



Issue Date
May 24, 2000
Audit Case Number
00-FW-222-1003

TO: Ronald C. Bailey
Director, Single Family Homeownership Center, 8AHH

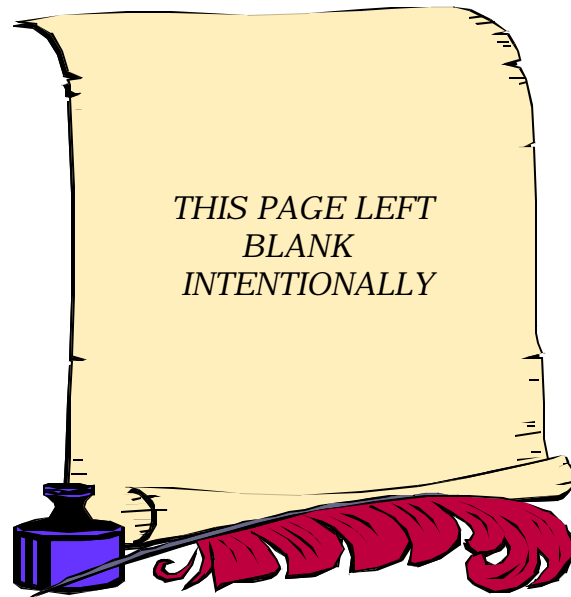
FROM: D. Michael Beard
District Inspector General for Audit, 6AGA

SUBJECT: Pope & Booth Closing Agent Contract

We performed an audit of Pope & Booth's Closing Agent contract. Our attached report contains two findings.

Within 60 days, please furnish this office, for each recommendation in this report, a status on: (1) corrective action taken; (2) the proposed corrective action and the date to be completed; or (3) why action is not considered necessary. Also, please furnish us copies of any correspondence or directives issued related to the audit.

If you have any questions, please contact Theresa A. Carroll, Assistant District Inspector General for Audit, at (817) 978-9309.



Executive Summary

We performed an audit of the law offices of Pope & Booth, P.C. (Pope & Booth), a closing agent for HUD, as part of a nationwide effort to review closing agents. Our audit objective was to determine whether management controls were adequate to ensure the prevention of fraud, waste, and abuse. To meet this objective, we performed audit steps to determine whether the closing agent complied with its contract terms and conditions. Overall, Pope & Booth's controls were sufficient to ensure substantial compliance with its HUD contract. However, we also found that Pope & Booth split title insurance fees and overcharged HUD for wire transfer fees.

Pope & Booth sufficiently performed some closing agent duties.

Although we noted some minor exceptions, Pope & Booth performed the following contractual duties adequately:

- Prepared extensions in writing and calculated the correct amount of extension fee;
- Paid only allowable expenses;
- Collected the correct fees;
- Wired correct amounts and generally conducted the wires timely;
- Calculated the correct amount for the taxing authority;
- Collected the correct closing agent fee, and
- Prepared the Warranty Deeds correctly.

Pope & Booth split title insurance fees.

Even though Pope & Booth performed no additional services beyond those required in the closing agent contract, it received a 40 percent split of title insurance premiums from two title insurance companies. The Real Estate Settlement Procedures Act (RESPA) prohibits fee splitting and receiving unearned fees for services not actually performed. Because Pope & Booth did not perform any additional services and received a split of title insurance premiums, Pope & Booth violated RESPA. From February 1998 to June 1999, Pope & Booth received unearned fees which range between \$361,886 to \$454,976.

Pope & Booth overcharged HUD for wire transfer fees.

Pope & Booth's contract required it to charge HUD the actual cost of wire transfer fees. For the 45 closing files reviewed, Pope & Booth charged HUD \$25 for each wire transfer. However, Pope & Booth's bank only charged \$12. As a result, Pope & Booth overcharged HUD a total of \$585 on the

45 files. In addition, Pope & Booth may have overcharged HUD on every file that it closed. Thus, Pope and Booth may owe HUD an additional \$28,587 for wire transfer fee overcharges on the remaining 2,199 closings reported in SAMS.

**Special Warranty Deed
Not Recorded Timely.**

Pope & Booth did not record Special Warranty Deeds timely after closings. Pope & Booth's contract required them to record the deed on the day of closing or the next business day. Pope & Booth recorded deeds anywhere from 1 to 96 days late. However, late filing of deeds did not negatively impact home buyers. Since Pope & Booth is no longer performing closings for HUD, this compliance issue is not significant enough to warrant a separate finding and will only be reported in this summary.

Recommendations.

As a result of these findings, we recommend that HUD pursue Pope & Booth and the two title insurance companies for RESPA violations. HUD should seek to recover from Pope & Booth the \$294,461 received from Alamo Title. HUD should also determine and recover the amount Pope & Booth received from American Title, which was between \$67,425 to \$160,515. In addition, we recommend that Denver Home Ownership Center require Pope & Booth to reimburse HUD \$585 for documented ineligible wire transfer fees. Further, HUD should determine the actual number of closings performed by Pope & Booth. Then, HUD should recover the amount overcharged for wire fees on those closings, which could be as high as \$28,587.

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Abbreviations

CFR	Code of Federal Regulations
HUD	U.S. Department of Housing and Urban Development
OIG	Office of Inspector General
RESPA	Real Estate Settlement Procedures Act
SAMS	Single Family Asset Management System

Introduction

Background.

The law office of Pope & Booth, P. C. (Pope & Booth), contracted with HUD to conduct closings of HUD's single family properties for Dallas county. Pope & Booth's closing agent contract¹ started on February 1, 1997. Pope & Booth terminated its contract with HUD on April 15, 1999.

Pope & Booth had an indefinite quantity contract that provided closing services for single family properties owned by HUD. The primary objectives of the contract were to ensure that: (1) the sale of all properties closed within 60 days; (2) lenders table-funded all closings so that the funds were available to disburse at closing; (3) prompt and accurate payment of all closing costs was made; (4) net proceeds from each sale were wire transferred to HUD's account on the day of closing or the next banking day; and (5) complete and accurate closing packages were submitted to HUD within 2 business days.

To conduct a closing, Pope & Booth's contract required them as closing agent to:

- Establish individual property files and maintain the files by FHA case number.
- Coordinate with purchaser, broker, and if appropriate, mortgagee, to establish a firm closing date on or before the date specified in the Sale Contract.
- Review title information and clear routine title issues² because clear title must be conveyed on all properties.
- Prepare a pre-closing package including a draft HUD-1³, Sales Contract, Special Warranty Deed, and closing instructions from the lender to be submitted to HUD for its review.
- On the day of closing, explain all closing papers and documents to the purchaser, complete and execute the HUD-1, accept only cash or certified check, and provide a tax certificate or sufficient documentation to show taxes have been paid.

¹ Pope & Booth's contract number was H06C97000100000.

² Such as past due taxes, water bills, and liens.

³ The HUD-1 is the settlement statement used in the sale of HUD owned properties.

- On the day of closing or the next banking day, deposit sales proceeds, initiate a wire transfer, and obtain the bank's wire transfer confirmation.
- On the day of closing or the next working day, record the Special Warranty Deed.
- Store title documents⁴ that are the property of HUD in a secure cabinet furnished by the closing agent.

According to information obtained from HUD's Single Family Asset Management System (SAMS), Pope & Booth closed 2,244 properties as a closing agent from February 1, 1997, to January 31, 1999. We were unable to confirm this figure or otherwise determine the total number of sales that Pope & Booth closed due to the significant error rate in SAMS data.⁵ Neither HUD nor the closing agent could provide a more accurate number of the closings performed.

For each closing performed, Pope & Booth received \$90 from HUD. If a sale canceled, HUD paid Pope & Booth \$22.50. Pope & Booth maintained three offices that conducted closings: Grand Prairie, Lewisville, and Dallas, Texas. Its main office was in Austin, Texas.

Audit Objectives.

Our audit objective was to determine whether management controls were adequate to ensure the prevention of fraud, waste, and abuse.

Scope and Methodology.

We obtained background information by:

- Reviewing the Fort Worth Single Family Office file on Pope & Booth.
- Reviewing prior closing agent audit programs.
- Participating in a teleconference with KPMG regarding its findings for the fiscal year 1998 FHA Financial Statement Audit.
- Reviewing the KPMG Briefing Paper regarding the fiscal year 1998 FHA Financial Statement Audit.

To accomplish our audit objectives, we:

⁴ Such as title policy and deed.

⁵ Audit testing of SAMS data for the closings conducted by Pope & Booth showed that there was a 22% error rate. In our original sample of 50 files, 11 were improperly identified as being closed by Pope & Booth.

- Examined the contract and HUD's Property Disposition Handbook.
- Obtained and tested information from SAMS.
- Obtained from SAMS a listing of closings performed by Pope & Booth, from which we selected our sample of closings for audit testing.
- Interviewed HUD and Pope & Booth staff at various offices regarding the closing process.
- Obtained an understanding of Pope & Booth's closing and accounting processes.
- Obtained and reviewed 45 closed and 5 canceled files while on-site at Pope & Booth's Grand Prairie and Lewisville offices. We selected files judgmentally using a random number generator. Because of the SAMS errors, the 11 files that were not closed by Pope & Booth were replaced by another judgmental sample while on-site. We tested closing files for the following contractual and HUD Handbook requirements:
 1. The property closed timely and, if the property did not close timely, we documented the number of days late;
 2. The closing file contained an extension request and approval, if applicable;
 3. The correct extension fee was collected, if applicable;
 4. Only allowable expenses were paid;
 5. The correct fees were collected;
 6. The sale proceeds were deposited timely;
 7. The correct amount was wired timely;
 8. The Deed was recorded timely;
 9. The correct amount was collected for the taxing authority;
 10. The correct amount was paid to the closing agent;
 11. Returned funds were distributed correctly;
 12. Clear title was issued;
 13. The title insurance premium was not split;
 14. A Warranty Deed was prepared;
 15. The Warranty Deed was forwarded to HUD timely;
 16. The selling amount on the sales contract and the settlement statement were identical;
 17. Closing costs for the buyer were identical on both pages of the HUD-1; and

18. The correct amount of extension fees were on the HUD-1, if applicable.

Audit Period and Sites.

We conducted the audit at Pope & Booth's offices in Grand Prairie, Lewisville, and Austin, Texas. The audit covered closings by Pope & Booth from February 1, 1997, to January 31, 1999. We extended the scope of our review to include payments Pope & Booth received from title companies on its contract with HUD. We performed site work from February 1999 through March 1999. We conducted our audit in accordance with generally accepted government auditing standards.

Pope & Booth Split Title Insurance Premiums

Even though Pope & Booth performed no additional services beyond those required in the closing agent contract, it received a 40 percent split of title insurance premiums from two title insurance companies. The Real Estate Settlement Procedures Act (RESPA) prohibits fee splitting and receiving unearned fees for services not actually performed. Because Pope & Booth did not perform any additional services and received a split of title insurance premiums, Pope & Booth violated RESPA. From February 1998 to June 1999, Pope & Booth received unearned fees which range between \$361,886 to \$454,976⁶.

Criteria.

Pope & Booth's closing agent contract⁷ stated that the closing fee paid by HUD was intended to be inclusive of all services and the preparation of all documents required by any party to the closing, including the lender. Further, the contract prohibited Pope & Booth from collecting any fees for services or documents required under the contract above and beyond HUD's established closing fee.

The RESPA is a consumer protection statute that was first passed in 1974. One of its purposes is to eliminate kickbacks and referral fees that increase unnecessarily the costs of certain settlement services. The RESPA section titled--Prohibition against kickbacks and unearned fees -- states in part (c) "No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed. A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section."⁸ Simply put, RESPA prohibits fee splitting and receiving unearned fees for services not actually performed.

⁶ Because of the time it takes to process payments, Pope & Booth received payments from Alamo Title until June 1999.

⁷ Section B.5.

⁸ Title 24 CFR 3500.14.

Pope & Booth received a percentage of the title insurance premiums.

In 49 percent of the closing files reviewed⁹, Pope & Booth received a 40 percent split of the premiums from two title companies that provided title insurance to lenders and/or homeowners. In each of the 22 cases, either the title commitment or the title company invoice documented that Pope & Booth would receive 40 percent of the title premium. Further audit work revealed that Pope & Booth had written agreements to split title insurance premiums with two title companies: American Title and Alamo Title.

Title company agreements duplicate work required in closing agent contract.

Pope & Booth's agreements with the two title companies consisted of duties that duplicated the work that HUD required of its closing agents. Specifically, Pope & Booth's tasks under the title company agreements included:

- performing closings in compliance with the terms and conditions of the sales contract;
- closing in accordance with normal legal and business practices;
- closing in strict compliance with the title commitment terms and requirements;
- disbursing consideration and proceeds through Pope & Booth's escrow account properly;
- recording documents properly or delivering the documents and recording fees to the title company for recording; and
- reviewing the title commitment provided and clearing any exceptions.

All of these tasks were also required by Pope & Booth's closing agent contract with HUD. In addition, HUD's contract specifically prohibited Pope & Booth from collecting any additional fees for services or documents already required as part of the closing agent contract.

Pope & Booth performed no additional work for the title company fee.

Pope & Booth performed no additional work for the title companies beyond what was required of a HUD closing agent. Yet, the two title companies paid Pope & Booth 40 percent of the title premium. RESPA considers such payments to be unearned fees. HUD's closing agent contract allowed

⁹ 22 out of the 45 closing files reviewed.

additional compensation for services other than closing activities. Yet, Pope & Booth performed no additional duties that were outside the scope of its HUD contract. Thus, HUD and the title companies paid Pope & Booth for performing the same services.

Additional audit work was performed to determine the amount Pope & Booth received as part of the fee splitting arrangements with the two title companies. Both title companies were issued subpoenas to obtain payment information.

\$294,461 paid by Alamo Title to Pope & Booth.

In response to the subpoena, Alamo Title provided check registers and other supporting information for payments to Pope & Booth. Based on the information provided, Alamo made payments to Pope & Booth from February 1998 to June 4, 1999. During that time period, Alamo Title's records showed that Pope & Booth was paid \$294,461 for insurance premiums paid for by purchasers or HUD.

American Title could not provide the total amount that it paid Pope & Booth. American Title provided database records that indicated that HUD was a party to 435 closings for properties in the Dallas county area.¹⁰ American Title did not provide the amount of fees paid to Pope & Booth for each of these 435 properties. However, they did provide the amount of title insurance premiums paid to Pope & Booth for seven properties identified during audit testing. American Title paid Pope & Booth \$2,360 for these seven properties. The amounts paid ranged from \$155 to \$369 per property. Thus for the 435 closings, Pope & Booth could have potentially received from \$67,425 to \$160,515 in unearned fees from American Title.

Pope & Booth acknowledged receiving a percentage of title premium.

In discussions with its management, Pope & Booth acknowledged that the title companies paid it a percentage of the title insurance premium. However, Pope & Booth management offered no explanation for the allowability of this practice.

¹⁰ Since Pope & Booth was the only closing agent for HUD in Dallas county that had an agreement with American Title, we concluded that Pope & Booth was the closing agent for all 435 properties. Thus, Pope and Booth would have received 40% of the title insurance premium from American title for all 435 properties.

Auditee Comments

American Title responded that because American Title complied with the rules and regulations of the Texas Insurance Code it did not violate RESPA. Further, because American Title complied with the Texas Insurance Code no RESPA violation occurred.

Alamo Title responded that Alamo Title entered into a standard contract with Pope & Booth for closing services rendered on Alamo Title's behalf and complied with the rules and regulations of the Texas Insurance Code. Additionally, Alamo Title stated that Pope & Booth received duplicative fees for performance of the same services, one from HUD and one from Alamo. Further, Alamo Title stated that Pope & Booth should either reimburse HUD or Alamo the amount it was overpaid. However, Alamo Title stated that it is not responsible to HUD for any overpayments that Pope & Booth received.

OIG Evaluation of
Comments

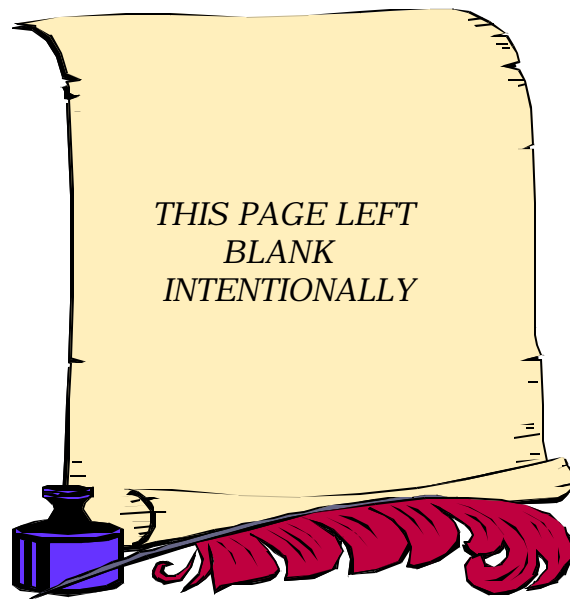
Based on our evaluation of American Title and Alamo Title's responses, the raising of the issue of Texas Insurance law versus Federal RESPA law is unfounded. If it were, Federal law would prevail, but the two are not at odds. Both title companies are raising Texas Insurance Code because they believe that the report states that title companies cannot pay a closing agent for closing services. The audit report does not state that. Texas law does allow title companies to pay for closing services. However, what the audit found was that the closing fees were indeed duplicative and thus, the title companies were paying something for nothing.

Recommendations

We recommend that the Director, Denver Homeownership Center:

- 1A. Pursue Pope & Booth and/or Alamo Title for the RESPA violations and recover \$294,461 in questioned unearned fees.

- 1B. Require Pope & Booth to research and report the amount of payments that it received from American Title for closing performed under the HUD contract.
- 1C. Pursue Pope & Booth and/or American Title for the RESPA violations and recover the questioned unearned fees of \$67,425 to \$160,515.



Pope & Booth Overcharged HUD for Wire Transfer Fees

Pope & Booth overcharged HUD to wire transfer the proceeds from sales that it closed for HUD. Pope & Booth’s contract required it to charge HUD the actual cost of the wire transfer fee. For each of the 45 closing files reviewed, Pope & Booth charged \$25 for a wire transfer. However, Pope & Booth’s bank only charged \$12. As a result, Pope & Booth overcharged HUD \$585 on the 45 files reviewed. In addition, Pope & Booth may have overcharged HUD on every file that it closed. Thus, Pope and Booth may owe HUD an additional \$28,587 for wire transfer fee overcharges on the remaining 2,199 closings reported in SAMS.¹¹

Criteria.

The closing agent contract¹² required Pope & Booth to “charge the actual cost of the wire transfer of sales proceeds to HUD and include it with settlement charges to the seller ... and deduct the cost from the sales proceeds due HUD.” In addition, Pope & Booth was required to review settlement statements prior to closing and certify that the information and costs they contained were correct.

Testing showed Pope & Booth overcharged for wire transfer fees.

For each of the 45 files reviewed, Pope & Booth charged HUD \$25 on the settlement statement to wire the sales proceeds to HUD. According to its contract, Pope & Booth was to charge HUD its actual costs for wire transfer fees. However, Pope & Booth’s bank only charged \$12 for an outgoing wire transfer. Thus, Pope & Booth overcharged HUD \$13 per wire transfer for a total overcharge of \$585 for the 45 loans reviewed.

Pope & Booth stated wire fee used to be \$25.

Management of Pope & Booth asserted that it had information that the cost of the wire transfer fee was \$25 and that the cost decreased without their knowledge. However, Pope & Booth did not provide documentation to support these statements. Further, a brochure from its bank listed the cost of outgoing non-repetitive wire transfer fees at \$12. The brochure shows that the stated fees were effective on October 31, 1997.

¹¹ See Introduction and footnote 5 concerning SAMS data errors and error rate.

¹² Section B.9.c.

Pope & Booth may have overcharged on every sale it closed.

Since Pope & Booth overcharged HUD on each of the 45 files reviewed and those files closed anywhere from April 1997 to January 1999, it probably overcharged HUD on every sale it closed. According to SAMS data for the period February 1997 to January 1999, Pope & Booth closed 2,244 properties. Thus, Pope & Booth may have overcharged HUD \$28,587 on the 2,199 closings that were not reviewed.

Auditee Comments

No comments were received on Finding 2.

Recommendations

We recommend that the Director, Denver Homeownership Center:

- 2A. Require Pope & Booth to reimburse HUD \$585 for ineligible wire transfer fees on the 45 files reviewed.
- 2B. Determine the number of sales closed by Pope & Booth as part of its closing agent contract with HUD.
- 2C. Require Pope & Booth to reimburse HUD for any additional ineligible wire transfer fees on any other HUD closings, which could potentially amount to \$28,587.

Management Controls

In planning and performing our audit, we obtained an understanding of the management controls that were relevant to our audit. Management is responsible for establishing effective management controls. Management controls, in its broadest sense, include the plan of organization, methods, and procedures adopted by management to ensure that its goals are met. Management controls include the processes for planning, organizing, directing, and controlling program operations. They include the systems for measuring, reporting, and monitoring program performance.

Relevant Management Controls.

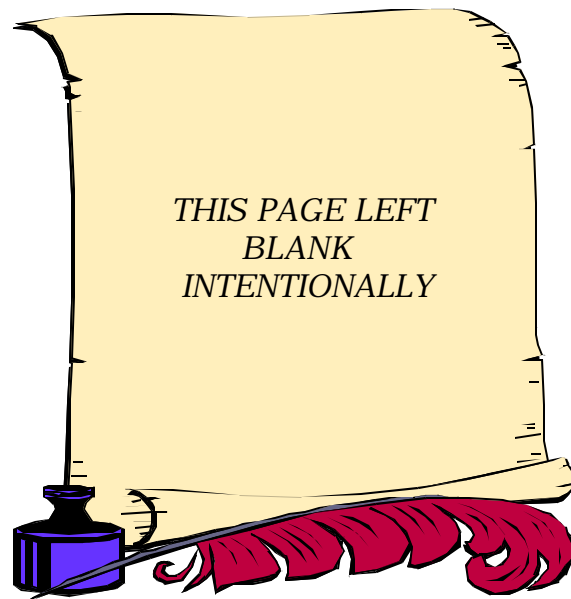
We determined the following management controls were relevant to our audit objectives:

- Policies and procedures of the sales process at HUD.
- Administrative controls to ensure that accurate data is input from the settlement statement into the Single Family Asset Management System.
- Policies and procedures of the cash receipts and disbursements controls at the closing agent.
- Administrative controls to ensure the closing documents were kept secure.

Significant Weakness.

A significant weakness exists if management controls do not give reasonable assurance that resource use is consistent with laws, regulations, and policies; that resources are safeguarded against waste, loss, and misuse; and that reliable data are obtained, maintained, and fairly disclosed in reports. Based on our review, we believe the following item is a significant weakness as discussed in this report:

Pope & Booth split the title insurance premium based on a percentage of the total amount (Finding 1).



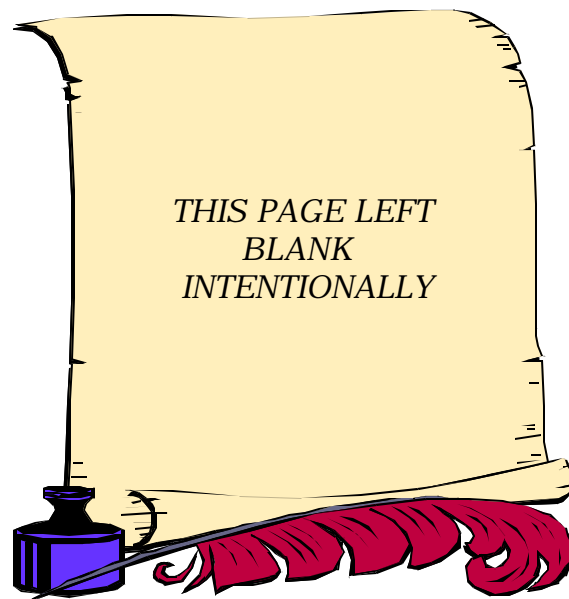
Schedule of Questioned Costs

<u>Issue</u>	<u>Type of Questioned Costs</u>	
	<u>Ineligible</u> ^{1/}	<u>Unsupported</u> ^{2/}
1A Questioned unearned fees		\$294,461
1C Questioned unearned fees		\$67,425
2A Ineligible wire transfer fees	\$585	
2C Additional wire transfer fees		\$28,587

¹ Ineligible costs are costs charged to a HUD-financed or insured program or activity that the auditor believes are not allowable by law, contract, or federal, state, or local policies or regulations.

² Unsupported costs are costs questioned by the auditor because the eligibility cannot be determined at the time of audit. The costs are not supported by adequate documentation or there is a need for a legal or administrative determination on the eligibility of the costs. Unsupported costs require a future decision by HUD program

officials. This decision, in addition to obtaining supporting documentation, might involve a legal interpretation or clarification of Departmental policies and procedures.



Auditee Comments

Kirkpatrick & Lockhart LLP

Phillip L. Schulman
202.778.9027
Fax: 202.778.9100
pschulman@kl.com

1800 Massachusetts Avenue, NW
Second Floor
Washington, DC 20036-1800
202.778.9000
www.kl.com

May 17, 2000

VIA FEDERAL EXPRESS

D. Michael Beard
District Inspector General for Audit
U.S. Department of Housing
and Urban Development
Southwest District Office of Inspector General
819 Taylor Street
Room 13A09
Fort Worth, Texas 76102

Re: Audit of closing agent contract of Pope & Booth, P.C.

Dear Mr. Beard:

We represent Alamo Title Company of Tarrant County, Inc., d/b/a Alamo Title Company, formerly Trinity Western Title Company (hereinafter "Alamo"). Enclosed is a letter from Dudley Beadles, responding to the Office of Inspector General's draft audit report of Pope & Booth, P.C. ("Pope & Booth").

As Alamo makes clear in its response, it entered into standard written contracts with Pope & Booth under which Alamo would pay Pope & Booth for closing services actually rendered on its behalf. These contracts were similar to those between Alamo and other fee attorneys and represent a standard practice in Texas. Furthermore, the contracts complied with the rules and regulations of the Texas Department of Insurance.

As you know, RESPA prohibits the giving or acceptance of any fee, kickback, or thing of value for the referral of settlement business, as well as the payment or receipt of settlement charges except for services actually performed. See 12 U.S.C. §§ 2607(a), (b). RESPA, however, provides a statutory exception for payments for services actually performed or goods or facilities actually provided. See 12 U.S.C. § 2607(c)(2). In this instance, Alamo complied with RESPA and applicable regulations. It paid Pope & Booth only for closing services actually performed on its behalf.

It appears that Pope & Booth entered into a separate contract with HUD under which the Department paid it for similar services that it performed under its contract with Alamo. Alamo was not a party to the HUD contract. Any arrangement between Pope & Booth and HUD was between those two parties and entirely independent of Alamo.

DC - 383478.1

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Kirkpatrick & Lockhart LLP

D. Michael Beard
May 17, 2000
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Alamo shares the Department's concern that duplicative fees may have been charged. If the draft report's findings are accurate, Pope & Booth charged Alamo fees to which it was not entitled. Accordingly, if Pope & Booth received two sets of fees for performance of the same services, then Pope & Booth is responsible to either HUD or Alamo for returning the amount by which it was overpaid. Alamo, however, is not responsible to HUD for any overpayments that Pope & Booth received.

For the reasons set forth above, and presented in greater detail in Alamo's enclosed response, no action should be taken against Alamo in connection with the Department's audit of Pope & Booth. If you have any further questions or if you need any additional information, please call me at (202) 778-9027.

Thank you for your consideration.

Sincerely,

Handwritten signature of Phillip L. Schulman in cursive, with initials 'eJB' at the end.

Phillip L. Schulman

Enclosure

cc: Dudley Beadles



Alamo Title Company

A member of Fidelity National Financial

May 17, 2000

VIA FEDERAL EXPRESS

D. Michael Beard
District Inspector General for Audit
U.S. Department of Housing and Urban Development
Southwest District Office of Inspector General
819 Taylor Street
Room 13A09
Fort Worth, Texas 76102

Re: Audit of closing agent contract of Pope & Booth, P.C.

Dear Mr. Beard:

This is in response to the April 27, 2000, letter from the U.S. Department of Housing Urban Development's ("HUD" or the "Department") Office of Inspector General ("OIG") to the Alamo Title Company of Tarrant County, Inc., d/b/a Alamo Title Company, formerly Trinity Western Title Company ("Alamo" or the "Company"). Attached to the OIG's letter was a copy of a draft report (the "Report") that the OIG prepared in connection with its audit of HUD's closing agent contract with Pope & Booth, P.C. ("Pope & Booth"). The Report suggests that Alamo may be responsible for payment to HUD of those fees that it paid to Pope & Booth for the performance of certain closing services. We take exception to the Report's findings. The recommended action against Alamo conflicts with the Real Estate Settlement Procedures Act of 1974 ("RESPA"), 12 U.S.C. §§ 2601 et seq., and with the facts and circumstances surrounding Alamo's relationship with Pope & Booth.

Alamo has carefully reviewed RESPA and regulations promulgated thereunder by the Department. As more fully discussed below, we believe that Alamo has fully complied with RESPA and the applicable regulations. Alamo paid Pope & Booth only for services actually performed under a valid Texas contract. As the Report notes, the Department paid Pope & Booth for similar, and perhaps overlapping, services. It thus appears that Pope and Booth charged duplicative fees. Therefore, Pope & Booth, and not Alamo, is responsible for returning any duplicative payments.

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3500 Hulen Street • Fort Worth, TX 76107-6898 • (817) 731-8715 • Fax Metro (817) 731-0243

I. BACKGROUND

As stated above, on April 27, 2000, Alamo received the Report from the OIG alleging that Alamo's payments to a fee attorney, Pope & Booth, constituted unlawful fee-splitting in violation of RESPA, and recommending that the Department seek payment from Alamo of those fees it paid to Pope & Booth. The Report is based on an audit of Pope & Booth's offices in Grand Prairie, Lewisville, and Austin, Texas.

A. Texas Insurance Practices

It is standard practice in Texas, pursuant to the Department of Insurance's rules and regulations, for title companies to enter into formal contracts with approved fee attorneys to perform certain closing services, including, but not limited to, preparing closing documents, conducting the physical closing, and disbursing loan proceeds. Payment is traditionally in the form of a percentage of the title premium. The Texas Title Insurance Basic Manual permits a title insurance company to pay an attorney for examination of a title and/or closing a transaction so long as certain requirements are met. These requirements include:

- the attorney's performance of those closing services that he or she is authorized to perform¹ and/or the examination of the title required for a commitment of title insurance prior to the issuance of any such commitment, construction binder, policy or other contract of title insurance, to determine the condition of the title to be insured;
- timely disclosures of the payment;
- payments commensurate with the services actually performed;
- the attorney's provision to the title insurance company of a written schedule of charges normally imposed for such services, to which the title insurance company has agreed and approved as reasonable;
- the attorney's presentation to the title insurance company, at or prior to the time of payment, of a written itemized statement or invoice setting forth the actual services rendered and billed for in representing the company at closing;
- the attorney's remittance of any title insurance premium collected to the title insurance company; and

¹These services may include: (1) the investigation made on behalf of the title insurance company to determine proper execution; (2) acknowledgment and delivery of all conveyances, mortgage papers, and other title instruments; and (3) a determination that all delinquent taxes are paid, current taxes have been properly prorated between the purchaser and seller, consideration has been passed, proceeds have been properly disbursed, a final title search has been made, and all necessary papers have been filed for record. See Procedural Rule P-1(f).

- the title insurance company's retention in its official records of written itemized statements or invoices in its official records for five years.

See Procedural Rule P-22. In addition, no portion of the charge for services actually rendered and no payment shall be made for the solicitation of, or as an inducement for the referral or placement of the title insurance business with the title insurance company. See id.

B. Pope & Booth's Contracts with Alamo and HUD

During the relevant period, Alamo entered into several approved attorney contracts with the law firm of Pope & Booth, clearly setting forth the duties and responsibilities required of Pope & Booth to earn a fee (Exhibit A). These contracts complied with the aforementioned Texas rules and regulations. Under the contracts, in those instances where Pope & Booth performed actual closing services for the Company, Alamo would retain sixty percent (60%) of the title premium and disburse forty percent (40%) of the premium to Pope & Booth. The original contract, dated August 1, 1992, provides that "no payment shall be made for the solicitation of, or as an inducement for the referral or placement of the title insurance business."

According to the Report, Pope & Booth had also entered into a closing agent contract with the Department between February 1, 1997, and April 15, 1999. The Report alleges that Pope & Booth's contract with Alamo included obligations that duplicated the work that HUD required of Pope & Booth, resulting in Pope & Booth's receipt of duplicative fees.

II. RESPA REQUIREMENTS

RESPA requires disclosures to borrowers and prohibits certain settlement practices. The statute is the central source of law in this area. In addition to the statute, however, administrative regulations have been issued, as have a number of administrative interpretations of the statute and regulation.

A. Coverage and Exclusions from Coverage

RESPA covers "settlement services" involving federally related mortgage loans. The statute provides a broad definition of the term "settlement service." That definition provides that a "settlement services" includes:

[a]ny service provided in connection with a real estate settlement including, but not limited to, the following: title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, . . . and the handling of the processing, and closing or settlement.

12 U.S.C. § 2602(3). Accordingly, closing functions are included within the statutory

definition of a "settlement service."

B. Prohibition on Kickbacks and Unearned Fees

In enacting RESPA, Congress expressed an intent to outlaw certain "kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(a). To this end, Section 8(a) of RESPA prohibits the giving or acceptance of any "fee, kickback, or thing of value" for the referral of settlement service business. 12 U.S.C. § 2607(a). Congress also prohibited the payment or receipt of settlement charges except for services actually rendered. Section 8(b) of RESPA provides that "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed." 12 U.S.C. § 2607(b).

C. Exceptions to Section 8 Prohibitions

RESPA's prohibitions on kickbacks and unearned fees are subject to certain statutory exceptions, including an exception applicable to payments for services actually performed or goods or facilities actually provided. Section 8(c) provides:

Nothing in [Section 8] shall be construed as prohibiting . . . the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed.

12 U.S.C. § 2607(c)(2).

The Department has incorporated this exception into its regulations. The regulations express HUD's concern with settlement service providers receiving multiple payments in the same transaction where the settlement service provider does not perform additional services to justify the fee. They provide, however, for the aforementioned exception, stating:

When a person in a position to refer settlement service business, such as an attorney, mortgage lender, real estate broker or agent, or developer or builder, receives a payment for providing additional settlement services as part of a real estate transaction, such payment must be for the services that are actual, necessary and distinct from the primary services provided by such person.

24 C.F.R. § 3500.14(g)(3). The legislative history further clarifies this exception by indicating that Section 8 "is not intended to prohibit the payment by title insurance companies, attorneys, lenders and others for goods furnished or services actually rendered." S. Rep. No. 93-866 reprinted in 1974 U.S.C.C.A.N. 6546, 6551 (1974).

III. RESPONSE TO DRAFT AUDIT FINDINGS

The Report indicates that Pope & Booth had entered into a closing agent contract with the Department under which HUD paid it for performing certain closing functions. The OIG's findings allege that Alamo paid Pope & Booth for performing the same services required of it under its contract with HUD. The Report recommends that HUD seek payment from Pope & Booth and/or Alamo for the amounts it disbursed to Pope & Booth. This recommendation is inappropriate.

Alamo entered into a valid contract with Pope & Booth in the ordinary course of business and pursuant to the Texas Department of Insurance regulations. Its arrangement with the fee attorney was similar to arrangements routinely made between title companies and fee attorneys throughout Texas. The Company paid Pope & Booth only for legitimate, non-referral closing services actually performed in compliance with their contract. Alamo neither paid a kickback or unearned fee to Pope & Booth nor paid for the referral of settlement business. Rather, we compensated Pope & Booth only for services actually performed. Such payment was lawful under Section 8(c) of RESPA and applicable regulations.

The fact that Alamo may have paid Pope & Booth in connection with similar services for which the Department compensated them is an issue of concern to us as well as to the Department. If the Report is accurate, Pope & Booth successfully secured funds from Alamo to which it was not entitled, causing the Company to furnish undeserved compensation. Nevertheless, Alamo was neither privy to nor party to Pope & Booth's contract with the Department. Any arrangement between Pope & Booth and HUD was between those two parties independent of Alamo. We properly treated our contract with Pope & Booth as a formal arrangement standard in the Texas industry, and we conscientiously paid Pope & Booth for closing services actually rendered on our behalf.

Under no circumstances is Alamo responsible to HUD for the amounts it paid to Pope & Booth under its fee attorney contract. As stated above, the Department's regulations provide that "[w]hen a person in a position to refer settlement service . . . receives a payment . . . , such payment must be for the services that are actual, necessary and distinct from the primary services provided by such person." 24 C.F.R. § 3500.14(g)(3) (emphasis added). Therefore, as Pope & Booth was the entity in receipt of payment, Pope & Booth is solely responsible for the repayment of such funds. Pope & Booth, not Alamo, benefitted from the former's successful charging of duplicative fees. Accordingly, Pope & Booth should return such fees to either Alamo or the Department.

IV CONCLUSION

If the findings in the Report are accurate, it appears that Pope & Booth charged the Department and Alamo duplicative fees for the same services. As Alamo entered into a valid and standard contract requiring payment only for services actually performed, the Company complied with RESPA. Alamo is not responsible for Pope & Booth's conduct. Pope & Booth is solely responsible for the repayment of duplicative fees to the Department and/or Alamo.

We appreciate the opportunity to respond to the findings in the Report. As demonstrated, Alamo has complied with RESPA and applicable regulations.

If you have any further questions or are in need of further information, please call me at (817) 731-8715. Thank you for your kind consideration.

Sincerely,

Dudley Beadles
President

A handwritten signature in black ink, appearing to read "Dudley Beadles", with a long horizontal flourish extending to the right.



May 15, 2000

Via Federal Express

Mr. D. Michael Beard
District Inspector General
U.S. Department of Housing and Urban Development
819 Taylor Street, Room 13A09
Fort Worth, Texas 76102

Re: Your letter of April 27, 2000 and
Draft report, Pope & Booth

Dear Mr. Beard:

My office received and reviewed your draft report concerning the closing of real estate transactions performed by Pope & Booth, P.C., acting as HUD's agent under its contract with your department. This letter will deal only with those summary findings and recommendations which are addressed directly toward American Title Company and which involve alleged violations of RESPA.

In the draft report you recommend in both the Executive Summary at page iv and in Finding 1 at page 8 that HUD and the Director, Denver Homeownership Center, pursue American Title Company for "RESPA violations". In essence, you have alleged that American Title Company violated RESPA by either paying or receiving fees for services not actually performed in the rendering of a settlement service.

Our records show that Pope & Booth, P.C., ordered title evidence in the form of a Commitment for Title Insurance from American Title Company which title information would be used in the closing of a real estate transaction by Pope & Booth. In order for Pope & Booth to have complied with the closing instructions of either a purchaser or lender in the subject transaction that title insurance be provided, it would have to order title evidence from a licensed agent which possessed a licensed title plant in the particular county in which the property was located. Pursuant to the Texas Insurance Code, American Title Company is a licensed agent for several title insurance underwriters also licensed to operate in Texas. We also maintain licensed title plants for several counties in the immediate metropolitan area. One would have to assume that Pope & Booth is not licensed as such and would therefore have to order title evidence from a provider such as American Title Company.

6029 BELTLINE ROAD

SUITE 200

DALLAS, TEXAS 75240

972-789-8400

FAX: 972-490-7260

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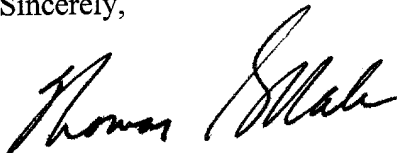
Ticor Title Insurance Company

Procedural Rule P-22. authorizes the payment by a title insurance agent to an attorney at law duly licensed by the Supreme Court of Texas of a fee for the closing of a transaction provided that the services described in Procedural Rule P-1.,f., have been performed. Pope & Booth, P.C., appear to have been duly licensed to practice in the State of Texas. The duties which Pope & Booth, P.C., performed as a part of the closing process with HUD are also those services which are required to be performed by the Texas Insurance Code in order to allow American Title Company to pay them a fee for the closing.

The division of the title premium between the furnishing of title evidence and examination and the closing of the transaction is set forth in Procedural Rule P-24. Rule P-22.,(F), further provides that so long as form T-00 which form verifies that the services for which a fee is earned is completed and presented to us that the fee (based upon a division of the premium per Rule P-24) may be paid. A random sampling of the closed files was performed by my office and the required T-00's were found in each.

In conclusion, our review of the closed files indicates that American Title Company strictly complied with the Texas Insurance Code and the rules and regulations promulgated thereunder in the conduct of its business with Pope & Booth, P.C., in providing title evidence, examination and issuance of the title insurance policies required by the parties to the transactions closed by Pope & Booth, P.C. Compliance with the Texas Insurance Code can hardly be the basis for alleging any violation of RESPA by American Title Company.

Sincerely,



Thomas G. Naler
Executive Vice President/Corporate Counsel

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