Title News

the official publication of the American Land Title Association

New ALTA Officers And Board Members Are Installed

November, 1972

President's Message

NOVEMBER, 1972

We have just concluded an outstanding convention in Houston. Certainly the Texans did extend a welcome and hospitality as big as their state. Our thanks from all the members to Jim Harris and Gloria Bartram and their committees for such a warm reception.

The membership was brought current as to the many activities of our Association. Of course, the one that received the most attention was federal regulation of the land title industry. I know each of you will want to read the January issue of *Title News* that reports the convention proceedings.

I feel honored to have the opportunity to serve the ALTA as your president. This Association has been fortunate to have outstanding leaders in the past, and I shall put forth my best efforts to uphold this tradition.

While we are confronted with major problems, I also believe our industry at this time has a very real opportunity to accomplish significant gains. The federal intervention has had the result of bringing our members closer in accord. We firmly believe that the logical solution is to have strong state regulation as well as to eliminate improper practices where they exist. Your officers will be striving to accomplish that result next year.

Sincerely,

James O Hickman

James O. Hickman

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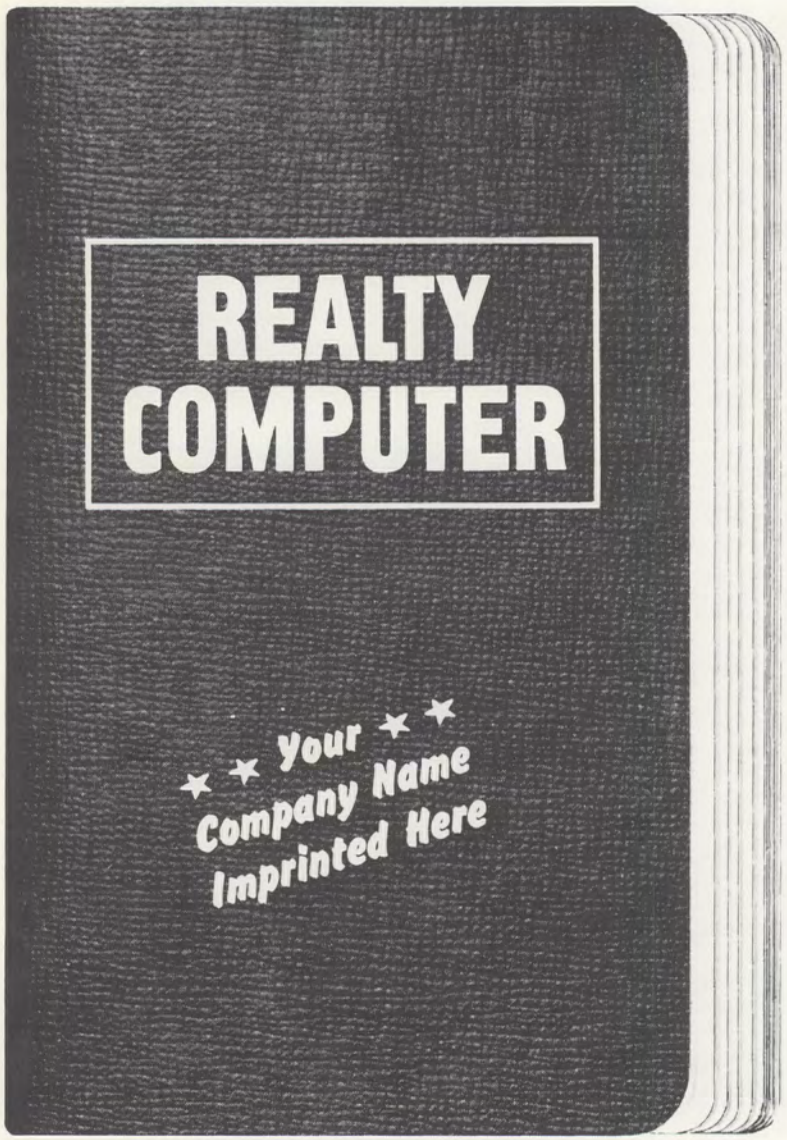

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meeting timetable

November 3-4, 1972
Land Title Association of Arizona
Tucson, Arizona

November 9-10, 1972
Dixie Land Title Association
DeSoto Hilton Hotel
Savannah, Georgia

December 6, 1972
Louisiana Land Title Association
Royal Orleans
New Orleans, Louisiana

1973

March 14-16, 1973
ALTA Mid-Winter Conference
Del Webb's TowneHouse
Phoenix, Arizona

April 13-15, 1973
Oklahoma Land Title Association
Camelot Inn
Tulsa, Oklahoma

May 3-5, 1973
Texas Land Title Association
Camino Real Hotel
Mexico City, Mexico

June 3-5, 1973
Pennsylvania Land Title Association
Host Corral
Lancaster, Pennsylvania

June 8-9, 1973
South Dakota Land Title Association
Holiday Inn
Mitchell, South Dakota

June 8-9, 1973
New England Land Title Association
Stratton Mountain Inn
Stratton, Vermont

August 22-25, 1973
New York State Land Title Association
Whiteface Inn
Lake Placid, New York

September 30-October 4, 1973
ALTA Annual Convention
Century Plaza
Los Angeles, California

1974

March 6-8, 1974
ALTA Mid-Winter Conference
Fairmont-Roosevelt Hotel
New Orleans, Louisiana

September 29-October 3, 1974
ALTA Annual Convention
Americana Hotel
Bal Harbour, Florida

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Features

Departments

ON THE COVER: Newly-elected ALTA officers and members of the Board of Governors are pictured during installation ceremonies following their election October 4 during the 1972 Annual Convention of the Association in Houston. At top, left, from left, are Finance Committee Chairman Alvin W. Long (Chicago Title and Trust Company); Governor Robert P. Stewart, Jr. (Southwest Title Insurance Co.); Governor Mel Kensinger (Colorado Title Guaranty Co.); and Vice President James A. Gray (Fidelity Abstract & Guaranty Co.). At bottom, left, from left, are Governor E. Gordon Smith, Sr. and Title Insurance and Underwriters Section Chairman Robert C. Dawson (both Lawyers Title Insurance Corporation). At bottom right, from left, are Immediate Past President John W. Warren (Albright Title & Trust Company); President James O. Hickman (Pioneer National Title Insurance Company); Governor Francis E. O'Connor (Chicago Title and Trust Company) and Treasurer James G. Schmidt (Commonwealth Land Title Insurance Company). In the other photograph, President Hickman is shown presenting remarks during the Convention. Past President Thomas J. Holstein (LaCrosse County Title Company) is shown officiating at the installation at top, left. Abstracters and Title Insurance Agents Section Chairman Robert J. Jay (Land Title Abstract Co.) was unable to be present when these photographs were made.

VOLUME 51, NUMBER 11, 1972

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GARY L. GARRITY, Editor, ELLEN KAMPINSKY, Assistant Editor

The development of Commonwealth Title Insurance Company is involved to a considerable extent with the history and development of the City of Tacoma. A thumbnail sketch of early Tacoma history may be of interest to readers of this article.

In 1870, Tacoma was a small waterfront settlement of a few pioneer families. By 1880 the population was slightly fewer than 1,100. During this time there was much speculation and conjecture regarding the location of the western terminus of the proposed Northern Pacific transcontinental railway. In 1883, the year the company was founded, the population of Tacoma was 4,400. The Northern Pacific transcontinental railway was completed in September of that year, with Tacoma as its western terminus. Needless to say, this sparked a sizeable population increase and proportionately greater amounts of activity in real estate. By the year 1890, the population of Tacoma had grown to 36,000. By 1910, it was 83,000. At the present time, it is over 160,000.

Commonwealth Title Company, as previously mentioned, was formed in 1883. No knowledge is available as to whether or not it was the first abstract company in town, but this could be a possibility. The small number of recordings at that time would have made it possible to compile abstracts by searching the public records. The records in Pierce County go back to the middle 1850s. There were recorded land transactions prior to that. However, the earlier records are lost, due to the fact that a pioneer burglar set fire to and burned to the ground the county auditor's office in order to destroy evidence of his activities.

It should be remembered that in 1883 Tacoma was a small remote settlement of mostly wooden frame buildings and dirt streets—usually mud, due to the rainy climate. At that time, under those conditions, setting up a title plant was a very expensive and risky undertaking. Therefore certain economies were put into effect, which turned out to be very false economy as the community grew. The original tract indices of Commonwealth were large permanently bound ledgers. There were situations where there was more than one account per page. Insufficient blank pages were provided for future postings. Therefore, it became necessary when the land boom period arrived to find alternate

First, Make Sure

It's Adaptable to the Job

David Fogg, President
Commonwealth Title
Insurance Company
Tacoma, Washington

The attractive plant area of the modern Commonwealth Title Insurance Company in Tacoma uses space and equipment with maximum efficiency.

places to enter the postings, as appropriate available space in these tract books was rapidly filled. The accounts were continued in various blank locations in the same book, and when that space became filled up they continued the account in other books, and so on, until it became—to say the least—awkward and inefficient. In 1902, the company was sold and taken over by new management. The president at that time ordered the start of conversion of the plant from the bound indexes to loose-leaf. These loose-leaf tract indexes became the basis of today's plant.

Note—the company operated solely as an abstract company until 1926 when a separate company was formed to underwrite title insurance. The title plant was conveyed to the insurance company. The abstract business was phased out in 1947 due to lack of sufficient demand.

The company emerged from the period of the depression and World War II somewhat in disorder and greatly in need of maintenance and improvements, especially maps for acreage accounts. Very little plant work had been done for several years, especially during the war when key employees were in the service and other help not available. In 1946, the president directed a group, which included this writer, to take the necessary steps to begin corrective action.

The first step was starting a program of making new arb maps and revising all the active acreage accounts. The county maps were not useable. At the same time it was decided to build a new general index as the existing one was a conglomeration of card indexes, books, and typewritten sheets in clipboards. It took half an hour to make a full G.I. search on a common name. We were at the point where firm decisions had to be made on the kind of plant we were going to have. The type of arbitrary system to use was of the utmost importance, due to the fact that over 40 per cent of the recordings in Pierce County contain metes and bounds descriptions. Platting laws were not enforced for many years. Also, many of the older plats had lots as large as seven to ten acres which, in the course of time, were subdivided. It was decided to use a straight arbitrary system. This decision raised some eyebrows at the time, and I am sure many plant specialists will criticize it to this day. However, we consider our decision right for our situation. Admittedly, the straight arbitrary system is more time consuming to install and maintain, but is by far the simplest to use, especially in the case of inexperienced employees.

Another point to consider, many more people use the plant than work on it. Two main drawbacks in the straight arbitrary system are the necessity to backpost segregations, and in large active accounts sometimes the number of arbs becomes too great. In cases

where separating the account into two or more was inappropriate, we tried to overcome the latter problem with transposition sheets but this solution was not very popular. We have since solved this problem by placing a photograph of the arb map at the beginning of the account and discontinuing posting to the account. The original arb map then is moved forward and new pages are inserted for the current posting. This effectively eliminates the backposting. We also discovered early in the program that complete arb maps, that is compiling the map from every pertinent recorded instrument, were too time consuming. We discontinued this practice. Maps are now assembled from all the existing starters—recorded plats, highway maps, and private surveys (we have over the years collected extensive files of private surveys) which are available. When the map is completed it is placed in the tract book at the end of the original account which is no longer posted to. Also inserted is a page with the starters posted thereto, which is used for new postings. The map is then further refined as postings and segregations occur.

In 1950, there still remained a few of the old bound tract indexes. The nuisance they caused became unacceptable. The material in these old books was typed onto loose-leaf sheets and integrated into our existing tract books. Tract books keep growing and the older pages become dirty, worn and tattered. The problem of the older pages deteriorating from continuous handling was partially solved by removing all pages with entries dated prior to 1940. These pages were placed in binders which are mounted in racks under the current tract book counters where they are available but seldom used. This program keeps the number of active books fairly constant. Deterioration of the arb maps is retarded by placing them in transparent plastic envelopes. We have noticed that in most title plants tract book pages have numbered columns for lots or arb numbers which are numbered in multiples of four—say, for example, 16 columns or 32 columns. When more than the 16 or 32 lots or arb numbers are required, the subsequent final digit of the higher numbers belongs in a different column than the digit or final digit for the first—for example, 32 numbers. This increases the possibility of errors in posting and chaining. Our tract book sheets now have 30 columns for the lot or arb numbers. In this way there can be inserted as many numbers as is reasonable and the final digit will always be in the same column.

This article so far has dwelt mostly on the tract indexes. However, our general index, while not being new or radical, has a twist to it that may be of interest. The index is a Soundex type with the individual cards mounted on perpendicularly mounted pivoting panels. We put the most recent seven years of index on the panel mounted cards. The earlier cards were photographed on 16 millimeter microfilm which was placed in cartridges which can be inserted in a Lodestar Reader. When coded with the Soundex Code and the appropriate buttons pushed, the film automatically is wound to the designated name. This system has saved large amounts of space. There are, however, some minor disadvantages involved with updating the film when the panels become full. (Once since 1966.)

We have always been interested in merchanizing wherever possible. In some cases we have redesigned machines and adpated existing equipment to our own use. As a very small example, the writer has never personally seen for sale a simple machine that will run multiple paper staplers at once. We designed and had one built over 20 years ago. It is still efficiently fastening policies. Members of our staff have designed such items as map racks, drafting tables, and other specialized furniture and equipment which was unavailable or not adapatable to our satisfaction.

We make our own takeoff and also sell takeoff. The present system involves photographing the takeoff on 35 millimeter microfilm. Six instruments are photographed at a time. This is quite an interesting procedure and is done as follows: The table on the microfilm camera is painted in the form of six rectangles representing legal size paper. They are separated by three-eighths of an inch. The instruments are placed on the rectangles and photographed. We found that using a glass cover to flatten the instruments caused them to shift out of their prearranged position, defeating the purpose of the system. The microfilm is printed out on a Xerox Model 1824 Copier with microfilm head. The paper is synthetic parchment called "Patapar" (Patapar is translucent, enabling copies of the takeoff to be made on Bruning copiers), is prepunched and perforated in six sections corresponding to the film arrangement, so that after printing the "Patapar" is torn apart on the perforations and the documents put in order for posting.

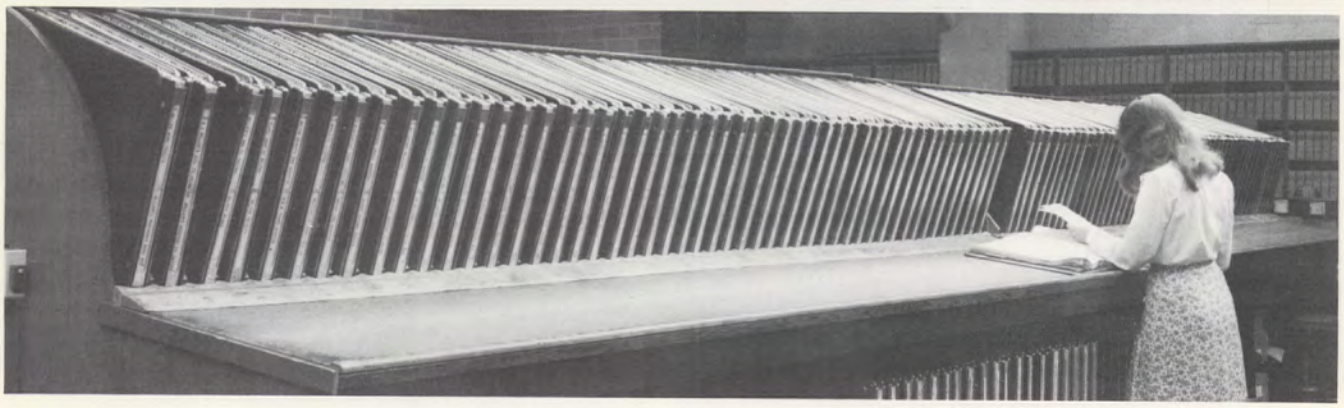
I am sure the reader can now see why it is extremely important to accurately locate the documents on the film. To maintain this accuracy we constructed a vacuum table. It is composed of a one-eighth inch steel plate which is sealed on a flange placed around the edge of the original camera table. The enclosed space is a plenum chamber. This one-eighth inch piece of steel is perforated by 744 eighth-inch holes (the writer remembers the 744 holes very vividly as he drilled every one of them by hand with a quarter-inch electric drill). A hole was cut through the original table of the camera to which is attached a flexible hose. The hose is attached to a tank-type vacuum cleaner suction unit installed for silencing in a box packed with glass fiber. When the vacuum is turned on, the air rushes through the holes and when covered by the instruments a vacuum is created, holding the documents perfectly positioned and flat. Rube Goldberg, yes—but it has been working for a number of years.

We have looked into all sorts of machinery to mechanize the typing of the reports and policies. In 1952, we started using autotypist equipment. In 1972, we still are using this equipment; of course, not the same pieces. Many people will probably consider us relics of the high stool and green eye shade era for not converting to equipment more commonly used that operates from a combination of perforated tape and edge punched cards. We have studied that system many times. Our research could not make the figures produce answers that would show for our company an economic improvement in a changeover. Autotypist machines will not produce efficiently unless close

attention is paid to proper location of the various items on each perforated roll and the relationship between the rolls. Typing of material not adaptable to the equipment is wasteful. The most important ingredient of the autotypist installation is operators who are willing and able to take full advantage of the capabilities of the machine. The paper tape machines commit the whole typing operation to one system. The possibility exists that new technology could render all the tapes obsolete. The use of translucent paper for the office copy of report forms greatly reduces the amount of typing as the original can be cut or laminated as desired for updating. Our customer copies are produced on a Bruning copier.

This article is not intended to promote or criticize any type or make of equipment or any particular system of operation. The only intent is to describe a few of the processes employed to upgrade a particular plant under a particular set of circumstances which turned out to be successful. Experience has taught us that many new theories and machines may be good, but it is important to be sure they are adaptable to a particular job before getting committed. It should always be borne in mind that in the absence of competent and loyal employees the best title plant in the world is but a collection of second-hand office equipment, tons of used paper, and hundreds of feet of exposed film.

Equipment specifically suited or modified for each job characterizes the Tacoma Commonwealth plant. Shown clockwise, starting at right, Bruning machines print copies of commitments and maps. The tract index counter features newer, actively-used binders on top, angling them to facilitate removal and reducing wear and tear, while seldom-used, older indexes are kept on bottom; slots for all binders have sponge rubber buffers. Printing and takeoff are done on a Xerox 1824. General index contains panel mounted cards, at left, and push-button reader, at right.



ALTA Statements to HUD, VA Challenge Methodology, Regulation

(Editor's note: This is a condensation of the ALTA statement filed with HUD on that agency's October 15, 1972, deadline date, in response to proposed settlement cost maximums and other regulatory material regarding six locales—which were published by HUD in the July 4, 1972, *Federal Register*. A similar ALTA statement was filed with the Veterans Administration regarding proposed VA settlement cost maximums and other regulatory material for the same six locales, published in the August 26, 1972, *Register*.)

* * *

This memorandum is filed on behalf of the American Land Title Association and its members. The Association has employed Arthur D. Little, Inc., a nationallly recognized research firm, for purposes including the analysis of methodology used by the Department of Housing and Urban Development in formulating proposed maximum settlement charges. As of this date, Arthur D. Little, Inc. has not completed its work. We therefore reserve the right to submit a supplementary statement based on its findings, or any additional information, if we deem that such data or facts would be helpful or explanatory. The time for preparation and clearance of this memorandum has been exceedingly short. The proposals published by HUD on July 4, 1972 will have a serious and adverse impact on all real estate transactions, not limited to those involving the home buyers for whose primary benefit they are designed.

Overview

The American Land Title Association is not only in sympathy with, but supports, the movement which has for its purpose the elimination of abuses, unsound and uneconomical practices in the closing of real estate transactions everywhere and anywhere in the United States.

To this end, it does not oppose appropriate regulation but on the contrary, has itself been instrumental, in increasing degree, in creating statutory regulatory procedures in the several states.

Whatever else may be subject to dispute in this complex field, it is hardly a subject of debate that regulation of this industry is not a simple matter. To those who are really familiar with the operations involved in such transactions, it is equally indisputable that practices, laws, and economic factors require the conclusion that regulation is best undertaken on the local, i.e., the state, level.

This is not to say, and this Association does not say, that nothing can or should be done at the federal level to encourage a standardization of practices across the nation to make transfers of real estate more efficient and less costly, and—what may be equally important—more understandable to the parties involved with particular reference to those who are purchasing single-family residences, whether they be separate houses or units in apartment complexes.

The Standardized Settlement Statement

In conformity with the foregoing, the American Land Title Association favors, and approves, the effort and purpose of the Secretary to prescribe a standardized title settlement statement for use in transactions involving FHA and VA loans. It does not approve the particular form, a part of the proposals, because, from the information received from its members, the Association con-

ceives that it will not fit the circumstances and practices of some areas, and certain important elements are not provided for. This Association is prepared to appoint a committee of knowledgeable members of our industry and to join with you and other concerned groups (such as The Mortgage Bankers Association and the American Bar Association) to help compose a form, or a group of forms, which will better serve your intent and goal.

Abuses, Kickbacks, And Unearned Payments

While the American Land Title Association wholeheartedly supports standarized settlement cost reporting forms, it must preface its comments on proposed corrective measures as to abuses, kickbacks and unearned payments with several caveats. Foremost is the observation that recent criticism of the title industry has seriously, and without justification, undermined public confidence in an industry which has been discharging an important consumer protection function since 1876.

A recent study by your Department and the Veterans Administration, in point 4 of a ten-point Summary of Findings, stated:

> "Costs appear to be higher in some areas, but unreasonable costs probably occur in fewer areas than may be popularly assumed."
>
> Report on Mortgage Settlement Costs, U.S. Department of Housing and Urban Development and The Veterans Administration, January, 1972, p. 4.

Moreover, the evidence, some of which will be cited hereafter, is quite clear that mounting state and county transfer and recordation taxes and other elements over which neither the title industry nor the Department of Housing and Urban Development has any control are the real culprits where costs are too high. It would, therefore, be deceptive for the Department or anyone else to give the public the impression that the proposed regulation attacks any but the most minor elements of the settlement bill of the nation's home buyers.

It is also important to point out that recent unjustified wholesale and often reckless criticism of the title industry has had the effect of undermining public confidence in and reliance upon the major protection afforded by owner's title insurance, and it may well fall to the Department to correct this unfortunate development by requiring notice to all buyers that owner's title insurance—and not lender's insurance—protects owners against unforeseen claims which may develop against title.

With the above caveats, the American Land Title Association desires to cooperate with the Secretary in promulgating regulation to attack abuses wherever they may occur, within the bounds of the Secretary's authority.

Much of the criticism of the industry in recent times has concerned what are called "kickbacks." By this term is meant consideration or inducements for other than services rendered to persons who place title insurance with a particular title insurance company. These payments have come in the form of "commissions" or origination fees to real estate brokers, lawyers, and others, who have performed no other service for those payments than the selection and designation of the title insurance company as the insurer. The American Land Title Association has already placed itself on record as favoring appropriate regulation to prohibit such considerations or inducements. This Association is prepared to appoint informed representatives of the industry to work with your Office in drafting appropriate regulations.

Establishment Of Maximum Rates and Charges

In the proposed regulations published by your Office on July 4, 1972, the maximums prescribed may be divided into several categories: First, title insurance premiums; second, charges by title companies and attorneys handling closings for title examinations and for services other than insurance in a real estate transaction; and third, charges payable in a real estate transaction to third persons over which none of the parties to the transaction have control.

Each of these categories has aspects which must be separately discussed; but it is important to note that they, in the aggregate, do not constitute the major expense to the home buyer when he effects settlement of his purchase. The most significant items, to him, are transfers and other real estate taxes, real estate broker's commissions, and "points" charged by lenders. In the end, the closing costs, as distinguished from all "settlement costs", including title insurance, are a relatively small part of what the buyer or seller must pay in effecting a sale and transfer of real estate. What concerns the home buyer is the amount of money he must bring to the closing in addition to the cash portions of his purchase price. For the most part, criticisms and complaints of home buyers arise from the fact that they learn, after their sales contract is signed, that they need substantially more than their "down payment", and mistakenly attribute all of this to the title company or attorney. It has not been adequately explained publicly that the title company or the attorney is merely acting as a collecting agent for most of the larger part of the buyer's extra expense.

In the search by state, county and local governments to tap additional resources for revenue, most government authorities have levied transfer or recording taxes.

Even where the tax is paid at another level, as in the instance of the acquisition of land by a developer, the tax paid is ultimately borne by the purchaser of a home; and again and again as one homeowner sells to another.

This Association hopes that the influence of the Secretary and the Administrator be exercised to discourage this form of taxation, elimination or reduction of which would be of marked benefit to the home buyer.

Title Insurance Premiums

The American Land Title Association strongly opposes the establishment of the maximum charges for title insurance in your proposals for the following reasons:

(a) Such action exceeds the statutory authority of the Secretary and Administrator;

(b) There has been no showing that the insurance rates presently being charged by title insurers in the areas affected are excessive or unreasonable;

(c) There has been no proper determination by the Secretary

that the rates proposed are reasonable;

(d) There is no relationship between the proposed maximums and the cost of doing business;

(e) The fixing of such rates is unlawful under existing Federal statutes;

(f) The charging of such rates by title insurers would violate state laws.

No Authority To Reduce Insurance Rates—A Construction Of The Statute

We have carefully reviewed and analyzed the language of the statute under which the Secretary purports to act, 12 U.S.C., S1710 (Note).

The statute contains two separate directives: Section (a) imposes on the Secretary and the Administrator of Veterans Affairs a duty to prescribe "standards governing the amounts of settlement costs" without definitions; and Section (b) directs the Secretary and the Administrator to undertake a joint study and make recommendations to the Congress with respect to legislative and administrative actions which should be taken to reduce and standardize settlement costs for all geographic areas. It is elementary that, being in derogation of the common law, such a statute must be strictly construed.

The references in Section (a) to "standards" covering the amounts of "settlement costs" allowable in connection with housing built, rehabilitated, or sold with FHA or VA assistance did not include any reference to title insurance premiums, nor under any reasonable interpretation of the statute authorize a reduction thereof.

As developed in a subsequent part of this memorandum, for the most part title insurance rates have been established by the title insurers under rate schedules filed, and usually approved, by state Insurance Commissioners; and elsewhere, such rates have been competitively established. In the absence of evidence of violations of antitrust laws, state or federal, we feel that there is a presumption, amounting almost to a conclusive presumption, that the title insurance premiums presently being charged are fair and reasonable. The publicity attending the issuance of the proposed maximum rates has made clear that your Department comprehends that the imposition of the rates prescribed would effect a reduction, presumably including insurance premiums. This is true and we think such result is beyond the authority of the Secretary.

In that same statute, the Congress dealt in Section (b) specifically with the subject of "reduction" of settlement costs. It contemplates that the joint study which the Secretary and the Administrator are to make will be a matter for further review before formal legislative or administrative action is taken on any recommendations contained in it. Missing from Section (a) of the 1970 Act is the word "reduction". This seems to us to be important. Whatever Congress may have meant by prescribing "standards", even if it included the concept of fixing maximums, it certainly cannot literally be construed to authorize, much less require, a reduction in title insurance premiums.

The Legislative History of this statute, as the same appears in Senate Report 91-761,[1] fortifies our views in this respect. Bearing in mind that your present regulation (Section 203.27 of Title 24, CFR) directly treats this subject, subsection (a)(3) therein authorizes the mortgagee to collect "reasonable and customary amounts" for, among other things, title examination and title insurance. The words "reasonable and customary" can have but one meaning in the context of our present consideration. Certainly, customary charges are those which are generally presently applicable—not less than such customary charges. And in the "Legislative History" of this statute (U.S. Code, Title 12, Sec. 1710, Note) as the same appears in the Senate Report, we find the following:

> "FHA and VA presently do pay some attention to closing charges, and attempt to protect individual borrowers from having to pay more —for a particular service than is *generally customary* in the local area involved. *The committee believes that this practice should be continued* and that procedures should be developed to provide helpful information about such charges to prospective borrowers along the lines discussed above in connection with information on borrowing costs." (Emphasis supplied)
>
> *U.S. Cong. & Admin. News, supra,* p. 3506

It is apparent that the Congress in directing the Secretary to promulgate "standards" governing the amount of settlement costs, never intended that such standards once promulgated would operate *to reduce* the present costs of title transfers, if such reductions resulted from maximums set *below* "customary" charges. A reading of the Report makes abundantly clear the expression of the Committee, that to protect the individual borrowers from having to pay more for a particular service than is *generally customary* in the local area involved, was a practice that they intended to be *continued*. These expressions, without more, negate any inference that the Secretary of HUD and the Administrator of VA were authorized and directed to *reduce* closing charges below that which is generally customary in a given area. The ultimate end of these activities is certainly to develop a simplified and less expensive procedure to transfer real estate title; that it is equally clear that Congress contemplated that the administrators would submit their findings and recommendations as to actions *thereafter* to be taken to reduce and standardize settlement costs, prior to a unilateral and arbitrary reduction of these costs by administrative fiat. Whatever may be the result of pending consideration being given by Congress to this whole subject, it is clear to us that the Secretary's proposals, insofar as they affect title insurance premiums, go beyond the authority of the enabling statute.

No Authority To Deal With Title Insurance Rates Specifically

If Congress had intended that the Secretary and the Administrator should fix rates for title insurance, it could easily have said so directly. As we have

Continued on page 13

[1] U.S. Cong. & Admin. News, Vol. 2, 91st Cong., Second Sess. 1970, pp. 3505-3506.

names in the news

George W. Shave has joined American Title Insurance Company as vice president and serves under the direction of senior vice president Frank B. Glover, director of agencies. Also under Glover's supervision is **David E. Wicker,** named agency representative, who will operate a service office to assist American's agents and attorneys in Georgia, the Carolinas, Tennessee and Alabama.

* * *

Edward P. Stevenson has been elected assistant vice president of West Jersey Title and Guaranty Company. He will head Salem County operations from a new Salem, N.J., branch office upon its completion.

* * *

District-Realty Title Insurance Corporation has announced several promotions: **Theodore O. deMoll,** to assistant vice president; **Margaret E. Hartung** to assistant secretary; and **Mary V. Herndon,** former secretary to the president, to assistant secretary.

* * *

First American Title Insurance Company has promoted **Thomas J. Brusca,** former Riverside (Calif.) office manager, to vice president and manager of its central California office in Bakersfield. He succeeds **Gordon L. Sickler,** now executive vice president of First American's Fresno County (Calif.) subsidiary, Home Title Company.

First American of Sacramento has named **Vincent E. Burch** chief title officer.

* * *

Peninsular Title Insurance has named **Nancy C. Malia** assistant vice president and manager of the Hollywood, Fla., office, succeeding **George E. Adams,** who has been named vice president-marketing with headquarters in Ft. Lauderdale.

* * *


SHAVE


WICKER


STEVENSON


deMOLL


HARTUNG


HERNDON


ADAMS


WADDICK


BURCH


MALIA


KINGMAN

Donald P. Waddick has been named manager of the national division of Title Insurance Company of Minnesota, succeeding **C. J. McConville,** now company president. Waddick will oversee the business development and agency operations in all states except the metropolitan twin cities area.

* * *

Philip D. Kingman, attorney, civil engineer, and lecturer at Lincoln College of Northeastern University, has been appointed vice president and counsel for Security Title and Guaranty Company and will manage its recently opened Boston office.

* * *

George J. Clarke has been appointed vice president and manager of the Jamaica, N.Y., office of the New York division of Commonwealth Land Title Insurance Company.

association corner

state

DeVillier Elected Wisconsin President

Clyde C. DeVillier, president, Dane County Title Company, Madison, was elected president of the Wisconsin Title Association at its sixty-sixth annual convention September 20-21 in Delavan.

Frank A. Kekow, vice president of Chicago Title Insurance Company's Wisconsin division, Milwaukee, was elected vice president. James J. Vance of Jefferson County Abstract Company, Inc., was elected secretary-treasurer.

WTA members heard speeches on federal regulation and legislation of settlement costs, by then ALTA vice president (now president) James O. Hickman; and on the future of the real estate business, by Phillip C. Stark, president, Wisconsin Realtors Association, Madison. John Poehlmann, vice president, First Wisconsin National Bank, Milwaukee, discussed construction lending.

Other speeches covered uniform abstracting procedures, survey problems, insuring against defects, policy provisions, standard exceptions, and recent Wisconsin inheritance and gift tax changes.

A. J. Achten, owner of Shawano Abstract Company, Shawano, was awarded an honorary association membership in recognition of his more than 30 years of service. He served as secretary-treasurer for 20 years, on the board of directors for 10 years, two years as vice president and two years as president. In presenting the award, past president Leon Feingold, president of Modern Abstract and Record Service, Janesville, called Achten, "Mr. Wisconsin Title Association."

In these scenes from the Wisconsin Title Association convention, shown clockwise, Otto Zerwick, left, retiring from the board of directors as past president, talks with outgoing president Nic Hoyer; Al Achten, left, is congratulated on his honorary membership by past president Leon Feingold; executive officers include, from left, secretary-treasurer James Vance; vice president Frank Kekow; president Clyde DeVillier; and Hoyer.

Ray Potter to Head Large ABA Section

Ray L. Potter, secretary and general counsel of Burton Abstract and Title Company and St. Paul Title Insurance Corporation, was named chairman-elect of the American Bar Association's Section on Real Property, Probate and Trust Law at ABA's 1972 annual convention in San Fancisco.

After serving one year in that position, he will become chairman of the 15,000-member section, second largest of the ABA's 21 sections.

Potter was vice chairman of the section during 1971-72, as well as serving as chairman of section journal's editorial board, and chairman of the committee on budget and finance.

Active in the ABA since 1951, Potter was director of the real property division from 1965 to 1968.

Potter also holds office in the State Bar of Michigan, as secretary of the Probate and Trust Law Section, and as a longtime member of the real property committee and the title standards committee, of which he is past chairman.

ALTA STATEMENTS — Continued from page 10

heretofore asserted, there is nothing whatever in the statute under which your proposals are issued which specifically refers to title insurance or insurance premiums. Dealing separately with that part of the proposals which fix maximums for title insurance, therefore, the negative intent of Congress in this respect must become more than statutory construction; and Congress has expressly provided in Title 15, of the U.S. Code, in S1012, that:

> "No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance. *** unless such Act specifically relates to the business of insurance ***."

We do not see how a more apposite reference can be made to discover Congressional intent. In July, 1947, by the foregoing Act, Congress had made clear that no enactment of it is to be extended by construction to include insurance, in any situation in which the states have laws regulating the business of insurance. In S1011, of the same chapter of the Code, Congress has declared its policy to be that the regulation of insurance is to be left to the states. All states concern themselves with the regulation of title insurance.* Certainly, in all of the areas to which the proposed regulations relate, there are state Insurance Commissioners, and in most of those areas, the title insurance companies have filed schedules and to which they must conform, as a condition precedent to their doing business in those states.

It is true that these regulations are couched in terms, or framed in such manner, that they appear to be no more than conditions under which the Federal Housing Administration and the Administrator of Veterans Affairs will approve the issuance of commitments for FHA and VA insurance of mortgage loans. Notwithstanding the external appearance of this device, as to insurance premiums especially, there is no escape from the obvious fact that the fixing of insurance rates in FHA and VA cases would fix such rates in all cases. Almost all states which regulate insurance in any way require insurance companies to file schedules of rates and substantially all of them will be operating under statutes which, as in Maryland, for example, provide in one form or another, that:

> "No person shall lawfully collect as premiums or charge for insurance any sum *in excess of or less than* the premium or charge applicable to such insurance, in accordance with the applicable classifications and rates as filed with and approved by the Commissioner ***". (Emphasis supplied)
>
> S230, Maryland Insurance Code, Article 48A of the Laws of Maryland

Or, as in Virginia, after a provision similar to the Maryland Code, it is provided:

> "Title insurance risk rates shall be reasonable and adequate for the class of risks to which they apply, *and shall not be unfairly discriminatory* between risks involving essentially the same hazards and expense elements. Such rates may be fixed in an amount sufficient to furnish a reasonable margin for profit ***". (Emphasis supplied)
>
> S38.1-728, *Code of Virginia*

Inadequate Administrative Due Process

Once again we assert that this memorandum is not intended to be a challenge, in the legal sense such as would occur in the courts, of the Constitutional aspects of the maximum rates and charges, not only of title insurance premiums, but all the other charges with which the proposal is concerned.

Nevertheless, as an appeal to sound and fair administrative policy, we urge that the procedures being followed by the Secretary in this matter fall short of what is required, in that:

(a) There has been no hearing, and one is apparently not contemplated;
(b) So far as is known, there has been little, if any consultation with the title industry — including in that term the lawyers whose practices and charges will be affected;
(c) There has been no specific finding that the rates and charges now obtaining are excessive or unreasonable;
(d) There has been published no finding that the rates and charges prescribed in the proposals are reasonable;
(e) There has been no publication of the evidence on the basis of which the Secretary and the Administrator have made "estimates of the reasonable charges for necessary services involved in settlements for particular classes of mortgages and loans";
(f) In any event, there has been no study of the costs of doing business of title companies and lawyers, a necessary condition precedent to a determination whether the rates and charges prescribed leave a fair return of profit for equity owners in their business.

These proposals constitute a rate making process. In respect to title insurance, the attempt at rate making embodied in the proposals ignores entirely the major reason for insurance, i.e., providing a financially responsible guarantor of the buyer's title. To this end, any rate making process must take into consideration the solvency of each title underwriter. All effective insurance regulation, in great detail, concerns the maintenance of solvency to a degree necessary to provide to the holders of policies that financial responsibility which enables them to a reimbursement for damages resulting from the human and other errors which occur in certifying titles. It is elementary that solvency will be affected amongst the title underwriters if they are compelled to write a substantial portion of their risks at less than cost.

These proposals affect not only transactions involving Federally-assisted loans, but transactions involving all loans to home buyers. This is true, in the first instance, with respect to rates for title insurance since, as we have already demonstrated in this memorandum, the title insurance companies

*In Iowa there is no statutory authority for the writing, in that state, of title insurance.

are prohibited from charging rates other than those fixed in their schedules filed with the several state Insurance Commissioners, and they are prohibited from arbitrarily discriminating between their customers where the risks are the same. But as to all other charges for the necessary services in real estate closings, the members of the industry could not, as a matter of business policy, make a different charge to home buyers who do not avail themselves of government assistance, and another to those who seek no such aid. In this respect, it is apparent that this memorandum represents a brief for the latter class, who (it seems to most of us) should not be discriminated against.

The label the Secretary places upon these proposals—as affecting only Federally-assisted loans—is not decisive. The courts will look behind the label to the substance of the proposals.

Far from any determination that the existing rates being charged for title insurance in the areas affected are excessive, the Secretary and Administrator have made no determination, known to the public, that the rates for title insurance or other charges fixed in the proposals, are reasonable maximums; and there could be no such determination on the basis of the facts known to this Association. It is not necessary to cite many authorities to demonstrate the principle that, under our system of law, maximum rates for any services may not be governmentally prescribed without allowing a fair return to him who performs the service; and no such determination of what constitutes a fair return can possibly be made without knowing what the cost of performing that service is. We know of no efforts on the part of your Office to determine the cost of doing business of title insurance companies; and we assume that it is a fact that you have not done so. There certainly is no express set of findings and conclusions by the Secretary and the Administrator, at least made public; and it is equally an elementary principle of law that the availability of evidence upon which the Secretary and Administrator have acted must be available to those affected, with a reasonable opportunity to be heard as to the validity of the evidence upon which they act, and an opportunity to submit evidence on their own part.

Thus, wholly aside from the law of the matter, it seems that a hearing and revelation of the basis of the proposals, is a matter of fair play. The burden is not on the title insurers to demonstrate that their existing rates are fair and reasonable; the statute expressly places that burden upon the Secretary and the Administrator. If the burden were on the title insurers, that burden has been fully met by the known two circumstances, namely, that their rates are presently subject to filings with the several states of rate schedules which require that they be fair and reasonable, so that they bear the initial *prima facie* status of having been so-found by such state Commissioners; and by the fact that they have been fixed in intense and continuing competition.

It is fair for those affected by these proposals to assume, on the basis of the foregoing, that the Secretary and the Administrator have wholly failed to follow the Congressional mandate in subsection (a)(3) of Section 1710 that the standards fixed "be based" on their "estimates of the reasonable charge for necessary services involved in settlements".

Sooner or later, in court or before the Department, all those affected by the proposed regulations are entitled to a hearing, where the reviewing court is directed to decide all relevant questions of law, including whether the proposals are arbitrary. Title 5, U.S. Code, S706. We urge that the Secretary himself direct that any order putting the proposals into effect shall be stayed until a full opportunity for a hearing has been provided. Such an administrative determination is in sound conformity with the purposes for which the Administrative Procedures Act was adopted. See *American Airlines, Inc.* v. *C.A.B.*, 123 U.S. App. D. C. 310, 359, F.2d 624 (1966), where the court cites (in Footnote 21) the Final Report of the Attorney General's Committee on Administrative Procedure:

> "Hearings are now generally held in connection with the fixing of prices and wages, . . . the prescription of commodity standards, and the regulation of competitive practices. The regulation of all of these matters bears upon economic enterprise and touches directly the financial aspects of great numbers of businesses affected, either by imposing direct costs or by limiting opportunities for gain. Appreciation of these effects, both by business men and government officials, seems to be the chief cause of the increased use of hearings in administrative rule making.
>
> "The Committee believes that the practice of holding public hearings and the formulation of rules in the character mentioned above should be continued and established as a standard administrative practice, to be extended as circumstances warrant into new areas of rule making. The difficulty of defining necessary exemptions from any general prescription argues strongly, however, against the wisdom or feasibility of a statutory requirement that hearings invariably precede promulgation of a regulation. . . . Here, as elsewhere in the administrative process, ultimate reliance must be upon administrative good faith—good faith in not dispensing with hearings when controversial additions to or changes in rules are contemplated." 123 U.S. App. D.C. at 318, Footnote 21.

We have tried to find some correlation between the maximum rates in the Secretary's proposals for title insurance and other services, and those which now obtain in the six areas thus far dealt with. We find no basis for concluding that the closing cost study of HUD constitutes the investigatory basis for the Secretary's "estimates" of what are or are not reasonable or excessive. On the contrary, a comparison of the HUD survey and the maximums contained in the proposals conclusively establishes that the Secretary arbitrarily has reduced prevailing rates.

A summary comparison of the proposed HUD rates and the prevailing rates for each of the affected areas would reveal marked differences in procedures and handling of title matters in the several areas affected. For example, in some states, the title companies perform title closing and escrow services, while in others the contrary is true; and these practices differ even in individual

areas of the same state. In some places there is a single, all-inclusive charge made for most necessary services, including title examining, closing and insurance. Therefore, it is almost impossible for anyone to draw a conclusion that the prescribed rates are reasonable or that prevailing rates are excessive.

The regulation by prescribing maximum rates in title closings at the Federal level is unprecedented, as it was in the matter of natural gas rates as described in the Opinion of the Supreme Court in *Permian Area Rate Cases,* 390 U.S. 747, 20 L. Ed. 2d 312, 88 S. Ct. 1344. From the Opinion of the Court in those cases, we learn that an administrative action where the agency holds hearings, takes testimony and receives evidence submitted by the parties affected, weighs both the interests of the consumer and the producer, and then fixes maximum rates, carries with it the benefit of a presumption of reasonableness. But the reverse is also true: Without such investigation and inquiry, and without findings from the evidence justifying the rates prescribed, and without full revelation of the basis of the agency's conclusions, no such presumption obtains.

Where, as here, there have been no hearings; the industry has not been effectively consulted; where there are no findings of fact from which it can be concluded that prevailing rates and charges are excessive in any of the areas; where no publication has been made of the basis for the Scretary's actions; and where prevailing rates and charges are the product of healthy and open competition, the Secretary's proposed order does not and cannot have a legal aura of reasonableness.

To this Association, it seems that the same lesson has been learned in the matter of the fixing of rent ceilings by FHA on Federally-assisted projects. There the rent ceiling was fixed at the rate prevailing on the statutory date. The court held this proper. It is clear that a rent ceiling of *less* than the prevailing rate would probably have been fatal without a finding that the prevailing rate was excessive, or resulted in excessive profits to the landlord, a fact which could only be ascertained after it was found on the evidence that the rate fixed would still provide the landlord with a fair return on his investment. So it was in *Northwood Apartments* v. *Brown,* 137 F. 2d 809 (1943). We are not unmindful of the principle, well stated in *Bowles* v. *Willingham,* 321 U.S. 503, 88 L. Ed. 892, 64 S. Ct. 641, that price-fixing legislation is not improper because it is on a class rather than an individual basis. If the rates and charges are reasonable for an industry as a whole, the fact that one of the competitors cannot live with those rates does not invalidate the regulation. But in the title industry, where there is intense competition, and no semblance of monopoly, the prevailing rates have, it may be assumed, driven the weak ones from the field. Therefore, the opposition of this Association to the proposals of July 4, 1972 is not designed to protect any particular member of the industry, but the industry itself.

Economic Factors

All will agree that the proposals of July 4, if adopted by the Secretary and ordered into effect, will have a major impact upon all of the persons affected. We respectfully submit that the total impact will not be good.

The industry, represented by this Association, is not made up of a few large title insurance companies, with unlimited financial resources. However, much may be the popular conception of this industry, the fact is that, of approximately 1,900 members of this Association*, 93 are title insurance underwriting companies, of which only a baker's dozen can be said to be of major national scope. Actually, although the Association's membership consists of most of the most-active commercial companies operating in the field of examining and insuring titles to real estate, a little more than 1,800 of our members are either abstract companies or abstract-agent companies. This means that 95% of the Association's members are small company operations. Of these latter, two-thirds employ fewer than 5 persons, and 87% employ fewer than 10 people on their staffs. Only 1% employ more than 40 persons. 80% of the company-members surveyed grossed less than $100,000.00 in 1970; as a matter of fact, 45% of them grossed less than $25,000.00 in that year; 73% of them reported their capital and net worth as being less than $100,000.00; and 71% of the participants in the survey reported that their net taxable income for 1970 was less than $25,000.00.

The foregoing figures are sufficient to demonstrate that in addition to insurance premiums, the regulation of the other items of closing costs, too, carry their effect down to a host of responsible, but small businessmen throughout the country. It is perhaps going too far to say, at this stage anyway, that these people would be put out of business. What we do say is that neither you nor this Association knows whether they will or not. Neither this Association nor the Secretary has made any kind of a study of their cost of doing business. But, *prima facie,* there certainly is no showing that their profits are excessive.

On the contrary, it is easy to demonstrate, if the opportunity presents, that in every area each of these small businesses is intensely competing with the other and, insofar as the closing costs and fees are concerned, their charges are not set by the big insurers. The elementary facts of competition drive their individual charges to the lowest level reasonable, with allowance for a profit margin. Therefore, we can see no justification, on the present evidence, for a reduction in these charges at all. There has been no assertion—in fact publicity emanating from the Congressional sponsors of these proposals and other legislation in the field expressly denies—that the title industry is reaping excessive profits from this business. The fact is known to be that the actual return on investment, even of the big companies, is modest. Therefore, the statements in the public press that home buyers may "save millions of dollars" as a result of these proposals would be true, if at all, only at the expense of those who perform the services. But the "saving" would be short-lived if title companies, abstracters and lawyers are driven from the field. The services they perform are

*Not all persons or firms engaged in the business of examining, abstracting or insuring titles to real estate are members of this Association.

necessary, as the legislation acknowledges.

In real estate transactions, the title must be abstracted and this is a complicated process. The public records must be examined, analyzed and reported, boundaries must be established, proper conveyances must be drawn and properly executed, and someone must reach a responsible conclusion that the title of the seller is a marketable title and that it has been legally and finally transferred to the buyer. Where loans are involved, someone must do all the things necessary to assure that the lender has a valid lien to secure repayment. With the Truth-in-Lending Laws, state, federal and local, this operation has become an expensive—and in some instances, a risky—process. If someone must do it, it is fortunate that it is done by private enterprise. County Clerks and Recorders are not equipped to do it; and if they did, the taxpayers generally would be bearing the cost. If, as we have said, it is a necessary service, and if it is to be done by private enterprise, mostly small enterprise, those who perform these services must be allowed a fair return.

The net effect of establishing maximums for charges which are unrealistic and less than reasonable cannot, for more than a short period, compel title companies and lawyers to continue to do the business at a loss or at minimal returns. They will turn to other things. Certainly, if they can barely survive under these proposals, as seems likely to be the best that can be made of them, the tendency in any event across this industry and all related industries, including those who lend money, will be to shy away from those home buyers who have Federal assistance. And after all, if that is the net effect, it seems to this Association to be wholly inconsistent with the ultimate objective and purpose of the entire Federal Housing program.

We know of no report or study either by Congress or by the Department of Housing and Urban Development which evaluates and assesses the impact of these proposals. It is apparently taken for granted that, because the Secretary orders reductions in closing costs, the home buyer will, *ipso facto,* save money. But, in the long run, the setting of rates below what is reasonable and fair for those who perform the services, may very well have the result of driving the home buyer to finding financial assistance, if he can find any at all, from sources not in the FHA and VA program. If so, the cost to the home buyer may be substantially more, not less.

Summary, Recommendations

On the foregoing grounds, the American Land Title Association must protest the issuance by the Secretary and the Administrator, of an order putting into effect the proposals published on July 4, 1972.

We believe them to be unwise and not in conformity with the primary objectives of the Emergency Home Finance Act; but we also submit that, to do so without a fair hearing, without specific and express findings, based upon evidence, including submissions by the industry, that prevailing rates and charges are excessive and that no other rates and charges than those fixed in the proposals are reasonable, would exceed the authority granted in the enabling statute, 12 U.S. Code, Section 1710 (Note), would otherwise violate the rights of those engaged in examining and insuring titles to real estate, including lawyers; and would unreasonably discriminate against a great body of unrepresented home buyers who do not seek Federal financing assistance.

The Association recommends:

1. That the title insurance be wholly eliminated from the proposed regulation;
2. That charges made by persons performing services not directly related to title examination and insurance (such as surveyors, credit reporters, and termite and infestation inspectors) be wholly eliminated from the proposed regulation;
3. That until investigation and hearings are completed as hereinafter proposed, the establishment of any standards be withheld, but in no event should such standards undertake to reduce the charges for title examination, closing fees, attorney's fees, etc., below prevailing rates in the areas affected as of the 4th day of July, 1972;
4. That an appeal procedure be prescribed under which, by a showing of special circumstances, application may be made for a greater rate or charge;
5. That, before any order is issued or regulation adopted which fixes standards for title services other than insurance premiums (regulation of which we have asserted to be unauthorized), hearings shall be held wherein a full inquiry is made as to the reasonableness of prevailing rates and charges generally or in any particular area, including an inquiry in depth as to the cost of performing the services and an allowance for a fair profit for all reasonably-efficient persons who perform such services;
6. That in such hearings, members of this industry be permitted to submit evidence or testimony relevant to the reasonableness of rates and charges for title services, and be entitled to know and comment on all evidence or testimony on the basis of which the Secretary and Administrator propose to act;
7. That, solely on the basis of the record made in such hearings, the Secondary and Administrator shall make specific findings as to the reasonableness or excessiveness in any area affected of the rates and charges then prevailing; and issue no order or regulation except in conformity with such findings.

As we have indicated, the Association is ready, promptly at your request, to appoint such committee, or committees, composed of knowledgeable and experienced people, as may be helpful to enable you more directly to consult with the industry.

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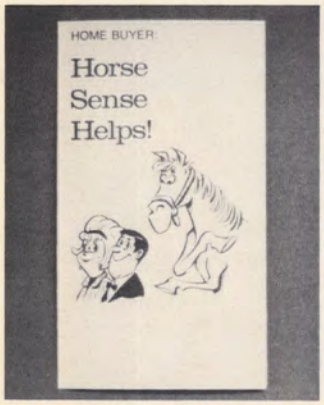

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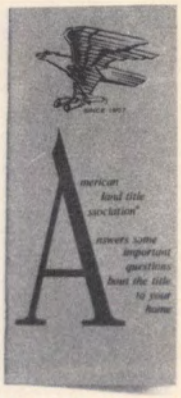

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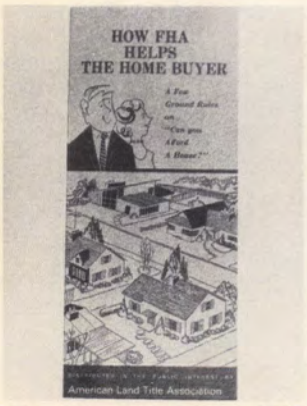

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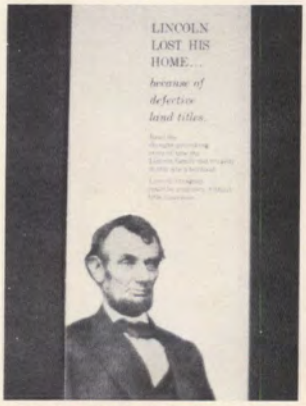

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