Chapter 47

The Closing

THE REAL ESTATE SETTLEMENT PROCEDURES ACT (RESPA)

For federally related first mortgages to purchase one-to-four-family dwellings (i.e., almost all residential first mortgage loans in the U.S.), the federal law known as the Real Estate Settlement Procedures Act (RESPA) sets most of the ground rules for the closing (settlement). The provisions of RESPA apply to the lender and to the borrower (buyer). RESPA requires lenders to provide the borrower with sufficient information to shop for settlement services (such as title services) and make informed decisions. RESPA requirements cover three major concerns.

	(a)	SETTLEMENT COSTS - At the time that the buyer applies for a covered loan or within three business days of application, RESPA requires the lender to provide him or her with a "good faith estimate" of what the settlement services will cost. The lender must also give the applicant a copy of the RESPA booklet, "Settlement Costs and You." The good faith estimate is designed to allow borrowers to shop for settlement services between loan application and settlement so that they will obtain good value for their money. RESPA regulates those costs only to the extent that it limits lenders in what they can require a borrower to escrow for taxes, insurance premiums, and other charges. The "Settlement Costs" booklet describes the settlement process and the nature of the charges for the borrower and suggests questions the borrower might ask of lenders, attorneys, and others to clarify what services they will provide for the charges quoted. This booklet also contains a line-by-line discussion of the HUD-1 Settlement Statement plus information on the borrower's rights and remedies available under RESPA, and alerts him or her to unfair or illegal practices.
	(b)	UNIFORM SETTLEMENT STATEMENT - The HUD-1 Settlement Statement is so called because it is the HUD form that lenders must use in most covered loan closings. The Statement has every line numbered and titled so that the parties can easily understand it. It must itemize every charge imposed and paid out of the closing proceeds. Items paid for before the closing must be noted as POC (“paid outside closing”) items. RESPA requires lenders to keep the statements for two years. The Georgia real estate license law requires brokers to keep these and all other sale documents for three years.
	(c)	KICKBACKS PROHIBITED - RESPA prohibits the payment of kickbacks or unearned fees. This includes anything of value given by one provider of settlement services to another in exchange for referrals or business. Licensees must be extremely cautious in their dealings and business relationships with lenders, closing attorneys, appraisers, inspectors, surveyors, and all the other various third parties involved in the purchase and sale of real estate.

THE BROKER'S RESPONSIBILITIES IN A REAL ESTATE CLOSING

In Georgia, closings must be conducted by a licensed attorney. In conducting a closing, the attorney sees that all the documents are properly executed; delivers the deeds, notes, affidavits, and other documents to the proper parties; prepares the closing or settlement statement; and disburses the funds according to that statement. The broker cannot under Georgia law oversee any of these functions, nor may a broker prepare legal documents, such as warranty deeds, security deeds, or affidavits. An attorney must prepare these and any other legal documents used in the closing. However, the broker should still have a representative at the closing to represent the broker and to complete its duties as agent for the client.

Some companies require that the broker actually attend the closing while others appoint the sales associate that negotiated the transaction to attend the closing. Whoever attends the closing as agent of the real estate firm should verify that all the parties receive copies of the settlement statement. State law requires that the closing attorney deliver a complete, detailed closing statement to the seller and to the buyer in every real estate transaction. The statement is delivered at the time of closing and must show all of the receipts and disbursements handled by the closing attorney for the seller, and all money received in the transaction from the buyer, and how and for what it was disbursed. Usually, the closing attorney will furnish completed settlement statements to buyer and seller, but not always to the brokers. If a sales associate attends a closing on behalf of the broker, the sales associate must secure a copy of the closing statement and give it to the broker.

If the broker is holding an earnest money deposit in the transaction, he or she must arrange with the closing attorney the method of disbursing it. Some closing attorneys insist that the broker bring the earnest money in certified funds to closing so that the attorney can deposit it in the attorney's escrow account and disburse it with all the other funds in the transaction. Sometimes the broker refunds the earnest money to the buyer at closing by a check drawn upon the broker's trust account; other times the broker retains the earnest money and applies it towards the broker’s commission, and receives the balance of the commission by check at closing.

AT THE CLOSING TABLE

In a typical residential closing in Georgia, an attorney representing the lender will conduct the settlement. The attorney will have prepared all the necessary documents and will explain each document to the buyer and seller as it comes their turn to sign it. This attorney does not represent the seller or the buyer. He or she represents the lender. While the attorney may explain the contents of documents, he or she cannot give the seller or the buyer legal advice. The parties are free to bring their own attorneys to the closing if they choose, but most do not. A knowledgeable attorney knows that for most people, buying a home is the single most significant financial step of a lifetime; consequently, the attorney will usually carefully explain each step of the process so that the parties will understand what they are signing. Although it is the attorney's responsibility to handle any problems as they arise, problems will occur less often if the licensee has explained all costs to each party before closing.

Commercial closings are very different from residential closings. Frequently both buyer and seller are represented by attorneys. One of the attorneys will have primary responsibility for preparing the closing documents. Usually, the other

attorney(s) review drafts of the closing documents prior to the closing. Since the buyer and seller are usually experienced and knowledgeable about real estate, the broker plays a smaller role in guiding the parties through the transaction. In any closing, there will be numerous documents for the parties to sign as the following discussion reveals.

	(a)		THE WARRANTY DEED - Although title may be transferred by quit claim deed, by executor's deed, or by trustee's deed, to name a few, the most common type of deed used in a closing to transfer title is the warranty deed. The seller signs the warranty deed, not the buyer. In addition, a notary public must notarize the deed and an unofficial witness who is not a party to the transaction must sign as well so the deed can be recorded. The notary and the witness are usually employees of the closing attorney, although sometimes the attorney may ask the licensee to be a witness. Once the seller, the notary, and the unofficial witness have signed the deed, and the seller or attorney hands (delivers) it to the buyer and the seller has officially transferred title. It is standard practice for the attorney to keep the original warranty deed at closing for recording at the courthouse. The original deed is then mailed to the buyer after the recording.
	(b)		THE SECURITY DEED - If the buyer takes out a new loan, the lender will require him or her to sign a security deed (also known as a "deed to secure debt" or "loan deed"). Lenders use this instrument in Georgia instead of a mortgage. The security deed contains many of the same clauses as the warranty deed, and it too transfers title. In this case, title transfers to the lender from the buyer, the only party to sign the security deed. The security deed sets forth the fact that the transfer of title to the lender only secures the loan. The buyer/borrower retains the right to use the property, and also retains the burdens of ownership, such as paying the property taxes. Like the warranty deed, the security deed must be notarized and witnessed before being recorded. (See the chapter on the Note and Deeds to Secure Debt).
	(c)		THE PROMISSORY NOTE - The promissory note documents the buyer's (borrower's) promise to repay the amount of money borrowed. (The security deed is the lender's security if the borrower does not repay the loan.) The note sets forth the terms under which the money is to be repaid (interest rate, monthly payment, number of payments) plus any special provisions. These provisions may include any of the items discussed below.
		(1)	PREPAYMENT PENALTY - The lender may charge a penalty on a conventional loan if the borrower pays off the loan before the due date. There are many variations on prepayment penalties, but they typically require payment of a percentage of the remaining principal balance of the loan as a penalty if the loan is paid off earlier than a certain number of months or years after the loan is made.
		(2)	LATE PENALTY - This penalty gives the lender the right to charge a fee if the borrower makes a payment after the date it is due.
		(3)	ESCALATION CLAUSE - If this clause appears, it gives the lender

			the right to increase the interest rate if a new buyer assumes the loan.
		(4)	ACCELERATION CLAUSE - This clause gives the lender the right to call the entire loan balance due upon default, such as the buyer's failure to make payments.
		These provisions may appear in the security deed and not in the promissory note, or may appear in both places. Only the borrower signs the note, and it is not recorded.	
	(d)	A QUIT CLAIM DEED - Sometimes the closing attorney will have someone sign a quit-claim deed either before or at the closing. If the attorney shows the parties the quit-claim deed but does not ask them to sign, then his or her purpose is probably to signify that someone else who had or might have had some interest in the property has released that interest so the title can be transferred free and clear. If the attorney has the seller sign, that is to release some possible claim that the seller might retain on the property. Attorneys use quit-claim deeds extensively to remove from the record possible conflicting interests in property. These deeds also are witnessed, notarized, and recorded. Their possible uses are (1) to correct an error in a previously recorded deed, such as a misspelled name; (2) to relinquish a spouse's interest in the property when the seller's divorce is pending; and (3) to transfer title from an heir of a deceased prior owner.	
	(e)	OWNER'S AFFIDAVIT - The owner's affidavit is a document that the seller signs in which he or she swears there are no unpaid or unsatisfied liens, assessments, or encumbrances against the property other than those identified by the title search. The owner's affidavit protects the buyer, lender, and attorney. If the seller/owner lies, the buyer or lender can sue the seller for damages. The owner's affidavit is notarized but not usually recorded.	
	(f)	BUYER'S AFFIDAVIT - Lenders will sometimes require that the buyer sign an affidavit at closing in which he or she swears there are no suits, judgments, or liens against him or her or pending against him or her. The buyer's affidavit assures the lender that the lender's loan has first priority and that there are no other claims on the borrower that might take precedence. The buyer's affidavit is also notarized but not usually recorded.	
	(g)	OTHER DOCUMENTS AND INSTRUMENTS - This list of closing documents is by no means exhaustive. Besides those already mentioned and in addition to the wood infestation clearance letter and homeowner's insurance policy, the buyer may encounter many other documents. Among them could be a survey, occupancy affidavit, title policy, truth-in-lending statement, numerous disclosures and disclaimers, and various FHA or VA forms if appropriate. It is not uncommon for a smooth closing with no problems to take an hour's time in simply reviewing and signing papers. The licensee can reduce this time by supplying the buyer and seller with sample copies of representative documents before the closing.	