

develop.²⁴ While Indiana courts have decided that certificates of deposit made out by the purchaser in multiple names create a contingent contract right in the donee that vests upon the death of the donor, it is altogether unclear whether they will hold that the vesting can be triggered by other occurrences.

XV. The Real Estate Settlement Procedures Act of 1974

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The Real Estate Settlement Procedures Act of 1974¹ was intended to correct what Congress saw as "abusive practices" within the "real estate settlement process."² The stated purposes

²⁴*Blackard v. Monarch's Mfrs. & Distribs., Inc.*, 131 Ind. App. 514, 169 N.E.2d 735 (1960); RESTATEMENT OF CONTRACTS § 143(a) (1932). The *Blackard* court stated the rule as follows:

It is a general rule that where a contract for the benefit of a third person has been accepted or acted upon, it cannot be rescinded by the parties without the consent of the third person.

131 Ind. App. at 522, 169 N.E.2d at 739. The *Restatement of Contracts* section 143(a) states the rule as follows:

A discharge of the promisor by the promisee in a contract or a variation thereof by them is effective against a creditor beneficiary if,

(a) the creditor beneficiary does not bring suit upon the promise or otherwise materially change his position in reliance thereon before he knows of the discharge or variation

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¹12 U.S.C.A. §§ 2601-16 (Supp. 1, 1975) [hereinafter referred to as the Act].

²*Id.* § 2601. The 1975 Indiana General Assembly, perceiving some of the same problems, amended the Indiana Uniform Consumer Credit Code. IND. CODE §§ 24-4.5-2-101 to -6-203 (Burns 1974). The amendment provides that an additional charge may be contracted for in connection with a consumer loan

(d) with respect to a debt secured by an interest in land, the following closing costs, if they are bona fide, reasonable in amount, and not for the purpose of circumvention or evasion of this article:

(i) fees or premiums for title examination, abstract of title, title insurance, surveys, or similar purposes;

(ii) fees for preparation of a deed, settlement statement or other documents, if not paid to the lender or a person related to the lender;

(iii) escrows for future payments of taxes, including assessments for improvements, insurance, and water, sewer and land rents;

(iv) fees for notarizing deeds and other documents, if not paid to the lender or a person related to the lender; and

of the Act are to effect more adequate advance disclosure of settlement costs to home buyers and sellers, to eliminate so-called "referral fees" or kickbacks, and to reduce amounts home buyers are required to keep in escrow accounts. A subsidiary purpose of the Act is the eventual reform and modernization of local land title record keeping procedures.³ In order to achieve these goals, the Secretary of the Department of Housing and Urban Development (HUD) promulgated Regulation X⁴ and prescribed a Uniform Disclosure/Settlement Statement (HUD Form 1) which is to be used in all transactions covered by the Act.⁵

A. Covered Transactions

The Act covers "federally related home mortgage" loans.⁶ Regulation X defines a "home mortgage," the first prerequisite to coverage, as a loan secured by residential real estate designed to be occupied by from one to four families, including mobile homes and individual units of condominiums and cooperatives.⁷ The funds loaned may be secured by any lien or security interest in real estate, including a leasehold interest, if there is a structure on the land designed for occupancy by one to four families. The proceeds of the loan must be applied toward the purchase or transfer of the property. Home improvement loans are not covered, nor is refinancing by an owner of real estate, where there is no transfer of title. Vacant lots are covered only if the proceeds of the loan are to be used to construct a dwelling.⁸

The second prerequisite to coverage is that the loan be "federally related."⁹ "Federally related" loans are those made in whole or in part by any lender the accounts of which are insured by any agency of the federal government or which is regulated in any way by an agency of the federal government.¹⁰ The loan

(v) appraisal fees, if not retained by the creditor

Id. § 24-4.5-3-202(1)(d) (Burns Supp. 1975), amending *id.* § 24-4.5-3-202 (Burns 1974). This additional charge must be disclosed to the consumer. *Id.* § 24-4.5-3-306 (Burns 1974).

³12 U.S.C.A. § 2601(b) (Supp. 1, 1975).

⁴40 Fed. Reg. 22,449-54 (1975) [hereinafter cited as Reg. X].

⁵HUD Form 1, Uniform Disclosure/Settlement Statement, Reg. X, § 82.6 (a) [hereinafter referred to as HUD Form 1]. HUD Form 1 and instructions for its use are set forth in Appendices A and B to Regulation X. See 40 Fed. Reg. 22,454-58 (1975). The use of a uniform settlement statement was mandated by the Act. 12 U.S.C.A. § 2603 (Supp. 1, 1975).

⁶12 U.S.C.A. § 2603 (Supp. 1, 1975).

⁷Reg. X, § 82.2(e).

⁸*Id.* §§ 82.2(e)(2), 82.4(a).

⁹12 U.S.C.A. § 2603 (Supp. 1, 1975).

¹⁰*Id.* § 2602(1)(B)(i); Reg. X, § 82.2(e)(4).

also is "federal related" if it is guaranteed, supplemented or assisted by any officer or agency of the federal government or if it is issued under any federal housing program.¹¹ Further, any mortgage eligible for purchase by the Federal National Mortgage Association, the Government National Mortgage Association, or the Federal Home Loan Mortgage Corporation is "federally related."¹² Finally, the loan will be covered by the Act if the lender makes, or invests in, residential real estate loans aggregating more than \$1 million a year.¹³ The term "lender" includes the creditor in both new mortgage loans and in assumptions.¹⁴

Purchases of property for resale by one engaged in the business of buying and selling real property are exempt from certain portions of the Act under the regulations;¹⁵ apparently, in such cases a lender need not make the detailed disclosure otherwise necessary since such a borrower is not the typical consumer the legislation was designed to protect. However, one who engages in the purchase and resale of residential real estate is subject to disclosure requirements upon the sale of such real estate.¹⁶

B. *The Law and the Mortgage Lender*

What are the lender's responsibilities under the Act and Regulation X? First, the lender must provide every mortgage loan applicant at the time of the application with a booklet prepared and distributed to lenders by HUD.¹⁷ The booklet discusses the provisions of the Act, the reasons for its passage, and the various steps involved in settlement. Regulation X provides that the booklet must be delivered to, or placed in the mail to, the loan applicant no later than the third business day after receipt of the loan application.¹⁸

Furthermore, the lender must make timely use of HUD Form 1 for both advance disclosure and settlement. The form itemizes all charges involved and indicates whether they are being imposed upon the buyer or the seller. It is designed to include all disclosures required by the Truth in Lending Act.¹⁹ It also includes

¹¹12 U.S.C.A. § 2602(1) (B) (ii) (Supp. 1, 1975).

¹²*Id.* § 2602(1) (B) (iii).

¹³*Id.* § 2602(1) (B) (iv).

¹⁴Reg. X, § 82.2(d).

¹⁵*Id.* § 82.4(b).

¹⁶12 U.S.C.A. § 2606(a) (Supp. 1, 1955).

¹⁷*Id.* § 2604; Reg. X, § 82.5. The *Special Information Booklet* is available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

¹⁸Reg. X, § 82.5(a).

¹⁹15 U.S.C. §§ 1601-65 (1970). Regulation Z was promulgated by the Federal Reserve Board to implement the Truth in Lending Act. The present

the amount of the premium charged for title insurance, as well as the interest which is thereby insured—borrower's, lender's or both.²⁰ Advance disclosure of settlement costs must be made by the lender—by mail or in person and on HUD Form 1—not later than 7 calendar days after the loan commitment is made, and at least 12 days (15 if the form is mailed) prior to settlement.²¹ If for some reason settlement is to be delayed more than 60 days after commitment, disclosure may be made 60 days before the anticipated date of closing.²²

The critical period involved in the requirement of advance disclosure is the 12-day period between such disclosure and settlement. The Regulation provides that this requirement may be reduced to three days between actual receipt of the advance disclosure form and settlement, if settlement occurs within 21 days of application for the loan and if both buyer and seller voluntarily execute the prescribed form of waiver. The waiver is of advance disclosure only; it does not operate to waive any rights of rescission under the Truth in Lending Act.²³ The required form of the waiver is set out in the Regulation.²⁴

It is also the lender's duty to obtain from persons providing services connected with settlement the charges that will be made for such services and to enter those charges on the form.²⁵ Where the exact amount of some charge required to be included on the advance disclosure statement is not yet certain, a good-faith estimate is permitted. However, each estimate must be stated as a specific figure and not as a possible range. Figures which are estimated are to be followed by an "(e)."²⁶ If the borrower obtains his own hazard insurance without involvement by, or referral from, the lender, real estate agent or broker, or person conducting the settlement, the amount of premium of such insurance may be omitted.²⁷ Similarly, if the buyer or seller uses his attorney, the charges made to that party by his own attorney need not appear. Any other charges by attorneys in connection with the settlement must be disclosed.²⁸ Other services independently obtained by a

version of Regulation Z appears in 12 C.F.R. pt. 226 (1975).

²⁰12 U.S.C.A. § 2603 (Supp. 1, 1975); Reg. X, §§ 82.6 to .11.

²¹Reg. X, § 82.7(b).

²²*Id.* § 82.7(c).

²³*Id.* § 82.7(d). See 15 U.S.C. § 1635 (1970); Reg. Z, 12 C.F.R. § 226.9 (1975) (requirements to waive right of rescission under the Truth in Lending Act).

²⁴Reg. X, § 82.7(d).

²⁵*Id.* § 82.7(g).

²⁶*Id.* § 82.7(f).

²⁷*Id.* § 82.7(h).

²⁸*Id.* § 87.7(i).

buyer or seller (such as a Certified Home Corporation home inspection) likewise do not have to be stated.²⁹ Lenders may make disclosure of adjustments for taxes and assessments based on the assumption that these are not delinquent.³⁰

Updating, although permitted, is not required if the lender discovers changes in some of the reported charges after he has provided the advance disclosure statement.³¹ The lender must keep a copy of the advance disclosure statement for two years, unless the mortgage is transferred, in which case it may be turned over to the transferee with the rest of the loan file.³² The lender is not permitted to charge a fee for preparing the advance disclosure statement.³³

HUD Form 1, which is used for advance disclosure, is also to be used as a settlement statement, which must be provided to the borrower and seller within three days after the date of settlement.³⁴ Again, the lender must keep a copy of the settlement statement for two years, unless the mortgage is transferred before the expiration of that period.³⁵ The lender must keep both the advance disclosure and settlement statements in addition to all other records required by Regulation Z of the Federal Reserve Board.³⁶ However, provisions of the Act do supersede section 1631(c) of the Truth in Lending Act³⁷ to the extent the latter applies to "federally related home mortgage" loans.³⁸

If construction of the residence involved has been completed for twelve months, the lender cannot make a loan commitment until confirming that the seller, in writing, has furnished to the buyer the following information: (1) The name and address of the present owner; (2) the date the property was acquired by such owner (but if more than two years have passed, the year of acquisition is sufficient); and (3) if the present owner has owned the property for less than two years and has not used it as his residence, the date and purchase price of the last arms-length transfer of the property, together with the cost of any subsequent improvements, excluding maintenance costs.³⁹

²⁹*Id.* § 82.7(j).

³⁰*Id.* § 82.7(k).

³¹*Id.* § 82.7(l).

³²*Id.* § 82.7(m).

³³12 U.S.C.A. § 2610 (Supp. 1, 1975).

³⁴Reg. X, § 82.8(a), (c).

³⁵*Id.* § 82.8(d).

³⁶*Id.* §§ 82.7(m), .8(d). See Reg. Z, 12 C.F.R. § 226.6(i) (1975).

³⁷15 U.S.C.A. § 1631(c) (Supp. 1, 1975), amending 15 U.S.C. § 1631 (1970).

³⁸12 U.S.C.A. § 2605(e) (Supp. 1, 1975).

³⁹*Id.* § 2606(a).

C. Prohibited Acts

The Act forbids giving or accepting any "fee, kickback, or thing of value" arising under any sort of arrangement where business incident to a real estate settlement is "referred" to any person or institution.⁴⁰ The Act also prohibits giving or accepting any "portion, split or percentage of any charge made or received" for services connected with such settlement other than for services actually performed.⁴¹

A lender may not require a borrower to deposit in an escrow account a sum which exceeds the borrower's pro rata portion of taxes and insurance which will actually be due and payable on the date of settlement. After settlement, the lender can require deposit in the escrow account each month only one-twelfth of the total taxes and insurance premiums which will be actually due and payable during the following 12-month period. Should it appear that there will be a deficiency, the lender may, however, adjust the monthly deposit to cover it.⁴²

The Act prohibits sellers from requiring that title insurance be purchased from any particular company;⁴³ and, as noted previously, a lender who charges a fee for preparation of the disclosure documents violates the Act.⁴⁴

D. Penalties

If a lender fails to provide a borrower or seller with the required disclosures, the lender will be liable to the aggrieved party in an amount equal to the greater of actual damages or five hundred dollars, plus court costs and an attorney's fee. The lender escapes liability only if the lender can show by a preponderance of the evidence that (1) The omission resulted from a bona fide mistake and was not intentional and (2) the lender maintains procedures adopted to avoid such errors.⁴⁵ Borrowers may not sue both under the Act and under section 1640 of the Truth in Lending Act,⁴⁶ but must elect which remedy to pursue.⁴⁷

"Knowing and willful" noncompliance with the requirement of disclosure by the seller of the previous purchase price as a precondition to the loan commitment carries a fine of up to \$10,000

⁴⁰*Id.* § 2607(a).

⁴¹*Id.* § 2607(b)-(c).

⁴²*Id.* § 2609.

⁴³*Id.* § 2608.

⁴⁴*Id.* § 2610.

⁴⁵*Id.* § 2605(b).

⁴⁶15 U.S.C.A. § 1640 (Supp. 1, 1975), *amending* 15 U.S.C. § 1640 (1970).

⁴⁷12 U.S.C.A. § 2605(d) (Supp. 1, 1975).

or one year in prison, or both.⁴⁸ Parties violating the section prohibiting kickbacks and unwarranted charges may be fined \$10,000 or imprisoned for one year or both, and, in addition, will be jointly and severally liable for three times the amount of the fee, portion, split, or percentage.⁴⁹

An action for damages under the Act must be brought within one year from the date of the violation. Jurisdiction is concurrent in the state and federal courts.⁵⁰

XVI. Secured Transactions and Creditors' Rights

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A. Security Interests in Real Property

1. Priorities—Bona Fide Purchaser; Possession as Notice

It is settled that a bona fide purchaser will take priority over prior unperfected interests in land.¹ The recent case of *Huffman v. Foreman*² dealt with two issues closely related to this principle: (1) Must a purchaser make further inquiry where he is told by the seller that there was a prior interest in the land but that it has been released or satisfied? (2) Is the purchaser charged with constructive notice when the claimant to an interest in the land is in possession? In *Huffman* an owner sold his land on a conditional sales contract, and the purchaser obtained possession. Although the purchaser remained in possession, he conveyed the land back to the owner for an executory consideration of \$13,500. The court determined that the purchaser retained a vendor's lien for the \$13,500 repurchase price.³ The owner, thereafter, conveyed

⁴⁸*Id.* § 2606(c).

⁴⁹*Id.* § 2607(d).

⁵⁰*Id.* § 2614.

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¹*Pugh v. Highley*, 152 Ind. 252, 53 N.E. 171 (1899).

²323 N.E.2d 651 (Ind. Ct. App. 1975).

³Apparently neither the conditional sales contract nor the reconveyance to the owner were recorded. *Id.* at 653-54. An additional problem occurs when the vendor's lien is not perfected; the unperfected vendor's lien will be defeated by a bona fide purchaser from the vendee. *Hawes v. Chaille*, 129 Ind. 435, 28 N.E. 848 (1891); *Heuring v. Stiefel*, 85 Ind. App. 102, 152 N.E. 861 (1926). A holder of a vendor's lien may protect himself by filing suit for a declaration of his rights and also by filing *lis pendens* notice. *Wilson v. Burgett*, 131