally related mortgage loan was defined as a loan insured or regulated by any agency of the federal government (including FHA and VA loans, loans made in connection with any federal housing or urban development program or a loan from an institution with federally insured deposits), a loan eligible for purchase by the Federal National Mortgage Association or other federally related secondary mortgage market institution or a loan from a creditor who invests more than $1 million per year in residential real estate loans.44 RESPA II exempted any state agency from this definition of creditor.45 Soon after the effective date of RESPA I, HUD promulgated Regulation X,46 which substantially limited the application of the Act.

Section 82.4 of Regulation X47 states that home improvement mortgages are not covered by the Act as long as the proceeds of the loan are not used to finance the purchase of the property. RESPA, as amended, still does not apply to most junior financings when there is no transfer of title.48 An exception was that certain assumption loans fall within Regulation X’s definition of “home mortgage” loans.49 Originally, Regulation X stated that all assumption loans in which the lender either changed the terms of the loan from the previous loan, or charged more than $50.00 for the right to assume the loan were covered by the Act.50 HUD later amended this “to exclude coverage of assumptions, except where a construction loan is converted to a permanent loan.”51

43. All provisions of RESPA I applied to all transactions involving federally related mortgage loans. 12 U.S.C. § 2601 et seq. (Supp. IV, 1974).
44. 12 U.S.C. § 2602(B) (Supp. IV, 1974).
47. 24 C.F.R. § 82.4 (1974).
48. Id.
49. Id. § 82.2(a), (e), § 82.4(a).
50. Id. § 82.2(a).
Also exempted under Section 82.4(b) as amended\(^{52}\) are the following types of mortgaged conveyances:

1) Purchases of property for resale in the ordinary course of business;
2) Loans financing the purchase or transfer of property which is 100 acres or more; and
3) Loans financing the purchase or transfer of property which is less than 100 acres but more than ten acres where the value of the house and the property it stands on is worth less than the remainder of the property.

This increased the number of conveyances not covered by RESPA. This regulation clearly reflects the attitude of those who wanted to see RESPA affect as few real estate conveyances as possible.

There are two more obvious exceptions to transactions covered by RESPA:

1) Any sale of land which has no structure upon it or upon which a structure will not be built with the proceeds of the loan; and
2) Most cases where the land is financed by a "take-back" mortgage from the seller.

This is because the seller is not likely to fit the definition of "creditor" contained in RESPA.\(^{53}\)

In passing RESPA II Congress has adopted and expanded the limitation of the application of the term "federally related mortgage" used in Regulation X. Now excluded from this definition are all construction loans and loans other than "first liens."\(^{54}\) Further, only a loan intended to be sold to GNMA, FNMA or FHLMC is to be considered a federally related mortgage loan.\(^{55}\) Where RESPA I included all loans "eligible"\(^{56}\) to be purchased by federally related institutions, RESPA II substantially limits the scope of its applicability.

**RESPA II'S MAJOR MODIFICATIONS**

*The Disclosure/Settlement Form*

Three major sections of RESPA I, the "heart" of the original bill,\(^ {57}\) have been either repealed or greatly modified. Section 2603 of RESPA I gave HUD the power to prescribe a uniform settlement form.

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\(^{52}\) *Id.* 26,509.


\(^{55}\) *Id.* FHLMC is the Federal Home Loan Mortgage Company, FNMA is the Federal National Mortgage Association, and GNMA is the Government National Mortgage Association.

\(^{56}\) 12 U.S.C. § 2602(c) (Supp. IV, 1974). The term federally related mortgage includes mortgages eligible for purchase by the FNMA, FHLMC, GNMA or a financial institution from which it is to be purchased by the FHLMC. *Id.* at § 2602(1)(B)(ii). 

\(^{57}\) 121 CONG. REC. 9,207 (daily ed. Sept. 26, 1975).
This statement was to be a standard form in all transactions in the United States involving federally related mortgage loans with allowance to be made for unavoidable differences in local practice and law. The settlement sheet, entitled HUD Form I, as originally developed was rather lengthy. Its purpose was to itemize all charges imposed upon the buyer and seller in connection with the settlement. But the plethora of items included in Form I served only to confuse everyone concerned. HUD then amended its regulations so that certain items not used locally or in connection with the mortgage transaction could be deleted from the form.

RESPA II virtually eliminated all vestiges of the original Form I. It allows HUD to eliminate any items from the settlement statement that do not coincide with local practice, whether or not those differences are unavoidable.

Repeal of RESPA I’s Advance Disclosure

RESPA I required advance disclosure of settlement costs. Regulation X set forth procedures for proper timing of loan application, commitment, disclosure and waivers. Basically, they included: 1) an itemized disclosure of costs and 2) a minimum time period between the disclosure and the settlement date. The full responsibility of meeting these requirements fell on the lender.

Implementation of these provisions resulted in a flood of complaints to Congress. RESPA II responded to these complaints by specifically repealing these advance disclosure requirements. RESPA II left only a minimal disclosure requirement:

The form prescribed... (the uniform settlement statement) shall be completed and made available for inspection by the borrower at or before settlement by the person conducting the settlement...” (emphasis supplied).
Two changes are patent:
1) The settlement statement containing disclosure costs need only be made available to the borrower.70 Under RESPA I, it had to be sent to both the buyer and the seller.71

2) The person conducting the settlement is now required to prepare Form I; under RESPA I, it was the lender's responsibility.72

RESPA II further limits the disclosure provision by providing that the buyer may waive his right to have Form I made available to him.73 The buyer, could now walk away from the settlement without ever having seen his settlement costs in writing, and even where he requests Form I be made available to him, it need not be done until the day of settlement.

This provision gives the unscrupulous an incentive to deceive the buyer. The vast majority of settlement companies provide more complete disclosure of settlement costs to the buyer than is now required. Statutory sanction is now given to that minority who would provide as little as possible as late as possible.

Repeal of Disclosure of Previous Selling Price

The provision of RESPA I which caused the most complaints74 was the requirement that the seller disclose to the buyer the previous purchase price of the property.75 This section barred the lender from making a loan commitmt until it had confirmed that the seller had disclosed, in writing to the buyer, the name and address of the present owner, the date the property was acquired, and the purchase price of the last "arm's length" transfer, if the seller had not owned the property for at least two years prior to the date of the loan application.76 Criminal penalties of up to $10,000 or one year's imprisonment were imposed for willfully providing false information or for failure to comply with the provisions.77

RESPA II repealed the section in its entirety.78 Problems in defining "arm's length transfer," and confusion and complaints from all sides led to this repeal.

The HUD Buyer Information Booklet

At least one clear improvement has come from RESPA II. RESPA I required the lender to provide the buyer with an information booklet

70. Id.
73. Id. § 3(4)(b)(2).
75. Id.
76. Id. § 2606(c).
77. Id.
prepared by HUD, upon receipt of a loan application. This booklet was
to explain various settlement costs, the uniform settlement loan, escrow
accounts, options in selecting persons to perform settlement services,
and in general warned the buyer what to expect. RESPA II added a
requirement that the lender include with the booklet a good faith
estimate of the range of charges for specific settlement costs likely to
be incurred. This single provision provides an inexpensive and simple
way for the home-buyer who is so motivated to seek the best possible
deal in a not very competitive industry.

CONCLUSION

The Real Estate Settlement Procedures Act of 1974, as amended by
the Real Estate Settlement Procedures Act Amendments of 1975,
continues to be woefully inadequate for the purpose which it was
intended to accomplish. After five years of congressional effort and
millions of dollars of taxpayer money, a bill was implemented which
only wreaked havoc within the settlement industry while accomplishing
little for the home buyer. It is disappointing that Congress has spent so
much time and money attempting to devise a law which would bring a
modicum of fair play into the confusing world of home-buying and
then realize a few months after its enactment that the effort has been
wanting. In the final analysis the situation remains relatively un-
changed. Congress must consider another approach if it is interested in
lessening costs to the consumer.

Michael Darrow

1974).