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HUD Targets "Unearned Fees"

■ *Scott Pierce, Southeast Region Manager*

The 7th Circuit Court's decision in the *Echavaria vs. Chicago Title & Trust* case in July 2001 has prompted HUD to center its attention on the issue of "unearned or reasonable fees." The cause of the dispute in this case was a \$14.00 charge made to a borrower that was over and above the amount required for recording fees. The Court's determination was that since the excess charge was not split with a third party, there was no violation of Section 8(b) of RESPA, which states that "no person shall give and no person shall accept any portion, split or percentage of any charge made or received.... other than for services rendered."

In response to the *Echavaria* decision, HUD published a policy statement in October 2001 indicating that a charge made by a settlement service provider to a consumer is in violation of Section 8(b) even where there is no split with a third party. According to HUD, this policy extends to three areas:

1. Where "little or no services are performed"
2. Where a "duplicative fee" is charged
3. When a "provider charges a fee that exceeds the reasonable value of goods or services."

It is this last area that is of concern to us, as HUD has provided no guidance to the industry or the courts as to how "reasonable value" is determined.

Reacting to HUD's policy statement, the American Land Title

Association, along with other interested parties, sent a "White Paper" memorandum to HUD in January that countered HUD's policy statement with the following points:

- ① Section 8(b) addresses the splitting of fees, but not the level of charges to the customer.
- ② Courts have repeatedly rejected the view that Section 8(b) applies to consumer charges.
- ③ RESPA's legislative history was, in fact, directed at kickbacks and payments to others.
- ④ The Senate Banking Committee in 1974 rejected a proposal to regulate closing costs partly due to the need to create a "pricing" bureaucracy.
- ⑤ Finally, HUD's position will expose settlement providers to unnecessary litigation.

The final chapter has yet to be written on this issue. HUD is currently in the process of publishing "sweeping proposals" for the settlement service industry, which we expect will be presented very soon. Until such time as the "reasonable fee" issue is resolved, we suggest that you:

- ① Not add on to third party charges.
- ② Disclose all of your fees accurately on the HUD-1.
- ③ Not charge for services that were not actually performed.



§1031 Tax-Deferred Exchanges

■ *Michael S. Davis, Florida State Counsel*

Over the past several issues, we have discussed certain aspects of the tax-deferred exchange under §1031 of the Internal Revenue Code.

From time to time, one question arises, and it often causes the taxpayer considerable grief or agony. The question, simply put, is what happens to the funds held by Old Republic if the exchange falls through. A brief review of certain aspects of the deferred exchange process is necessary to answer the question.

Recall that the taxpayer has 45 days from the date of closing of the sale of the relinquished property within which to identify potential replacement property. This identification must be communicated in writing to the intermediary. During this 45-day period, the taxpayer may amend the identification as often as he or she wishes. Further, the taxpayer may effectively terminate the exchange process by withdrawing all identification of replacement property on or before the end of the 45th day. Therefore, if no replacement property has been properly identified at the

conclusion of the 45-day identification period, the deferred exchange process cannot be completed under established rules and regulations, and the funds may be returned to the taxpayer at the conclusion of this 45-day period.

The exchange itself must be completed by the earlier of 180 days from the date of the closing of the sale of the relinquished property, or the due date of the taxpayer's tax return. If the taxpayer has properly identified replacement property to be acquired in the exchange, that property must be acquired within the 180-day period. If the taxpayer has acquired all of the property identified as replacement property before the end of the 180 day period, any funds remaining in the exchange may be returned to the taxpayer. If, however, additional identified replacement property remains to be purchased, the funds cannot be released until the conclusion of the exchange period (180-day period).

If it has become practically impossible for the taxpayer to acquire the identified replacement property due to circumstances

beyond the taxpayer's control, funds may be released to the taxpayer prior to the conclusion of the exchange.

The key element in these types of

circumstances revolves around the question, "Who controls the proceeds of sale of the replacement property?" It is important for a valid deferred exchange that the taxpayer not control the proceeds of the sale. The proceeds of the sale of the relinquished property are assigned to the qualified intermediary and become the property of the qualified intermediary. By allowing the proceeds to be returned to the taxpayer prior to the termination of the exchange, it can be argued that the taxpayer had ultimate control over the funds. If one taxpayer is allowed to receive the exchange proceeds prior to the conclusion of the deferred exchange, could it not then be said that any taxpayer doing business with that intermediary could decide to terminate the exchange and demand the return of their funds? Who, then, is in control of the proceeds? The taxpayer or the intermediary?

Old Republic takes its responsibility as a qualified intermediary very seriously. We do not wish to jeopardize the validity of any taxpayer's deferred exchange. Therefore, before we will return funds to a taxpayer in a deferred exchange, we will make certain that the circumstances fall within permitted guidelines for the return of those funds. While some taxpayers may be unhappy with this situation, we do seek to protect all taxpayers for whom we serve as qualified intermediary.

Of course, if there are any questions, please do not hesitate to contact your Old Republic Underwriting Department.



Tips from Auditing

■ *Renea Thompson, Senior Auditor, Debbie Carr, Auditor, Missy Maxson, Auditor, Kathy Leard, Auditor*

PROTECTING YOUR ESCROW ACCOUNT

We have just been made aware of **SAFEChecks**, a company that specializes in protecting your bank accounts.

“SAFEChecks provides checks and check disbursement software and hardware specifically designed to stop or deter check fraud losses while simplifying check printing. Products include Total-Security checks, Positive Pay file-transmission software, check-writing and forms-printing software (for

W-2s, 1099s, etc.), MICR laser printers, and unique security fonts designed specifically to prevent altered payee names and dollar amounts on laser-printed checks.” (Source: checkfraud.org)

You can visit them on the web at www.checkfraud.org or call them at (800) 755-2265 to request information.

Your protection is one of Old Republic’s highest concerns. If you need any additional information as to what you can do to safeguard your bank accounts, please contact the Auditing Department at (800) 342-5957.



Keeping You Posted...

Please note:

TitleSoft, Inc. is proud to announce “The Preferred Underwriter Product Discount” to any Title

Insurance Agent who is referred to TitleSoft by an Old Republic National Title Representative. TitleSoft™ is a

provider of Enterprise software for the Title and Settlement Industry. INTELLAclose™ & INTELLAstore™ for MS Windows™ is a Universal workflow management software, which provides central management *via a LAN or the Internet* and is comprised of fully integrated technologies. The INTELLAsuite solution facilitates Electronic Order Entry, Event Scheduling

and Management, Production Documents, Title Policies, Automated Escrow Accounting & Reconciliation, Management Reporting and Document Imaging. To learn more about this discount program, obtain product information or for a software demonstration call 800.529.0585. You may visit TitleSoft’s website at www.titlesoftinc.com.

Ask Your Underwriter

■ *Linda M. Hernandez, Florida State Underwriter*

Question:

Can we insure condominium parking spaces? If so, how do we show them on the commitment?

Answer:

The answer to the first part of your question lies with the controlling document—the Declaration of Condominium. You will have to review it to see how it deals with parking spaces. Are they assigned to particular units? Are they sold as appurtenances to the unit? If they are simply assigned, they cannot be

insured, whereas if they are appurtenant to the unit and are sold as part of the unit, they can be insured. If there is any question, you should discuss the matter with our Underwriting Department. Once you have determined that the parking space is insurable, you may include it in your deed after the legal description (or convey it by separate Bill of Sale) in the manner set forth below. Schedule A of your commitment should recite the legal description of the unit and a sentence that says “TOGETHER WITH APPURTENANT PARKING SPACE NUMBER _____.”

COMMENTS:

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.
100 S. Ashley Drive, Suite 700
Tampa, FL 33602
800-342-5957
Fax: 813-223-3401



Introducing a new E&O Program for Title Agents of Old Republic. CalSurance Associates, Inc. has tailored a group Title Agents and Title Abstracters E&O program for agents of Old Republic National Title.

Highlights of the program include:

- Defense Costs are in Addition to Limits of Liability
- Prior Acts Coverage
- Claims Made Policy
- Optional Limits
- Optional Deductibles/Which Apply to Damages Only
- Quick and Easy Application
- Payment Plans Available
- Coverage Provided for Title Agent, Abstracter, Searcher, Escrow Agent, Closing Agent and Notary Public.
- Coverage is Underwritten by Fireman's Fund, an "A" Rated Admitted Carrier.

If you write 50% or more business with Old Republic National Title, there is a 25% discount in your E&O premium as a benefit of the group program.

For further details, please contact CalSurance Associates, Inc. at (800) 745-7189. Please ask for either Carole Gallegos or Sandy Caporale.

*What's
New?*



Old Republic National Title Insurance Co.

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Tampa, Florida 33602

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