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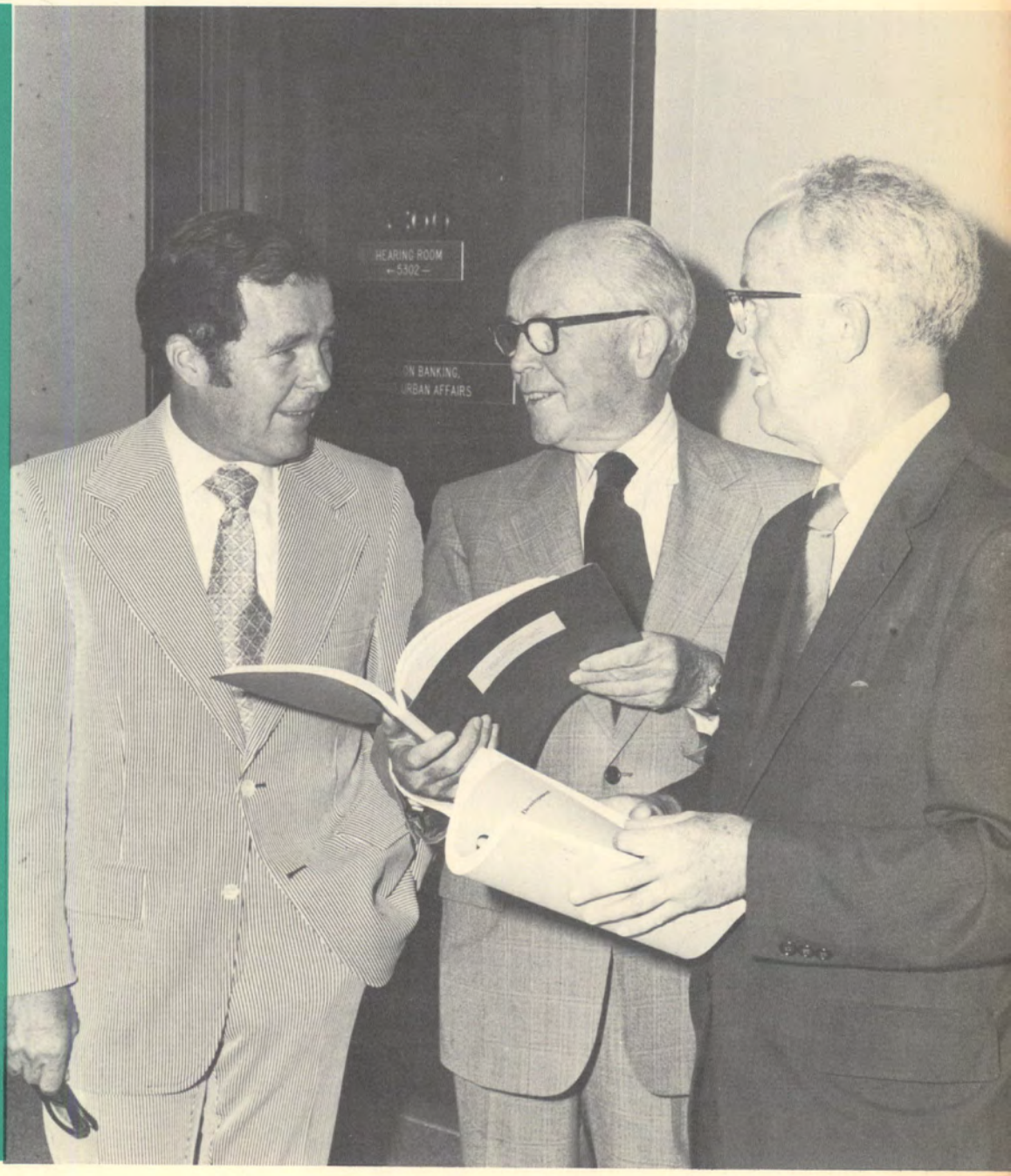
Title News

the official publication of the American Land Title Association



ALTA Presents Testimony At Senate Hearings

September, 1973

A Message from the President

SEPTEMBER 1973

It seems that we of ALTA have been occupying our attention for a long period of time with the threat of Federal regulation of our industry. The present trend started with the passage of the Emergency Home Finance Act of 1970 which gave HUD and VA the authority to set standards. Subsequently, HUD and VA issued proposed regulations setting rates under this Act, but as yet these rates have not been implemented. As this is written, we are supporting two bills on closing costs in the 93rd Congress—S. 2228 introduced by Senator Brock (R-Tenn.) and H. R. 9988 introduced by Representative Stephens (D-Ga.)—which could have a vital effect on our operations. We are opposed to another bill on this subject, S. 2288, sponsored by Senator Proxmire. On July 30 ALTA presented testimony before the Senate Subcommittee on Housing and Urban Affairs which sets forth the Association's position on closing costs. (ALTA's statement presented to the Subcommittee is reprinted in this issue.)

Your Association has taken giant strides to be able to cope with legislative matters. Our staff has been increased and requested to spend full effort on the legislative front. Outside counsel has been retained by members of our industry and is working in close accord with our office. Your officers and members of the legislative committees have done yeoman tasks. The backbone of our strength, however, has been you, the individual members. We've heard from a number of members who are willing to contact their Congressmen on issues concerning the title industry, and we'd appreciate hearing from others who would make such contacts at the appropriate time.

The best place to obtain a complete update on our Federal action as well as an insight as to how to establish effective contacts with your legislator will be the ALTA Convention in Los Angeles September 30-October 4. I hope to see you there!

Sincerely,

James O Hickman

James O. Hickman

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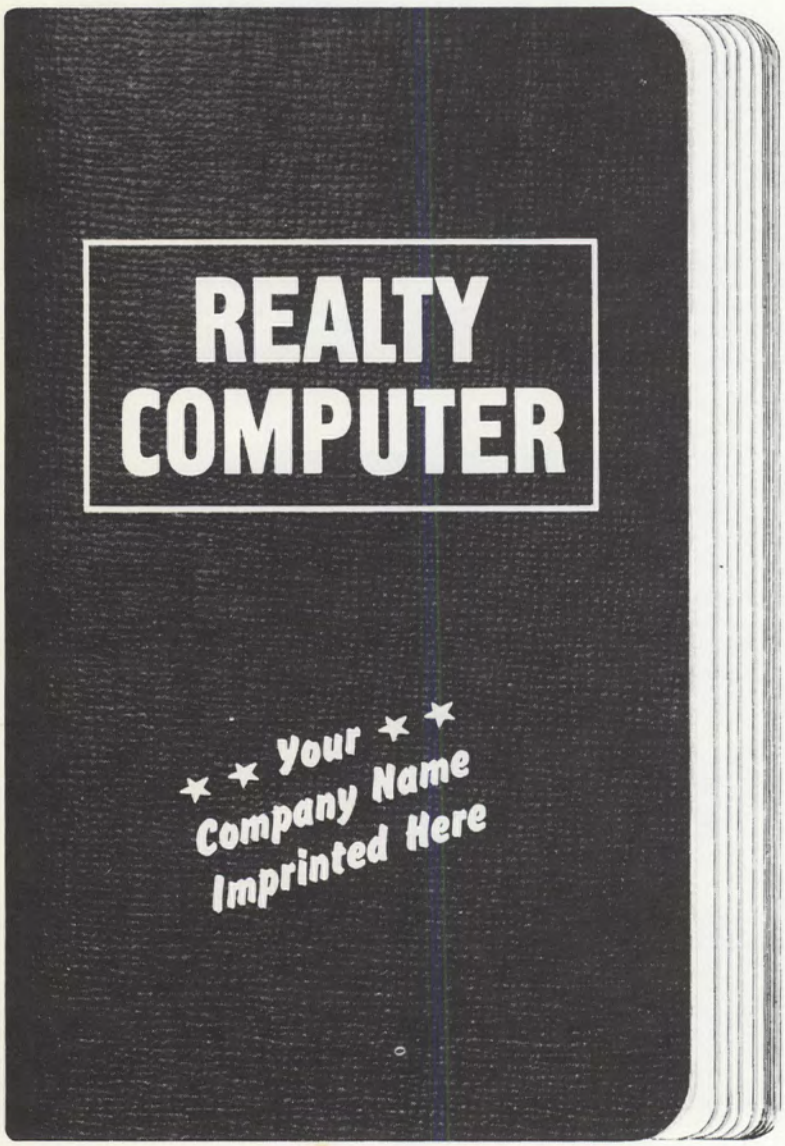

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meeting timetable

1973

September 6-8, 1973
Ohio Land Title Association
Salt Fork Lodge
Cambridge, Ohio

September 13-14, 1973
Wisconsin Land Title Association, Inc.
The Dome Resort
Marinette, Wisconsin

September 13-15, 1973
North Dakota Land Title Association
Westward Ho Motel
Grand Forks, North Dakota

September 14-16, 1973
Missouri Land Title Association
Hotel Muehlebach
Kansas City, Missouri

September 20-22, 1973
Nebraska Land Title Association
Villager Motel
Lincoln, Nebraska

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

October 22-24, 1973
Mortgage Bankers Association of America
New York Hilton, and the Americana
New York, New York

October 26-27, 1973
Carolinas Land Title Association
Foxfire Inn
Pinehurst, North Carolina

October 26-27, 1973
Florida Land Title Association
Disney World, Florida

October 28-30, 1973
Indiana Land Title Association
Atkinson Hotel
Indianapolis, Indiana

November 2-3, 1973
Land Title Association of Arizona
Francisco Grande Hotel and Motor Inn
Casa Grande, Arizona

November 7-10, 1973
Dixie Land Title Association
Sheraton-Biloxi
Biloxi, Mississippi

November 9-15, 1973
National Association of Real Estate Boards
Sheraton Park, and Hilton Hotels
Washington, D.C.

December 5, 1973
Louisiana Land Title Association
Royal Orleans
New Orleans, Louisiana

Title News

the official publication of the American Land Title Association

Features

Departments

ON THE COVER: ALTA President James O. Hickman, left, discusses the Association's position on settlement regulation with James G. Schmidt, center, chairman of ALTA's Federal Legislative Action Committee, and William J. McAuliffe, Jr., ALTA executive vice president, before presentation of the Association testimony before the Senate Subcommittee on Housing and Urban Affairs on July 30, 1973. For the text of the ALTA statement, please see page 4.

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GARY L. GARRITY, Editor *CAROL MATHES HALEY, Managing Editor*

ALTA Presents Testimony at Senate Hearings

(Editor's note: The following statement was presented by ALTA Federal Legislative Action Committee Chairman James G. Schmidt July 30, 1973, at Washington hearings on housing and urban development legislation before the Senate Subcommittee on Housing and Urban Affairs.)

* * *

Introduction and Summary of Position

Mr. Chairman, my name is James G. Schmidt and I am the chairman of the Federal Legislative Action Committee of the American Land Title Association. I serve as consultant for and have also served as the Chairman of the Board and Chief Executive Officer of Commonwealth Land Title Insurance Company of Philadelphia, Pennsylvania. With me today are William J. McAuliffe, Jr., the Executive Vice President of ALTA, Thomas S. Jackson, the Association's general counsel, and William T. Finley, Jr., counsel to the Association.

I appreciate the opportunity to present the views of our Association on a matter of great importance not only to members of ALTA, but to the home buying public which we serve. ALTA is a national association of approximately 2,000 companies that are in the business of providing title evidence and title insurance. Our membership includes title insurance agents, abstracters and title insurance companies who provide title search and examination services and title insurance protection to home buyers, mortgage lenders and other real estate investors.

While most of the title insurance companies in the United States are members of ALTA, the overwhelming majority of the Association's members are small businesses that are engaged as abstracters or title insurance agents. Most frequently, these enterprises are owned by small, independent businessmen and operate within a single county in a particular state.

Mr. Chairman, while many people may believe that concern for the protection of the consumer is a relatively recent phenomenon, I should like to point out that the development of title insurance in the 19th century was in direct response to the need to protect the consumer in the purchase of land. The first title insurance company in the United States was created in Philadelphia in 1876 by a group of individuals who were concerned by a decision of the Pennsylvania Supreme Court that a real estate purchaser could not recover from a title searcher for a loss resulting from a lien that existed at the time of purchase which the searcher mistakenly believed would not affect the purchaser's title to the property. Since that time, title companies and abstracters have continuously devoted their efforts to minimizing the risks involved in land title transfers. By virtue of these efforts, the marketability of home mortgages has been enhanced tremendously—with the result that title insurance not only assures the security of a real estate investment, but helps to keep the supply of mortgage money flowing to the home buyer by facilitating a secondary mortgage market.

We are proud of our record of having provided almost a century of reliable service to home buyers and real estate investors. We are concerned, however, about maintaining public confidence in us and in the services we render. During the past few years, certain allegations regarding problems and abuses in the real estate settlement process have received public attention. Many of these problems do not involve title companies; other alleged problems simply do not exist or exist in only very isolated instances in a limited number of areas. But any criticisms—justified or not—that are leveled at the practices or procedures involved in a real estate settlement are of concern to our members. I should like to reiterate, as representatives of ALTA have stated on other occasions in the past, that it is the position of the American Land Title Association that problems or abuses that exist in the settlement process must be and should be immediately corrected, no matter in what area of the real estate industry such problems or abuses occur.

The question, however, that this Committee and the Congress itself must direct attention to is what the role of the Federal government ought to be in dealing with these problems.

There are two answers that have been suggested to this question. One proposed answer is to have the Federal government impose limits on the charges that may be made by those who provide certain settlement services. This would impose a scheme of Federal rate regulation over tens of thousands of lawyers, small businessmen who are engaged as abstracters, surveyors and pest and fungus inspectors, and title insurance companies. This approach is embodied in the proposed regulations published by the Department of Housing and Urban Development on July 4, 1972, which would establish the maximum charges for certain title related services rendered in connection with an FHA-assisted real estate transaction, and the virtually identical proposed regulations published on August 26, 1972, by the Administrator of Veterans' Affairs for VA-assisted transactions. The purported authority cited for the publication of these proposed regulations is Section 701 of the Emergency Home Finance Act of 1970. The theory behind this approach presumably is that certain problems and abuses are resulting in higher-than-necessary settlement charges and that by imposing limits on these charges the problems and abuses will disappear and reasonable settlement charges will thereby be attained.

An alternative approach, which is embodied in the provisions of S. 2228 that was introduced by Senator Brock last week and in the provisions of Chapter IX of the Housing and Urban Development Act of 1972 (H. R. 16704) that was overwhelmingly approved by the House Banking Committee in the closing days of the 92nd Congress, is to have the Federal government supplement state and local efforts to deal directly with the underlying abuses and problems in this area by means of various anti-abuse, disclosure and reform provisions. The theory underlying this approach is that Federal rate regulation would be a cumbersome, discriminatory and highly inappropriate method of dealing with what are merely the symptoms of problems that can more appropriately and effectively be dealt with by means of direct prohibitions and regulations.

ALTA strongly supports this second approach. We believe that any objective analysis of the problem by this Subcommittee or the Congress will lead to the conclusion that the approach adopted by S. 2228 and Chapter IX of H. R. 16704 offers the best means for the Federal government to eliminate any problems and abuses that exist in the real estate settlement process and to ensure that charges for settlement services are not unreasonably high because of undesirable or abusive practices.

Before discussing some of the reasons for our position, I believe it would be useful to provide the Subcommittee with a brief picture of the legislative and administrative background of this problem.

Legislative and Administrative Background

On July 24, 1970, the Emergency Home Finance Act of 1970 was enacted into law. The main purpose of this Act was to help alleviate the shortage of mortgage credit that existed at that time. The Act also contained a provision, Section 701, that dealt with closing and settlement charges in two ways: Subsection (a) authorized and directed the Secretary of HUD and the Administrator of Veterans' Affairs "to prescribe standards governing the amounts of settlement costs allowable" in connection with the financing of FHA and VA assisted home purchases, and subsection (b) directed 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 mortgage settlement costs and to standardize these costs for all geographic areas."

In view of the importance of the other provisions of the Act, Section 701 received little Congressional consideration at the time. Language in the Report of the Senate Committee on Banking and Currency, however, appeared to indicate that it was not the intention of the Congress to authorize HUD and the VA to fix specific maximum charges for settlement services at levels below prevailing levels, but to have HUD and the VA continue their practice of approving FHA or VA assistance in a particular transaction only if settlement charges for that trans-

ALTA representatives testify before the Senate Subcommittee on Housing and Urban Affairs on July 30, 1973. From right to left are William T. Finley, Jr., counsel to the Association; Thomas S. Jackson, the Association's general counsel; James G. Schmidt, Chairman of ALTA's Federal Legislative Action Committee, and William J. McAuliffe, Jr., Executive Vice President.

action were in line with customary charges in the local area involved.

Moreover, the language in subsection (b) of Section 701 authorizing a study of legislative and administrative actions that would "reduce" settlement charges would appear to confirm the interpretation that the authority provided by subsection (a) was not intended to be used to reduce these costs. In other words, the scheme of Section 701 appeared to be (a) the development by HUD and VA of interim standards for settlement charges that would not involve a reduction in these charges from customary or prevailing levels, and (b) the preparation of a study by HUD and the VA on what further legislative or administrative actions should be taken to effect reductions in charges.

In February, 1972, the joint HUD-VA Report on Mortgage Settlement Costs, prepared pursuant to subsection (b) of Section 701 of the 1970 Act, was released. (This report was published as a committee print of the Senate Committee on Banking, Housing and Urban Affairs in March, 1972.) The Report included text and tables summarizing data compiled by HUD and VA offices on a sample of real estate settlements involving FHA or VA assistance in the month of March, 1971. In addition, the Report included as a supplement a paper prepared by the staff of the Washington College of Law at American University entitled "The Real Estate Settlement Process and Its Costs."

Some of the findings reached by the HUD-VA Report were summarized as follows on pages 2 and 3 of the Report:

> —High cost and other problems of settlement stem in no small part from basic inefficiencies in the multiple and complex systems of conveyancing, recording, and assuring validity of title to parcels of real estate.
>
> —Settlement practices and costs vary between geographic areas and within the same metropolitan area.
>
> —Competitive forces in the conveyancing industry manifest themselves in an elaborate system of referral fees, kickbacks, rebates, commissions and the like as inducements to those firms and individuals who direct the placement of business. These practices are widely employed, rarely inure to the benefit of the home buyer, and generally increase total settlement costs.
>
> —Minimum or recommended fee schedules by local legal or real estate groups often do not reflect the actual work done and tend to increase settlement costs.
>
> —Most public land record systems need to be improved in order to facilitate title search and eventually reduce title related and other settlement costs.

Although the HUD-VA study is frequently cited as having found that excessively high settlement costs existed throughout the country, the actual findings made by the Report on this point was that:

> Costs appear to be high in some areas, but unreasonable costs probably occur in fewer areas than may be popularly assumed.

The American University study also reached a number of conclusions and recommendations as to how the settlement process could be improved. Its most significant conclusion was that "at the root of the closing cost problem are poorly organized and indexed public records."

Thus, the HUD-VA Report concluded that while higher-than-necessary costs existed in some areas of the country, this was the product of certain factors such as the basic inefficiencies in existing land recordation systems (*i.e.,* insufficiencies in the indexing of public land records), the existence of kickbacks or referral fees and the use of minimum fee schedules by lawyers and real estate groups. As I will discuss in greater detail in a moment, direct action has been and can be taken to deal effectively with each of these problems.

Unfortunately, apparently before the Congress could conduct any extensive analysis or appraisal of the HUD-VA Report, the Senate on March 2, 1972, passed S. 3248, the Housing and Urban Development Act of 1972. The bill included a section on closing costs (Section 712) that did not deal with the fundamental problems disclosed by the HUD-VA Report but simply extended the authority of HUD to establish "standards governing the amounts of closing costs allowable" in connection with certain conventional mortgage transactions in addition to FHA and VA assisted transactions. In addition, Section 712 included an anti-kickback provision.

On July 4, 1972, prior to the consideration of this problem by the House Committee on Banking, Housing and Urban Affairs, the Department of Housing and Urban Development published proposed regulations under the authority of Section 701(a) of the Emergency Home Finance Act of 1970 that would have set arbitrary and unreasonable ceilings on certain settlement charges made in connection with FHA assisted transactions in six standard metropolitan statistical areas. These areas included Cleveland, Newark, San Francisco-Oakland, Seattle-Everett, St. Louis and Washington, D.C. The charges that would have been subject to the proposed HUD regulations included credit reports, field surveys, title examination charges, title insurance, closing fees and pest and fungus inspections. The Federal Register notice accompanying the proposed regulations indicated it was HUD's contemplation that similar standards for other geographic areas would be published subsequently.

Public comment was requested on the proposed regulations and accordingly ALTA filed a memorandum strongly opposing the establishment of maximum charges for settlement services in general, and title examination and insurance charges in particular, on the grounds that:

> (a) Such action exceeded the statutory authority granted to the Secretary by Section 701(a) of the Emergency Home Finance Act of 1970 to "prescribe standards";
>
> (b) There had been no showing that title insurance rates presently being charged in the areas affected were excessive or unreasonable;
>
> (c) There had been no proper determination by the Secretary that the proposed rates were reasonable;
>
> (d) There was no relationship between the proposed maximums and the cost of doing business;
>
> (e) The fixing of maximum rates for title insurance would conflict

Continued on page 15

The Uniform Land Transactions Act

Robert Kratovil
Vice President
Chicago Title
Insurance Company

(Editor's note: Author Kratovil serves as an adviser to a committee of the National Conference of Commissioners on Uniform State Laws that is developing a Uniform Land Transactions Code scheduled for completion by July 1, 1974. The completed Code will be submitted to the National Conference for approval and subsequent consideration by state legislatures. In this two-part series of articles, he reviews work on the Code to date and provides commentary on elements of interest to the land title industry. Part 2 of the series will be published in the October issue of *Title News*.)

* * *

Introduction

The impetus for the preparation of a Uniform Land Transactions Act came from Professor Dunham of the University of Chicago Law School. He made the proposal to the American Law Institute and the Commissioners on Uniform State Laws and they authorized the project. The purpose of the Code, he stated, would be to make land law rules conform as far as possible to the personal property rules set forth in the Uniform Commercial Code. Probably the best way to convey a notion of how Professor Dunham's philosophy has found expression is to look at the work of the Committee, which he is presently chairing.

So far as procedure is concerned, the Committee is divided into two groups, the Commissioners and the Advisers. Professor Benfield of the University of Illinois and Professor Leary of Temple University prepare the material to be considered. All have an opportunity to be heard. When divided opinion becomes evident, the Commissioners' vote is the vote that counts.

However, since the agenda includes mainly material proposed by the Chairman and Reporters, the debates are obviously held within narrow confines.

With this background before us, we can now turn to the Code itself, keeping in mind that the Code has not as yet received formal approval of the National Conference of Commissioners.

A final note: All of us must now have the Uniform Commercial Code with its comments, decisions, and law review articles available as a reference when construing the Land Code.

General Provisions: Part I

1. Section 1-102 states the purposes of the Code, among which we find (b)(3):

"To protect consumer buyers and borrowers against practices which may cause unreasonable risk and loss to them."

2. Section 1-103 is important:

"Except as provided in subsection (b), unless there are words in a section of this Act such as 'notwithstanding agreement to the contrary' or other language indicating a contrary result, the parties, by agreement, may vary the effect of provisions of this Act.

"The obligations of good faith, diligence, and reasonable care prescribed by this Act may not be disclaimed by agreement but the parties by agreement may determine the standards by which the performance of those obligations is to be measured if the standards are not manifestly unreasonable."

3. Section 1-106 is modeled after UCC Section 1-106 and is as follows:

"SECTION 1-106. *(Remedies To Be Liberally Administered.)*

"(a) The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed, but consequential, special, or penal damages may not be had except as specifically provided in this Act or by other rule of law.

"(b) Any right or obligation declared by this Act is enforceable by judicial proceedings unless the provision declaring it specified a different and limited effect."

4. Other provisions in this Part are of lesser importance.

General Provisions: Part II

1. Section 1-201 goes beyond the

definition of good faith in the UCC. The UCC reads:

"'Good faith' means honesty in fact in the conduct or transaction concerned."

The Land Code reads:

"'Good faith' means honesty in fact and the observance of reasonable standards of fair dealing in a party's trade or business."

Thus a party is guilty of bad faith if he fails to observe reasonable standards of fair dealing in his trade or business.

2. Real estate is given a strange definition in Section 1-201 (22), as follows:

"'Real estate' means

"(i) any estate or interest in land including buildings, structures and other things which by custom, usage, or law pass with a conveyance of land even though not described or mentioned in the contract of sale or instrument of conveyance, and

"(ii) any assignment of lease or of rent of or from real estate.

This definition seems inconsistent with (24) which is as follows:

"'Residential real estate' means a parcel of land not exceeding 3 acres on which there is a building consisting of not more than 4 dwelling units. Residential real estate does not lose its residential character if the parcel or structure contains units devoted to other uses and the combined number of dwelling units and other units does not exceed 6."

3. Section 1-206 is in part, as follows:

"SECTION 1-206. *(Waiver or Renunciation of Claim or Right After Breach.)*

"(a) Subject to subsection (b), any claim or right arising out of an alleged breach or any security interest or lien can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party holding a lien."

This would seem to adopt the view that a lien, a mechanics lien, for example, can be waived without consideration, which certainly is an improvement in the law.

4. Section 1-207 is as follows:

"SECTION 1-207. *(Final Written Expression: Parol or Extrinsic Evidence.)*

"Terms agreed to by the parties in confirmatory memoranda or terms set forth in a writing intended by the parties as a final expression of their agreement may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement, but may be explained or supplemented:

"(1) by course of dealing or usage or by course of performance; and

"(2) by other evidence of the parties' intention or understanding, and

"(3) unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement, by evidence of consistent additional terms."

This section purports to follow UCC Section 2-202, but adds (2), which does not appear in the UCC. Subsection (2) adopts the views of Professors Corbin and Wigmore and rejects the views of Professor Williston. See *Smalley v. Juneau Clinic Bldg Corp.*, 493 P2d 1296. Restatement of Contracts 2d treats this in a series of sections beginning with Section 227. I offer these comments: (1) The law under the UCC is now different from the Land Code in an important respect. (2) An important change in the law is made in most states.

5. Section 1-208 dispensing with seals parallels UCC 2-203.

6. Section 1-209 regarding performance as bearing on the construction to be given a contract parallels UCC 2-208.

7. Section 1-210 abolishes the rule that a contract of sale is merged in the deed. It will cause some problems. Up to now, for example, the rule has been that all questions of marketability of title end when the deal is closed. 57 ALR 1261; 84 ALR 1025, 1027. This is a wholesome rule. Presumably vendors will, pursuant to Section 1-103, insert merger language in the contract.

8. Section 1-211 parallels Section 2-209 of the UCC and permits modifications of a contract without consideration. In the Comments to Section 2-209 it is stated:

"The test of 'good faith' between merchants or as against merchants includes 'observance of reasonable commercial standards of fair dealing in the trade' (Section 2-103), and may in some situations require an objectively demonstrable reason for seeking a modification. But such matters as a market shift which makes performance come to involve a loss may provide such a reason even though there is no such unforeseen difficulty as would make out a legal excuse from performance under Sections 2-615 and 2-616."

Thus a modification involving an upward or downward revision of the sale price requires no consideration. This usually takes place when in a period of rising prices the seller refuses to go through with the deal and the buyer who needs the property offers to increase the price. There is no consideration for this new offer under existing law. The modification under the Code requires no consideration and probably does not require a writing because Section 2-201, the new Statute of Frauds, does not require the memorandum to state a sale price.

9. Section 1-212 is modeled, in part, on UCC 2-302. However it goes far beyond that section. It enables the court to determine whether the sale price is unconscionably too high or unconscionably too low.

This, obviously is new law in most states.

A like provision is made with respect to charges for credit. These can be revised by the courts if unconscionably too high or low.

In this connection, remember that good faith cannot be disclaimed. Section 1-103. And good faith requires the observance of reasonable standards of fair dealing in a party's trade or business. Section 1-201 (a).

The courts will now be called upon to examine contracts critically and remake them according to the court's notion of what is fair. This section is bound to breed litigation. Some decisions have read this result into UCC. *Frostifresh Corp. v. Reynoso,* 54 Misc 2d 119, 281 N.Y.S.2d 964 (1964). 18 A.L.R. 3rd 1305 cites a number of articles on unconscionability.

1. Section 2-104 relates to a sale of minerals, including oil and gas, or a structure or its materials to be removed from the realty, also a sale of crops. It parallels in part the recent amendments to Section 2-107 of the UCC but paragraph (c) is a stronger section underscoring the need for recording for such sales to be good against third parties.

2. Section 2-201 is the new Statute of Frauds, roughly paralleling UCC Section 2-201. The sale price no longer is needed in the memorandum, which is new law. The memorandum is to be signed by the party against whom enforcement is sought, which is new law in a few states. A lease for a year or less can be oral, which is a change in a number of states having longer periods.

Section 2-201 (b) (5) is as follows:

"A contract which does not satisfy the requirements of subsection (a) but which is valid in other respects is enforceable if:

"the party against whom enforcement is sought admits in his pleadings, testimony, or otherwise in court that a contract for conveyance was made."

The Comments to the UCC state as follows:

"Under this section it is no longer possible to admit the contract in court and still treat the Statute as a defense."

It would seem that the Statute of Frauds has all but disappeared, since modern practice acts make liberal provisions for extracting admissions and testimony from adverse parties.

3. Section 2-202 is as follows:

"SECTION 2-202 *(Formation in General.)* Even though one or more terms are left open a contract for conveyance does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy, but a contract within the statute of frauds (Section 2-201) is not enforceable unless the writing is sufficient under that section."

This parallels UCC Section 2-204 (3). The Comment on this section is as follows:

"Subsection (3) states the principle as to 'open terms' underlying later sections of the Article. If the parties intend to enter into a binding agreement, this subsection recognizes that agreement as valid in law, despite missing terms, if there is any reasonably certain basis for granting a remedy. The test is not certainty as to what the parties were to do nor as to the exact amount of damages due the plaintiff. Nor is the fact that one or more terms are left to be agreed upon enough of itself to defeat an otherwise adequate agreement. Rather, commercial standards on the point of 'indefiniteness' are intended to be applied, this Act making provision elsewhere for missing terms needed for performance, open price, remedies and the like.

"The more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement, but their actions may be frequently conclusive on the matter despite the omissions."

Some comments are in order: (1) This, of course, is a substantial change in the law. For specific performance today, completeness and certainty are requirements of the contract. Thus if a contract of sale calls for a purchase money mortgage and fails to state the maturity or interest rate, relief is denied. Kratovil, *Real Estate Law* (5th ed. 1969) §166. There is a vast body of case law on the subject. *Ibid.* This rule would now disappear. (2) The UCC comments speak of "commercial standards" of reasonableness. It is obvious that the draftsmen of that Code thought that such standards would often be present in chattel transactions. It is doubtful that such standards exist in great numbers in real estate transactions, especially complex deals. (3) The language of the section is inept, as is that of the UCC. A substitute section was proposed as follows:

"A contract does not fail for indefiniteness if the parties have intended to make a contract and the nature of the property sold and the nature of the omitted terms are such that supplementation by the court on a reasonable basis, fair to all parties to the contract is, in the judgment of the court, a fairer result than a refusal to enforce the contract. The court may resort to such supplementation, and in this connection the court may hear evidence on all such matters and take judicial notice of all public and private publications setting forth current statistics bearing on this question."

It certainly seems lacking somewhat in accuracy to speak of an "appropriate remedy" when it is clear that the judge is being called upon to fill the gaps in a contract.

4. Section 2-203 is as follows:

"SECTION 2-203 *(Firm Offers.)*

"(a) An offer to buy or convey real estate in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time; not withstanding agreement to the contrary, the period of irrevocability, absent bargained for consideration, may not exceed 2 months if the offeror is an individual offering to sell his residential real estate or 6 months if the offeror is any other person. Any term of irrevocability on a form supplied by the offeree must be separately signed by the offeror."

This is modeled after UCC Section 2-205. However, that section relates to an offer "by a merchant," who, presumably has the sophistication to protect himself. The Land Code section applies even to the uninitiated. As to the uninitiated it is capable of working mischief. When a seller lists his house with a broker and the broker finds a prospective buyer, the contract prepared for the buyer's signature can have a printed appendage that "this contract is irrevocable for two months". Probably some unsophisticated buyers will sign, and the seller has two months time to shop around for a better offer. It was never made clear why the firm offer was needed in real estate deals. Options amply fill this need.

5. Section 2-505 deals with assignments of the contract and roughly parallels UCC Section 2-210. This adopts a minority rule to the effect that an assignee acquires liabilities as well as rights and that an assignment is a delegation of performance on which the other party to the contract can sue. *Rose v. Vulcan Materials Co.,* 194 SE2d 521 (N.C. 1973). Delegation of performance is not permitted where the other party has a substantial interest in having his original promisor perform. This, I presume, perpetuates the existing rule that the vendor need not accept a purchase money mortgage from the purchaser's assignee. The remainder of the section is of little interest to title men.

General Obligations and Construction of Agreement to Convey: Part III

1. Section 2-301 and the Comment thereon are as follows:

"SECTION 2-301. *(General Obligations of Parties.)* The obligation of the seller is to convey the real estate agreed upon and deliver possession if a possessory interest is to be conveyed and that of the buyer is to accept the conveyance and pay the price in accordance with the agreement.

"COMMENT

"This section refers to both freehold and non-freehold estates. In the case of non-freehold estates, the price will usually be 'rent' payable periodically during the term conveyed."

The cases are in conflict as to the landlord's duty to put his tenant in possession when the prior tenant holds over wrongfully. 15 Cleveland-Marshall L. Rev. 389; 35 Tenn. L. Rev. 656. This section resolves the issue in favor of putting such a duty on the landlord, which is certainly the better rule.

2. Section 2-302 parallels UCC 2-305 and is as follows:

"SECTION 2-302. (*Open Price Term.)*

"(a) The parties if they so intend can conclude an agreement to convey even though the price is not settled. In such a case the price is the fair market value of the real estate at the time for transfer if:

"(1) nothing is said as to price; or

"(2) the price is left to be agreed by the parties and they fail to agree; or

"(3) the price is to be fixed in terms of some agreed market or appraisal as determined by a third person and it is not so determined.

"(b) A price to be fixed by the seller or by the buyer means a price to be fixed in good faith.

"(c) If a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other at his option may treat the agreement to convey as cancelled or himself fix a reasonable price."

In the UCC this makes sense because the value of chattels can often be determined by reference, for example, to the commodities market. Real estate is something else again. It seems like a poor section.

3. Section 2-303 roughly parallels UCC Section 2-311 and is as follows:

"SECTION 2-303. *(Options and Cooperation Respecting Performance.)*

"(a) An agreement for sale which is otherwise sufficiently definite to be a contract is not rendered invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any specification made under a power granted in the contract must be reasonable and in good faith.

"(b) Whenever specification would materially affect the other party's performance but is not seasonably made or where one party's cooperation is necessary to the agreed performance of the other but is not seasonably forthcoming, the other party in addition to all other remedies

"(1) is excused for any resulting delay in his own performance; and

"(2) may also either proceed to perform in any reasonable manner or after the time for a material part of his own performance treat the failure to specify or to cooperate as a breach.

"(c) Unless otherwise agreed, a transferor of real estate must on due demand supply his purchaser with any requisite instrument which may be necessary for recordation of the transfer, but if the transfer is not for value a transferor need not do so unless the purchaser furnishes the necessary expenses. Failure to comply with a demand made within a reasonable time gives the purchaser the right to reject or rescind the transfer."

Again there is the provision for a contract with missing terms to be supplied later.

Paragraph (c) is new and creates a requirement that the deed be recordable. This is good, because a multitude of recent statutes render deeds nonrecordable if, for example, they lack the name of the draftsman, and so on.

4. Section 2-304 is as follows:

"SECTION 2-304. *(Warranty of Title; Freehold Real Estate.)*

"(a) A seller in a contract for conveyance of freehold real estate warrants that:

"(1) the agreed title to the real estate will be marketable at the time of conveyance;

"(2) he will not do or permit any act to be done which would impair the likelihood that the title will be marketable at the time he has agreed to convey; and

"(3) if the seller has retained title for security, he has disclosed prior to the making of the contract all security interests in the real estate and all other encumbrances securing the payment of money, and

"(4) if a possessory interest, he will deliver possession.

"(b) For purpose of the obligation of this section and of any contractual obligation as to the quality of title stated as an obligation to convey 'good title', 'record title', 'good and sufficient title' or as a title obligation in similar general

terms, the obligation means a 'Marketable record title' (Section 5-301(1) as to matters and interests arising before the 'root of title' (Section 5-301 (6) which are extinguished by Part 3 of Article 5.

"(c) The grantor in a deed of conveyance warrants that:

"(1) the title is that contracted for;

"(2) the real estate is free from all unexpected encumbrances; and

"(3) if *(sic.)* the buyer will have quiet and peaceable possession of or right to enjoy the real estate granted; and

"(4) the grantor will defend the title to the real estate granted against all persons who may lawfully claim it.

"(d) A warranty under subsections (a) and (b) may be excluded or modified by language which clearly indicates to the buyer the exclusion or modification. In an agreement to convey in which the only reference to title by the seller is a statement that he will convey by a quitclaim or other non-warranty or limited warranty deed, the buyer may, nevertheless, for failure of the title to be marketable, refuse to accept the deed and have restitution of any part of the price paid, but without any other remedy.

"(e) There are no warranties of title in a sale made under a court order unless the order provides otherwise."

Subsection (a) (3) is rather muddy. A vendor must disclose all security interests and all money encumbrances in his contract, else the title is unmarketable.

Subsection (a) (4) repeats the obligation of a landlord to deliver possession.

Subsection (b) is unclear, and probably will be revised.

Subsection (c) (2) is unclear in its reference to "unexpected encumbrances." Perhaps this is a reference to the modern rule that visible and beneficial easements do not render title unmarketable. Kratovil, *Real Estate Law* (5th ed. 1969) §171.

Subsection (d) is new in that it limits the buyer to rescission if the title is unmarketable in the circumstances stated.

Subsection (e) is probably a statement of existing law but leaves unresolved the conflict between states that permit a purchaser at a judicial sale to reject a defective title and states that apply caveat emptor. 55 Am.Jur. 2d 694. In all states, once the purchaser at a judicial sale accepts his deed, he is without warranties of title.

(To Be Continued)

Western TI Office Plans Fall Move

Plans have been completed to move the Los Angeles western district office of Title Insurance and Trust to an office building under construction in Beverly Hills. Scheduled for completion late this year, the new building will also house a branch of TI's trust department, which will move from its present location in Century City.

George M. Ramsey, (above) vice president and secretary of Southwest Title Insurance Co., was presented the "Titleman of the Year" award at the recent Texas Land Title Association convention. He is a recent past president of the Title Underwriters of Texas.

Home Title of Fresno Changes Name

Home Title Company of Fresno, California, has changed its name to First American Title Company of Fresno. The company is affiliated with First American Title Insurance Company.

The Fresno County operation, directed by Philip Wilson, president, and Gordon L. Sickler, executive vice president, retains its local management and staff.

William Johnson Dies In Oklahoma

Services were August 1 in Ponca City, Okla., for William F. Johnson, 45, member of the ALTA Directory Rules Committee, who died July 29 at a local hospital where he was a patient.

Mr. Johnson, who was president of Albright Title and Trust Company, Newkirk, Okla., had been ill for some time.

Robert G. Bannon, (above) vice president and manager of the Hartford Office of Security Title and Guaranty Company, has been elected president of the New England Land Title Association. He was also recently elected president of the Connecticut Board of Title Underwriters.

names in the news

Eleven persons were recently elected to office by the boards of directors of Title Insurance and Trust and Pioneer National Title Insurance. Elected to office in TI were: vice presidents: **J. Patrick Galvin,** construction disbursement service; **William H. Mince,** manager, Ventura office, southwestern division; **Richard S. Quarto,** manager, southern California area, realty tax and service division; **Ivor Wallis,** national service representative for northern California and coordinator of HUD projects; assistant vice president: **Bruce R. House,** manager, Santa Barbara office, southwestern division; trust officers: **Agnes Bogosian,** assistant trust officer; **Patricia A. Ohanesian,** assistant trust officer.

Elected to office in PNTI were: vice presidents: **Jerry L. Frost,** major account representative, north central division; **J. W. Mullen,** major account representative, western region; **Ivor Wallis,** national service representative for northern California and coordinator of HUD projects; **Terry Wise,** manager, northwestern area, realty tax and service division; assistant vice president: **Anthony A. Schunk,** construction disbursement service.

* * *

Lawrence A. Newland has been named vice president and personnel director for the combined Ticor Title insurance subsidiaries.

* * *

Raymond E. Johnson, vice president and **Orrin C. Shaw,** assistant vice president, Title Insurance and Trust, will serve as part of a newly formed marketing team offering assistance to brokers, developers and builders specializing in commercial and industrial development. **Robert A. McDonald** has joined the investment department as manager of the bond department. **William H. Mince** has been appointed vice president and manager of the Ventura County (Cal.) office.

NEWLAND

STILO

KANTER

ANDERSON

PAULSEN

WEATHERFORD

HELIKER

MAYES

WALKER

KOCH

Thomas J. Higgins, Pioneer National Title Insurance Company, has been elected vice president in charge of special accounts, Chicago Metropolitan area.

* * *

Anthony J. Stilo has been elected president and chief executive officer of USLIFE Title Insurance Company of New York. The company also announces the appointments of **William H. Kanter,** vice president and manager of the Brooklyn office; **Curtis W. Gustafson,** vice president, Dallas national agency division with responsibility for all states served by the firm except Texas, New Mexico and Arizona; **Timothy D. Markham,** assistant vice president, agency division, with responsibility for Texas.

* * *

Southwest Title Insurance Co. announces the appointments of **John D. Anderson,** field representative, midwest division, Indiana, and **Kenneth E. Paulsen,** field representative, southwest division, Dallas.

* * *

John Ely Weatherford, senior vice president, has been elected general counsel of American Title Insurance Company in Miami. **Bryan S. Heliker** has joined the company as assistant director of public relations.

* * *

Commonwealth Land Title Insurance Company announces the promotions of **Woodrow J. Dandrea,** vice president, to head of Philadelphia area operations and **Thomas B. White,** assistant vice president, to head of Philadelphia title plant operations. **Robert T. Howe** has

Continued on page 14

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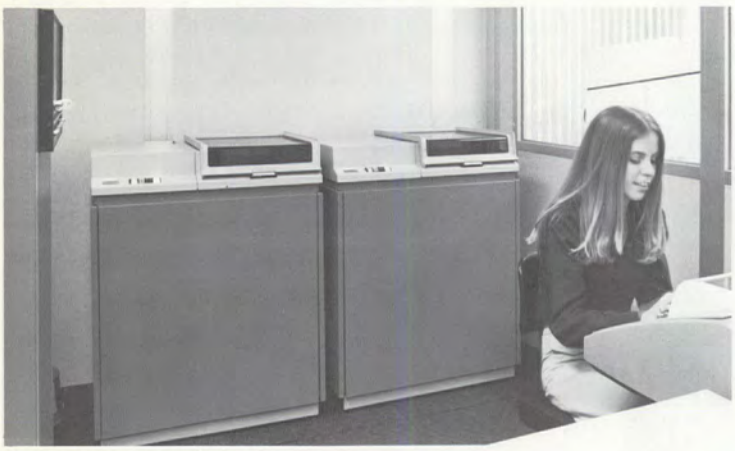

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NAMES —Continued from page 12

BARISH

JANOPOULOS

CRAWFORD

OTTEN

been named assistant manager and assistant vice president of the company's Cherry Hill (N.J.) office.

* * *

Stanton S. Roller is joining Chicago Title Insurance Company and assumes responsibilities in its newly-formed international operation.

* * *

Lawyers Title Insurance Corporation has elected **Gilford H. Mayes, Jr.,** Denver, Rocky Mountain regional counsel and **H. E. Walker, Jr.,** Dallas, southwest regional counsel. The company also announces the promotion of three men in its Chicago office: **Richard C. Koch,** Illinois state manager; **Marvin H. Barish,** branch counsel; and **Thomas G. Janopoulos,** branch manager. **Franklin G. Crawford** has been elected manager of the company's Howell (Mich.) branch office.

* * *

Hendrick J. (Hank) Otten has been appointed manager of Stewart Title's new Broward County (Fla.) office.

Galaway Elected President at Oregon Meeting

W. Bern Galaway, vice president and manager of Title Insurance Company of Oregon, Beaverton, was elected president of the Oregon Land Title Association at its 1973 annual convention at the Kah-Nee-Ta resort in Warm Springs, Oregon.

Additional officers elected include Kenneth R. Schramm, Transamerica Title Insurance Company, Portland, vice president; Wallace Bohning, Jackson County Title Company, Medford, and Carlyle Staab, Land Title Insurance Company, Baker, executive committee members at large; and Leland Wimberly, Douglas County Title Company, Roseburg, chairman of the executive committee. Marie Hoffman, formerly of Commonwealth Title Company, Hillsboro, and William J. Peek, retired after service with Commonwealth and Cascade Title Company, were elected honorary members of the association.

Robert C. Dawson, chairman of the Title Insurance and Underwriters Section of ALTA, addressed the meeting on legislative and regulatory matters affecting the land title industry nationally. Additional speakers included Don McIntyre, vice president, Benj. Franklin Federal Savings and Loan Association; Howard T. Beugli, Oregon deputy insurance commissioner; Kenneth Schramm; Tom Stapleton, counsel for Pioneer National Title Insurance Company; Robert W. Gilley, Portland attorney; Herbert Alstadt, executive secretary of the Oregon Title Insurance Rating Bureau, and Stanton Allison, executive secretary of the Oregon Land Title Association.

An Indian theme prevailed at the recent meeting of the Oregon Land Title Association meeting held at Kah-Nee-Ta resort. At top, left, Robert Dawson, Chairman, Title Insurance and Underwriters Section of ALTA, addresses the convention. Margaret Thompson (above right) gives the address of welcome. In the lower picture, Indian dancers provide entertainment.

TESTIMONY—Continued from page 6

with existing federal statutes since the McCarran-Ferguson Act (15 U.S.C. §1012) provides that no act of Congress shall be construed to invalidate, impair or supersede any state law regulating insurance unless the act specifically relates to the business of insurance; and

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

This last point deserves emphasis and elaboration. Under the insurance laws of most states, title insurance companies (as well as other insurance companies) may not impose charges that are at variance with the rates that have been filed with and approved by the state insurance authority. Title companies operating in those states could not comply with the proposed HUD-VA maximums in regard to FHA or VA assisted transactions and still be in compliance with state law since those maximums are below the rates that have been approved as reasonable, adequate and non-discriminatory by state authorities. Moreover, the imposition of such limits in FHA and VA transactions would, as a legal and practical matter, result in such limits being imposed in all conventional transactions as well—something that was certainly not intended in the 1970 Act. The reason for this is that most states—Virginia and Maryland are nearby examples—have statutory provisions prohibiting different rates for risks involving essentially the same hazards and expense elements. Moreover, a title company could not justify to the public and could not competitively maintain a policy or practice of lower charges in an FHA-assisted transaction than its charges for an identical house purchased for an identical amount in a conventional transaction.

Thus, many title companies potentially face a difficult dilemma in regard to the proposed HUD-VA maximums: they may either have to give up writing title insurance in FHA and VA transactions to the detriment of the home buyer in such transactions or be forced to adopt the proposed maximums for title insurance in all transactions, conventional as well as FHA and VA. We have already had some indications from state insurance commissioners that adopting the proposed maximums in all transactions might threaten the solvency of the title companies under their jurisdiction because of the unrealistically low levels imposed on the charges involved. As you can tell, Mr. Chairman, Federal rate regulation involves many problems that apparently have not been fully considered.

Because of our concern about the methodology utilized by HUD in the development of its proposed regulations and the fact that no hearings were held wherein title companies had an opportunity to contest the proposed maximums, ALTA retained the well-repected economic consulting firm of Arthur D. Little, Inc. to analyze the procedures utilized by HUD in reaching their determination of maximum fees for the various settlement services. Arthur D. Little, Inc. submitted a report to ALTA on November 1, 1972, and this report was filed with HUD on November 9, 1972. While I would commend the entire report as essential reading for anyone who wishes to understand why HUD's approach to Federal rate-making simply will not work, the basic conclusions reached by Arthur D. Little can be summarized as follows:

(1) The proposed maximum charges were not based upon a determination of the actual costs and fair profit of providing title related services;

(2) The HUD methodology in developing the proposed maximum charges was based on the unjustified assumption that differences in charges for title related services do not reflect differences in the value of services received or the costs of providing such services but arise from unnecessary services and charges or abusive practices;

(3) Apart from the above defects, the HUD methodology cannot be used as a basis to set maximum prices for title related services because its results were consistently downward-biased; and

(4) The proposed *maximums* were established at the levels indicated by the HUD econometric method as the *average* prices that should be charged for title related services.

In short, what HUD did was to develop the proposed maximums on the basis of charges in fourteen of the lowest cost states in the country and to ignore many important factors (such as differences in the costs of title searching resulting from differences in the quality of land records) that would account for differences in charges in various areas. Moreover, while the HUD methodology produced figures which under any analysis could only be construed as what *average* charges should be, HUD converted these figures into *maximum* allowable charges in their proposed regulations. I can easily understand why HUD has received more comments on these proposed regulations than on any other matter it has ever published for public comment. Virtually all of the comments filed by private businessmen, attorneys and public officials (including state insurance commissioners) have been justifiably critical of the proposed regulations.

Subsequent to the publication of the proposed regulations, the House Committee on Banking and Currency took up consideration of H. R. 16704, the Housing and Urban Development Act of 1972, and, in particular, the provisions of Title IX of the bill as reported by the House Subcommittee on Housing that would have directed HUD to set ceilings on closing and settlement costs for most conventional transactions as well as for FHA and VA assisted transactions. During the Committee's consideration of the bill, Representative Robert G. Stephens, Jr., of Georgia, offered an alternative to Title IX that would have retained and strengthened the anti-abuse, disclosure and reform provisions of the title but would have eliminated any authority for HUD to prescribe maximum settlement costs under Section 701 of the 1970 Act. ALTA strongly supported the approach adopted by the so-called Stephens Substitute, which contained provisions that would deal with many of the fundamental problems that were discussed in the HUD-VA Report and during the 1972 Congressional hearings that were held by both the House and Senate Banking Committees. This approach proved attractive to many members of the House Banking and Currency Committee and the Stephens

Substitute was overwhelmingly approved by a bipartisan 28-8 majority of the Committee. Unfortunately, the entire omnibus housing bill, of which the Stephens Substitute was a part, did not obtain a rule from the House Rules Committee and therefore did not come to a vote on the House floor during the closing days of the 92nd Congress.

Federal Regulation of the Charges Made for Settlement Services Would Be an Unwise and Inappropriate Response to the Problems that Exist in the Settlement Process in a Few Areas of the Country

Mr. Chairman, on April 5 the Department of Housing and Urban Development, as part of a review and evaluation of departmental programs, published in the Federal Register an invitation for public comment on what the role of the Federal government ought to be in the housing area. In response to that invitation, ALTA submitted to HUD a letter dated May 1, 1973 commenting on the proposed HUD program of regulating settlement charges in FHA-assisted transactions. In that letter we discussed some of the reasons why imposing maximum limits on settlement charges is not an efficient or necessary response by the Federal government to the problem of ensuring that title to real property can be readily transferred at reasonable costs. While our May 1 filing with HUD goes into greater detail on these points, because of the importance of this issue I would like briefly to summarize some of the reasons why we believe the Congress should reject the approach of Federal regulation of settlement charges.

First, Federal rate regulation of settlement charges should only be considered if there are clear and convincing findings that (a) unreasonably high settlement charges are a widespread problem throughout the country and (b) there are no other practical ways to deal with the underlying problems that are causing such high charges. In regard to (a), there has been no demonstration that settlement charges in general, and land title charges in particular, are excessively high throughout the nation. We submit that any such assumption is without foundation. While some home buyers may feel that settlement costs are generally too high, possibly because they do not understand fully the range of necessary services involved in the transfer of something as valuable as residential real property, I must point out again that it was the conclusion of the 1972 HUD-VA Report that while costs "appear" to be high in some areas, "unreasonable costs probably occur in fewer areas than may be popularly assumed." Moreover, in regard to (b), as S. 2228 and last year's Stephens Substitute in the House demonstrate, there are indeed alternative ways to deal with the underlying problems that may be causing higher-than-necessary settlement charges in a few areas of the country.

Second, while certain problems or abuses may exist in particular areas of the country, this is hardly a reason or justification for imposing a substantial economic burden on tens of thousands of businesses and attorneys whose charges for settlement services are reasonable and who do not engage in any abusive or uneconomic practices. If rate regulation were the Federal response to every industry in which some problems or abuses may be resulting in higher-than-necessary charges, there would be few sectors of the economy left where prices would not be dictated by the Federal government. The traditional approach of the Federal government to practices or problems in an industry that may be causing higher-than-necessary prices is to attack those practices or problems directly. We can see no reason why a similar approach should not be adopted in regard to those problems that may exist in the real estate settlement process.

Third, a new bureaucratic machinery of possibly immense proportions would have to be developed by the Federal government if maximum charges are to be established in accordance with reasonable and fair procedures that have been required in other instances of Federal rate making. In a long line of cases, the Supreme Court has declared that the Constitutional requirements of due process guarantee a full and fair hearing before administratively established rates can be put into effect. See *St. Joseph Stockyards Co. v. United States,* 298 U.S. 38 (1936); *Chicago, Minneapolis and St. Paul Railway Co. v. State of Minnesota,* 134 U.S. 418 (1890); *Ohio Bell Telephone Company v. Public Utilities Commission of Ohio,* 301 U.S. 292 (1937); *Railroad Commission of the State of California v. Pacific Gas and Electric Company,* 302 U.S. 388 (1938); *West Ohio Gas Company v. Public Utilities Commission of Ohio,* 294 U.S. 63 (1935); *United States v. Illinois Central Railroad Company,* 291 U.S. 457 (1934). In his concurrence in the *St. Joseph Stockyards* case, Mr. Justice Brandeis stated:

> The inexorable safeguard which the due process clause assures is not that a court may examine whether the findings as to value or income are correct, but that the trier of the facts shall be an impartial tribunal; *that no finding shall be made except upon due notice and opportunity to be heard;* that the procedures at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be an opportunity for a court to determine whether the applicable rules of law and procedures were observed. (298 U.S. at 73; emphasis added.)

Even if such hearings were not constitutionally required, the complexity of the issues and the diversity of conditions in the industries regulated would make it manifestly unfair for HUD to prescribe maximum rates without giving those individuals and businesses whose charges are to be regulated an opportunity to present evidence on their costs and profits, to challenge the evidence presented by others, to be informed about the basis of any decision reached on proposed maximum charges, and to appeal any final decision setting such maximums prior to the time they become effective. Given the tremendous variation of local laws, requirements and practices that characterize the transfer of real property, it is certain that a large and expensive bureaucratic structure would have to be developed to deal with Federal regulation of settlement charges.

The methodology employed by HUD in developing the proposed limits on settlement charges set forth in their

July 4 proposed regulations demonstrates that there is no easy road to the regulation of charges made by thousands of individuals for services rendered in extremely diverse circumstances. By using econometric models, HUD believed that it would be relieved of conducting a costly and burdensome analysis of the services provided in particular localities, of making an accurate calculation of the costs involved in providing such services, of considering differences in the quality of services performed, and of determining whether reasonable profits were being earned by the attorneys, surveyors, pest control inspectors, title insurers, title examiners, abstracters and other businessmen engaged in transactions involving the transfer of real property.

The failure to take these factors into consideration has resulted in the publication of proposed maximums that simply cannot be justified as fair or reasonable. If HUD should insist on issuing final regulations on this basis, such arbitrary rate regulation must certainly be in violation of the due process clause of the Fifth Amendment. Furthermore, if the HUD-established rates are fixed at levels that are below the costs incurred by those persons and companies providing settlement services, such rates might well be held confiscatory or unreasonable under the due process clause.

ALTA believes that the Congress should give close attention to these serious constitutional questions that inevitably arise under any scheme of Federal rate regulation of settlement charges and that due consideration must also be given to the enormous administrative costs that any fair and constitutional system of rate regulation will necessarily entail. Unfortunately, these important aspects of Federal rate regulation have not received adequate attention from those who favor such an approach.

Fourth, the development of a new Federal bureaucracy to regulate settlement charges would, at least in the case of title insurance charges, duplicate many existing and proposed state regulatory schemes, thereby imposing additional administrative costs that can only result in increased title insurance charges. As I have already pointed out, it may be impossible for title companies to comply with Federally-established maximum limits and at the same time comply with their obligations under state laws to charge rates which have been found to be reasonable and necessary by the state insurance authorities that regulate title insurance companies. Moreover, it would be dangerous and unwise for the Federal government simply to prescribe maximum limits for title insurance charges without at the same time adopting the necessary legislative and administrative framework to ensure that adequate reserves will be maintained and that these maximum limits would not jeopardize the solvency of the affected title companies. State regulatory schemes characteristically not only provide for the examination of rates charged by title insurance companies to ensure that they are fair and reasonable to the customer, but, directly or indirectly, also govern such matters as the coverage of title policies, title insurance reserves and the financial solvency of title companies. It is obvious that the charges that are made for title insurance services have a direct impact on these other aspects of title company operations, and vice versa. Unless the Federal government intends to abandon the well-established policy embodied in the McCarran-Ferguson Act and regulate all of these other aspects of title insurance operations—a proposal that no one has suggested because of the tremendous costs and administrative burden involved in the duplication of existing state regulatory schemes—it would be extremely unwise and potentially disastrous to the financial soundness of the title industry for the Federal government to prescribe maximum limits for title insurance charges. In other words, the responsibility for regulation of rates cannot be divorced from the responsibility for overseeing other aspects of title company operations.

Fifth, the imposition of limits on charges for settlement services does not deal effectively with the fundamental reasons why certain settlement charges may be unnecessarily high in a few areas of the country. This point was persuasively made by the Federal Home Loan Bank Board in a letter dated June 14, 1972, to the chairman of the House Banking and Currency Committee. In commenting on the settlement cost provisions of last year's housing bill, the Board opposed the concept of Federal rate regulation and characterized such an approach as "merely symptomatic treatment." Instead, the Board stated its belief that the only pragmatic approach is "to regulate the underlying business relationships and procedures of which the costs are a function." In addition to opposing rate regulation because it failed to come to grips with the real problems involved, the Board stated its view that "rate regulation is likely to create a bureaucratic monstrosity," that "rate regulation is contrary to this country's traditional philosophy regarding the role of the market place," and that "rate regulation not only doesn't work very well, but itself creates serious distortions and instabilities." The Board summarized its position by saying that "the costs of rate-fixing outweigh the benefits." ALTA believes that the views expressed by the Federal Home Loan Bank Board, the agency established by Congress to ensure that adequate funds and resources are available to meet the nation's housing goals, deserve most serious consideration by the Congress.

Sixth, it is important for this Subcommittee and the members of Congress to realize that even if the Federal government imposed rate regulation on the charges imposed by title companies, attorneys, surveyors and others who provide settlement services, only a small part of total settlement costs would be affected. While title companies and lawyers are all too frequently the main focus of attack by those who believe settlement costs are too high, the plain fact is that the major portion of the total charges paid in connection with the transfer of real property consists of such items as transfer taxes, recording fees, prepaid taxes and insurance, loan origination fees, loan discounts or "points" and sales commissions to real estate brokers. An examination of the tables set forth on pages 95 through 118 of the HUD-VA Report on the settlement charges incurred in the more than 3,900 transactions examined by HUD indicates that the average *total* cost involved in the sale and transfer of ownership of a home was $1,976 and

that the average charges for settlement services alone, *i.e.*, those charges that would be covered by the proposed HUD regulations (title examination and insurance, survey, attorney's fees, preparation of documents, closing fees and escrow fees) amounted to only $282. *Thus, only slightly over 14% of total settlement charges would be covered by Federal regulation.*

Assuming that Federal ceilings were arbitrarily imposed at levels which are 25 per cent below prevailing levels—even though it is highly doubtful that such a large reduction could be justified on any grounds—the net savings to home buyers and sellers would amount to only 3½ per cent or so of total settlement costs. Weighed against this comparatively minimal savings is the likely catastrophic effect on those regulated of having to reduce their charges by 25 per cent. A great many businessmen and lawyers who provide settlement services and who earn only modest profits from the prevailing charges will be forced out of business and into other lines of endeavor. If this happens, competition in this area will be significantly reduced since few competitors can afford to stay in business if they do not earn reasonable profits. I cannot believe that such a result is in the best interests of the American home buying public.

ALTA Supports the Basic Approach of S. 2228 and Chapter IX of H. R. 16704 as Approved Last Year by the House Banking and Currency Committee

Mr. Chairman, ALTA believes that there are better and more efficient ways to deal with problems that may exist in the real estate settlement process than to have the Federal government fix maximum limits for settlement charges. We believe that Federal legislation along the lines of S. 2228 and last year's Stephens Substitute, combined with actions already being undertaken at the state and local level by those who provide settlement services, by state and local governments and by Federal officials, offers the best hope of ensuring that necessary settlement services are provided to home buyers at reasonable costs.

Before discussing some of the provisions of S. 2228, I think it would be useful to the Committee if I highlighted just a few of the actions that have been taken within the last year at the local, state and Federal levels that demonstrate that the problems in these areas can be dealt with without the need for Federal rate regulation.

On March 16, 1973, ALTA members again confirmed the strong and active position the Association has taken in the past in support of strengthened state regulation of title insurance by approving an extensively revised and up-dated Model Title Insurance Code. Included in this Model Code are provisions requiring close supervision by the state insurance commission of title insurance rates and operations, provisions prohibiting kickbacks or rebates of any type, and provisions requiring home buyers who purchase lender's title insurance to be advised that such a policy does not protect them, but that owner's title insurance is available if they wish such coverage. ALTA members have agreed to encourage the adoption of the Model Code by state legislatures wherever possible. We believe that effective state regulation of title insurance, which can be responsive to the variations that exist in local requirements and conditions, offers the best means of maintaining public confidence in our industry by assuring that title insurance rates will not be excessive, inadequate or discriminatory.

The National Association of Insurance Commissioners, through a duly appointed title insurance Task Force of that organization, is also aggressively pursuing strong and more effective regulation of title insurance. For example, at its December, 1972, meeting, the NAIC adopted the following resolution:

> *Resolved,* by the National Association of Insurance Commissioners, December 7, 1972, that the supervision and regulation of the business of title insurance is and should continue to be the responsibility of the respective states, and be it further
>
> *Resolved,* that a Subcommittee of the Laws, Legislation and Regulation (B) Committee be designated to proceed with dispatch in drafting a model title insurance law for adoption by the NAIC as a means towards promoting uniformity of the operation and regulation of title insurance.

This NAIC Subcommittee is presently working on the development of a strong model code, which will be submitted for approval by the NAIC at its December, 1973, meeting.

While strong competitive or regulatory safeguards exist or are in the process of being developed in regard to title insurance and other settlement services, in the remaining areas of closing and settlement competition is rapidly developing by virtue of recent actions undertaken by the Department of Justice and recent court decisions. For example, the Department of Justice has recently undertaken several actions challenging the use of minimum fee schedules by bar associations and real estate brokers. A recent decision of the United States District Court for the Eastern District of Virginia in the case of *Goldfarb v. Virginia State Bar* has held that minimum fee schedules utilized by bar associations are a form of price fixing and, therefore, inconsistent with the antitrust laws. Many bar associations have voluntarily decided to eliminate the use of such schedules. These actions should have the effect of ensuring that competitive charges are made for real estate settlement services provided by attorneys.

Similar action by the Justice Department in regard to commission rates for real estate brokers indicates that the Federal government is vigorously pursuing activities in this area that it believes to be anti-competitive. On April 16, 1973, for example, the Department filed a consent judgment in the United States District Court for the Western District of Pennsylvania prohibiting the Greater Pittsburgh Board of Realtors and four multiple listing service organizations from fixing commission rates in connection with the sale of housing. Since December 18, 1969, the Department has brought nine such actions, seven of which have already been settled by consent decree. These are just some examples of activities taking place at the state and local levels or under existing Federal law to deal

with problems in the settlement process.

In regard to Federal efforts that could supplement the actions at the state and local level, there are at least three problem areas that ALTA believes might appropriately be dealt with in Federal legislation. First is the lack of understanding on the part of most home buyers as to the purpose, nature and costs of particular settlement services. Second is the existence in some areas of the country of the payment of kickbacks and referral fees, the cost of which is inevitably passed on to the home buyer even though he receives no benefit from the charge. Third, and perhaps most important of all, is the need for modernization of land recordation systems in order to deal with a problem that all of us who are engaged in land title work face—poorly organized and indexed public records relating to interests in real property.

1. INFORMATION ON SETTLEMENT SERVICES AND COSTS

While title companies, attorneys, lenders and others have made commendable efforts to help inform home buyers about the nature and costs of settlement services, ALTA supports Federal legislation, along the lines of Sections 102, 103 and 104 of S. 2228, that would assist every purchaser of a home in obtaining full information about the settlement process and the costs he is likely to incur at the time of settlement.

Section 103, for example, would direct the Secretary of HUD to prepare special information booklets that would provide a description and explanation of the nature and purpose of each cost incurred at settlement, the nature and purpose of escrow accounts, the choices available to home buyers in selecting persons to provide settlement services and an explanation of the unfair practices and unreasonable or unnecessary charges to be avoided by the prospective buyer with respect to a real estate settlement. Lenders will be required to provide these booklets to a prospective home buyer at the time when the information will prove most useful to him—when he files a mortgage loan application. These booklets should prove to be of real benefit to home buyers in helping them to select those who will provide settlement and to avoid unreasonable or unnecessary practices or charges. As is true in so many other instances, informed buyers can very effectively help to eliminate undesirable practices in the industry.

Sections 102 and 104 of the bill would require that an itemization of settlement costs be provided to home buyers, on a uniform settlement form to be developed by HUD, at least ten days in advance of settlement. By requiring that this information be given a substantial time in advance of settlement, the bill would put the home buyer in a better position to utilize the information provided by the special information booklets and to question and negotiate the charges that are listed. In any event, apprising the home buyer in advance that he will have to incur certain costs, such as the payment of transfer or recording taxes or fees, title examination and insurance charges, and escrow payments for real estate taxes and insurance, will help to avoid the difficulties faced at the present time by many home buyers who are surprised to learn of such costs only at the time of settlement. Of course, there is little that the home buyer can do about these charges if he first learns about them at the time of settlement.

2. ELIMINATION OF KICKBACKS AND REFERRAL FEES

A second problem that has received great public attention is the payment of kickbacks or referral fees made in order to obtain settlement business. While such payments do not exist in most areas of the country, the problem is sufficiently important to be deserving of Federal remedial legislation. Since such payments do not benefit the home buyer, ALTA has long been opposed to kickbacks or referral fees. For example, our 1964 Model Title Insurance Code contained a strong anti-kickback provision in Section 136, and similar language has been included in the revised Model Code that was approved by our membership this past April. ALTA has for many years recommended that legislators and regulators in all states that have not already done so act to prohibit such payments in the title insurance business. We therefore support a strong anti-kickback provision that would apply to all aspects of the settlement process. We believe the approach of Section 105 of S. 2228 is sound and that some provision along these lines should be incorporated in any Federal legislation dealing with settlement costs.

3. IMPROVEMENT OF LAND RECORDATION SYSTEMS

The third area where Federal legislation would be proper and desirable is in assisting local governments to improve existing land recordation systems. As the January, 1972 Report by American University to HUD on Mortgage Settlement Costs concluded: "(T)he root problem involved in reducing costs is reform and reorganization of public land records." A first step must be taken in this area to investigate what can be done to assist local governments in improving and modernizing their land record systems. While S. 2228 does not contain a provision dealing with this problem, ALTA believes that a provision along the lines of Section 911 of H. R. 16704, as approved last year by the House Banking Committee, presents a reasonable first step for the Federal government to take.

Under that section, the Secretary of HUD would be directed to establish and place in operation, on a demonstration basis in various areas of the country, a computerized system for the recordation of land parcels. This system would be designed to facilitate and simplify land transfer and mortgage transactions with a view to the eventual development of a nationally uniform computerized system of land parcel recordation. We would recommend, however, that in addition to computerized models, the language of the section be expanded to permit the Secretary sufficient flexibility to develop other model systems for the recordation and indexing of interests in land. A computerized system may work in some areas, but may not be useful in other areas. The experience gained from these models should prove invaluable in the determination of how basic reforms in land parcel indexing and recording can be achieved. We would hope that the Secretary and his staff would consult with us and with others who have had

extensive experience in this area in carrying out his mandate under this section.

I should also point out that the title industry has been continually seeking to develop more efficient methods for conducting title searches and examinations of the public records in an effort to keep costs down and obtain greater efficiency. For example, many companies have begun to use electronic data processing techniques in handling the public land title records with which they must deal. Some of the larger companies have developed fully computerized title plants. In a number of areas, including Denver, Dallas/Ft. Worth, Houston, St. Louis, Los Angeles, Phoenix and Washington, D.C., title companies have formed joint title plants from which to examine titles. These cooperative efforts help eliminate duplicative costs, thereby effecting savings which can be passed on to the home buyer. In addition, the American Land Title Association is cooperating with the American Bar Foundation in the development of a computerized land parcel identifier system which would make a major contribution to more efficient land record keeping in this country.

4. OTHER PROVISIONS

There are some other provisions of Chapter IX of H. R. 16704 that ALTA believes would prove to be a real benefit to home buyers and recommends be included in any Senate bill dealing with closing and settlement costs. Section 908, for example, of H. R. 16704 would limit the amount that home buyers could be required to pay into escrow accounts at the time of settlement and thereafter for the purpose of ensuring the payment of real estate taxes and insurance. While ALTA is not directly affected by this provision, we believe that the proposal is a reasonable one and will have the effect of reducing, at least in some instances, the total costs incurred at settlement.

Likewise, we would support a provision that would prevent home buyers from being charged for the costs of preparing Truth-in-Lending statements or the disclosure statements called for by Sections 102 and 104 of the S. 2228.

If whatever underlying problems that exist in the settlement process are dealt with directly by appropriate reform provisions, as they are by the provisions of S. 2228, we believe that there is absolutely no need for the Federal government to fix the maximum charges that may be made for settlement services. Accordingly, we strongly endorse the repeal of Section 701 of the Emergency Home Finance Act of 1970, as would be provided for by Section 108 of S. 2228.

Conclusion

Mr. Chairman, in conclusion I would like to point out that the proposals embodied in S. 2228 combined with the provisions of Chapter IX that I have discussed are directly responsive to recommendations for additional Federal action made in the February, 1972 HUD-VA Report on Mortgage Settlement Costs. On pages 3 and 4 of that report, HUD and the VA set forth a number of suggestions for action at the Federal level that they believed to be necessary to reduce settlement costs. These proposals were that:

(a) A single uniform settlement statement should be utilized in providing disclosure of settlement costs;

(b) Buyers should receive detailed estimates of probable individual settlement costs in advance of settlement;

(c) Such disclosure should indicate that the mortgagee's title insurance policy does not protect the buyer's interest, but that a policy protecting the buyer is available at an additional cost;

(d) Limitations should be placed on the initial deposits that are required to be made into escrow accounts for payment of real estate taxes and insurance and that limitations be placed on the monthly payments that may be required thereafter;

(e) Lenders be prohibited from charging a fee for the preparation of Truth-in-Lending statements or other disclosure statements; and

(f) A federally sponsored, computerized land parcel recording system be developed in selected jurisdictions throughout the country, with a view toward the development of a nationwide system which will simplify procedures and result in reduced costs.

ALTA believes that S. 2228, with the amendments we have suggested, would be responsive to each one of these recommendations made in the HUD-VA Report. We believe that the combination of reform legislation along the lines of S. 2228 or Chapter IX of H. R. 16704 and the other actions described above that are presently being taken at the state and Federal level will ensure that reasonable charges are made to the American home buying public for settlement services.

Mr. Chairman, thank you for this opportunity to appear before the Subcommittee and give testimony on this very important subject.

Chelsea Acquires Four New Companies

Chelsea Title and Guaranty Company has announced the acquisition of four new companies in New Jersey. They are Coastal Abstract Company of Cherry Hill, Abstract Services Inc. of Trenton, Risley Abstract Company of Woodbury and Vogel Abstract Company of Bridgeton.

Thomas McGraw and Jerome Mauro, former owners of Coastal Abstract, have become assistant vice presidents of the new Cherry Hill branch office. Donald Ogden of Trenton will serve as an assistant vice president of Chelsea's new Trenton branch.

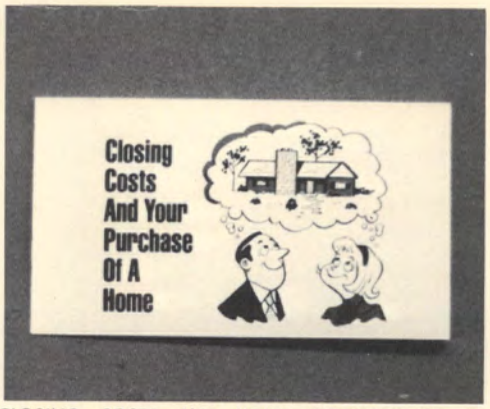
Vaughn Risley and his staff, formerly of Risley Abstract, have joined the Gloucester County operation of Chelsea. Vogel Abstract's former owners, Mr. and Mrs. Edward Vogel, are now with Chelsea's Cumberland County operation.

Tell Your Story More Effectively

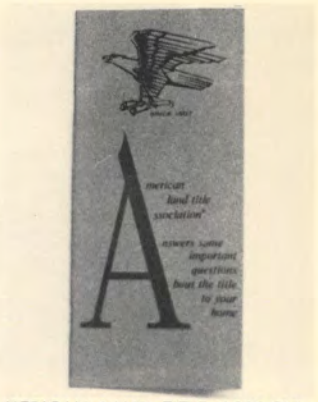
. . . with these ALTA Educational Aids

(All orders plus postage; write Business Manager, ALTA, 1828 L Street, N.W., Washington, D.C. 20036)

HOME BUYER: HORSE SENSE HELPS! A concisely-worded direct mail piece that quickly outlines title company services. 1-11 dozen, 65 cents per dozen; 12 or more dozen, 50 cents per dozen; designed to fit in a No. 10 envelope.

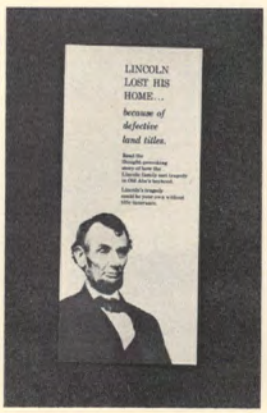


CLOSING COSTS AND YOUR PURCHASE OF A HOME. A guidebook for home buyer use in learning about local closing costs. Gives general pointers on purchasing a home and discusses typical settlement sheet items including land title services. 1-11 dozen, $2.25 per dozen; 12 or more dozen, $2.00 per dozen.



AMERICAN LAND TITLE ASSOCIATION ANSWERS SOME IMPORTANT QUESTIONS ABOUT THE TITLE TO YOUR HOME. Includes the story of the land title industry. $16.00 per 100 copies of the booklet.

THINGS YOU SHOULD KNOW ABOUT HOME BUYING AND LAND TITLE PROTECTION. Folder designed for No. 10 envelope includes a concise explanation of land title industry operational methods and why they are important to the public. Narration provides answers to misinformed criticism of the industry. $5.75 per 100 copies.



LINCOLN LOST HIS HOME . . . BECAUSE OF DEFECTIVE LAND TITLES . . . A memorable example of the need for land title protection is described in this folder. $5.00 per 100 copies.

THE IMPORTANCE OF THE ABSTRACT IN YOUR COMMUNITY. An effectively illustrated booklet that uses art work from the award-winning ALTA film, "A Place Under The Sun," to tell about land title defects and the role of the abstract in land title protection. Room for imprinting on back cover. $12.00 per 100 copies.

(RIGHT) BLUEPRINT FOR HOME BUYING. Illustrated booklet contains consumer guidelines on important aspects of home buying. Explains roles of various professionals including broker, attorney and titleman. $18.00 per hundred copies, 20 cents each on 99 or fewer copies. (RIGHT) ALTA FULL-LENGTH FILMS: "BLUEPRINT FOR HOME BUYING." Colorful animated 16 mm. sound film, 14 minutes long, with guidance on home selection, financing, settlement. Basis for popular booklet mentioned above. $95 per print. "A PLACE UNDER THE SUN." Award winning 21 minute animated 16 mm. color sound film tells the story of the land title industry and its services. $135 per print.

This talented group wants to sing your praises

These talented performers are ready to sing the praises of your title company through local radio advertising. They're waiting—on tape—in the recently-introduced ALTA Do-It-Yourself Commercial Kit.

If you're an ALTA member, you can buy the kit—on a first come, first served basis—for $50 plus postage. Just write Gary Garrity in the ALTA Washington office. You'll be billed later.

What's in the kit? The singers, of course. On 7½ ips mono tape. Furnishing high quality contemporary music for a 20, a 30, and a 60-second commercial. Plus instructions and suggested copy for three different title company radio advertising approaches. For promoting use of local attorneys or real estate brokers. For establishing local identity for a title company executive. For promoting simultaneous issue and awareness of mortgagor title insurance. You decide which approach is best for your local need—or substitute another.

Here's how it works. First, order the kit. Then work out your radio advertising campaign with one or more local stations. Adapt the enclosed commercials to carry your message—or write your own. Have a local announcer—or other appropriate talent—record voice copy to link your message with the taped music. And—presto—you have a customized local radio campaign to strengthen your market identity.

What does the group sing? This jingle: "Who can ease all your worries . . . when you're buyin' a home . . . who can bring you protection . . . the title man can."

Better order now. They're doing your song.

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