



OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

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The New HUD-1: Are You Ready?

■ by James C. Russick, Vice President, Florida State and Governmental Affairs Counsel

On November 17, 2008, the United States Department of Housing and Urban Development (HUD) released the most sweeping changes to the Real Estate Settlement Procedures Act (RESPA) since its inception nearly 40 years ago. The changes will take effect no later than January 1, 2010, but you could be required to use the new three-page HUD-1 as early as tomorrow. We have written confirmation that one major national lender will implement the new rules with loans originating December 5, 2009.

While rumors of either delayed implementation or delayed enforcement by HUD abound, they are, as of this writing, merely rumors, so you need to be prepared.

To help prepare you for these momentous changes, Old Republic Title formed a RESPA Reform Task Force. **The Task Force has created a new tab under the Agent Services heading on StarsLink, titled RESPA Reform; we recently loaded onto StarsLink a PowerPoint presentation designed to be a basic primer on RESPA Reform titled "RESPA Reform-An Overview," the new GFE and HUD-1 forms, an article on RESPA Reform, another PowerPoint titled**

"The New HUD-1," and a hyperlink to HUD's FAQs.

Within the next few days, an interactive HUD-1 will be added to StarsLink under this tab, and a webinar production of the PowerPoint will be completed and added by approximately November 13, 2009. More documents and other training and educational materials will be added between now and the mandatory implementation date as the Task Force completes additional projects.

Once you access StarsLink, the login page will appear. If you have not yet registered for a Username, click the link that reads "Click here if you are not a

registered user" and fill out the form. After submitting the registration you will receive an e-mail welcoming you to StarsLink. Please note that it will not happen instantaneously. Once you gain access to StarsLink, click on the Agent Services heading and a number of items appear, including "RESPA Reform." Click on that tab and review the contents

To access StarsLink, follow the hyperlink <http://www.oldrepublictitle.com/orstarslink> or copy and paste it in your browser.

referenced above.

We will continue to advise you of any new information provided by HUD.

Small But Dangerous

■ *by Jeanne F. Murphy,
Florida State Counsel*



As a sign of the times, more and more agents are being asked to insure title derived through “small lien” foreclosures. A small lien foreclosure is generally under \$15,000 and is for such things as condominium association liens, homeowner liens, construction liens and municipal liens.

Properties that are the subject of a small lien foreclosure typically sell at the foreclosure sale for far less than their fair market value. This can present significant risks to underwriters, as courts will routinely uphold challenges to such foreclosure actions on technical procedural grounds to prevent owners from losing their property for small amounts and to prevent the purchasers at the foreclosure sale from obtaining a windfall. The risk is so substantial, some underwriters refuse to insure title to property that has recently been involved in a small lien foreclosure.

Old Republic National Title Insurance Company does not prohibit agents from insuring out of small lien foreclosures, but we do require that special precautions be taken to avoid the threat of a claim. One of the major problems with these types of foreclosures is that the original

owner of the property is not properly served. Much of the time, the owners do not live at the property and never receive proper notice that their property is going to be foreclosed for failure to pay a relatively small lien. If the owner then challenges the foreclosure due to defective service, they are usually successful. Accordingly, you need to look very closely at the service of process before insuring out of a small lien foreclosure. In most cases, we will require personal service on the owner. If service is by publication, the affidavit of diligent search and supporting report will need to be reviewed carefully to ensure it is sufficient to withstand challenge. Due to the risks associated with these types of foreclosures, we generally authorize insuring title based on service by publication only if the equity in the property is less than the amount of the

final judgment of foreclosure.

Please contact the Underwriting Department prior to insuring title out of a small lien foreclosure.

Comments and information

We invite your feedback and welcome your suggestions regarding “*In The Title Corner*” and the publication of future articles.

Address correspondence to:

In The Title Corner

Old Republic National Title
Insurance Co.

1410 N. Westshore Blvd.

Suite 800

Tampa, FL 33607-4547

Phone: 800-342-5957

Fax: 813-228-0301

www.ortfl.com

Sailing the Seven Seas: Understanding the Navigational Servitude Exception and Endorsement

■ by Laura M. Licastro, Associate Florida Underwriting Counsel

Following up on last quarter's article on the sovereignty rights exception, this article will discuss the navigational servitude exception and endorsement. While sovereignty rights relates to the rights reserved to the State of Florida, which acquired title to the lands submerged beneath navigable waters when it became a state in 1845, the navigational servitude relates to rights in favor of the United States of America by virtue of its control over the actual bodies of waters used for navigation and commerce. The Federal navigational servitude is simply the right of the Federal government to keep all navigable waters open and regulate them for commerce and navigation.

How can one tell if a body of water is navigable? As was discussed in the sovereignty rights article, bodies of water that are actually used for navigation and bodies of water that are capable of navigation (capable of sustaining boat traffic) are considered navigable. When insuring title to land that abuts navigable waters, the Federal navigational servitude must always be considered. It is not the mere fact that the property abuts the water that is the problem, since title is not insured past the mean high or ordinary high water mark. The real issue is that the rights of the United States in the navigable waters cannot be defeated by improperly filling the

land to change the natural boundary between the land and the water. So, improperly filled lands might still be considered part of the navigable waters. To protect against claims due to improperly filled lands, the following exception is required:

Those portions of the property herein described comprising artificially filled land in what was formerly navigable waters, are subject to any and all rights of the United States government arising by reason of the United States government's control over navigable waters in the interest of navigation and commerce.

If the abutting water body is contained within or runs through the insured land, there is an additional issue. The public has the right to use navigable waters and the government has the right to regulate their use, and the fact that the property owner has title to the land on either side of or surrounding the body of water does not defeat those rights, meaning the owner cannot stop anyone from using that navigable body of water. The additional exceptions required in the commitment and the policy will be follows:

The inalienable right of the public to use navigable waters.

AND

The right of the State of Florida and the United States of America to regulate the use of the navigable waters.

Note that all these exceptions are in addition to an exception that the policy does not insure title to any portion of the parcel beyond the ordinary high water mark.

The Navigational Servitude Endorsement, available for both owner and mortgagee policies, provides affirmative coverage to the policyholder against the forced removal of any improvements on the property which occurs due to the government's exercise of its right of control over navigable waters. Prior approval from the Underwriting Department is required. The promulgated rate for the Navigational Servitude Endorsement is the same as for a Florida Form 9.

Two of the most important tools the agent can have when dealing with water issues is a good survey and access to fill permit records. These items will show whether the land has been properly filled and whether there are any improvements which might be cause for concern, especially when asked to issue a Navigational Servitude Endorsement. Please contact the Underwriting Department with any questions concerning navigational servitude exceptions and endorsements.





Celebrating Commitment

We are extremely proud to announce additional companies who have made a commitment to Old Republic National Title Insurance Company and its customers:

★ 34 YEARS ★

Levy Abstract & Title Company, Bronson
Paul D. Newell, P.A., Keystone Heights

★ 24 YEARS ★

Fisher, Tousey, Leas & Ball, P.A.,
Jacksonville and Ponte Vedra Beach

★ 23 YEARS ★

Bankers Title Company, Clearwater

★ 21 YEARS ★

Bond, Schoeneck & King, PLLC, Bonita Springs
Devito & Colen, P.A., Largo
First Coast Title Services, Inc., Jacksonville

★ 16 YEARS ★

Tropical Land Title Insurance Agency, Inc., Jupiter

★ 11 YEARS ★

Deluxe Title and Escrow, Inc., Miami
Gunster, Yoakley, Valdes, Fault & Stewart, P.A.,
West Palm Beach
Henderson, Franklin, Starnes & Holt, P.A., Fort Myers
Kiesel, Hughes & Johnston, Ft. Myers
Title Florida, Inc., Naples

Legal Department Change

■ *By Scott Pierce, Senior Vice President*

As you know, Jim Russick is now handling the governmental and regulatory issues involving Old Republic Title, and I am pleased to announce that Carolyn Broadwater, Assistant Vice President and Florida State Counsel, has been named the new Chief Underwriting



Counsel for Florida Agency Operations.

Carolyn has been with Old Republic for more than 8 years, and has more than 20 years of experience as an underwriter. She previously worked for Chicago Title and Stewart Title in Tampa where she was underwriting and claims counsel. She has also spent time in private practice with a well-known foreclosure firm and with two Tampa firms, one of which is an Old Republic agent. She is admitted to practice before the Federal District Courts of the Northern, Middle and Southern Districts of Florida. She is a member of the Florida Bar, Real Property, Probate and Trust Law Section, she served as a member of the Board of Directors of the Florida Land Title Association, and is a member of the Hillsborough County Bar Association.

Jim will continue to focus more and more on the Regulatory and Legislative issues that so seriously affect our industry, especially the agency base which is our mainstream of revenues.

I want to thank both Jim and Carolyn for their invaluable support of Old Republic Title, and I hope you'll take a moment to express your congratulations to both of them.

The Cost of RESPA Violations— Class Action Suit Against JP Morgan Chase

■ by Brenda J. Cannon, Florida State Counsel



A pending class action lawsuit in the State of New York entitled [Cohen v. JP Morgan Chase & Co.](#) is a good reminder for all of us that RESPA violations—even the mere allegation of RESPA violations—may result in costly litigation and the payment of significant damages or settlement monies.

This case involves the 2003 refinance by Sylvia Cohen and her husband (“Cohen”) of their Brooklyn co-op, with JP Morgan Chase (“Chase”). In connection with the refinance, Chase charged various closing fees, including a \$225 “post-closing fee.” According to Chase, the fee covered a variety of services necessary to finalize the file for its post-closing center, including verifying compliance with loan closing instructions and assembling the closing package.

Cohen’s original complaint in 2004 alleged that the post-closing fee was an “unearned” fee in violation of, among other statutes, RESPA’s Section 8 (b). Section 8 (b) states that “[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for the services actually performed.”

Although the 2004 complaint

was dismissed and denied reconsideration by the trial court, in 2007 the Second Court of Appeals vacated the dismissal and remanded the case for reinstatement. In the amended complaint, Cohen made the following allegations: 1) that no services were provided “in exchange for” the post-closing fee; 2) that even if services were provided, they were duplicative of services already performed by other parties in the transaction; and 3) that these services, whether provided or not, were not settlement or closing services.

Cohen sought class certification in 2008 and Chase moved to stay such certification on the grounds that the parties were in settlement negotiations. In August of this year, the parties asked the court to approve a proposed settlement in which all borrowers who had been charged this post-closing fee from September 2001 through December 2008 would be reimbursed for that amount, plus 5% interest per year. Because the proposed class would

have consisted of some 50,000 people if certified, Chase is looking at an approximately \$20 million dollar settlement payout, as well as all attorney fees and litigation/settlement costs (which have been requested by Cohen’s counsel in the amount of \$6.6 million dollars). In return, Chase will not have to admit any wrongdoing. (As a side note, although Chase continues to assert in this lawsuit that its post-closing fee did not violate RESPA, it purportedly stopped charging this fee sometime in 2007.) A hearing to obtain court approval of the proposed approximately \$27 million dollar settlement is scheduled for December 22, 2009.

This lawsuit and pending multi-million settlement amount clearly illustrates that RESPA is alive and well and must always be forefront in our agents’ minds.

If you have any questions regarding RESPA or this case, please contact your Old Republic Underwriting Department.



Ask Your Underwriter

■ *Laura M. Licastro, Associate Florida Underwriting Counsel*

Question: I know Florida law does not require witnesses for a mortgage on non-homestead property, but what about homestead property?

Answer: Ever since the 1968 amendment to the Florida Constitution, witnesses are no longer required on mortgages of either homestead or non-homestead property. Remember, however, that § 689.111(a), F.S. requires that any power of attorney being used to mortgage homestead property have two witnesses. In addition, a durable power of attorney must have two witnesses regardless of whether the document it is being used for requires witnesses or not (see § 709.08 F.S.).



OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY

1410 N. Westshore Boulevard, Suite 800
Tampa, FL 33607-4547

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CLAIMS PREVENTION: Satisfaction of Revolving Lines of Credit

■ by Jeanne F. Murphy, Florida State Counsel, Old Republic National Title Insurance Company

One of the areas where we continue to experience a substantial number of claims is mortgages securing revolving credit line notes which do not get satisfied. The good news is that, in most cases, these types of claims can be avoided by following the instructions contained in the lender's payoff letter and some simple, but important, guidelines. Although we have addressed this issue in the past, since these claims are on the rise, we thought it was timely to remind you how to identify a revolving line of credit and, once identified, the procedures necessary to obtain a satisfaction.

Revolving lines of credit allow property owners to borrow against the equity in their real property. The borrower can pay it down from time to time, and then borrow against it, up to a maximum amount. So, even if the loan is paid off to a zero balance, it is not satisfied unless the intent is expressly understood and agreed to by both the borrower and the lender. Since the borrower can generally access the line of credit by making "draws" using checks, a credit card or an ATM card, the account must be closed prior to the final payoff. Most estoppel letters for revolving lines of credit instruct the closing agent to obtain a written authorization from the borrowers requesting the closing of the account prior to the payoff.

The most common claim with this type of mortgage occurs when the outstanding balance has been reduced to zero prior to the closing, or the funds collected and disbursed at closing will result in a zero balance. If the payoff letter received from the institutional lender shows a zero balance or states the amount necessary to bring it to a zero balance, the agent *incorrectly* assumes the mortgage will be satisfied once the payoff is received by the lender. The problem is that even though the balance is zero, the revolving line of credit is still open and, after the closing, the original borrower can still make additional draws and increase the balance. Another risk is that the borrower may have written checks prior to closing that the lender was not aware of when it provided the payoff information.

In an effort to reduce our liability caused by lenders refusing to satisfy revolving lines of credit, Old Republic requires the following procedures when such a mortgage is being paid off:

- (1) Obtain an original estoppel letter from the lender specifically stating that the revolving line of credit has been closed and that upon payoff of the sum in the letter, the lender will execute and record a satisfaction of the line of credit. It is important to read the credit line mortgage carefully as many of them contain specific requirements with regard to obtaining payoff information and satisfactions, which are different than traditional mortgages. For example, as stated, many lenders require a letter from the borrower requesting that the line be terminated and they won't accept a letter from the closing agent. Because the borrower can make draws against the line until closed, you should telephone the lender on the day of closing to verify the accuracy of the payoff figures. If the verbal payoff differs from the original estoppel letter, a revised estoppel letter must be obtained from the lender prior to disbursing the transaction.
- (2) Obtain a Borrowers Revolving Line of Credit Affidavit and fax it to the lender. (Attach the fax confirmation to your file copy of the Affidavit.) It is suggested that you obtain the Affidavit as soon as you are aware there is an outstanding revolving line of credit that will need to be satisfied. A sample Affidavit is shown on the reverse side.
- (3) Require the borrowers, either before or at closing, to surrender and return all unused checks, credit cards, vouchers or other means of accessing the credit line. If possible, verify with the lender the number of the last check that cleared the bank and compare it to the number of the first check the Borrowers surrender. Also verify with the lender that any missing checks or checks out of sequence have cleared the bank prior to closing.
- (4) Forward the payoff check via overnight mail. If the revolving line of credit is not already closed, the check must be accompanied by a cover letter instructing the lender to close the account and satisfy its lien. In addition, a copy of the signed Borrowers Revolving Line of Credit Affidavit, together with evidence of compliance of any other requirements made pursuant to the lender's instructions for payoff, must be enclosed. Then, follow up by obtaining the satisfaction.

Although we understand these requirements may create additional time and work, based on our claims history for these types of loans, unfortunately they are necessary to avoid future problems. Should you have any questions regarding any of the procedures, please do not hesitate to contact underwriting.

Borrower(s) Revolving Line of Credit Affidavit

Property located at: _____

Borrower(s): _____

Borrower(s) address: _____

Loan number: _____

I/we, the undersigned affiant(s), upon my/our oath do swear and state the following to be true:

I/we currently have a revolving Line of Credit account with the following lender, _____
_____. The loan number is referenced above. The unpaid balance on the
account is \$ _____. Attached is a copy of the payoff statement provided by my lender to Old Republic National
Title Insurance Company on the date shown thereon. There have been no advances or withdrawal of funds within 30 days prior to
the date of closing, and there will be no more advances or withdrawals made by me/us as it is my/our intention to fully close and pay
off the account in full as of the date of the affidavit. If there was activity within the 30 days prior to closing, the activity is listed as fol-
lows:

All () checks () credit cards () other _____ available to me/us to make withdrawals or advances from the above-
mentioned Revolving Line of Credit were given to Old Republic National Title Insurance Company on or before the date of closing.

Dated this ____ day of _____, 20____.

BORROWER

BORROWER

STATE OF FLORIDA)

COUNTY OF _____)

The foregoing instrument was acknowledged before me the ____ day of _____, 20____ by
_____, who is/are personally known to me, or who has/have produced
_____ as identification, and who did/did not take an oath.

Notary Public, State of Florida

Printed Name of Notary

My Commission Expires: _____ [SEAL]