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Title News

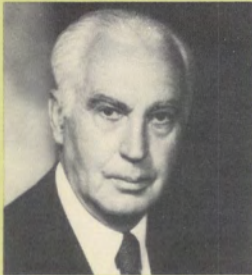
the official publication of the American Land Title Association



ALTA Officers,
Board Members
Are Installed



November, 1975



A Message from the President

NOVEMBER, 1975

We have just concluded a successful Convention of our membership and a year of accomplishment for the Association under the direction of Bob Jay as President and Bill McAuliffe, our Executive Vice President, whose successes and accomplishments could not have been achieved without the dedicated work of all of the officers, committee chairmen and committee members of our Association. To all, I wish to take this opportunity to express the appreciation of our membership.

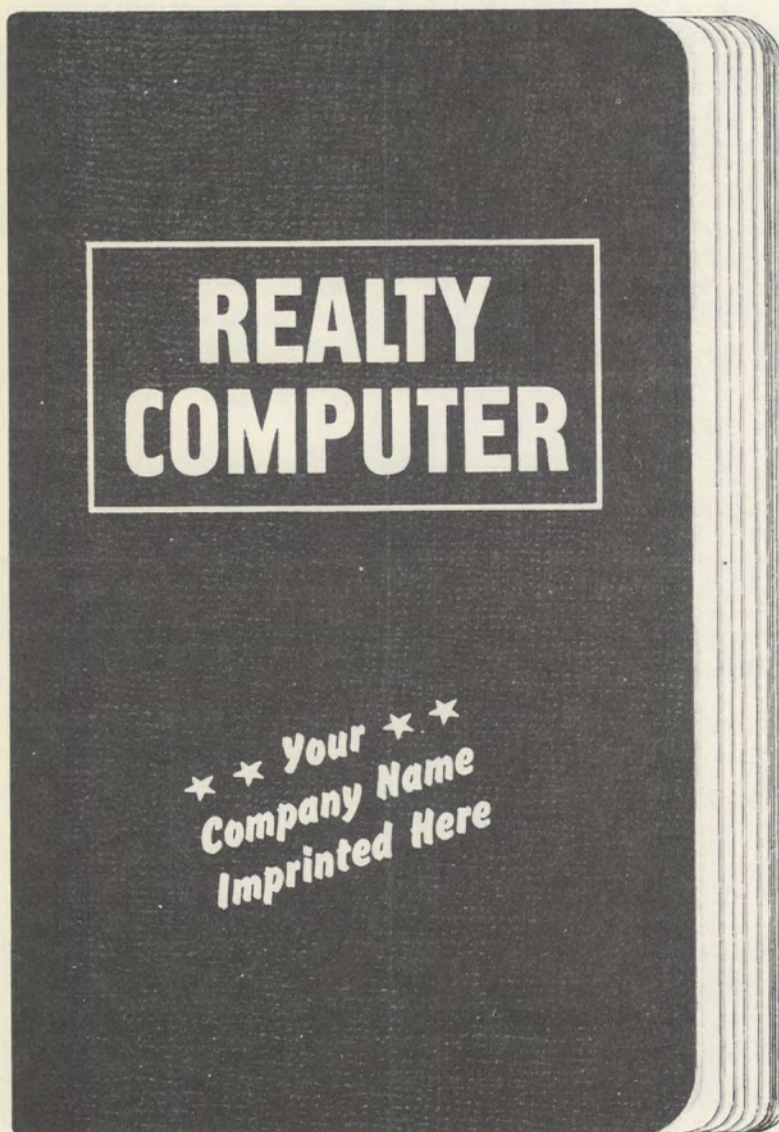
The Executive Committee has under consideration and has authorized actions designed to improve the public image of our industry and to acquaint governmental bodies and the public generally with the value of our services and the contribution our industry makes to the public and the real estate industry as a whole. The committees of the Association are being asked to redouble their efforts in carrying out their purposes and in doing so we must necessarily call upon the membership as a whole for their support of our Association's efforts. The National Association and its Washington staff seek your suggestions of ways that we can be helpful in supporting the efforts of the state affiliated associations and our members in achieving our goal of improving the relationship of our industry with governmental bodies and the public.

You should plan now to attend the Mid-Winter to be held at The Greenbrier in White Sulphur Springs, West Virginia, on March 21-24, 1976. The success of our efforts will depend entirely upon your participation, and the plans cannot be successfully executed without your input and your support. That will be the purpose of the Mid-Winter.

Sincerely,

Richard H. Howlett

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The ALTA Executive Committee will meet November 3 at the O'Hare Hilton in Chicago. Committee assignments for the coming year will be among items on the agenda.

* * *

ALTA President Richard H. Howlett will be a featured speaker at the November 7-8 annual convention of the Land Title Association of Arizona in Carefree, Ariz. In addition, the annual convention of the Florida Land Title Association will be held November 13-15 in Fort Lauderdale, and will include talks by ALTA President Howlett and Executive Vice President William J. McAuliffe, Jr.

Gary L. Garrity, ALTA director of public affairs, will be among speakers at the Dixie Land Title Association convention November 6-7 in Callaway Gardens, Ga.

* * *

ALTA President Howlett will present awards to journalist winners in the ALTA-sponsored Consumer Information Category of the National Association of Realtors Creative Reporting Contest in San Francisco November 11. Presentations will be made at a National Association of Real Estate Editors dinner during the National Association of Realtors Annual Convention. ALTA Director of Public Affairs Gary L. Garrity also will be on hand for the ceremonies. This is the seventh consecutive year that ALTA has sponsored the contest category.

* * *

ALTA Executive Vice President McAuliffe will travel to Dallas November 22 to participate in a regional seminar conducted by the Texas Land Title Association.

* * *

A Land Title Insurance Centennial Kit has been mailed to ALTA members for use in celebrating the one-hundredth anniversary of title insurance next year.

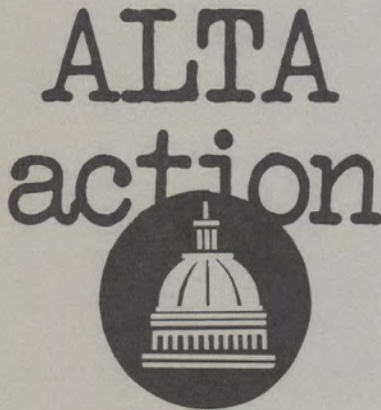
The kit has been developed by the ALTA Public Relations Committee and staff, and contains a Centennial folder; advertising material; a Centennial logo; model radio-television interview script; and model speech and proclamations — both with accompanying model news releases designed to help generate related publicity. Individual members of ALTA and affiliated land title associations are being encouraged to use the kit as a basis for planning Centennial activity.

Edward S. Schmidt is chairman of the Public Relations Committee Centennial Ideas Subcommittee responsible for creation of the kit. Other Public Relations Committee members are Philip B. Branson, H. Randolph Farmer, Patrick McQuaid, Francis E. O'Connor, James W. Robinson, and William H. Thurman.

* * *

ALTA President Howlett was scheduled to present ALTA testimony October 30 at RESPA amendatory hearings held by the House Subcommittee on Housing and Community Development of the House Committee on Banking, Currency and Housing.

Earlier this fall, Robert J. Jay, 1974-75 ALTA president, testified at the Senate Banking Committee's RESPA hearings. The full text of Mr. Jay's remarks on behalf of the Association may be found in this issue of *Title News*.



Title News

the official publication of the American Land Title Association

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A Message from the President Inside Front Cover

ON THE COVER: Newly-installed ALTA officers and Board of Governors members are shown at the Association's 1975 Annual Convention. In the top photo, the new officers are, from left, Title Insurance Agents Section Chairman Roger N. Bell, Security Abstract and Title Company, Wichita, Ks.; President-Elect Philip B. McCulloch, Hexter Fair Title Company, Dallas; Immediate Past President Robert J. Jay, Land Title Abstract Company, Detroit; President Richard H. Howlett, Title Insurance and Trust Company, Los Angeles; Title Insurance and Underwriters Section Chairman C. J. McConville, Title Insurance Company of Minnesota, Minneapolis; Finance Committee Chairman Alvin W. Long, Chicago Title and Trust Company, Chicago; and Treasurer Fred B. Fromhold, Commonwealth Land Title Insurance Company, Philadelphia. The new Board members shown in the lower photograph are, from left, Billy F. Vaughn, Lawyers Title Insurance Corporation, Dallas; Richard L. Martin, Chicago Title Insurance Company, Chicago; and Keith R. Tolliver, Cape Girardeau County Abstract & Title Company, Cape Girardeau, Mo.

VOLUME 54, NUMBER 11, 1975

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RICHARD W. RONDER, Managing Editor

ALTA Presents Testimony at Senate RESPA Hearings

(Editor's note: Robert J. Jay, 1974-75 ALTA president, presented the following testimony of the Association September 16, at Senate Banking Committee oversight hearings on the Real Estate Settlement Procedures Act of 1974.)

* * *

Mr. Chairman, my name is Robert Jay and I am president of the American Land Title Association. I am also president of the Land Title Abstract Company, whose offices are in Port Huron, Michigan.

On behalf of the more than 2,000 members of ALTA, I appreciate the opportunity to present our testimony at these hearings on the Real Estate Settlement Procedures Act of 1974 (RESPA). Our members are in the business of searching, reviewing and insuring land titles to protect home buyers and other real estate investors against claims and losses from land title problems. While ALTA membership includes approximately 90 title insurance companies, the overwhelming number of our members are small, local concerns that provide land title abstracts and serve as title insurance agents.

Since it is our understanding that a primary purpose of these hearings is to examine problems that have arisen in the implementation of RESPA, let me initially address this subject area.

Problems in Implementation

Mr. Chairman, in considering the concerns and problems that we and other participants in these hearings will express, it is important to keep in mind that it has been less than three months

since RESPA became effective on June 20, 1975. Everyone expected that there would be initial problems in the implementation of such comprehensive legislation, and the fact that there are concerns about particular provisions should not be surprising. In many instances, however, we believe these concerns will disappear over time as all of us become used to the new forms and procedures.

There are, nevertheless, some problems that ought to be dealt with immediately. Members of ALTA have reported concern regarding various provisions of the Act, and it is our belief that many of the problems raised by lenders, Realtors and others are concerns that may not be obviated with the passage of time and should be dealt with immediately.

It is our position, however, that with appropriate legislative and regulatory changes, the basic approach of RESPA — an approach that remedies the lack of understanding that home buyers have about the real estate settlement process and deals with certain underlying problems that may exist in the real estate settlement area — continues to offer the best prospects for solving those problems that Congress believes cannot be resolved at the state or local level. If the Act is given a fair chance to work, we believe that the wisdom of Congress' approach in enacting RESPA will be fully justified.

Particular Problems to be Remedied

Let me now turn to our specific observations and recommendations with regard to the particular sections of RESPA.

The provisions dealing with the disclosure of settlement costs are embodied in Sections 4, 5 and 6 of the Act. With regard to Section 4, the provision requiring the use of a uniform settlement statement (HUD Form 1), a few members of ALTA have reported that the use of these forms in connection with residential real estate settlements is time-consuming and adds to their operating cost. On the other hand, some of our members report that the form is significantly better and more informative than prior forms that have been used. In our view, continued use of a uniform settlement statement offers the best opportunity yet for the federal government to collect meaningful and accurate information on closing costs throughout the nation. As you may recall, the 1971 closing cost study performed by HUD did not use a comprehensive, uniform settlement statement in collecting data, with the result that there was no way to determine whether charges in one area of the country were really comparable to charges in other areas of the country. Moreover, the data that was collected cannot be relied upon by the Congress in 1975, since this information is out of date and the methodology used in its collection has been severely criticized by economic and statistical experts.

With respect to the HUD information booklets required by Section 5 of the Act to be given to home buyers at the time they file a home mortgage loan application, we are aware that this requirement does impose some cost on lenders, but we also realize that these booklets will prove extremely useful to millions of home buyers who might otherwise go to closing with little knowledge of the details that are necessary in the purchase of a home.

We are aware that many lenders and others have found Section 6 of RESPA, the provision calling for itemized advance disclosure of settlement costs, to be particularly troublesome. The problem, we believe, is not so much in the concept of informing the home buyer about the costs he is likely to incur in settling on his home — an objective we continue to believe is worthwhile. Rather, the problem with Section 6 lies in the detail and rigidity of the provision.

We believe the problems of Section 6 are essentially threefold. First, the 12-day requirement and the waiver provision of the statute may be too inflexible. Second, we believe that HUD's regulations interpreting Section 6 should more clearly permit the advance disclosure to be given in a less detailed form and at a much earlier point in time. Third, because Section 6 embodies strict criminal sanctions and severe civil penalties, overly cautious lawyers have advised their lender clients to abide by ultra-conservative procedures — such as trying to verify particularly the precise charge that will be imposed by every person who renders settlement services — that are inconsistent with the objectives of providing the disclosure at the earliest possible time and in ensuring that the disclosure does not delay the settlement transaction. In combination, these three factors have destroyed much of the advantage that the concept of advance disclosure promised.

The solution to these difficulties is not to repeal Section 6, but to make the advance disclosure less burdensome to lenders and more beneficial to home buyers. We believe these objectives can be met if the home buyer is given reasonable estimates of the various costs he is likely to incur at the earliest possible stage in the settlement process — perhaps at the same time he receives his HUD information booklet when he files a loan application. He would then be in a better position to shop around and negotiate for the lowest possible prices and best service. By giving this disclosure at such an early time in the settlement process, we believe that a lender might be able to estimate most if not all of the charges in a way that would not require the lender to undertake the difficulties and costs that are apparently incurred today in complying with the provisions' requirements.

It is our recommendation, therefore, that the Department of Housing and Urban Development do all it can to simplify the disclosure requirement of Section 6 through changes in its Regulation X. If such changes cannot be made through the administrative process, however, we would support appropriate legislative changes that would allow a lender to provide settlement cost information to the home buyer at the earliest possible time and in a form that will reduce the need for lenders and others to have to undertake the timely and costly procedures now being used to comply with Section 6.

With respect to Section 7, which requires that in certain instances information regarding the prior ownership and selling price of residential real property be given by the seller to the buyer we believe that this provision has not only been ineffective in achieving what Congress intended — dealing with inner-city speculators in residential real estate — but it also provided costly and unjustifiably troublesome to sellers and real estate brokers in many transactions that do not involve potential abuses. Indeed, in hearings held by the Housing Subcommittee of the House Banking and Currency Committee in December, 1973, ALTA testified that this provision was unnecessary to the basic purposes of the Act and should be deleted from RESPA. While Section 7 does not directly affect the land title industry, it is our recom-

mendation that it is an unnecessary provision and that it be repealed.

While ALTA has strongly supported — and continues to support — the approach of Section 8 of RESPA, the section that prohibits kickbacks and unearned fees, to date this provision has created more confusion in the land title industry than any other part of RESPA. The difficulty lies in the fact that our members and the entire real estate industry have been unable to determine exactly what activity is prohibited or permitted by Section 8.

The land title industry has been on record for many years in supporting the elimination of any payment or referral fee that unnecessarily increases the costs of a real estate settlement, such as a payment for merely the referral of business without any related work being done by the recipient of such payment. But we are unsure what other payments for services rendered or practices, many of which are legitimate, pro-competitive and may result in benefits to the consumer, are prohibited by Section 8.

Equally as important is the need for all of the participants in the land title industry to be placed on an equal footing in regard to the application of Section 8. I am sure you can understand the dilemma posed to a title company that believes a

continued on page 16



Pictured above, ALTA 1974-75 President Robert J. Jay, right, presents testimony on behalf of the Association at Senate RESPA hearings. James B. Rowe, witness for the Mortgage Bankers Association of America, is seated at left.

Part II

The Uniform Land Transactions Act: A First Look

(Editor's Note: The author is a retired vice president of Chicago Title Insurance Company and a former chairman of the ALTA Committee on the Commission on Uniform Laws. This article first appeared in the Spring, 1975, issue of the *St. John's Law Review*, and is reprinted with the approval of that publication. Part I of this article may be found in the October, 1975, issue of *Title News*.)

* * *

Article II*

Article II deals with deeds, leases, and contracts for the sale of land.⁶⁰

Statute of Frauds

Section 2-201. (*Formal Requirements; Statute of Frauds.*)

(a) Notwithstanding agreement to the contrary and except as otherwise provided in this section a contract for (*sic*) to convey real estate is not enforceable by judicial proceeding unless there is a writing signed by or on behalf of the party against whom enforcement is sought which describes the real estate and which is sufficient to indicate that a contract to convey has been made by the parties.

(b) A contract not evidenced by a writing satisfying the requirements of subsection (a) but which is valid

in other respects is enforceable if:

(1) it is for the conveyance of real estate for one year or less;

(2) the buyer has taken possession of the real estate and has paid all or a part of the price;

(3) the buyer has accepted an instrument of conveyance from the seller;

(4) either party, in reasonable reliance upon the contract and upon the continuing assent of the party against whom enforcement is sought, has changed his position to such an extent that an unreasonable result can be avoided only by enforcing the contract; or

(5) the party against whom enforcement is sought admits in his pleading, testimony, or otherwise in court that the contract for conveyance was made.

This Statute of Frauds provision, again, is modeled after its UCC counterpart.⁶¹ Of interest is the fact that the memorandum need not state the contract price. That may be established by parol evidence. Of similar interest is subdivision (b)(5) which provides that an oral contract can be enforced where the party against whom enforcement is sought makes certain admissions. Some discussion arose as to the terminology of this provision. Originally, the third line spoke of "a contract." In the Committee of the Whole a question was asked regarding the possibility that the defendant might be quite willing to admit that he entered into a contract of

sale but on terms differing from those set forth in the petition or complaint. Professor Dunham agreed to substitute the phrase "the contract" but stated he regarded the change as immaterial. His conclusion seems correct. Once the parties admit that a contract was made, the price and terms can be established by parol evidence.

Another question sought to elicit the form of the damaging admission contemplated by subdivision (b)(5). Assume the plaintiff calls the defendant as a witness, as he can under modern practice acts. The defendant admits in deposition or in court that a contract was made. Would this, the question ran, take the case out of the statute? Professor Benfield answered in the affirmative. This, it is evident, will substantially limit the impact of the Statute of Frauds.

Indefinite Contracts Enforced

Section 2-202. (*Indefiniteness; Enforcement of Contract.*) A contract to convey does not fail for indefiniteness if the parties have manifested an intent to make a contract and there is a reasonably certain basis for giving an appropriate remedy, even though the parties have:

(1) left one or more terms for future agreement; or

(2) not included in the agreement a term dealing with one or more aspects of the contract.⁶²

In this day and age one learns not to

*Footnote references cited in this article may be found beginning on page 13.

be shocked by a statute giving a judge the power to fill in the contract where the parties have omitted terms. But it is shocking to see this radical concept cloaked in language that speaks of an "appropriate remedy." When the parties have made a contract, the judge can provide a remedy. When the parties have failed to make a complete contract and the judge proceeds to complete it for them, he is doing much more than providing a remedy.

This section is certainly a departure from existing law, where for example, if a contract of sale calls for a purchase money mortgage but fails to state a maturity date, the contract generally cannot be enforced. Similarly, if a contract of sale were contingent upon the purchaser obtaining a mortgage of \$30,100, but did not state the terms of the mortgage, the contract could not be enforced. There are a multitude of similar cases where the parties have stated only part of the contract terms and the courts have declined to supply the balance.⁶³

An earlier draft of this section followed more closely the language of UCC section 2-204. This draft was criticized for being unclear as to whether subjective or objective intention was meant to be controlling. It was felt that the provision should make it clear that the outward, objective manifestations of the parties are determinative. Thus, the term "manifested" was included in the current draft to meet these objections.

Open Price Terms and Firm Offers

Section 2-203. (Open Price Terms)

(a) If they so intend, the parties may conclude a contract to convey even though the price is not settled. If the price is not settled, the price is to be determined as stated in subsection (b) if:

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

(2) 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) Under the conditions stated in subsection (a), the price of an interest

to be conveyed for a fixed term is its fair rental value, and the price of any other interest is its fair market value.

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

(d) 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 may either treat the agreement to convey as cancelled or fix a reasonable price.

(e) Unless the parties have agreed that a price not settled is to be fixed or agreed to in the future, there is no contract.

Section 2-205. (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



Author Kratovil

of consideration during the time stated or if no time is stated for a reasonable time.

(b) Notwithstanding agreement to the contrary, a term which, without consideration, gives assurance that an offer will be held open is enforceable against an offer (*sic*) who would be a protected party upon acceptance of his offer, or is an individual offering to sell his residence, only if the term is separately signed by the offeror.

(c) Notwithstanding agreement to the contrary, the period of irrevocability absent consideration may not exceed:

(1) one month if the offeror would be a protected party upon

acceptance of his offer or is an individual offering to sell his residence, or

(2) six months if the offeror is any other person.

Section 2-203⁶⁴ was drafted by the Committee of the Whole in such a way as to make it clear that it applies only where the parties have agreed that the price was to be fixed in the future. As one Commissioner pointed out, placing a value on land is quite different from doing the same with respect to chattels.

Section 2-205 is a firm offer section, modeled after UCC section 2-205, which, however, applies only to offers by merchants. The ULTA provision was frequently redrafted. The objection constantly offered to earlier drafts was that a contract signed only by the seller or only by the buyer is an offer and could be deemed a firm offer if it stated that it is not revocable for a stated period. This could be a trap to an unwary home buyer or seller. In the present draft neither an individual selling his residence nor a protected party is bound unless the firm offer is contained in a separate document. Whether this will really protect unsophisticated persons is an unanswered question.

Substantial Performance

The doctrine of "substantial performance" is explicitly incorporated into the ULTA. Section 2-301(a) specifically provides that "(s)eller's performance of the title obligations of Section 2-304 . . . if applicable, and his substantial performance of other obligations is a condition to buyer's duty to tender the purchase price." Further, failure to perform at a fixed time will not in itself discharge the duties of the other party under the contract unless in the circumstances the failure amounts to a material breach, or the contract specifically provides that such a failure will in fact discharge the other party.⁶⁵ In this regard section 2-302(c) states that "(t)he phrase 'time is of the essence' or other similar general language does not of itself provide specifically that failure to perform at the time specified discharges the duties of the other party." This, of course, will lead to the incorporation of boilerplate clauses reciting such circumstances as sharply rising prices or inter-

est rates in order to satisfy this provision.

Title Obligations: Non-Leasehold

Section 2-304. (*Seller's Title Obligation—Other than Leasehold.*)

(a) This section does not apply to contracts to convey a leasehold.

(b) A seller in a contract for conveyance of real estate is obligated that:

(1) the title to the real estate will be marketable at the time for conveyance;

(2) the deed conveying the real estate contracted for will not exclude the warranties specified in Section 2-306; and

(3) if the contract is for conveyance of a possessory interest, at the time of delivery of the deed the buyer will be able to enter into possession without judicial action or breach of the peace.

(c) An express contract term which states that the seller is to furnish "good title" or "good and sufficient title" or a title described in similar general terms means that the seller is to furnish a marketable title. Recorded and unrecorded interests and claims which have been extinguished by reason of Article 8 do not prevent a title from being marketable.

(d) If an agreement expressly or by implication provides for the conveyance of real estate as distinguished from whatever interest the seller may have in real estate, a term in the agreement specifying the form of the instrument of conveyance as a "quitclaim" deed or other form of conveyance with less than all of the warranties provided in Section 2-306 does not of itself limit the obligation of the seller under paragraph (1) of subsection (b) with respect to the marketability of title, but does limit the remedy of the buyer on seller's default as to marketability to refusal to accept the deed and restitution and incidental damages as provided in Section 2-510(b), but if the buyer accepts a deed which conforms to the seller's obligation, he may not thereafter make any claim based on the failure of the grantor's title to be

marketable except to the extent provided in the deed.

(e) Seller must at this expense arrange for and make available to the buyer, before the date for tender of the deed sufficient evidence and documentation to enable the buyer to determine the prospect of seller's compliance with the title obligations of the contract.

(f) The seller performs his obligation under subsection (e) by furnishing one or more of the following showing the state of the title as of a time no earlier than the time of contracting:

(1) an abstract of the title history of the real estate;

(2) a report of title or a commitment to insure by a title insurance company;

(3) a title opinion certificate or report prepared by an attorney acceptable to the buyer; and

((4) a torrens certificate;)

((4))(5) any other evidence which by usage in the place where the real estate is located is acceptable as title evidence.

(g) Notwithstanding the fact that the seller is obligated to furnish or furnishes evidence for inspection by the buyer as to the state of the title at a time before the time for tender of the deed, by the seller, the seller is obligated to tender, at the time for tender of the deed, the title required by the contract.

(h) The buyer is entitled to a reasonable time to inspect the title evidence and documentation before making payment and accepting the deed.

(i) There are no warranties of title in a sale made under a court order unless the order so provides.

Subdivisions (d), (e), and (f) are of interest. At present, "(a)n agreement to convey by quitclaim deed does not require the vendor to convey a good title unless the contract shows that the parties intended to contract for the land and not merely for the vendor's interest, whatever it might be."⁶⁶ The last four lines of section 2-304(d) pose a minor problem. It is hornbook law, of course, that all questions of marketability end with the closing of the transaction. It is not entirely clear whether these four lines restate this general rule or confine

it to situations where the contract calls for the type of deed described in this paragraph. In any event a merger clause in the deed should solve this problem.

Section 2-304(e) places the burden and expense of furnishing evidence of title on the seller, which is contrary to the practice on the eastern seaboard. In that area, no doubt, the contracts will continue to require that the purchaser bear this expense.

Subdivision (4) of section 2-304(f) is bracketed because not all states employ the Torrens system.⁶⁷ For those states which do utilize this system, however, the requirement of furnishing a Torrens title will not be truly adequate for the purposes of this subdivision since the official certificate of title must always remain with the registrar of titles. Although the seller can furnish a duplicate certificate he will additionally have to provide other documents relating to such matters as tax and bankruptcy searches and judgment liens which may appear on the official certificate but not on the seller's duplicate. More than likely, contracts of sale will ignore this section and set forth in detail the type of evidence of title to be furnished.

Warranties of Title

Section 2-306. (*Warranty of Title in Deed.*) A seller who executes a deed not providing to the contrary impliedly warrants that:

(1) the real estate is free from all encumbrances;

(2) the buyer will have quiet and peaceable (*sic*) possession of or right to enjoy the real estate conveyed;

(3) the seller had power and right to convey the title which he purported to convey; and

(4) the seller will defend the title to the real estate conveyed against all persons lawfully claiming it.

Section 2-306 makes all deeds general warranty deeds unless the deed provides to the contrary. Undoubtedly, in areas such as New York City and California, where general warranty deeds are a rarity, the deeds will "provide to the contrary." This provision must be read in conjunction with section 2-304 which provides that unless the seller has specifically contracted to convey a deed with lesser warranty of title obligation, he must give a deed under which the

buyer receives the warranties specified in this section.

Title Obligations: Leasehold

Section 2-307. (*Obligation as to Title; Leaseholds.*) The seller of a leasehold warrants that

(1) If a possessory interest is being conveyed, the buyer will be able to take possession at the beginning of the term without judicial action or breach of the peace;

(2) if an interest other than a possessory interest is being conveyed, the buyer will be able to enjoy fully the real estate at the beginning of the term;

(3) the buyer will have quiet and peaceable possession or right to enjoy the real estate; and

(4) the seller has power and right to convey the interest being conveyed except that the seller of a term of five years or less does not warrant against the existence of a security interest or lien having priority over the buyers interest.

With regard to leaseholds, section 2-307 provides that the lessor warrants to put the tenant in quiet possession or quiet enjoyment, depending on the possessory nature of the lease at the beginning of the term. This position follows closely that of the proposed Restatement Second of Property.⁶⁸ Specifically omitted, however, are any warranties against encumbrances running against short term leases. As the Comment to this section indicates, the existence of an encumbrance such as a mortgage in the typical short term lease is not generally considered a breach unless under the circumstances the lessee's right to enjoyment would be substantially threatened.⁶⁹

Express and Implied Warranties

Section 2-308. (*Express Warranties of Quality.*)

(a) Express warranties by a seller are created as follows:

(1) any affirmation of fact or promise which becomes a part of the basis of the bargain relating to the real estate, its use or rights appurtenant thereto, area improvements which would directly benefit the property, or the right to use or have the

benefit of facilities not located on the premises, creates an express warranty that the real estate and related rights and uses will conform to the affirmation or promise;

(2) any sample or model, or description of the physical characteristics of the real estate, including plans and specifications of or for improvements which are part of the basis of the bargain creates an express warranty that the real estate will conform to the sample, model, or description;

(3) any description of the quantity or extent of the real estate including plats or surveys which is part of the basis of the bargain creates an express warranty that the real estate will conform to the description, subject to customary tolerances;

(4) a provision that a buyer may put the real estate only to a specified use is an express warranty that the specified use is lawful.

(b) Neither formal words, such as "warranty," or "guarantee," nor a specific intention to make a warranty are necessary for the making of an express warranty, but a statement purporting to be merely an opinion or commendation of the real estate or its value does not create a warranty.

Section 2-30. (*Implied Warranty of Quality.*)

(a) Subject to the provisions on risk of loss (Section 2-406), a seller warrants that the real estate will be in at least as good condition at the time of the earlier of delivery of possession or conveyance, as it was at the time of contracting, reasonable wear and tear expected.

(b) A seller, other than a lessor, who is in the business of selling real estate impliedly warrants that the real estate is suitable for the ordinary uses of real estate of its type and that any improvements made or contracted for by him will be:

(1) free from defective materials; and

(2) constructed in accordance with applicable law, according to sound engineering and construction standards, and in a workmanlike manner.

(c) A seller in the business of selling real estate warrants to a protected

party that an existing use, continuation of which is contemplated by the parties, does not, at the earlier of conveyance or delivery of possession, violate applicable law.

(d) Warranties imposed by this Section may be excluded or modified as provided in the Section on exclusion or modification at warranties of quality (Section 2-311).

(e) For the purposes of this section, improvements made or contracted for by a person related to the seller (Section 1-204) are treated as if they were made or contracted for by the seller.

(f) A person who extends credit secured by real estate and acquires real estate by foreclosure of, in lieu of foreclosure of, his security interest, does not become a person in the business of selling real estate by reason of selling that real estate.

Section 2-310. (*Lender's Obligation as to Improvements.*) A lender who loans money that is or may be used to finance the design, manufacture, construction, repair, modification or other improvement of real estate for sale or lease is not liable solely by reason of making the loan for any loss or damage caused by any defect in the real estate or for any loss or damage resulting from the failure by another person to use reasonable care in the design, manufacture, construction, repair, modification, or other improvement of the real estate.

Section 2-311. (*Exclusion or Modification of Warranties of Quality.*)

(a) Words or conduct relevant to the creation of an express warranty of quality and words or conduct tending to negate or limit the warranty shall be construed wherever possible as consistent with each other; but, subject to the provisions on parol or extrinsic evidence (Section 1-306), negation or limitation is inoperative to the extent that construction is unreasonable.

(b) Except as limited by subsection (c) with respect to a protected party, implied warranties of quality:

(1) may be excluded or modified by agreement of the parties, and

continued on page 13

Part V: ALTA Judiciary Committee Report

(Editor's note: Members of the ALTA Judiciary Committee have submitted over 400 cases to Chairman John S. Osborn, Jr., of the Louisville law firm of Tarrant, Combs, & Bullitt, for consideration in the preparation of the 1975 Committee report. Chairman Osborn reports that 93 cases have been selected for publication in this year's report. For previous installments, please see the June, July, August, and September, 1975, issues of *Title News*.)

* * *

Mortgages and Liens (Continued)

Gulf Oil Corporation and Others v. Fall River Housing Authority and Another, Mass. Advance Sheet 15 (1974)

This is a bill in equity by Gulf to enforce a Land Assembly and Redevelopment Plan. The Authority and the City approved a plan which divided an area into two zones, providing that a gasoline service station should not be permitted in B if previously approved in A. Gulf, owning under a chain of title reciting restrictions and a deed from an immediate predecessor with license for filling station, sought to prevent similar use by defendant Mt. Hope of land in B, purchased directly from the Authority and also licensed for a filling station.

Held: Restrictive covenant is to be enforced. It qualifies as part of a "com on scheme of development" even though uses in the entire area are not uniform, and the fact that a competitive advantage will result does not prevent enforcement. The court enlarges applicability of *Snow v. VanDam*, 291 Mass. 477, (1935) as to "scheme" and distinguishes *Shell v. Oullette*, 352 Mass. 725 (1967), in which the court had refused to overrule earlier cases which did not enforce covenants against competition, but warned it might reach a different result in the future. These earlier cases therefore still stand—subject to the warnings and the distinctions in the instant case.

Stewart Transportation Co. v. Ashe, 304 Atl. 2d 788, 269 Md. 74 (1973)

This is an action to enforce restrictions with

respect to property contained in a subdivision. The judgment for the plaintiff was

The tract owner, simultaneously with the filing of the subdivision plat recorded an instrument which dedicated the beach portion of the land shown on the subdivision plat to the common use by any of the lot owners and imposed certain restrictions thereon and the riparian rights incident thereto. The first few conveyances of lots out of the common owner contained specific provisions relating to the use in common of the beach area with specified rights therein and certain limitations on the riparian rights, and also specifically referred to the writing recorded simultaneously with the subdivision plat. Neither the deed to the defendant's predecessor from the common owner nor the deed to the defendant contained any specific provisions relating to the beach or restrictions on the riparian rights.

Held: The defendant was charged with constructive notice of the restrictions and that the chancellor's findings, based on the facts, that a scheme of development had been established, would not be set aside.

The Court of Appeals having previously decided in *Williams v. Skyline Development Corp.*, 265 Md. 130, that riparian rights may lawfully and effectively be severed from the land by grant or reservation, stated in this opinion that they may be restricted by the owner of the rights.

TAXATION

George F. Shaffer, et al. v. Marene Oil Corporation, 204 S. E. 2d 404

Held: Failure of a tax purchaser who provided the County Clerk with the names of landowner's heirs to comply with the statute requiring a tax purchaser to search the records to ascertain the true owners of real estate and provide the County Clerk with a list of the true owners was a jurisdictional defect not validated by presumptive statute making a tax deed conclusive evidence of acquisition of title and curative statute making a tax deed valid despite any irregularity, error, or mistake in respect to any step in the procedure leading up to delivery of deed.

Supervisor of Assessments of Anne Arundel County v. Bay Ridge Properties, Inc., 310 Atl. 2d 773, 270 Md. 216 (1973)

An appeal from an order of the tax court abating and cancelling a property tax assessment on beach property contained within a subdivision, in which the purchasers of lots in the subdivision had been granted rights to use same in common. Affirmed, holding that where the use of the beach area between the subdivision lots and the water was reserved exclusively to the lot owners in the subdivision, whatever value the beach area may have had, should have been reflected in the assessed value of the lots and the beach area should not have been separately assessed.

TITLE INSURANCE

Gildenhorn v. Columbia Real Estate Title Insurance Company, 317 Atl.2d 836 271 Md. 387—Court of Appeals (1974)

This is a suit by a mortgagee of real property against two title insurance companies for damages for the insurers' alleged breach of their contracted duty to defend the plaintiff's interest in actions in which the validity of the mortgages was questioned. The suit, not being an action to recover for loss which was insured against by the policy, was not limited by a provision in the policy which required that the suit under the policy be filed within five years and thirty days after loss or damage was determined. Title insurance policies bearing testimonium clause reciting that the insurer "has caused its corporate name and seal to be hereunto affixed by its duly authorized officers" and bearing the printed name of the corporation with facsimile signatures of the president and secretary, over which the corporate seal was printed, constituted a "specialty" and the twelve year statute of limitations applicable to specialties applied to the action which was brought by the insured for damages allegedly caused by the insurer's breach of agreements to defend.

Land Title Company of Alabama v. State of Alabama ex rel. Irvine C. Porter, et al., Supreme Court of Alabama, 299 So.2d 289 (1974)

Petition by State to enjoin title company from engaging in acts constituting the practice of law.

The Supreme Court of Alabama held that title company's issuance of a "Commitment for Title Insurance" issued prior to the

issuance of a title policy and providing that the estate covered was a fee simple did not constitute the unauthorized practice of law.

Livingston v. Title Insurance Company of Minnesota, 373 F. Supp. 1185 (1974)

Purchasers of property, which was intended for use as a service station and office building site, brought action to recover under policy of title insurance damage due to the fact that a right of access had been limited to a 30 foot wide entrance.

After cause was removed from state court by insurer, the District Court, Harper, Senior Judge, held that right of unlimited access to property was an "easement" within the provision of the policy of title insurance to the effect that the policy did not insure against loss or damage due to the easement of state acquired in specified condemnation suit; thus, any loss suffered by the purchasers of such property, which was intended for use as a service station and office building site, due to the fact that the right of access had been limited to a 30-foot-wide entrance was excluded from the coverage under the policy.

Commercial Standard Insurance Company v. Fondren, 509 S. W. 2d 728 (1974)

In action on title policy, the District Court of San Jacinto County, Ernest Coker, J., entered judgment on verdict for insured, and insurer appealed. The Court of Civil Appeals, Stephenson, J., held that defendant waived plea of privilege by first filing answer and cross action; that where title to an undivided one-half interest in the land failed, policy provision for proportionate payment was not applicable; that no harm was shown in refusal of the trial court to submit special issue asking the market value of the land at time of purchase where there was no evidence which would have supported findings of less than \$6,000.00 for the entire tract and the verdict was in the amount of \$3,000.00 for loss of half interest; and that the contention with respect to the alleged refusal to submit certain requested issues was not properly presented by the record, which did not include the charge of the court.

Affirmed.

Southern Title Insurance Company v. Crow, 278 So.2d 294-5 (Fla. 1973)

D, a title insurance company, issued its loan policy on a mortgage which had been assigned by M, the mortgagee, to P and P-1. The mortgage was held invalid for failure of M to comply with the Truth-in-Lending Act. P and P-1 had no knowledge of M's failure to comply with the Act.

Issue: Does the policy exclusion of defects "known to the insured claimant" bar recovery by P and P-1 against D?

Held: It does not bar recovery.

Opinion: Southern insured "Housing Development Corporation and/or its assigns," including "each successor in interest in ownership thereof." It excludes defects "known to the insured Claimant." The Appellant reads this as if it said "named insured," and that is the fallacy in its argument. There is no claim that either of the "insured claimants" knew of the defect, and

while the defense might be good against the original insured, it is not available against the appellees, who took without notice the defective title.

Worthey v. Sedillo Title Guaranty, Inc., 512 P.2d 667 (New Mex. 1973)

P, the insured under a mortgagee's title insurance policy, brought suit against the title insurance company and its soliciting agent to recover under the policy. The policy had failed to show a prior recorded lien on the policy. P, however, had failed to notify the title company at the time it learned of this lien, but waited until eighteen months after it commenced a mortgage foreclosure action and one month after the judgment was entered.

Issue: Was the title company prejudiced by the failure to give prompt notice and, if so, what was the extent of the prejudice?

Held: The Title company was prejudiced, and the case was remanded to make a finding as to the extent of the prejudice.

Opinion: The notice provision in the policy with which we are here concerned provides in pertinent part:

"... provided, however, that failure to notify shall in no case prejudice the claim of any insured unless the Company shall be actually prejudiced by such failure and then only to the extent of such prejudice."

By failure to give notice, the title company was denied its rights under the policy to defend against the claims of the prior lienholder and to make timely efforts to recover under its right of subrogation from the mortgagor, or from others who might well have been involved in what appears to have been a fraudulent scheme. The title company had the right to protect the title it insured and also to mitigate its damages.

Weir v. City Title Insurance Company, 308 A.2d 357 (N. J. 1973)

P's attorney, who was also on the approved list of D, a title insurance company, made a title search covering January 6, 1969, which he mailed to D, requesting issuance of the title policy. Two days later, he discovered that, through a surveying error, the land in question had a frontage of 100 feet instead of 147 feet. The attorney, however, waited about a month, until after the policy issued, before notifying the insurance company.

Issue: Was the defendant liable under the policy?

Held: It was not.

Opinion: Title insurance is no different from any other type of non-marine insurance and, as such, is governed by the same general rules and principles applicable to issuance, validity, and interpretation of policies of insurance generally. (*Sandler v. N. J. Realty Title Ins. Co.*, 36 N. J. 471, 178 A.2d 1 (1962). It is well settled that, where an application for insurance has been submitted to an insurer and, before the policy is issued a change of conditions material to the risk occurs or is discovered by the applicant, he is under an obligation to

inform the insurer promptly. The knowing suppression or failure to make timely disclosure of such information constitutes a material misrepresentation. The rule and the reasons underlying it were set forth by the United States Supreme Court in the case of *Stipich v. Metropolitan Life Ins. Co.*, 277 U.S. 311, 48 S.Ct. 512, 72 L.Ed. 895 (1928). Although P's attorney was undoubtedly on D's list of approved attorneys, this did not make him any the less the agent of his client, P, nor did it make P any the less chargeable with the knowledge of the attorney or with the attorney's failure promptly to notify the defendant of the change in circumstances. (*Dickerson v. Bowers*, 42 N.J.Eq. 295, 11 A. 142 (Ch. 1886); Annotations, "Imputation of Attorney's Knowledge of Facts to His Client," 4 A.L.R. 1592 (1919), 38 A.L.R. 820 (1925). Compare *Colegrove v. Behrle*, 63 N. J. Super. 356, 164 A.2d 620 (App. Div. 1960), *Farr v. Newman*, 14 N. Y. 2d 183, 250 N. Y. 2d 272, 199 N. E. 2d 369 (Ct. App. 1964).

Conway v. Title Insurance Company, 277 So.2d 890 (Ala. 1973)

P brought suit against D to foreclose her mortgage which covered a number of lots originally owned by A, a developer. As lots were sold by A, partial releases would routinely be issued by P upon payment of \$1,200.00. D had purchased a lot and house from A for \$29,500.00 and had made improvements in the amount of \$5,000.00. D, however, had failed to obtain a release deed from P. No attempt was made by P to give D notice of the foreclosure sale, for fear that D would belatedly tender the \$1,200.00. P bid \$50,000.00 at the foreclosure sale, obtained a foreclosure deed and the following day procured a title insurance policy from X Title Insurance Company. The foreclosure sale was thereafter set aside by the court by reason of P's conduct in concealing the existence of the mortgage lien from D. P then sued X for damages on the title policy; X had the action transferred to equity and filed a bill alleging that the defect was created by P and therefore X had no liability.

Issue: Do the exclusions from coverage contained in the policy relieve X from liability?

Held: They do.

Opinion: Under the "Exclusions from Coverage" provisions found in Schedule B, it is provided in paragraph 2(d):

"Defects, liens, encumbrances, adverse claims against the title as insured or other matters (1) created, suffered, assumed or agreed to by the insured;..."

It is not uncommon for title insurance policies to contain clauses excluding or excepting from coverage "defects, liens, encumbrances, or adverse claims against the title as insured, or other matters" when such defects are created, suffered, agreed to, or assumed by the insured, and are known to the insured at the date of the policy, but are not shown by the public records, nor disclosed to the insurer by the insured in writing.

Such limiting conditions are not unreasonable, are set forth in clear and unambiguous language, and have been recognized repeatedly. *Lawyers Title Ins. Corp. v. Research Loan and Investment Corp.*, 8 Cir., 361 F.2d 764; *Alabama Title and Trust Co. v. Millsap*, 5 Cir., 71 F.2d 518. Such exceptions and limiting provisions either in the language of similar import, have been held effective because of the misconduct of the insured in *Hansen v. Western Title Ins. Co.*, 220 Cal. App. 2d 531, 33 Cal. Rptr. 668, 98 A.L.R.2d 520; *First National Bank and Trust Co. v. New York Title Ins. Co.*, 171 Misc. 854, 12 N. Y. S. 2d 703; *Rosenblatt v. Louisville Title Co.*, 218 Ky. 714, 292 S. W. 333; *Feldman v. Urban Commercial, Inc.*, 78 N. J. Super. 520, 189 A.2d 467; *Brick Realty Co. v. Guarantee and Trust Co.*, 161 Misc. 296, 291 N. Y. S. 637. See also annotation in 98 A. L. R. 2d, pp. 527 et seq.

Commander Leasing Co. v. Transamerica Title Ins. Co., 477 F.2d 77 (U. S. 1973)

P, a partnership and two individuals, brought suit in the U. S. District Court in Colorado on their own behalf and as a class action against twelve title insurance companies and two Colorado companies which were local agents for the title insurance companies, seeking treble damages under the Sherman and Clayton Acts and for injunctive relief. The trial court dismissed the action.

Issue: (1) Does the "business of title insurance" come within the "business of insurance" as used in the McCarran-Ferguson Act? (2) Does the State of Colorado regulate title insurance companies?

Held: Title insurance is the "business of insurance," and the State of Colorado does regulate title insurance companies.

Opinion: The McCarran-Ferguson Act, 15 U.S.C., Sections 1011-1015, provides that "the business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation of such business." That act further provides that the Sherman and Clayton Acts shall be applicable to the business of insurance to the extent that such business is not regulated by state law.

In *United States v. Home Title Insurance Company*, 285 U.S. 191, 52 S.Ct. 319, 76 L.Ed. 695 (1932), the Supreme Court, in an admittedly different context, held that a title insurance company was an "insurance company." In so holding the Court recognized that "preliminary" to the issuance of a title insurance policy the title insurance company prepared abstracts and conducted an examination of the title and that its fee for a title insurance policy was based on a scale dependent on the face amount of the policy and "included fees for examinations, searches and other sources incident to the transaction."

Similarly, in *Real Estate Title Ins. Co. v. District of Columbia*, 82 U. S. App. D. C. 170, 161 F.2d 887 (1947), it was held that a title insurance company was an insurance company and in so doing rejected the argument that a title insurance company was a

mere title examiner. In this holding, it was observed that the business of the title insurance company there under consideration consisted solely of issuing either "certificates of title" or "title policies" to real estate, plus "such further incidental transactions as relate to these main objectives."

Our attention has not been directed to any case where the business of title insurance has been held to constitute the business of insurance within the meaning of that phrase as used in the McCarran Act. However, based on the foregoing authority, we agree that title insurance is insurance as that word is used in the McCarran Act, and our conclusion is in nowise altered by the fact that prior to the issuance of a title insurance policy the defendants make an examination of title and include in the rate ultimately charged the purchaser of such insurance a charge therefor.

In 1969, the Colorado Legislature enacted the Title Insurance Code of Colorado which now appears as a separate article in the chapter on insurance. CRS 72-26-1 et seq. By this enactment, the State brought together in one place its regulation of both domestic title insurance companies and foreign title insurance companies doing business within the State. This particular article provides for what appears to us as a rather comprehensive set of regulations for title insurance companies and specifically provides that title insurance rates shall be regulated in the manner provided for regulation of casualty and surety insurance as provided for in CRS 72-12-1 et seq.

With respect to the two agent companies, in applying the McCarran Act, we see no reason to distinguish between a principal and an agent. It would appear to us that an insurance agent, as well as an insurance company, is engaged in the "business of insurance."

Banville v. Schmidt, 37 Cal. App. 3d 92 (1974)

In this case the plaintiffs sold their real estate through defendant broker for cash and the assignment of a promissory note secured by a first deed of trust on other property. Defendant assignor represented to the broker that the other property had an appraised value in an amount that was adequate security for the note that he proposed to assign. The assignor further represented to the broker that the makers of the note and trustors of the deed of trust were financially solvent. The broker passed this information on to the plaintiffs without investigating the value of the other property or the financial condition of the makers and trustors. Plaintiffs relied upon these representations.

Defendant title insurer handled the escrow of the cash down payment and the assignment of the note and deed of trust on the other property to the plaintiffs. The owners of the other property, the makers of the note and trustors of the deed of trust, recorded a deed conveying the other property back to the beneficiary-assignor of the deed of trust. Plaintiffs were not advised of this deed

which had the effect of extinguishing the deed of trust. Plaintiffs conveyed their real property to the assignor who assigned the deed of trust on the other property to plaintiffs. Contemporaneously therewith, the title insurer issued its policy to plaintiffs insuring the assignment of the beneficial interest under the deed of trust and incorrectly vested title to the other property in the former owners, the makers of the note and trustors of the deed of trust.

It was held that plaintiffs were damaged by the broker's negligent misrepresentations of the value of the other property and of the financial condition of its former owners. The broker sought indemnification from the title insurer alleging that its negligence in incorrectly vesting the title to the other property was in effect a superseding cause of any damage incurred by the plaintiffs and that if the broker is to be held liable to the plaintiffs, the title insurer should be required to indemnify the broker. The court held that the title insurer, which had no contractual relationship with the broker, was not liable to it in negligence for the reason that the broker's negligent misrepresentations were not in any way done in reliance upon any information furnished by the title insurer.

The title insurer, however, was held liable to its insureds, the plaintiffs, for its negligence in incorrectly vesting the title to the other property. The title insurer argued that it acted in the transaction not as an abstractor but as an insurer which, if it wishes, can intentionally and deliberately fail to note a specific defect in the title to the property. The court was not persuaded that the distinction between the abstracting function and its function as an insurer of titles was determinative of the issue. The court concluded that in the light of modern real estate and title insurance practices an incorrect statement as to the vesting of title is hardly something which a title insurer in the conduct of its business and in its best judgment would see fit to make. The title insurance policy was issued to insure plaintiffs against the very loss which they suffered. Further, the premium was imposed as the "Total Fee for Title Search Examination and Title Insurance." The court seemed to adopt plaintiffs' argument that where the title insurer received a fee for a title search and examination, the beneficiaries of which are the plaintiffs, it is unconscionable to say that the title insurer did not owe a duty to the plaintiffs to reasonably and carefully perform their search and examination. The title insurer's negligence was found to be a proximate cause of plaintiffs' damage. The conduct of the broker, the assignors, or the former owners could not be considered a superseding cause which would absolve the title insurer of liability.

The court also stated that the title insurer had a duty to the plaintiffs as an escrow holder which it breached.

NEXT:
TITLE INSURANCE
(CONTINUED)

(2) are excluded by expressions of disclaimer such as "as is," "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion of warranties.

(c) With respect to a protected party, no disclaimer of implied warranties of quality in general language or in the language of the warranty as set out in this Act is effective, but a seller may disclaim liability for particular and specified defects or specified failures to comply with applicable law if the defects or failure to comply entered into and became a part of the basis of the bargain.

(d) Notwithstanding any rule of evidence, written acknowledgement by a protected party that he has contracted to buy after the disclosure of specific defects or failures to comply with applicable law set forth in the writing and which were specifically called to his attention before contracting, creates only a presumption that the particular or specified failures to comply with applicable law set forth in the writing were specifically a part of the basis of the bargain and the parties may offer any evidence relevant to that issue.

(e) Any disclaimer of warranties is also subject to the provisions on unconscionability (Section 1-311) even though the seller has complied with subsections (b) or (c).

(f) If a buyer, other than a protected party, before contracting has examined the real estate or a sample or model as fully as he desired or, after receiving a written request to do so, has failed to make an examination, there is no implied warranty with regard to any defect that an examination by him in the circumstances ought to have revealed.

Section 2-312. (*Third Party Beneficiaries and Assignment of Warranty.*)

(a) A seller's warranty of title extends to the buyer and his successors in title.

(b) The benefit of a seller's warranty of quality extends to the following individuals who suffer bodily

injury by reason of a breach of the warranty:

(1) successors in title of the buyer;

(2) residents in the household of the buyer or his successors in title. A seller may not exclude or limit the operation of this subsection.

(c) Notwithstanding any agreement that only the immediate buyer shall have the benefit of warranties of quality with respect to the real estate, or that warranties received from a prior seller shall not pass to the buyer, a conveyance of real estate transfers to the buyer all warranties of quality made by prior sellers, but any rights the seller may have against prior sellers for loss incurred before the conveyance may be reserved by the seller either expressly or by implication from the circumstances.

(d) A seller's warranty of quality to a protected party extends to any successor in title of the protected party unaffected by any disclaimer or limitation of liability of which the successor had no reason to know at the time of the conveyance to the successor.

Section 2-313. (*Cumulation and Conflict of Warranties Express or Implied.*) Warranties, whether express or implied, shall be construed as consistent with each other and as cumula-

tive, but if that construction is unreasonable the intention of the parties shall determine which warranty is dominant.

Section 2-314. (*Other Liability Not Determined by This Act.*) Nothing in this Act determines or affects the liability or nonliability in tort of a seller to any person including the buyer, arising apart from this Act for injury to the person, death, property damage, or other loss caused by a condition of the real estate including any improvement made or arranged for by the seller of the real estate.

Sections 2-308 through 2-314 deal exhaustively with the subject of warranties.⁷⁰ An undefined phrase that recurs throughout these sections is "basis of the bargain."

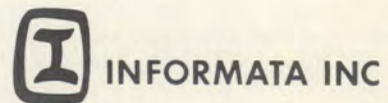
One commentator on the law of sales has determined that "basis of the bargain" refers to the entire setting of the transaction, including statements made before and after the sale occurs.⁷¹ This naturally creates a serious problem under the parol evidence rule and may not be entirely appropriate to real estate transactions.⁷² One immediate example of some of the difficulties which can flow from this general proposition is evidenced by section 2-308(a)(3) which speaks of descriptions of the quantity or extent of real estate as part of the basis of the bargain. Under exist-



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ing law it is arguable that representations as to acreage would not be part of the basis of the bargain if the sale is in gross rather than by the acre.⁷³ It is unclear at this point whether the draftsmen of the ULTA mean to change this rule.

Frustration and Impracticability

Section 2-407. (*Excuse by Impracticability.*) Delay in performance or non-performance in whole or in part is not a breach of duty under a contract for sale of real estate if performance as agreed has been made impracticable by the occurrence of a contingency the risk of which the parties did not assume would be borne by the party whose performance has been made impracticable.

This section brings into the ULTA the concepts of commercial frustration and impracticability embodied in UCC section 2-615. It has been said that the principle of unjust enrichment, which is the basis of quasi-contractual liability, has its counterpart in the principle of unjust impoverishment as reflected in the impracticability doctrine.⁸¹ Insofar as frustration is concerned, it has been argued that this principle should be used only as a safety valve which is moved only by the pressure of war and other catastrophic events.⁸²

These two concepts are treated at length by both Professor Corbin and the Restatement of Contracts.⁸³ The subject bristles with controversy and obviously there is no room here for an in-depth analysis. One point, however, deserves comment. Both the ULTA and the UCC speak only in terms of future (or "supervening") frustration or impracticability. Not discussed is another type of impracticability and frustration—that which may already have existed, unknown to the obligor, at the time of contracting. Where courts have treated this problem, they have often done so on the theory that the impossibility (or impracticability so extreme that it amounts to impossibility) constitutes a mutual mistake as to the basis of the bargain for which neither party had assumed the risk.⁸⁴ In any event, it will remain for the courts to determine how this special type of impracticability will be read into the ULTA.

Remedies

Seller's and buyer's remedies are treated in part 5 of article II. The most significant aspect of these provisions is the virtual elimination of the earnest money concept as it has traditionally existed in the law of vendor and purchaser.⁸⁵ In this regard sections 2-504 and 2-516 must be read in close conjunction with one another:

Section 2-504. (*Seller's Resale Including Contract for Resale.*)

(a) Under the conditions stated in Section 2-502(a) on seller's remedies, a seller may resell the real estate concerned. If the resale is made in good faith and in a reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of Section 2-507, less expenses saved in consequence of the buyer's breach.

(b) Unless otherwise agreed, resale may be at public or private sale. Sale may be as a unit or in parcels and at any time and place and on any terms, but every aspect of the sale, including the method, manner, time, place and terms must be reasonable.

(c) If the resale is at private sale, the seller must give the buyer reasonable notification of his intention to resell and of time after which sale will take place.

(d) If the resale is at public sale, the buyer must be given reasonable notification of the time and place of the sale and the seller may buy.

(e) A purchaser who buys in good faith at a resale takes the real estate free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

(f) A seller is not accountable to the buyer for any profit made on any resale.

Section 2-516. (*Liquidation of Damages; Deposits.*)

(a) Damages for breach by either party may be liquidated in the agreement but only at an amount which is not unreasonable in the light of the anticipated or actual harm caused by the breach, the time the real estate is withheld from the market, the difficulties of proof of loss, and the in-

convenience of (*sic*) non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void.

(b) A party entitled to recover under a valid liquidated damages clause has no other remedy for any breach by the other party to which the liquidated damages clause applies.

(c) Whenever a seller justifiably withholds conveyance of real estate because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (a).

(d) The buyer's right of restitution under subsection (c) is subject to offset to the extent of:

(1) the seller's right to recover damages under the provisions of this Article other than subsection (a); and

(2) the amount or value of any benefits received by the buyer under the contract.

(e) If a seller has received payment in property other than money, its reasonable value or the proceeds of its sale shall be treated as payments for the purposes of subsection (c).

The ULTA position looks to contractually determined liquidated damages clauses which cannot be unreasonable in light of anticipated actual harm. The defaulting buyer is specifically given a right to restitution of any payments which exceed this amount. In eliminating the earnest money concept, the drafters have effectively failed to distinguish between installment and cash sale contracts. In cash sale contracts the earnest money concept has worked well. The proof of this lies in the paucity of case law compelling a vendor to disgorge earnest money. The conceptual error of those who choose to treat this as a liquidated damages problem was revealed by Professor Corbin long ago.⁸⁶ When a purchaser defaults, the vendor simply retains earnest money already in his hands. When a contract provides for liquidated damages, the injured party must often sue to recover such damages. To set a court in motion is quite a different matter from leaving the parties where they have volun-

tarily placed themselves. Since a defaulting purchaser has no right of restitution as long as the vendor has a right of specific performance,⁸⁷ the well-advised vendor will obviously always contract for a right of specific performance.

It is a legitimate inference that the ULTA thinking on earnest money is based on the views of Justice Traynor as set forth in *Freedman v. Rector, Wardens & Vestrymen of St. Mathias Parish*.⁸⁸ The *Freedman* court took the position that any measure of damages must be rationally tied to compensating the injured party for actual harm done and not result in forfeitures which are, in effect, unjustifiable penalties for breaching the contract. However, this position has been severely criticized⁸⁹ and is not likely to be well received by the real estate bar.

Conclusion

As stated at the outset, the purpose of this article has been to acquaint the bar with the emergence of a proposed uniform state code on real estate transactions. It is hoped that the foregoing brief commentary on the first two articles of the ULTA has helped unveil its fundamentally new approach to the law of real estate transactions. Simply stated, this approach is a general attempt to mold the laws controlling real estate transactions after the UCC. The proposed abolition of the earnest money concept and the reliance on resale as a remedy, which is central to much of the thinking in article II, are just two examples of this attempt to bring commercial and real estate law under one umbrella.

The validity of the assumption that there is a basic similarity between real estate and chattel transactions has yet to be determined. It is certain that many of the provisions contained in the ULTA will not be accepted without much heated debate. In any event, the extension of UCC concepts to real estate transactions through the ULTA will be a revolution within the industry. □

Footnotes

⁶⁰One complaint that has been raised about ULTA draftsmanship, particularly with reference to Article II, is that its definitions are marked with an ineptitude characteristic of the UCC.

Compare, e.g., ULTA SS 1-201(c), (f) with ULTA SS 2-103(a), (b).

For a commentary on UCC draftsmanship, see Mellinkoff, *The Language of the Uniform Commercial Code*, 77 Yale L.J. 185 (1967).

⁶¹See UCC S 2-201.

⁶²This section was modeled after UCC S 2-204.

⁶³See, e.g., *Sweeting v. Campbell*, 8 Ill. 2d 54, 132 N.E.2d 523 (1956), where the majority viewpoint was discussed and adopted. *Id.* at 57-59, 132 N.E.2d at 524-25. The court was aware that in some jurisdictions "where a mortgage is to be given as part of the purchase price and the maturity date is not specified, (the minority view will presume it) to be payable on demand and specific performance will be decreed." *Id.* at 58, 132 N.E.2d at 525.

It has also been held that a contract of sale contingent upon the purchaser obtaining a mortgage of a stated sum for terms unstated was too vague to be enforceable. *Kenimer v. Thompson*, 128 Ga. App. 253, 196 S.E.2d 363 (1973). Numerous cases may be found in which courts have declined to supply terms left unstated by the parties. See, e.g., *Roberts v. Adams*, 164 Cal. App. 2d 312, 330 P.2d 900 (2d Dist. 1958) (provision of lease which provided for option to purchase for sum payable "as mutually agreed by both parties" held unenforceable); *Cefalu v. Breznik*, 15 Ill. 2d 168, 154 N.E.2d 237 (1958) (contract which provided for payment of "balance in monthly payments" held unenforceable); *Murphy v. Koll Grocery Co.*, 311 Ky. 770, 225 S.W.2d 466 (1949) (contract calling for a selling price of \$75,000, \$5,000 cash, "(t)ime of possession and balance of payment to be arranged at a later date" held indefinite and unenforceable); *Edward H. Snow Dev. Co. v. Oxsheer*, 62 N.M. 113, 305 P.2d 727 (1956) (binder held unenforceable where it provided for payment of balance "as lots are released at purchaser's convenience"); *Bentzen v. H. N. Ranch, Inc.*, 78 Wyo. 158, 320 P.2d 440 (1958) (contract stating that balance of price was "payable by future agreement on or before (a specified date)" held unenforceable).

⁶⁴This section was modeled after UCC S 2-305.

⁶⁵ULTA S 2-302(b)(2).

⁶⁶92 C.J.S. *Vendor and Purchaser* S 184(d) (1955) (footnotes omitted).

⁶⁷

The Torrens system of land registration provides for the registration of title rather than instruments of conveyance by which title is transferred. Title is transferred only by a surrender of the existing certificate of title to the registrar who in turn issues a new certificate. See, e.g., *Minn. Stat. Ann. S 508.1 et seq.* (1970).

⁶⁸Restatement (Second) of Property S 6.2 (Tent. Draft No. 2, 1974).

⁶⁹ULTA S 2-307, Comment 3.

⁷⁰See generally *S. F. Bowser & Co. v. McCormack*, 230 App. Div. 303, 243 N.Y.S. 443 (4th Dep't 1930), where the court suggests that the implied warranty, instead of being a part of the contract to which it attaches

itself, is the law's contribution to the welfare of the parties beyond the terms of the contract itself. Or, to put it another way, the implied warranty is not read into the contract as part and parcel thereof, but is a legal fiction invented to prevent the seller from loading a fraud onto a contract which, by its terms, would not be able to combat the fraud. *Id.* at 306, 243 N.Y.S. at 445.

⁷¹See R. Nordstrom, *Law of Sales* SS 66-68, at 203-12 (1970).

⁷²In this regard, it has been suggested that even if a contract of sale includes an express disclaimer of warranties and a standard merger clause a court can nevertheless look to the circumstances surrounding the sale to ascertain whether the parties in fact "intended" the contract in question to be a final expression of their agreement. If the court finds that they (one or the other) did not, evidence can be taken on the question of what else took place which may have constituted a basis for the bargain. *Id.* S 69, at 213-16 (1970).

⁷³Relying on this distinction, some courts have been more reluctant than others to grant equitable relief based on a mistake as to the quantity of land to be conveyed. Compare *Hunter v. Keightley*, 184 Ky. 835, 213 S.W. 201 (1919) (equitable relief granted where no fraud or misrepresentation was involved), with *Rich v. Scales*, 116 Tenn. 57, 91 S.W. 50 (1905) (equitable relief granted but only because sale was by acre).

⁸¹See Patterson, *Constructive Conditions in Contracts*, 42 Colum. L. Rev. 903, 950 (1942).

⁸²*Id.* at 954.

⁸³6 A. Corbin, *Contracts* S 1331 *et seq.* (1964). See also Restatement (Second) of *Contracts* S 281 *et seq.* and introductory note to ch. 11 (1972).

⁸⁴See, e.g., *Mineral Park Land Co. v. Howard*, 51 Cal. 356, 156 P. 458 (1916), noted in 4 Calif. L. Rev. 404, 407 (1916). In this case, the defendant contracted to take from the plaintiff's land all the gravel which he would require for a certain construction project. Defendant further agreed to pay for the gravel at an agreed rate per cubic yard. Unknown to both parties at the time of contracting was the fact that a substantial amount of the gravel was below water level. When this condition was discovered by defendant, he began using gravel from another landsite. The court held that the defendant was excused from performance when he showed that he had removed all available gravel above water level and that to take the remainder would cost 10 to 12 times the expected cost.

⁸⁵*Cf.* 5A A. Corbin, *Contracts* S 1122 *et seq.* (1964).

⁸⁶Corbin, *The Right of a Defaulting Vendee to the Restitution of Installments Paid*, 40 Yale L.J. 1013, 1028-31 (1931).

⁸⁷5A A. Corbin, *Contracts* S 1130 (1964). It was pointed out by Corbin that once an enforceable contract for sale has been entered into

(n)either by a repudiation nor by mere failure

to pay installments when due, can the vendee terminate the vendor's right to payment of the full price—his right to specific performance. . . . (The vendee) cannot recover back money that he has paid if it is money that the vendor could still compel him to pay if as yet unpaid.

⁸⁸37 Cal. 2d 16, 230 P.2d 629 (1951).

⁸⁹See Hetland, *The California Land Contract*, 48 Calif. L. Rev. 729 (1960). □

TESTIMONY—continued from page 5

given practice or payment is or may be prohibited by Section 8 when its competitors do not take a similar view of the provision, and may therefore continue a practice or payment that contributes to the generation of business. We strongly recommend, therefore, that the Department of Housing and Urban Development in conjunction with the Department of Justice as appropriate, issue explanatory opinions to interpret Section 8, and that they do so in the very near future. If it is necessary to provide specific legislative authorization for these opinions and regulations, we recommend that Section 8 of RESPA be amended to specifically empower either or both of these agencies to issue opinions regarding this section.

We also recommend that Section 8 be modified to make clear that it does not prohibit real estate brokers who perform work in a given transaction to share multiple listing commissions — or brokers who otherwise share commissions when all concerned perform related work — so that home buyers and sellers will continue to receive the benefits of this vital and desirable service.

Congressional Consideration of Lender-Pay and Other Radical Approaches is Premature

Mr. Chairman, we are aware that major changes in RESPA are being contemplated — and that these include the

possibility of so-called lender-pay legislation. We believe that such legislation raises many complex questions that should receive extensive study and careful consideration before Congress determines whether this approach is advisable. A proposal with similar far-reaching implications — the proposal for federal rate regulation of settlement charges — received extensive and detailed analysis by appropriate federal agencies and was deliberated by the Congress for several years before it was determined that RESPA offers a more appropriate and workable solution.

There are a number of major questions that need to be fully answered with information not presently available before lender-pay legislation can be appropriately considered. For example, what will be the effect of such legislation in areas where sellers typically pay title-related closing costs — in comparison with buyer-pay locales? What effects would be created by differences in mortgage interest rates if some mortgages included "up-front" buyer settlement charges absorbed by lenders and others did not? And, what would be the actual saving to buyers if only a small portion of their closing costs were covered by lender-pay legislation?

It is our view that lender-pay legislation should be the subject of additional Congressional hearings after comprehensive statistical information is collected and analyzed that will provide an accurate picture of closing costs across the nation. This, of course, should be accompanied by a detailed analysis — made by appropriate federal agencies —

of a lender-pay approach impact on the real estate segment of our economy. As you know, the Department of Housing and Urban Development is now gathering needed statistical information by nationwide use of the RESPA settlement forms.

RESPA Should Receive a Fair Opportunity

In conclusion, Mr. Chairman, it is our belief that, with certain recommended changes, RESPA ought to be given a fair opportunity to work. More radical approaches should only be considered after complete and accurate information is available. Although such information is presently not available, the data being collected by the Department of Housing and Urban Development in nationwide use of the RESPA settlement statements will, for the first time, provide the federal government with a data base necessary to an informed judgment as to what settlement costs really are, what charges account for the major portion of the costs that home buyers must bear, and what the potential savings from various alternative approaches might be. Until such information is available, and until a more detailed and comprehensive study is made of the potential benefits and implications of alternatives such as lender-pay, we believe that the adoption of a substantially different approach would negate the very hard work by the 92nd and 93rd Congresses in developing an Act that represents an appropriate response to the need for settlement reform at the federal level. □

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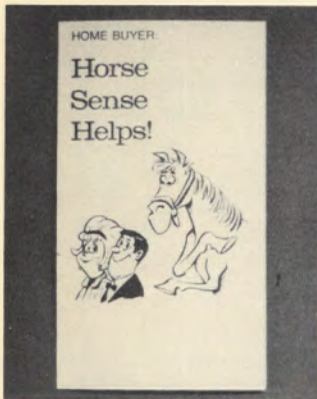
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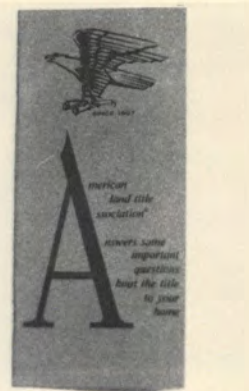
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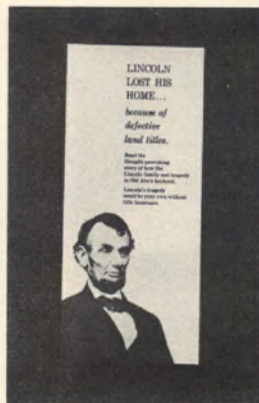
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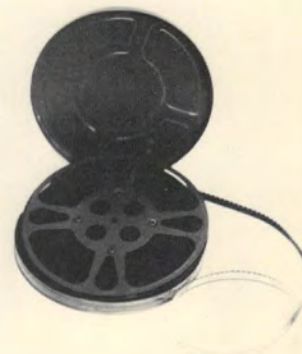
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