
Who Picks the Title Company

By Don R. Hancock, Hancock & McGill, Attorneys At Law

Determining who has the right to select the title company to close and insure a residential transaction can sometimes be an emotional and controversial issue. Although most residential buyers and sellers could care less who closes the transaction, most real estate agents have a favorite title company or closer with whom they prefer to do business.

Accepted Practice

The accepted business practice in central Texas is for the agent to offer the title company to the seller. The listing agent may then counsel the seller to change the proposed title company, especially if the seller is going to counter the offer for other reasons. The conventional wisdom is that because the seller is paying for the policy (usually), the seller should have the right to select which title company to use. However, there may be a problem.

Section 9 of RESPA

The Real Estate Settlement Procedures Act (RESPA), enacted by Congress, applies to most residential transactions. The potential problem arises out of Section 9(a) of RESPA which states, "No seller of property that will be purchased with the assistance of a federally related mortgage loan shall require directly or indirectly, as a condition to selling the property, that title insurance covering the property be purchased by the buyer from any particular title company." The penalty for violating this provision is an amount equal to three times the cost of the title insurance provided.

Texas Rates Set by Insurance Board

In Texas, title insurance rates are set by the state board of insurance; however, in many states the cost of title insurance can be negotiated. Section 9 was intended primarily to prevent volume home builders, in those states which allow negotiated rates, from negotiating a reduced title premium for interim construction or development loans in return for directing all closings to a title company when a home was sold. Unfortunately, the language of Section 9 is broad enough to present problems for all sellers and their brokers.

Because Texas regulates title premiums, there is little reason to apply Section 9; referring volume business to a title company will not entitle the title company to offer a better rate. However, HUD has been unwilling to unequivocally state that Section 9 does not apply to regulated title premium states such as Texas.

Because the seller usually pays for the owner's title policy, at first consideration you might conclude that there is no problem. Section 9 only prohibits the requirement that a buyer purchase title insurance from a particular company. With the seller purchasing the insurance, arguably, there is no violation.

Unfortunately, having the seller pay for the policy does not completely dispose of the issue. The buyer is normally required to pay for a mortgagee's title policy. If mortgagee's coverage is purchased from the title company providing the owner's policy, the cost is \$100.00, excluding the cost of any lender-required endorsements. If the buyer chooses to purchase mortgagee's coverage from a title company other than the company providing the owner's policy, the buyer will be required to pay the full premium for a mortgagee's policy. The difference in cost is substantial: \$100.00 versus \$1,023.00 for a \$100,000.00 loan. Is the buyer then effectively "required" by economic necessity to use the company selected by the Seller?

What about the argument that in most closings, the only party writing a check into closing is the buyer? Can a buyer not effectively argue that the buyer is paying all costs of closing, whether they are listed on the seller's statement or the buyer's statement? If a seller were not paying \$1,000.00 for title insurance, would the sales price be reduced by \$1,000.00?

Lenders can Specify the Title Company

Lenders are permitted to specify particular title companies. The reason for this interpretation is that lenders have a vested interest in insuring that their loan is closed the way they want it closed. Because lenders can select a title company, it would appear that a seller who finances part of the purchase price would have the right to select the title company.

The Safe Approach

Unfortunately, we do not have definite answers to many of the questions raised by Section 9 of RESPA. The safe approach, until we have a definite answer from HUD or the courts, is to allow the buyer to select the title company, particularly when you have a buyer who is insistent upon using a particular title company. If selection of a particular title company is important to a seller, it would be prudent to require the seller to pay both the owner's and mortgagee's policy premiums.

Don Hancock is a partner in Hancock & McGill, L.L.P., attorneys at law. Mr. Hancock is certified by the Texas Board of Legal Specialization as having special competence in residential and commercial real estate transactions. He received his undergraduate degree from Texas A&M University and his J.D. degree from the University of Texas School of Law.
