THE U.S. REAL ESTATE MARKET ON LIFE SUPPORT: UNPLUGGING THE RESPA-RATOR

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On January 1, 2010, the U.S. Department of Housing and Urban Development (HUD) responded to the real estate lending crisis with revised regulations for the Real Estate Settlement Procedures Act (RESPA). The new regulations require heightened disclosures from lenders to homebuyers and encourage competition among lenders. This Note argues that HUD's attempts to solve irresponsible lending with further RESPA regulations are misguided. The author contends that the new rules will provide homebuyers with a false sense of security about their mortgages and lenders, without actually protecting them from predatory practices. Instead, this Note suggests a novel solution: lawyers should play a more prominent role in real estate transactions in order to protect consumers.

This Note first traces the growth of the title insurance industry in the United States and shows how this industry pushed lawyers out of residential real estate transactions in many states. The author then explains the original RESPA of 1974, through which Congress responded to a rising tide of anticompetitive practices in the real estate industry by requiring disclosures to borrowers and promoting competition, among other provisions. This Note then details the new RESPA rule, which requires lenders to itemize and guarantee certain real estate settlement costs. The author evaluates the new rule and predicts its consequences, concluding that it will not serve HUD's avowed goals to end price gouging and spur competition, and instead will create a façade of transparency for consumers. The author recommends instead that lawyers occupy a larger role in residential real estate transactions because they can act to inform and protect homebuyers. The Note concludes by suggesting that federal regulators encourage, or at least do not discourage, homebuyers to seek legal representation for their real estate transactions.

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I. INTRODUCTION

One of the most misunderstood lines in all of Shakespeare may shed light on America's current real estate crisis. In *Henry VI*, a character says, "The first thing we do, let's kill all the lawyers."[1] Shakespeare was not advocating for the deaths of lawyers. Contrary to popular understanding, this line was uttered by an irresponsible rabble rouser who wanted lawyers removed as the first step toward an anarchist revolution.[2] Just as in Shakespeare's era, today's lawyers should be society's first line of defense against social instability. Yet during the past half century, the real estate industry has pushed lawyers out of residential transactions,[3] so that buyers and sellers often conduct deals without responsible legal representation.[4] The unsurprising result is a depressed real estate market and millions of current and projected home foreclosures.[5]

Where lawyers remain involved in residential real estate, they practice primarily through attorney-owned title insurance companies.[6] Unfortunately, the government's response to the most recent crisis was to regulate real estate closings in a way that will push lawyers further out of the picture. In 1974, Congress passed the Real Estate Settlement Procedures Act (RESPA)[7] to prohibit collaboration between lenders and certain third parties, like title insurers, to inflate prices in home buying settlements through kickbacks, secret deals, and other anticompetitive practices.[8] RESPA requires certain disclosures to homebuyers so that they can make informed decisions before securing a loan.[9] Despite decades of RESPA disclosures, the United States recently suffered one of

1. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH 131 (Norman Sanders ed., Penguin Books 1981) (1594).

2. Hon. Mark D. Fox & Michael L. Fox, *It's No Joking Matter: Our Profession Requires Greater Civility and Respect*, N.Y. ST. B.A. J., Feb. 2009, at 10, 14.

3. Brian A. Coleman, *Bar-Related Title Insurance in Utah*, UTAH B.J., May 1997, at 18, 18.

4. Debra Pogrund Stark, *Navigating Residential Attorney Approvals: Finding a Better Judicial North Star*, 39 J. MARSHALL L. REV. 171, 175 (2006) ("[M]ost buyers in America fail to hire an attorney to represent them . . . typically relying upon the seller's broker for assistance.").

5. *See* Ellen Harnick, Statement at the House Judiciary Committee Field Briefing on the Mortgage Crisis and Its Impact on the Economy: One Solution with an Immediate Effect 2 (Oct. 22, 2008), http://www.responsiblelending.org/mortgage-lending/policy-legislation/congress/harnick-statement-judiciary-briefing-oct-22-edited.pdf.

6. *See, e.g.*, *ATG Corporate Profile*, ATTORNEYS' TITLE GUAR. FUND, http://www.atgf.com/AboutATG/CorporateProfile/tabid/850/Default.aspx (last visited Nov. 14, 2010). Attorneys' Title Guaranty Fund, Inc., (ATG) is an insurance underwriter for a network of over 4000 real estate attorneys. *Id.* Those attorneys benefit from continuing legal education and legal research provided by the company, so the attorneys' clients receive more value from representation by an ATG member attorney than they might from an independent attorney, and they certainly receive more value from their title insurance costs than they would in a transaction without an ATG member attorney. *See id.*

7. Pub. L. No. 93-533, 88 Stat. 1724 (1974) (codified as amended at 12 U.S.C. §§ 2601–2617 (2006)).

8. *See, e.g.*, 12 U.S.C. § 2601; *see also* Baro Enters. v. Thorian (*In re* Thorian), 387 B.R. 50, 68–69 (Bankr. D. Idaho 2008).

9. 12 U.S.C. §§ 2603–2604.

the worst real estate crises in its history as a result of irresponsible lending and borrowing practices.[10]

Instead of finding a new solution, the Department of Housing and Urban Development (HUD) continues to cling to the RESPArator. Recently, HUD significantly revised the RESPA rules with the avowed goal to require lenders to be even more transparent in their dealings with homebuyers and to encourage competition among third parties.[11] In reality, the new rules create the illusion that purchasing a home is so simple that no "costly" legal representation is needed.[12] Thus, buyers and sellers will be even more likely to reject legal representation in real estate transactions, and banks will be free to continue the lending practices that precipitated today's crisis.[13]

This Note examines the title insurance industry, with particular focus on legal representation and the influence of RESPA. First, this Note describes the evolution of the title insurance industry in America and the adoption of RESPA. Second, this Note analyzes the new RESPA regulations and the extensive criticism they received both before and after the final rule was published. Finally, this Note projects the rule's likely impact on homebuyers and the title insurance industry and suggests that the government should finally unplug the RESPArator and implement a more comprehensive solution to prevent a future disaster.

II. BACKGROUND

Title insurance is a uniquely U.S. invention.[14] Nevertheless, it strongly influenced the real estate industry as it evolved.[15] Whereas at-

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10. *See, e.g.*, Oren Bar-Gill, *The Law, Economics and Psychology of Subprime Mortgage Contracts*, 94 CORNELL L. REV. 1073, 1074–76 (2009). Nothing better illustrates the market's lack of fiscal responsibility than how the few financiers who escaped the mortgage meltdown with real gains treated the once-stable commodity of real estate like poker chips. They short-sold mortgage securities using credit-default swaps, hoped that the bubble would burst, and then collected tens of billions of insurance dollars. *See* Malcolm Gladwell, *The Sure Thing: How Entrepreneurs Really Succeed*, NEW YORKER, Jan. 18, 2010, at 24, 26–28.

11. *See generally* Real Estate Settlement Procedures Act (RESPA): Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs, 73 Fed. Reg. 68,204 (Nov. 17, 2008) (codified at 24 C.F.R. §§ 203, 3500) [hereinafter RESPA Final Rule].

12. *See infra* Part IV.B.

13. *See Preserving the American Dream: Predatory Lending Practices and Home Foreclosures: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 110th Cong. 2–4 (2007) (statement of Sen. Christopher Dodd, Chairman, S. Comm. on Banking, Hous., and Urban Affairs). Even before the "subprime meltdown" created a firestorm of foreclosures, a February 2007 hearing by Senator Christopher Dodd (D-CT) exposed many aspects of lender behavior, including the issuance of subprime loans to people whom the lender knew had little prospect of paying them back. *Id.* at 1–4. One lender even referred to subprime adjustable rate mortgages as "foreclosure loans." *Id.* at 3.

14. D. BARLOW BURKE, JR., LAW OF TITLE INSURANCE § 1.1, at 2 (1986). Not only is title insurance uniquely American, but the subsequent elimination of lawyer representation is, too. For instance, in the United Kingdom, where property law is similar to the United States, almost all home buyers are represented by attorneys. Michael Braunstein & Hazel Genn, *Odd Man Out: Preliminary Findings Concerning the Diminishing Role of Lawyers in the Home-Buying Process*, 52 OHIO ST. L.J. 469, 473 (1991).

15. *See infra* Part II.A.

torneys once conducted virtually all real estate transactions, title insurers and real estate brokers have taken their place.[16] In some states, attorneys no longer represent parties in any residential transactions.[17] Because RESPA is a statute designed to remedy illegal practices in residential transactions, it affects not only consumers but also the title insurers and the remaining attorneys who participate in those transactions.

A. *The Evolution of Title Insurance and Residential Real Estate Legal Practice*

An owner or lender procures title insurance to protect against claims on a defective title and subsequent monetary losses.[18] Although titles are recorded in county offices in the United States, the record keeping is imperfect, and bona fide purchasers of a land title may be subject to extreme losses.[19] Therefore, lenders generally require a title insurance policy as part of a real estate loan settlement.[20] Because title insurance grew up organically throughout the United States during the past 150 years, it is used and regulated inconsistently in different regions of the country.[21] One state, Iowa, even prohibits the sale of title insurance by statute.[22]

The title insurance industry differs from other "pure insurance" industries in that it engages not just in risk indemnification, but also in risk avoidance.[23] The industry's system of expert searching and analysis prior to issuing policies is analogous to a traditional fire and casualty insurance company dispatching locksmiths to safeguard your home before issuing homeowner's insurance or a life insurance company assigning you a nutritionist and personal trainer before issuing a policy. As such, the title insurance industry enjoys a much lower claims rate, but much higher labor costs than casualty insurers.[24]

Before the advent of title insurance, attorneys not only performed title searches, but also participated in curing any defects they discovered.[25] Even after title insurance became common, attorneys were still the experts who handled the intricacies of title insurance and all other

16. *See infra* Part II.A.
17. *See infra* Part II.A.
18. *See* BURKE, *supra* note 14, § 1.1, at 2.
19. *Id.* § 1.1, at 2, § 1.2.1, at 12.
20. *Id.* § 1.1, at 4.
21. *Id.* § 1.1, at 2, 5.
22. IOWA CODE § 515.48(10) (2007); BURKE, *supra* note 14, § 1.1, at 5–6.
23. *See* BURKE, *supra* note 14, § 1.1, at 3.
24. Les Christie, *Title Insurance: Getting Ripped Off?*, CNNMONEY.COM (Jan. 11, 2006, 10:41 AM), http://money.cnn.com/2006/01/11/real_estate/title_insurance_exposed/index.htm ("In 2003 . . . the [title insurance] industry paid out about $662 million. That's just over 4 percent of the $15.7 billion taken in as premiums. Auto insurers, in contrast, paid out 75 percent of collected premiums . . . ."). This disparity suggests that the title insurance industry does not offer value to consumers; rather, most of the value is provided "up front" in prevention services rather than through indemnification after a claim is made. *See id.*
25. *See* Braunstein & Genn, *supra* note 14, at 473.

aspects of real estate transactions.[26] Because hiring attorneys for real estate transactions was the industry norm, parties felt no pressure to cut costs by avoiding attorney fees.[27] Like visiting a new dentist, parties felt generally comfortable, not adversarial, when interacting with their attorneys.[28] Thus, attorneys were trusted to provide not only advice on the title, but on all legal matters surrounding the transaction.[29] Parties could rest assured that professional advocates were protecting their interests.[30]

But commercial title insurance companies have increasingly eliminated attorneys from the residential real estate market by reducing their access to the searchable abstracts commonly used by the industry.[31] Whereas attorneys have to use the publicly available records at county recorder offices, title insurance companies often use their own privately-held databases of abstracts, giving them an advantage in efficiency.[32] In many states, title insurers passed this efficiency on to consumers as a cost savings, pricing attorneys out of the residential real estate business.[33] As recently as 1997, attorneys participated in only forty percent of residential real estate transactions and, according to one legal scholar, "their involvement is typically late and shallow."[34] Nevertheless, in nineteen states the attorneys refused to leave the complex title industry to laypersons, opting instead to found attorney-owned title insurance companies.[35]

Competition inherently ensues when commercial companies fight with attorney-owned companies for a share of the market.[36] The commercial companies are often backed by larger national insurers and can afford to expand more aggressively,[37] but the regional attorney-owned companies survive by providing added value to consumers.[38] Local, independent attorneys are often affiliated "members" of an attorney-owned company.[39] Therefore, consumers can obtain representation, title insurance, and other "law-related services" from a motivated local attorney, and the attorney-owned company both underwrites the policy and

26. *See* BURKE, *supra* note 14, § 1.2.1, at 11–12.

27. *See* Braunstein & Genn, *supra* note 14, at 472–73.

28. *See id.* at 473.

29. *Id.*

30. *See* Michael Braunstein, *Structural Change and Inter-Professional Competitive Advantage: An Example Drawn from Residential Real Estate Conveyancing*, 62 MO. L. REV. 241, 247–48 (1997).

31. BURKE, *supra* note 14, § 1.2.1, at 12.

32. *See id.*; Braunstein, *supra* note 30, at 248.

33. Braunstein, *supra* note 30, at 248.

34. *Id.* at 241; *see also* Stark, *supra* note 4, at 178 (explaining that attorneys in most states had to accept "join[ing] the dinner party a bit late . . . rather than be[ing] completely excluded from the deal table altogether").

35. BURKE, *supra* note 14, § 1.2.1, at 12–13.

36. *Id.* § 1.2, at 7–11.

37. *Id.* § 1.2, at 7 (describing the consolidation of the industry by expanding companies). Although commercial companies still operate as regional subsidiaries, these subsidiaries were generally acquired through merger and acquisition, now acting for a "national insurer." *Id.* § 1.2, at 7–8.

38. ABA STANDING COMM. ON LAWYERS' TITLE GUAR. FUNDS, HOW-TO-DO-IT: BAR-RELATED TITLE ASSURING ORGANIZATIONS 1–2 (1976) [hereinafter ABA STANDING COMM.].

39. *Id.* at 8.

provides support or educational services to the member.[40] Attorney-owned title companies act not only as private businesses, but also as de facto professional associations for real estate attorneys in their states.[41]

As the title insurance industry grew throughout the twentieth century, industry critics, including government regulators, accused title companies of engaging in anticompetitive practices through kickbacks and "referrals" to sustain artificially high costs.[42] In such a system, the supposedly independent providers in a mortgage transaction would refer customers to each other.[43] These parties include realtors, lenders, and other settlement services.[44] The referring party would insinuate that the borrower was required to use a certain provider and not educate the borrower to the fact that other, cheaper options might be available.[45] In return, large percentages of each service's cost would return to the referrer in the form of kickbacks.[46]

In 1970, Congress tasked HUD and the Department of Veterans Affairs with creating a report on settlement costs.[47] The report was released in 1972, and it found that such anticompetitive practices existed.[48] In response, the federal government regulated the industry through RESPA.[49]

B. The Implementation of RESPA

At its heart, RESPA is a consumer protection statute designed to achieve this protection by requiring certain disclosures to potential homebuyers.[50] Therefore, this Note focuses primarily on RESPA's general cost disclosure requirements and its method of categorizing costs during settlement. Disclosure is achieved through the Good Faith Estimate (GFE) that lenders must provide to borrowers within three days of receiving a loan application.[51] Before the latest revision, lenders had to include the interest rate and estimated third-party costs for settlement

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40. *Id.* at 1–2, 19–20; *see also* MODEL RULES OF PROF'L CONDUCT R. 5.7 (2010).

41. *See* ABA STANDING COMM., *supra* note 38, at 20.

42. BURKE, *supra* note 14, § 1.2.1, at 14–16; Michael J. Rooney, *Bar-Related Title Insurance: The Positive Perspective*, 5 S. ILL. U. L.J. 263, 265 (1980).

43. *See* George S. Mahaffey, Jr., *A Product of Compromise: Or Why Non-Pecuniary Damages Should Not Be Recoverable Under Section 2605 of the Real Estate Settlement Procedures Act*, 28 U. DAYTON L. REV. 1, 6–7 (2002).

44. *See id.* at 8.

45. Jonathan P. Solomon, Comment, *Resolving RESPA's § 8(b) Circuit Split*, 73 U. CHI. L. REV. 1487, 1490 (2006).

46. *Id.*

47. *Simplifying the Home Buying Process: HUD's Proposal to Reform RESPA: Hearing Before the Subcomm. on Hous. and Cmty. Opportunity of the H. Comm. on Fin. Servs.*, 108th Cong. 67 (2003) [hereinafter *RESPA Hearings*] (statement of Peter J. Birnbaum, President, Attorneys' Title Guaranty Fund).

48. *See* BURKE, *supra* note 14, § 7.6.5, at 254–55.

49. *See* 12 U.S.C. §§ 2601–2617 (2006).

50. *RESPA—Real Estate Settlement Procedures Act*, U.S. DEP'T OF HOUS. AND URBAN DEV., http://www.hud.gov/offices/hsg/rmra/res/respa_hm.cfm (last visited Nov. 14, 2010).

51. 12 U.S.C. §§ 2604(c)–(d).

services, such as title insurance.[52] These costs, however, were subject to increase at settlement.[53] Congress also required lenders to educate loan applicants through a booklet that explained in clear terms how the process of buying a home worked.[54]

Furthermore, Congress apparently intended that RESPA would limit horizontal integration of certain real estate services. For example, RESPA prohibited a seller from requiring a buyer to purchase title insurance from a particular provider.[55] Without such a prohibition, a bank holding outstanding home loans could encourage its mortgagors to require potential buyers to use the bank's in-house title insurance company, thus stifling competition among service providers.[56] RESPA, however, did not similarly prohibit a lender from requiring a new buyer to use a particular provider.[57] Some states have since passed laws to encourage competition in title insurance prices by making it illegal for lenders to require a borrower to select a certain title insurer.[58]

At the end of the home buying process, when the borrower was ready to settle on the home and accompanying mortgage, the lender was required to itemize certain costs in a prescribed settlement summary.[59] HUD promulgated a form designated the "HUD-1 Settlement Statement" (HUD-1) for this purpose.[60] Prior to the latest changes, HUD-1 contained numerous itemized costs, but they might bear little resemblance to the amounts quoted on the GFE.[61] Therefore, without an expert or attorney present, a borrower would probably have little chance of realizing whether anything had changed since the original estimates.

HUD made minor changes to its RESPA regulations in the decades since it was enacted, but HUD did not propose a major amendment until its controversial 2002 proposal.[62] HUD planned to reform the mortgage loan process and "reduce settlement costs for consumers."[63] One prominent feature of the proposed revision involved "guaranteed mortgages packages" or "GMPs."[64] HUD planned to encourage lenders to create

52. 24 C.F.R. § 3500.7 (2009).

53. *See id.*

54. 12 U.S.C. §§ 2604(a)–(d).

55. *Id.* § 2608(a).

56. *See id.* Congress's concern over "unnecessarily high settlement charges caused by certain abusive practices," such as requiring buyers to use in-house title insurance, is evident in RESPA's findings and purpose. *See id.* § 2601(a).

57. K.F. BOACKLE, REAL ESTATE CLOSING DESKBOOK 76 (2d ed. 2003).

58. For example, Illinois law prohibits a lender or seller from requiring that a buyer purchase third-party settlement services from a certain provider. 815 ILL. COMP. STAT. 505/2T (2008).

59. *See* 12 U.S.C. § 2603.

60. *HUD-1 Settlement Statement*, U.S. DEP'T OF HOUS. AND URBAN DEV. (Dec. 2009), http://www.hud.gov/offices/adm/hudclips/forms/files/1.pdf (current version).

61. Now, the HUD-1 corresponds to the GFE. *See id.*

62. James K. Weston, *The Last Gasp for RESPA Reform?*, 96 ILL. B.J. 372, 372 (2008).

63. Joseph M. Kolar et al., *RESPA: The Changing Landscape*, 58 BUS. LAW. 1259, 1269–70 (2003).

64. *Id.* at 1270.

GMPs that included most settlement services for homebuyers as a single package.[65]

Theoretically, this packaging of services would benefit consumers in two ways. First, consumers would be able to compare lenders' total costs at a glance and choose the cheapest one, which would encourage cost-cutting and competition. Second, HUD expected that lenders would use their resources to assemble affiliated service providers (or perhaps in-house providers) to lower total costs further through volume discounts and other arrangements.[66] Although this form of horizontal integration of settlement providers is diametrically opposed to RESPA's statutory language, HUD believed it would create the precise competition that RESPA was originally designed to ensure.[67] Therefore, lenders who formed GMPs within HUD's rules would be given a "safe harbor" to protect them from RESPA prosecution.[68]

Due to a "firestorm" of opposition,[69] however, HUD did not finalize these proposed amendments.[70] Instead, RESPA reform went back to the drawing board until HUD devised the new approach presented in the recent rule change. HUD published this proposed amendment in the *Federal Register* on March 14, 2008.[71] The amendment inspired enormous commentary from the real estate industry and consumer groups alike.[72] Despite many objections, HUD published its final RESPA rule in the *Federal Register* on November 17, 2008.[73]

III. ANALYSIS

A. The 2008 RESPA Rule

The 2008 RESPA rule distilled not only years of brainstorming on RESPA's future, but also reflected a major change from the initially proposed rule.[74] HUD incorporated some of the 12,000 comments received during an extended comment period.[75] Significant portions of the new rules went into effect on January 1, 2010, and the entire real estate industry is still scrambling to come into compliance.[76] In fact, many commen-

65. *Id.*
66. *Id.*
67. *See id.*
68. *Id.*
69. *See* Weston, *supra* note 62, at 372.
70. Real Estate Settlement Procedures Act (RESPA): Proposed Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs, 73 Fed. Reg. 14,030, 14,032 (proposed Mar. 14, 2008) [hereinafter RESPA Proposed Rule].
71. *Id.* at 14,030.
72. RESPA Final Rule, *supra* note 11, at 68,204–05.
73. *Id.* at 68,204.
74. *Compare id.*, *with* RESPA Proposed Rule, *supra* note 70.
75. RESPA Final Rule, *supra* note 11, at 68,205.
76. *RESPA—Real Estate Settlement Procedures Act*, *supra* note 50; *RESPA Resource Center*, WOLTERS KLUWER FIN. SERVS., http://www.wolterskluwerfs.com/info/resparc (last visited Nov. 14,

ters requested that HUD delay the effective date of its rulemaking to either allow more time for industry compliance or because they believed the rule needed further revision.[77] HUD cited general support for its rule and the urgency of the contemporaneous mortgage crisis as reasons for publication and enforcement on the current schedule.[78]

Instead of creating a new regime of packaged services like the 2002 reform would have, the 2008 RESPA rule focuses on disclosure and guaranteeing costs. The final revision altered both the GFE and HUD-1 forms, and it placed additional restrictions on how lenders categorize and modify costs in both documents.

First, the GFE was expanded from one page to three pages.[79] The expanded GFE requires extensive itemization, particularly of settlement costs, so that consumers can easily identify what they are paying for.[80] HUD-1's categories were also realigned so that the GFE and HUD-1 are now comparable at a glance.[81] The new forms were designed to help consumers better identify any modifications to costs from the original GFE to the final HUD-1 presented at closing.[82] The last page of the new HUD-1 form now contains a comparison table showing the HUD-1's charges compared to the charges quoted on the GFE; this page also includes a "Loan Terms" section with a table showing all monthly amounts owed, including escrow account payments.[83]

Comparison between the documents is important because HUD has restricted lenders from increasing certain costs at settlement. Settlement costs were split into three categories, each with its own "tolerance" on how much it can increase at closing.[84] First, costs such as the origination charge and charge for the interest rate may not increase at settlement.[85] In other words, the cost on the HUD-1 must be identical to the cost on the GFE.[86] Second, lender-required services when the lender either chooses or identifies the provider, including title services and title insur-

2010); *see also Getting it Right: New RESPA GFE & HUD-1/1A*, COMPLIANCE COACH, http://www.compliancecoach.com/respawebinar.html (last visited Nov. 14, 2010).

77. RESPA Final Rule, *supra* note 11, at 68,205.

78. *Id.*

79. *See* 24 C.F.R. § 3500 app. C (2009). The new form is still shorter than the originally proposed four-page document. *See* RESPA Final Rule, *supra* note 11, at 68,205. HUD was severely criticized for quadrupling the length of this standard form while purporting to simplify the disclosures for inexperienced homebuyers. *Id.* at 68,205–08. Even consumer protection advocates stated that "most consumers will not have the capacity to absorb everything in a four-page GFE." *Id.* at 68,206.

80. 24 C.F.R. § 3500 app. C.

81. RESPA Final Rule, *supra* note 11, at 68,228 ("[T]o facilitate comparison between the HUD–1 and the GFE, each designated line in Section L on the final HUD–1 includes a reference to the relevant line from the GFE."). *Compare* 24 C.F.R. § 3500 app. C., *with HUD-1 Settlement Statement*, *supra* note 60.

82. RESPA Final Rule, *supra* note 11, at 68,228.

83. *See HUD-1 Settlement Statement*, *supra* note 60, at 3.

84. 24 C.F.R. § 3500.7(e).

85. *Id.* § 3500.7(e)(1).

86. *See HUD-1 Settlement Statement*, *supra* note 60, at 3.

ance, cannot increase by more than ten percent at settlement.[87] Finally, all other charges are subject to change.[88] The third page of the new HUD-1 shows the GFE and HUD-1 charges side by side in three groups that correspond to the new tolerances: "Charges That Cannot Increase," "Charges That In Total Cannot Increase More Than 10%," and "Charges That Can Change."[89]

According to HUD, these disclosures will sweep away behind-the-scenes price gouging and create competition.[90] HUD claims that the new rules will save consumers between $6.48 and $8.38 billion per year, representing between 9.7% and 12.6% of the total charges made by the mortgage industry.[91] The highest possible savings, $8.38 billion, would be achieved under a theory that lack of competition among title insurers causes inordinately inflated prices.[92] Under that "title approach," the entire $8.38 billion loss in revenue will be borne by title insurers.[93]

Besides these industry losses, HUD estimates that the industry will bear $571 million in one-time adjustment costs from training employees, making software modifications, and expending additional time per loan application to comply with the rule.[94] HUD concludes that borrowers will still realize enormous savings even if the industry shifts the entire one-time cost onto those borrowers.[95] But HUD contemplates only a simple subtraction of estimated costs from estimated benefits, with the estimates based on the industry existing as it does today.[96] HUD's conclusion naively presupposes that the title insurance industry will remain static, with similar levels of competition from similarly situated companies.

B. Evaluating the Rule

The lofty consumer benefits anticipated by HUD will supposedly be achieved through increased competition among title insurers.[97] Critics of

87. *See* 24 C.F.R. § 3500.7(e)(2).

88. *See id.* § 3500.7(e)(3).

89. *HUD-1 Settlement Statement*, *supra* note 60, at 3; *see also Revised Summary of HUD's Final RESPA Rule*, MORTG. BANKERS ASS'N 4 (Nov. 14, 2008), http://www.mbaa.org/files/AU/MBAKeyPointsinRESPARule11-14-08final.pdf.

90. *See* RESPA Final Rule, *supra* note 11, at 68,204 (asserting that the rule's purpose is to enhance consumer awareness "to protect customers from unnecessarily high settlement costs," presumably by forcing settlement service providers to compete based on price on a level playing field).

91. *Id.* at 68,261.

92. *See id.*

93. *Id.* HUD cites "widespread evidence of lack of competition and overcharging in the title and settlement closing industry" in its study that estimates savings from only the title insurance industry. *Id.* The illogical conclusion that consumers will save more in an estimate that excludes savings from all other elements of a mortgage transaction indicates that a separate group of researchers who coined the "title approach" may be exaggerating the costs of title services.

94. *Id.* at 68,262–63.

95. *Id.* at 68,264.

96. *Id.*

97. *See id.* at 68,262, 68,265 n.15.

the RESPA rule maintain, however, that it may have unintended negative consequences. First, the new rule may have the opposite effect on competition; it may cause monopolization of the market by powerful, horizontally integrated title companies. Second, the uniform GFE and HUD-1 might hurt consumers in certain regions, even if it helps those in others, due to regional variance in real estate practice. Third, HUD's rush to promulgate the new rule might create far higher industry compliance costs than anticipated, which would undoubtedly be passed on to consumers.

1. Whether the RESPA Revision Will Guarantee Better Prices for Consumers

One way title insurers already claim to offer lower prices to consumers is through "streamlined mortgage and title services" realized through companies that affiliate builders with mortgage lenders.[98] These "affiliated business arrangements" toe the edge of legality because RESPA makes such arrangements illegal unless certain conditions are satisfied, particularly regarding disclosure of the nature of the relationships between the entities doing business.[99] Also, the person making a referral to an affiliated business generally cannot require the consumer to use that provider, and if the consumer does use the provider, the referred business cannot provide kickbacks to the referrer.[100]

Although HUD altered the definition of "required use,"[101] lenders may still offer certain consumer discounts.[102] For instance, a lender may provide "discounts or rebates to consumers for the purchase of multiple settlement services" without running afoul of RESPA.[103] The only caveat is that using the combination of services offered must be optional to the consumer and the discount provided by using the lender's proposed combination of services "must not be made up by higher costs elsewhere in the settlement process."[104]

What HUD ignores is the potential for lenders to expand upon the trend of using "captive" title insurance departments rather than working with private, competitive title insurance companies, such as the regional attorney-owned ones.[105] This move would be logical because lenders are now required to make extremely specific estimates about title insurance

98. *Id.* at 68,235 (internal quotation marks omitted).
99. 24 C.F.R. § 3500.15 (2009).
100. *Id.* §§ 3500.15(b)(2)–(3).
101. *Id.* § 3500.2; RESPA Final Rule, *supra* note 11, at 68,236.
102. 24 C.F.R. § 3500.2; RESPA Final Rule, *supra* note 11, at 68,236 (explaining revisions to "required use" definition).
103. 24 C.F.R. § 3500.2.
104. *Id.*
105. *See* Joyce D. Palomar, *Bank Control of Title Insurance Companies: Perils to the Public that Bank Regulators Have Ignored*, 44 SW. L.J. 905, 933 (1990).

costs as early as three days after receiving a loan application.[106] Commenters on the rule warned that "large lenders would seek to manage the risks associated with tolerances by contracting with large third-party settlement service providers, thereby placing small settlement service providers at a competitive disadvantage."[107]

In a letter to Secretary Shaun Donovan of the Department of Housing and Urban Development, Congresswoman Judy Biggert (R-IL) pointed out the potential for packaged services to ruin competition for title services.[108] Criticizing § 3500.7(c)(2)(ii) of the final rule, she argued,

> [T]he net effect of the guaranteed pricing component of this rule will result in lenders either dictating that consumers use particular bank favored title providers or to the use of title companies that are owned by the bank. One of the nation's largest lenders has already stated its intention to dictate the title provider.[109]

Biggert did not indicate to which lender she was referring, but this monopolizing of business through packaged services is the logical consequence of Section 3500.7(c)(2)(ii).[110]

Although HUD purports that the final rule will balance borrower interests against a "lender's interest in maintaining flexibility to address the many issues that can arise in a complex process such as loan origination," HUD does not address the possibility of anticompetitive practices raised by the criticism above.[111] Powerful lenders will no doubt look after their own interests and do everything within the bounds of the new rule to maintain that flexibility.[112] That will include expanding the use of captive title companies.[113] Such a move would negate HUD's expected gains in competition while simultaneously driving many remaining lawyers out of the residential real estate market in those states where they currently still provide value to homebuyers and sellers.[114]

HUD defends RESPA against these arguments, asserting, "[T]he information-gathering service the [title] industry provides will require proximity to land title records . . . . Even if a provider is efficient and charges low prices, it will not be able to compete against title and closing firms who are located sufficiently closer to the site in question."[115] HUD

106. 24 C.F.R. § 3500.7(e).

107. RESPA Final Rule, *supra* note 11, at 68,218.

108. Letter from Judy Biggert, Member of Congress, to Shaun Donovan, Sec'y of the U.S. Dep't of Hous. and Urban Dev. (Nov. 24, 2009) (on file with author).

109. *Id.*

110. *See id.*

111. *See* RESPA Final Rule, *supra* note 11, at 68,219.

112. For example, in *Lane v. Residential Financing Corp.*, a title company and lender provided each other with cut-rate title insurance policies in exchange for flat escrow services and referred business to each other. 323 F.3d 739, 740–42 (9th Cir. 2003). The Ninth Circuit rejected the plaintiff's contention that "allowing settlement providers to rely on 'economies of scale' in giving discounts to institutional sellers like [Residential Funding Corporation] will defeat RESPA's purpose." *Id.* at 746.

113. *See* Palomar, *supra* note 105, at 933.

114. *See, e.g.*, *ATG Corporate Profile*, *supra* note 6.

115. RESPA Final Rule, *supra* note 11, at 68,266.

concludes, "Thus, title and closing companies are by economic necessity provided by local firms. Reinforcing the local orientation are the value of local expertise and the importance of personal networks in receiving referrals."[116] Whether HUD is justified in putting its faith in local expertise and the "importance of . . . referrals" to maintain competitive prices for consumers will be discussed later in this Note.[117]

2. *Whether the RESPA Rule Actually Hurts Consumers in Certain Regions Due to Regional Variance in Residential Real Estate Transactions*

Despite efforts by the government to make home buying a simple process, even the simplest purchase of a house is an overwhelming morass of paperwork.[118] Real estate closings are complex transactions that require many hours and much careful attention to ensure the interests of all parties.[119] Some attorneys avoid real estate work even in states where it is a viable professional choice simply to avoid the "thin ice" of liability in such a complicated practice.[120]

When lawyers are responsible for title work and closings, however, they can have their hands on a project from beginning to end that will often involve defects that are inherently "legal," such as liens and judgments.[121] A lay person working for a title company does not have the benefit of a lawyer's training and experience to recognize and resolve these issues.[122]

The government's effort to streamline the process is admirable, but it may ultimately give individuals without a legal background a false sense of security that their decisions are savvy. Despite knowing more about the costs of a home purchase, there are many intricacies of a real estate transaction that the buyer does not learn through RESPA disclosures. There are two examples in which uninformed buyers may be hurt more by RESPA than helped. First, buyers may not know about issues of regional disparity in residential real estate transactions, especially "seller-pay" jurisdictions, whereby sellers typically pay for title insurance policies.[123] Second, buyers may not be aware that real estate agents' duties are to the seller, not the buyer.

116. *Id.*
117. *See infra* Part III.B.2.
118. *See* Jay Romano, *Your Home: Paper, Paper and Even More Paper*, N.Y. TIMES, July 1, 2001, at RE5.
119. BOACKLE, *supra* note 57, at 20.
120. *Id.* at xiii.
121. *Id.* at 55.
122. *See id.*
123. *See infra* Part III.B.2.a.

a. "Seller-pay" Jurisdictions and Regional Disparity

In at least part of twenty-nine states, common practice is for sellers to pay for buyers' owner title insurance policies.[124] Any attorney representing a buyer in a "seller-pay" jurisdiction will require this allocation of costs as a matter of course, even though in many other states, owners pay for their own optional title insurance policies.[125]

Under the recently promulgated regulations, however, title services are categorized as a "lender required service."[126] Presumably, because the buyer chooses the lender, the regulations categorize this cost as a buyer expense. What the regulators failed to realize when drafting HUD's RESPA rule and the recent accompanying FAQs, which both categorize owner title insurance policies as a buyer cost,[127] is that title insurance is not a voluntary purchase by a homebuyer.[128]

The new GFE must include the owner's title insurance policy as a buyer cost even in states where it is generally a seller cost.[129] In this respect, HUD's "one size fits all" RESPA reform does a huge disservice for borrowers who could realize a major increase in settlement costs if they are not represented by attorneys who can fight for their best interests.

HUD's lack of understanding of the non-uniform use of title insurance in the United States is demonstrable elsewhere.[130] In another por-

124. JAMES L. GOSDIN, TITLE INSURANCE 96–97 (3d ed. 2007) ("Customary 'seller pay' jurisdictions, where the seller typically pays for an Owner's Policy for the purchaser, include states such as Alaska, Alabama (but varies), Arizona, Arkansas, parts of California (particularly in Southern California), Colorado, Florida (usually), Hawaii (part of cost), Idaho, Illinois, Indiana (majority but not always seller in southwest), Kansas (in many places, to be split), Michigan, Minnesota (if policy is the title evidence in lieu of abstract), Missouri (e.g., seller in west and east to edge of St. Louis), Montana, Nebraska (often split by seller and buyer), Nevada, New Mexico, North Dakota (seller responsible for abstract only), Ohio (in most of state), Oklahoma (varies, seller provides abstract), Oregon, South Dakota (may be split), Tennessee (in part), Texas, Utah, Washington, Wisconsin and Wyoming.").

125. *See id.* at 97. In fact, buyer-pay jurisdictions generally do not mandate that an owner obtain a policy at all (although the lender will almost certainly require that the owner buy a lender policy); therefore, frequency of purchase of owner policies varies by as much as 20% to 80% depending on local custom. *See id.*

126. 24 C.F.R. § 3500.7(e)(2)(ii) (2009).

127. *New RESPA Rule FAQs*, U.S. DEP'T OF HOUS. AND URBAN DEV., 33 (Apr. 2, 2010), http://www.hud.gov/offices/hsg/ramh/res/resparulefaqs422010.pdf ("Q: If a seller typically pays for the Block 5, 'Owner's title insurance', does the charge still have to be shown on the GFE? A: Yes, an estimate of the cost must be shown in Block 5, 'Owner's title insurance' for all purchase transactions regardless of who is selecting or paying for it.").

128. *See* Michael J. Rooney, *Ethics and the Attorney/Title Agent*, 96 ILL. B.J. 132, 137 (2008) ("[T]he purchase of title insurance is usually not discretionary. Sellers are nearly always already contractually obligated to provide it as evidence of marketable title.").

129. If the seller ultimately pays for the owner's title insurance, the regulations still require that the borrower should show a charge in the borrower column. *New RESPA Rule FAQs*, *supra* note 127, at 33. Then, the HUD-1 should show a credit from the seller to the buyer in the same amount. *See HUD-1 Settlement Statement*, *supra* note 60.

130. *See, e.g.*, 215 ILL. COMP. STAT. 155/24 (2008) ("[N]o person shall pay . . . consideration as inducement or compensation for the referral of title business or for the referral of any escrow or other service from a title insurance company, independent escrowee or title insurance agent."). This Illinois Act is an example of how one state's law might conflict with another state's or with federal court deci-

tion of the proposed RESPA rule, HUD sought to require closing agents to read a prescribed closing script to inform borrowers of their rights and the lenders' responsibilities.[131] This requirement sounds appealing in isolation and had the support of numerous consumer advocacy groups, including the California Reinvestment Coalition, which operates in a state that does not have attorney representation in closings.[132]

But the national professional group that sets the standard for real estate closing documents, the American Land Title Association, astutely pointed out that "in many states, settlement agents risk engaging in the unauthorized practice of law by reviewing loan documents and answering borrower questions about final loan terms."[133] HUD gave up on the closing script with little fanfare,[134] perhaps cowed by the realization of how little it really understands the industry it seeks to regulate.

b. The Real Estate Agent's Duty to the Seller and Other Conflicts of Interest

After decades on the books, RESPA has done little to explain certain fundamentals of real estate transactions to consumers. Under the traditional structure of real estate brokerage, firms are divided between a listing service and a selling service.[135] Typically, a seller enters a relationship with a listing firm, so that firm becomes a fiduciary of the seller.[136] Meanwhile, a buyer enters into a relationship with a selling service in order to view homes and eventually buy one.[137] The selling service is legally a subagent of the listing service.[138] Therefore, the buyer generally interacts with a real estate agent who owes his or her primary duty of loyalty to the seller in a residential real estate transaction.[139]

Real estate agents do not always act to the detriment of buyers simply because of their fiduciary relationship with sellers. In fact, they may sometimes act to the detriment of their fiduciary, the seller, by accepting a lower-than-expected offer in order to close a deal.[140] Nor is this

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sions interpreting RESPA. See *supra* note 112 for an explanation of the Ninth Circuit's decision in *Lane v. Residential Funding Corp.* to allow a title company and lender to pay each other for services and referrals. The Illinois prohibition against "consideration" in exchange for "inducement" might be much more narrowly construed than the RESPA provisions interpreted by the Ninth Circuit. *Compare* 215 ILL. COMP. STAT. 155/24, *with* Lane v. Residential Funding Corp., 323 F.3d 739, 746 (9th Cir. 2003).

131. RESPA Final Rule, *supra* note 11, at 68,229.
132. *Id.* cmt. Consumer Representatives.
133. *Id.* cmt. Industry Representatives.
134. *See id.* at 68,230.
135. Royce de R. Barondes & V. Carlos Slawson, Jr., *Examining Compliance with Fiduciary Duties: A Study of Real Estate Agents*, 84 OR. L. REV. 681, 682–83 (2005).
136. *Id.* at 689.
137. *Id.*
138. *Id.*
139. *Id.* at 682–83; Braunstein & Genn, *supra* note 14, at 476.
140. *See* Barondes & Slawson, *supra* note 135, at 692 & n.33.

traditional rule the rule in every jurisdiction.[141] RESPA, however, fails to educate consumers about these fundamental relationships and the consequences that agency law creates.

In a survey of Columbus, Ohio, residents who had recently purchased homes, about one-third of the respondents admitted that they did not understand the seller's legal duty.[142] That significant minority might actually be larger, considering few home buyers would be keen to admit that they misunderstood such a fundamental part of an expensive process that they had just concluded. Nearly half of those respondents further admitted not knowing what kind of deed they owned and one-quarter admitted not even knowing what kind of estate they held in their title.[143]

This lack of understanding is contrary to RESPA's fundamental assumption that consumers only need adequate disclosures about interest rates and service costs to protect themselves from dishonest practices.[144] In fact, the home buyers in the Columbus survey most sorely lacked knowledge that was specific to their newly purchased title insurance:

> Only 7 percent realized that there were any exceptions to their policy. Almost two-thirds of the Columbus respondents did not know that title insurance did not cover them if the house they bought was worth less than they paid, and more than half did not know that title insurance did not cover faulty construction, but did cover adverse legal claims to the house and land.[145]

This survey suggests that RESPA's required disclosures do not sufficiently arm consumers to navigate a home purchase. Even more importantly, the average consumer apparently remains mostly uninformed on the nature of his or her title insurance policy, the one document the consumer would need to understand when dealing with a potentially predatory title insurer.

c. Whether HUD's Haste in Enacting the 2008 RESPA Rule Will Increase Industry Compliance Costs that Will Be Passed on to Consumers

After announcing the new rule, HUD was forced to push back the rule's release date by several law suits.[146] During those intervening months, the American Bankers Association and a number of other industry groups sought a moratorium so that HUD could reevaluate the

141. *Id.* at 690 & n.29.
142. Braunstein & Genn, *supra* note 14, at 476.
143. *Id.*
144. See *supra* Part III.A for an explanation of RESPA's plan to protect consumers with disclosures.
145. Braunstein & Genn, *supra* note 14, at 477.
146. *See* Stephen F.J. Ornstein et al., *The Final RESPA Rule*, 63 CONSUMER FIN. L. Q. REP. 296, 297, 302 (2009).

proposed rule.[147] Peter Birnbaum, President of ATG, suggested that HUD would be better served by organizing an advisory body that took account of the varied real estate practices in different regions of the country.[148] He also suggested that HUD's changes were justified only by statistics taken from Federal Housing Agency loans, which were not sufficiently representative of the larger real estate market.[149]

Industry advocates assert that HUD's hasty rulemaking will frustrate the industry's compliance with RESPA for several reasons. First, there is a movement toward creating an independent Consumer Financial Protection Agency.[150] That agency would take over enforcement of RESPA, clearly a consumer protection statute, but would probably have even less direct understanding of real estate matters than HUD.[151] Such an agency could arrive on the scene just as the industry finished spending HUD's estimated $571 million coming into compliance with the new rule.[152] At that point, the new agency would probably want to assert its power and justify its existence by promulgating new regulations that could make the industry's compliance efforts moot.

Second, RESPA is not the only law that requires disclosures related to real estate transactions. The Truth in Lending Act (TILA),[153] administered by the Federal Reserve Board, requires similar consumer protection disclosures.[154] Because of their similar purpose, members of the residential real estate industry typically provide both sets of disclosures to consumers simultaneously.[155]

While HUD was considering comments for its RESPA rule, the Federal Reserve Board announced a plan to broadly reform its own disclosure regulations.[156] For the ease of both the industry and consumers, HUD was urged to postpone its RESPA rule so that it could coordinate its reform with the Federal Reserve Board.[157] This coordination was encouraged by "244 Members of Congress, industry participants . . . and even the Federal Reserve Board staff."[158] As with the Consumer Financial Protection Agency scenario above, a separate TILA reform would

147. Letter from the Am. Bankers Ass'n et al. to Shaun Donovan, Sec'y of the U.S. Dep't of Hous. and Urban Dev. (Feb. 9, 2009) [hereinafter ABA Letter] (on file with author). The coalition that petitioned HUD with this letter also included the American Escrow Association, the American Financial Services Association, the Consumer Bankers Association, the Consumer Mortgage Coalition, the Housing Policy Council of the Financial Services Roundtable, the Independent Community Bankers of America, and the Mortgage Bankers Association. *Id.* at 2.

148. *See RESPA Hearings*, *supra* note 47, at 67.

149. *See id.*

150. Memorandum from Tania Stori, Staff Attorney, Attorneys' Title Guar. Fund (ATG), to Peter Birnbaum, President, ATG (July 9, 2009) (on file with author).

151. *See id.* at 1.

152. *See supra* note 94 and accompanying text.

153. 15 U.S.C. §§ 1601–1615 (2006).

154. *See* ABA Letter, *supra* note 147, at 1.

155. *Id.*

156. *Id.*

157. *Id.* at 1–2.

158. *Id.* at 2.

increase industry compliance costs that could have been mitigated by a single, coordinated reform that would only require one compliance overhaul for the industry.

Unfortunately, HUD's rule was promulgated and has taken effect. With the new rule in place, and other economic and defense matters of national concern gripping the nation, the current administration likely will not retract it. The only questions that remain are how it will affect the industry and consumers and whether the administration will take action to mitigate any harmful effects.

IV. RECOMMENDATION

Even if all of HUD's predicted benefits come true in the short term, there are still major issues in the residential real estate market that HUD should have sought to resolve with its latest ruling. Instead, HUD all but ignored these problems, and its rulemaking may serve only to make them worse. First, the new RESPA rule has the potential to encourage increased monopolization of the title insurance industry, which will ultimately raise consumer costs in residential closings. Second, the new rule does nothing to stem the elimination of attorneys from residential real estate transactions. Encouraging more attorney involvement in the real estate market is perhaps the best solution to the consumer awareness and protection problems RESPA seeks to fix.

A. Lender Monopolies in Title Insurance

HUD continues to allow lenders to offer discounts on combined services from referred or internal providers, so long as the discounted cost is not "made up by higher costs elsewhere."[159] HUD, however, does not propose a method for enforcing this rule.[160] No lender would voluntarily admit that a charge on its settlement form is higher than necessary because it serves to make up for a package of discounts. Such a cost would be subtly hidden, perhaps even embedded in the structure of the lender's internal components. The discount might be in the form of lower settlement costs from the lender's captive title insurance company and captive title search department, whereas the overall lender could make up the difference and more by charging one-quarter of a percent higher interest rate.

HUD seems to indicate that this structure would violate the new RESPA rule, but its new rule does not guide its enforcement staff on how to differentiate between one-quarter of a percent interest rate that is

159. 24 C.F.R. § 3500.2 (2009).

160. In fact, RESPA does not give HUD the authority to directly enforce its provisions. Other financial regulatory entities have that duty, making it all the more likely that HUD regulations with loopholes will be exploited without government oversight. *See Revised Summary of HUD's Final RESPA Rule*, *supra* note 89, at 4.

an illegal "make up" cost and one-quarter of a percent interest rate that is a bona fide mortgage offer.[161] In fact, they are virtually indistinguishable, so the practice of offering these "discounts" (which do not affect the lender's bottom line) to squeeze independent title insurers out of the marketplace is a practice that is likely to grow.

The entire movement to improve the RESPA rules implicitly admits that, even after decades of RESPA disclosures, home buyers are not adequately informed consumers. Therefore, although consumers might make better decisions with the new itemized GFE, they will still tend to shop for loans based on figures that make sense to them, such as interest rates and total closing costs. But they will also probably use a title services provider identified by one of the banks rather than independently shop for a service of which they probably have little understanding.

By requiring lenders to disclose highly accurate estimates of third-party settlement costs, HUD in essence encourages lenders to do business with their closest "buddies" rather than with the most competitive provider in the marketplace.[162] If a lender cannot afford to violate the new rule, it has an incentive to strive for a guaranteed price over the fair market lowest price when it identifies a provider. The most locked-in price, of course, would be provided by an in-house servicer, such as a title insurance element within a banking institution.[163]

Over time, if lenders move toward an industry standard of in-house title insurance providers, they can draw business away from independent providers through both their added exposure to consumers, as described above, and the potential for cost-cutting by packaging title insurance and loans together. Although this efficiency may reduce consumer prices in the short term, it will ultimately have the opposite effect expected by HUD. Rather than increasing marketplace competition for settlement services, the industry will move toward one-stop shopping for loans and settlement services at a single lender agency.

The "Wal-Mart Effect" of lenders providing all title services under one roof could prove disastrous for an already beleaguered real estate industry. Like customers of the real Wal-Mart, borrowers of mega-lenders would see a lack of expertise in certain services, a lack of variety in available services, and most troubling, a lack of ethical responsibility

161. *See* RESPA Final Rule, *supra* note 11, at 68,236. In the example in the text, an increased interest rate would be used by the company to "make up" the lower closing costs. Thus, the lender would "make up" the difference and would pocket the same amount of money or more in the end. HUD specifically prohibits "making up" costs. *Id.* HUD, however, does not indicate how its enforcement staff will identify schemes that "make up" costs. One lender might charge one-quarter of a percent higher rate than the market rate for interest, but have $1000 lower closing costs than the market average, because the lender wants to attract business while duping consumers. Another lender might charge the same interest and closing costs based on good faith financial decisions. The rule's weakness is that it does not specifically demonstrate whether one or both of these lenders would be in violation of the rule.

162. *See* Palomar, *supra* note 105, at 933.

163. *See id.*

when practices skirt legality.[164] Furthermore, once a lender has solidified a significant market share, it can ultimately charge whatever it wants without fear of competition, so long as it does not violate the RESPA rules for providing an accurate up-front GFE.[165]

HUD's rule assures the industry that this monopolization will fail because local companies will have an advantage over national ones due to their access to title records.[166] Also, HUD states that monopolization will not occur because local businesses will support each other through referrals.[167] HUD's first point ignores the title insurance industry history of more powerful national firms taking over smaller, regional firms while still allowing them to continue doing business as a local puppet.[168] Thus, the puppet company continues to benefit from its regional structure, but as a subsidiary of a large conglomerate it does not promote competition like a truly independent business, which itself is trying to expand and profit.

HUD's second point inconsistently suggests that the referral system is a strength of the local residential real estate market. In fact, one of the major justifications for the initial implementation of RESPA, and even its current reform, is HUD's assertion of the anticompetitive nature of referrals accompanied by kickbacks.[169] Even without kickbacks, the referral system would still presumably lead to anticompetitive practices.[170] The key inclusion of three different tolerances for settlement service costs based on whether they are provided by a servicer required by a lender, identified by a lender, or unrelated to a lender, is designed to minimize referrals of any kind, even ones that are made in good faith because of a relationship between the servicer and lender.[171]

Despite its assertions, HUD does not successfully refute the industry criticism that the new RESPA rule will contribute to further lender monopolization of the settlement services industry, ultimately eliminating competition rather than promoting it.

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164. *Cf.* Catherine Holahan, *What Not to Buy at WalMart*, CBS NEWS (Dec. 10, 2009), http://www.cbsnews.com/stories/2009/12/10/business/moneywatch/main5963156.shtml.

165. *Cf.* Suzanne Kapner, *Wal-Mart's Breather on Lower Prices*, CNNMONEY.COM (Aug. 13, 2009, 4:33 PM), http://money.cnn.com/2009/08/13/news/companies/walmart_margins_earnings.fortune/ ("Once you've achieved a low price position in the minds [sic] of the consumer it does not mean you have to keep lowering your prices all the time." (internal quotation marks omitted)).

166. RESPA Final Rule, *supra* note 11, at 68,266.

167. *Id.*

168. *See* BURKE, *supra* note 14, § 1.2, at 7.

169. *See* RESPA Final Rule, *supra* note 11, at 68,234 (explaining the importance of borrowers shopping for services "free from the influence of deceptive referral arrangements").

170. *See* GOSDIN, *supra* note 124, at 99 (discussing the use of marketing to settlement service providers to induce their loyalty in referrals, including perks like "entertainment, meals, or other advantages" but also others that are "harmless" but might nevertheless lead to anticompetitive distribution of business).

171. *See* 24 C.F.R. § 3500.7(e) (2009).

B. Elimination of Real Estate Attorneys in Title Insurance

In the interest of consumer protection, HUD should encourage borrowers to get expert representation to balance home buyers' negotiating power with powerful corporate lenders. Instead, the blanket RESPA revision gives them a false sense of understanding and security in the home buying process. Despite the greater disclosure to consumers, a truly "bad" deal may not be obvious until the buyer sits down at the closing table.[172] At that point it would be nearly impossible to obtain a different loan. According to an attorney in Illinois, a state in which home buyers are represented by lawyers, "[t]he real protection for borrowers will come from bringing real estate counsel into the transaction at the outset, far in advance of closing."[173]

Unfortunately, the false sense of security created by RESPA disclosures will discourage buyers from enlisting attorneys, even in those states where attorneys routinely represent buyers. Considering the anticipated harm to attorney-owned title insurance companies from national megalenders,[174] the new RESPA rule will only hasten the residential real estate lawyer's exit from the U.S. legal landscape.

Some commenters see no significant value added to real estate transactions by attorney representatives.[175] A 1993 study of residential transactions in New Jersey might lead the HUD reformers to believe that the marginalization of attorneys in residential real estate is a justified result of adding nothing to transactions that laypersons cannot also add.[176] When the study was conducted, home buyers in northern New Jersey were generally represented by attorneys whereas home buyers in southern New Jersey generally were not.[177] Yet buyers represented by attorneys did not report significantly more satisfaction from their attorney representation.[178]

The conclusion that attorneys do not offer significant added value to real estate transactions is specious for two reasons. The first and most prominent missing piece of the puzzle is the lack of a New Jersey attorney-owned title insurance company. An earlier movement by attorneys in New Jersey to create such an institution was blocked by New Jersey courts.[179] The New Jersey Supreme Court cited conflicts of interest for attorneys who represent both a client and a title company.[180] Of course,

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172. James K. Weston, *New RESPA Regulation Finally Arrives*, 97 ILL. B.J. 52, 53 (2009).
173. *Id.*
174. *See supra* Part IV.A.
175. Braunstein, *supra* note 30, at 278–79.
176. *Id.* at 275–77.
177. *Id.* at 276.
178. *Id.* at 277.
179. *In re* Op. 682 of the Advisory Comm. on Prof'l Ethics, 687 A.2d 1000, 1005–06 (N.J. 1997); *see also* Aurora N. Abella-Austriaco, *Ethics Ruling May Not Bar Door on an Ancillary Service*, CHI. DAILY L. BULL., June 23, 1997, at 6.
180. *In re Op. 682*, 687 A.2d at 1005–06; Abella-Austriaco, *supra* note 179. Interestingly, the controversy that resulted in the New Jersey Supreme Court's ruling adverse to its state's attorneys was

these supposed conflicts do not prevent many other states from enjoying the many benefits of attorney-owned title insurers, which allow real estate attorneys to operate with a great deal more education and support to best represent their clients. Perhaps the New Jersey buyers surveyed would have been more impressed by attorneys from those states.

Second, attorney representation has a far more important benefit besides obtaining a small edge in negotiation to get a "better deal."[181] When a buyer enlists an attorney, the attorney has a fiduciary duty to represent the buyer's best interests. If the lawyer leads a client astray, especially if the lawyer's goal is to exploit the client, the client can sue the lawyer for malpractice.

Even the most diligent lawyer managing a real estate transaction runs risks that could leave him or her liable for malpractice.[182] An attorney representing a buyer must understand every aspect of a title insurance policy and deed.[183] Meanwhile, a consumer might be excused for not even understanding the fundamentals of a title insurance policy, and a real estate agent owes primary responsibility only to the seller. The attorney must ensure that the buyer can sue the other parties if any aspect of the transaction is lacking.[184] Consequently, if the client's opportunity to sue is missed because of the attorney's mistake, the client may instead sue his or her attorney for malpractice.[185] The shifting of liability and consequences from the consumer to an insured legal representative would take the guess work out of RESPA's consumer protection through disclosure framework.[186]

Furthermore, lawyers are subject to rules of professional conduct in every state.[187] Most states have adopted a version of the model rules of professional conduct created by the American Bar Association.[188] When attorneys represent clients in residential real estate transactions, often as agents or affiliates of title insurance companies, those attorneys are subject to the ABA's Model Rules of Professional Conduct Rule 5.7.[189] This Rule governs "law-related services" provided by an attorney that, al-

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prompted by its previous ruling that allowed title agents to conduct closings without lawyers. *See* Tim O'Brien, *Lawyers Can't Muscle in on Title Business*, N.J. L.J., Feb. 12, 1996, at 1.

181. *See* Stark, *supra* note 4, at 178–85 (pointing out that negotiating is but one of many values provided by an attorney, including expert advice based on a client's needs, an understanding of local law, and an ability to interpret legalese boiler plate like that found in title insurance commitments).

182. *See* Robin Paul Malloy & Mark Klapow, *Attorney Malpractice for Failure to Require Fee Owner's Title Insurance in a Residential Real Estate Transaction*, 74 ST. JOHN'S L. REV. 407, 427 (2000).

183. *Id.* at 444.

184. *Id.*

185. *Id.* at 443–44.

186. Some states have also sought to protect buyers through predatory lending statutes. *See, e.g.*, Richard E. Gottlieb & Andrew D. LeMar, *Selective Burdens: Illinois Enacts a Broad Predatory Lending Statute*, 61 CONSUMER FIN. L. Q. REP. 665, 665, 672 (2007). Predatory lending statutes, like RESPA, create heightened burdens on the title insurance industry, but the industry tends to push those burdens on to consumers. *Cf. id.* at 671, 676–77.

187. GEOFFREY C. HAZARD ET AL., THE LAW AND ETHICS OF LAWYERING 16 (5th ed. 2010).

188. *Id.*

189. MODEL RULES OF PROF'L CONDUCT R. 5.7 (2010).

though legal, potentially create a conflict between the attorney's interests and the client's interests.[190] The Rule's comments list numerous examples of these services, including "providing title insurance."[191]

Rule 5.7 lays out a professional obligation for attorneys who provide law-related services.[192] Attorneys must sufficiently communicate their interests to clients before entering into a professional relationship; the attorney must inform the client that part of their interaction will not be under the guise of an attorney-client relationship.[193] The Rule places the burden on the attorney "to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding."[194] The reasonableness of these measures is judged by the client's sophistication; for example, "an individual seeking tax advice from a lawyer-accountant" would probably need a simpler and clearer explanation than a corporation.[195]

Even in states that have not adopted Rule 5.7, the enacted rules of professional conduct and related disciplinary actions are taken seriously by judges and protect the clients of attorneys.[196] For instance, Illinois has not adopted Rule 5.7,[197] but attorneys who violate the enacted rules may be suspended or even disbarred by a court.[198]

The best way to protect consumers in complex real estate deals is to encourage them to enlist expert representation in the form of attorneys. In some states that is essentially not an option because attorneys do not conduct real estate closings;[199] the federal government would likely not broadly mandate attorney representation in states where there is no infrastructure of attorneys with that expertise.

In treating the plague of exploitative lending that caused today's housing crisis, however, HUD's first duty should be "to do no harm" in states that still have residential real estate attorneys. HUD should reexamine its latest RESPA rulemaking and issue guidance for enforcing its terms in certain states where residential real estate attorneys are prevalent. Because these states will probably be ones where regional attorney-owned title companies do business, HUD may be able to implement a separate set of blanket rules, perhaps in the form of a policy letter addendum, that should work for the largely-similar attorney-owned title companies.

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190. *Id.*

191. *Id.* cmt. 9.

192. *Id.* R. 5.7.

193. *Id.* cmt. 6.

194. *Id.* cmt. 7; *see also* Rooney, *supra* note 128, at 137 ("[P]rudence suggests that the recommendation be made in writing and signed by the client to indicate both receipt and understanding of it.").

195. *See* MODEL RULES OF PROF'L CONDUCT R. 5.7 cmt. 7.

196. David A. Simon, *Mo' Money, Mo' Problems: Should Appellate Courts Have Nonparty Jurisdiction Over Lawyers' Appeals from Nonmonetary Sanctions?*, 78 U. CIN. L. REV. 183, 213 (2009).

197. *See Article VIII—Illinois Rules of Professional Conduct*, ILL. COURTS (Jan. 1, 2010), http://www.state.il.us/court/supremecourt/rules/art_viii/.

198. Simon, *supra* note 196, at 184 n.3.

199. *See supra* note 34 and accompanying text.

More government regulation of the real estate industry, without an injection of responsibility into the workforce, merely invites more of the same scheming and criminal behavior with slightly altered rules. For example, the $8000 first-time homebuyer tax credit designed to stimulate the real estate market was recently cited as rife with abuse, and also shows signs of precipitating the same kind of irresponsible lending that created the subprime mortgage crisis.[200] HUD should recognize that tweaking the regulations for a disclosure statute is not a permanent solution to a systemic lack of professional responsibility.

V. CONCLUSION

In Henry VI, "kill[ing] all the lawyers" is the first step to avoid living up to one's responsibilities.[201] Like a person trapped by a variable interest, subprime mortgage, the character Cade laments, "I did but seal once to a thing, and I was never mine own man since."[202] In the residential real estate industry, where brokers and government regulators supplant lawyers, individuals who precipitated a worldwide financial crisis still refuse to admit their wrongdoing. Irresponsible lenders, supposedly proponents of an unregulated, market-driven economy, want the government to bail them out to avoid the natural demise of their companies in a capitalist system.[203] Uninformed borrowers want courts to revise their loans so they can live in homes bought with someone else's money.[204]

Regrettably, the one body that might encourage or require lawyer representation for parties, the U.S. government, instead clings to the RESPArator, which more likely than not will drive the last lawyers out of residential real estate transactions. The RESPA revision may save consumers money in the short term by quashing lender misconduct, but in the long term, the new RESPA rules only put more power into the hands of lenders to rampage the market the next time they gamble on a scheme like the subprime mortgage bubble. The real estate industry has "kill[ed] all the lawyers," and the result may be more absurd than a Shakespearean comedy.

200. Jackie Calmes, *Audit of Home Tax Credit Shows Errors and Abuses*, N.Y. TIMES, Oct. 23, 2009, at A24 ("Of the 1.4 million people who have claimed nearly $10 billion in credits for 2008 and 2009, 60 percent had incomes below $50,000, raising questions about whether some could afford a home.").

201. SHAKESPEARE, *supra* note 1, at 131.

202. *Id.*

203. For an explanation of the Troubled Asset Relief Program, see David Goldman, *Bank Bailout: What's in the Plan*, CNNMONEY.COM (Feb. 10, 2009, 4:57 PM), http://money.cnn.com/2009/02/10/news/economy/bank_bailout_overhaul/index.htm.

204. *See Permitting Judicial Modification of Home Loans Would Save 600,000 Homes—Purchase of Securities Will Not Save Any*, CTR. FOR RESPONSIBLE LENDING (Sept. 19, 2008), http://www.responsiblelending.org/mortgage-lending/policy-legislation/congress/crl-judicial-mod-of-home-mortgages-brf.pdf.