

RESPA and Washout MLIs

by
Knud E. Hermansen
Ph.D., P.L.S., P.E., Esq.

The Real Estate Settlement Procedures Act, better known as RESPA, is well known among most title attorneys, settlement agents, mortgage brokers, and even some surveyors. What is not well known is how the payment arrangement between lenders, mortgage brokers, attorneys, or title insurance agents, on the one hand, and surveyors, on the other hand, in the process of obtaining mortgage loan inspections (better known as MLIs), could be violating certain RESPA provisions.

As part of the process for obtaining a residential mortgage, a MLI of the property is often sought from surveyors. The MLI is used to remove the survey exception from the mortgagee's title insurance policy. Consequently, an MLI is a necessary part of the loan process. In addition to the use by the lender, the MLI is also examined by the buyer or buyer's agent to determine if potential defects are present that could affect the title to the property. In cases where the MLI reveals a problem, the buyer will often choose not to proceed with the purchase of the property. Consequently the buyer will not obtain a loan and become a borrower. In these cases, the lender, Realtor, or agent ordering the MLI has no opportunity to obtain the surveyor's payment from the borrower. They are "stuck" with the surveyor's bill. To avoid the cost of surveying services that can not be recouped from the buyer/borrower, certain lenders or lending agents have sought and reached agreement with some surveyors where the surveyor will forego payment for MLI services in the situation where the mortgage is not executed. Where the surveyor has agreed not to seek payment in the situation where the mortgage is not executed, the surveying services are termed a "washout survey." The "washout survey" arrangement is similar to the contingent fee arrangement some attorneys have with clients for legal services. (Because the surveyor has a superior responsibility to the public, some surveyors have said a contingent fee arrangement involving a surveyor presents a potential conflict of interest for the surveyor and is therefore deemed to be unethical conduct on the part of the surveyor.)

Involved with most residential loans, the Federal government has adopted certain regulations, including the Real Estate Settlement Procedures Act (RESPA). RESPA section 2607 (12 U.S.C. § 2607) prohibits kickbacks and unearned fees where a federally related mortgage is involved. Provisions in RESPA, section 2607, deal with kickbacks, splitting charges, allowable compensation, and penalties. (See http://www.hud.gov/fha/res/respa_hm.html for a complete rendition of the statute.) In particular, the RESPA subsection on kickbacks, section 2607(a), states:

No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

RESPA section 2602(2) defines a “thing of value” to include services. RESPA section 2602(3) defines “settlement service” to include surveys.

The question arises whether foregoing a fee for surveying services earned when performing an MLI pursuant to an agreement with a lender or other person seeking an MLI is a kickback in violation of RESPA section 2607. Many attorneys and surveyors have denied any suggestion that a washout survey is a kickback and in violation of RESPA. However, recent interpretations of RESPA involving third parties have lent support to the argument that washout surveys are a kickback in violation of RESPA.

The Federal Register, volume 61, number 111, dated 7 June 1996, page 29262 notes that:

HUD has looked at whether the contracting party receives payments... at less than the reasonable value of the services rendered. If so, then the difference between the payments made to the contracting party and the reasonable value of the services rendered may be seen as a disguised referral fee in violation of Section 8 [now § 2607]. 24 CFR 3500.14(g)(2).

The argument is made that when the lender and surveyor contractually forego a fee for services that were actually performed, such an arrangement is simply a disguised referral fee or kickback and illegal under RESPA. The foundation for the argument is based on the logical and reasonable belief that few surveyors or other professionals would voluntarily give up a fee that was properly earned unless a certain volume of services will be sought from the surveyor by the lending agency or person seeking MLIs. In other words, the reason the surveyor foregoes the fee with a washout survey is to keep the flow of business coming from that lender or person. The failure to pursue a fee properly earned is a gift made to the lending institution in prospect of the lender or person seeking other MLIs from the surveyor.

The problem is compounded because the surveyor oftentimes, in order to make up losses for services that were not paid for, raises fees on other MLIs. The result is that other borrowers will eventually pay for past or future washout surveys — in effect compensating the surveyor for fees unearned during the loan process that was completed. This is one reason for the enactment of RESPA — to prevent price fixing along with preventing hidden, unearned, and improper fees from being thrust upon the public consumer in the mortgage loan transaction process.

It should be made clear that there is no direct opinion or decision stating that a washout survey is in violation of RESPA. Nevertheless, as the discussion has shown, there is an argument that can be made that washout surveys as a mode of doing business in the mortgage loan business are a violation of RESPA and therefore illegal. Violation of RESPA provisions include a fine of not more than \$10,000 or imprisonment for not more than one year, or both (12 U.S.C. § 2607(d)(1)) The attorney, lender, mortgage broker, title insurance agent, surveyor, and others

involved in the mortgage loan process should carefully evaluate their arrangements for seeking and payment of surveying services to ensure there is not a violation of certain RESPA provisions.