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Title News

Special Issue

Problems & Progress

1977 ALTA Annual
Convention Proceedings

a message from the Chairman, Title Insurance & Underwriters Section . . .

Although many people in the title industry today were born after World War II ended, many others can remember with clarity and precision some of the phenomena caused by that war. One of those phenomena was the massive shortage of natural rubber caused by the early conquests of the Japanese military machine. This country desperately needed huge quantities of rubber for a multitude of uses both military and non-military. Natural rubber had been developed to the point where it was an excellent product available at a very reasonable cost. It was an absolutely essential product that was needed for an almost infinite list of uses. But we were faced with a major dilemma—*we couldn't get it when we needed it.* Surely plenty would be available at the end of the war *but we needed it now, not later.*

So what did we do when faced with the inability to obtain natural rubber? We turned to another product which could be used in its place. Perhaps not as good and certainly more expensive: synthetic rubber. But synthetic rubber had one huge advantage—*we could get it.* Today synthetic rubber has been improved to the extent that it has almost entirely replaced natural rubber.

The same story can be told with respect to the use of silk. When we couldn't get it, even at a much higher price, we turned to synthetic materials, which initially were not nearly as desirable but they were available.

Any reader of this piece who is still reading and who attended the ALTA Convention in Washington, D.C. in October 1977 has probably already recognized the point I want to make. That point is, no matter how important our product is to our customers (and you can be sure title insurance is extremely important); no matter how effective our public relations and sales activities; no matter how strong our companies are financially; and no matter how fair our price—if our customers can't get our policies when they need them they will be forced to find a substitute, even though not of the same quality and even at a higher price.

Normally this is a message each of us as managers would try to deal with in our own companies in an effort to gain a competitive advantage. We would reason that if our own company could produce policies in a more timely fashion than our competitiors we would have an excellent opportunity to gain share of market.

But the inability of mortgage lenders (particularly those dealing in the secondary market), lawyers, realtors and builders to receive our title insurance policies when they need them has become so pervasive, the officers of ALTA feel it is necessary to do everything reasonably possible to encourage our members to get our policies to our customers as soon as the insured transaction has closed and the prerequisites for the issuance of the policy have been met.

It's true that we have all been extremely busy with record amounts of business. It's true that the recession of 1974 left us understaffed with no reserve of trained people. It's true that some of our customers occasionally contribute to delays by their own actions. But none of this really makes any difference when a customer needs his policies and can't get them.

If we don't find a way to meet the legitimate needs of our customers they will have no alternative but to look for other ways of meeting title evidence requirements.

We must find a way, and I know we will.

Robert C. Bates

Robert C. Bates

VOLUME 57, NUMBER 1

Title News

Proceedings—71st annual ALTA convention, Washington, D.C.

Departments

Title News is published by the American Land Title Association, 1828 L Street, N.W., Washington, D.C. 20036, **Maxine Stough, Managing Editor**

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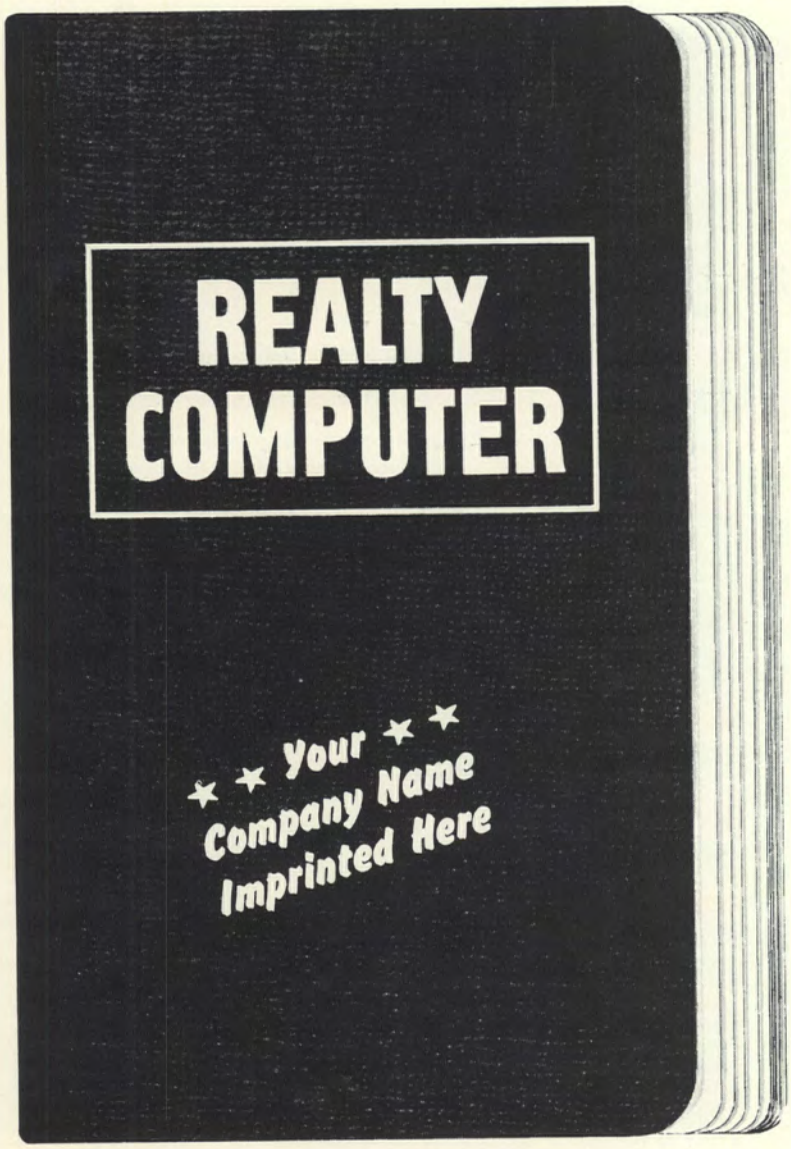

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General Sessions

President's Report

Philip D. McCulloch, 1976-77 ALTA President
Littleton, Colorado

I find it difficult to realize that a year has passed since I assumed the awesome position as president of the American Land Title Association. To say the very least, it's been a confusing year with the usual amount of problems coming to the fore. It's been a rewarding year and I can only say I have profited much from having served.

Recently, I heard that a very good friend of mine made the comment that Phil McCulloch has changed. Though not in the context with which he offered that remark, I must admit that I have changed.

My basic morals, principles and Christian beliefs remain the same. Certainly my experience and my background have not changed. But, I have changed because of my association with the members of this organization and the magnificent staff at our headquarters here in Washington.

I can only say to you that I am a far wiser man with a greater understanding of this industry than I ever had before. In that regard, I am very proud to say that I have changed.

To say that this has been a busy year would be perhaps a trite statement. Just to give you some idea of how busy a year it has been, let me point out to you that since the Mid-Winter Conference in Costa Mesa, your officers and staff have collectively attended or have held 132 meetings or conferences. That, of course, represents a tremendous amount of time—many man-hours—but it has all been man-hours devoted to our mutual interest.

Many serious problems have come up during the year. Sen. Brooke mentioned many of them in his talk this morning. During the year, as these problems came up, ALTA officers, committees and staff moved together in a concerted effort to meet, to evaluate, to study or to combat those problems. Information with reference to many of these problems to be discussed during the sessions at this convention will be sent to you from the speaker's platform. This is all in accordance with our policy of endeavoring to keep the most important and current problems before you.

Admittedly, one of the most serious problems to have come up during the year is that of Indian claims. It was interesting to gain the Senator's view.

On the other side of the coin, there are other problems coming out of Indian claims—obviously, more than dollars—when we get to the points that Sen. Brooke made regarding basic American rights.

Saturday morning, we will hear a discussion on the great Indian uprising and I urge each of you to appear in that session.

Sen. Brooke alluded to the Real Estate Settlement Procedures Act of 1974. He told you that it was a study of computerized land recordation systems and modernization of land records. You will recall that Section 13 very definitely calls for the establishment of demonstration land parcel recording systems in selected locales, as Sen. Brooke mentioned, with the eye to facilitating and simplifying land transfers and reducing the related costs in connection therewith.

At our recent Seminar '77 held here in Washington, Reid Patterson, attorney advisor in the Office of the General Counsel of the Department of Housing and Urban Development, informed us of the progress that was being made in this regard. This morning, Sen. Brooke said the contract for the study has been let. I'm sure that they are going to start moving rapidly.

A little later this morning, Gil Blankespoor, research program manager with HUD, will give us an update on Section 13 activity. As he gets into detail, I'm sure we will find his subject matter very interesting and very appropriate to us at this stage of the game.

Saturday morning, our own general counsel Tom Jackson will inform us about the new developments in unauthorized practice of law cases. It's still serious. It is still a very important matter to all of us. I'm sure Tom will discuss the New Mexico case and probably certain points that are coming out of the Virginia case, now under appeal.

Both of these cases contain very important items for your consideration. Our program, as it is published for the workshop and section meetings, indicates that these are going to be outstanding. There is much here for all of us in the way of education and information.

During this past year, we have made a sincere effort to cooperate with and assist the state and regional affiliates with problems as they arose. Our Public Relations Committee and Government Relations Committee have done absolutely superlative jobs. In fact, I don't think I can really single out just those two committees. I have to say to you that all the ALTA committees have given of their time and energy beyond what my words here can describe to you.

I'm pleased to report to you that it has been a good year. As our treasurer and chairman of the Finance Committee will tell you during the sessions, it's been a very expensive year. We've operated at terrific deficit this year, going far beyond our projected budget.

Fortunately, due to our good financial condition, we have been able to absorb this deficit without increasing dues or special assessments. I'm not sure that is going to last.

Very frankly, we are an industry that is 100 years old. But we are an infant industry and we suffer growing pains. But cheer up. I think the first 100 years were the hardest.

So long as we can maintain our organization and our cooperation within our organization, I'm sure that we are going to be able to withstand the pressures of any problems that arise in the future.

They are going to arise. We are not going to be without problems. We never have been and we will never be. But, standing together as this association grows, as the cooperation becomes paramount as it has during recent years, we are going to stand and stand well.

The Federal Government's Role in the Land Title Industry

Sen. Edward W. Brooke (R-Mass.)
Member, Senate Committee on Banking, Housing and Urban Affairs

I am very pleased to be with you this morning particularly as so many of the subjects you are addressing in your meeting are of such concern to me. The cost of housing and the viability of our land information systems are matters which I have been working on in my capacity as the ranking minority member of the Senate's Banking, Housing and Urban Affairs Committee. And the Indian land claims which have attracted such attention nationally have not only required ALTA resources, but also a great deal of my office's attention and energies through this entire year.

As the first session of the 95th Congress draws to a close, I would like to review with you the status of some of these issues. First, I have been especially troubled by the barriers first-time homebuyers face in present day markets. You well know that over the past six years, the escalating cost of housing has threatened the traditional American dream of home ownership, particularly for those young families in the 25- to 34-year-old age group who are entering the housing market for the first time.

The two principal barriers to home ownership for the first-time homebuyer have been high initial monthly mortgage payments and increasing downpayment requirements. A study by the Congressional Budget Office released this year reported that in the U.S. from 1970 to 1975 the cost of a median-priced new home for first-time buyers has risen almost twice as fast as their incomes.

The effect of inflation on housing costs is magnified by our continued use of the standard level-payment mortgage instrument. Developed for a low-inflation world, this level-payment mortgage is not well suited to an inflationary environment, since it ignores the rise in money income which the homebuyer is likely to enjoy over the life of the mortgage. It also ignores the likely increase in value of the mortgaged property due to inflation.

To relieve the constraints which are imposed by the level-payment mortgage, I introduced the Young Families Housing Act first in July 1976 and, in revised form, in February 1977 when the 95th Congress convened. My bill authorizes FHA mortgage insurance for equity-adjusted mortgages and would permit first-time buyers to accumulate the required downpayment by establishing an individual

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housing account in amounts up to $2,500 per year, not to exceed a total of $10,000, deductible for income tax purposes.

Under the graduated-payment mortgage (GPM), payments are lower during the early years of the mortgage and increase during the later years. For example, under one GPM plan where payments are increased annually for the first five years by 7.5 per cent, monthly payments on a $40,000 loan at 8 per cent interest would be $220 in the first year rather than $294 on a standard mortgage—a difference of 25 per cent in monthly payments. And those payments would rise by about $17 a year until they reached $315 a month in the sixth year and would remain at that level for the life of the mortgage.

And I am pleased to announce that the graduated-payment mortgage provision in the Young Families Housing Act has been incorporated into the Housing and Community Development Act of 1977, which, on Tuesday, was signed into law by the President. This provision will make permanent the experimental Section 245 graduated-payment mortgage program.

I also am pleased to note that one shortcoming of the Experimental Mortgage Insurance Program which has been of concern to the title industry has been addressed in the new legislation authorizing a permanent program. The lower payments permitted during the early years of the mortgage frequently may not cover the full interest on the loan. Therefore, the interest shortfall is capitalized, so that the outstanding balance on the loan will increase for a period of time. An unavoidable result of this method of payment is the charging of interest upon interest—a practice which is prohibited by usury laws in about 32 states.

According to testimony of the American Bankers Association on March 31, 1977, under the experimental program, several title insurance companies began writing exceptions to title coverage for that portion of the graduated-payment mortgage which represented interest on deferred interest. Since FHA requires a clear title to insure its loans, insurance of such loans was effectively barred in those states. A limited federal preemption of state-imposed rate restrictions which would apply to mortgages by virtue of the graduated-payment provision is provided in the new legislation. This pre-emption will now permit full title coverage of GPM's throughout the U.S. and will make the program available to young families in all regions of the country.

My efforts to expand home ownership opportunities for young families will not end with the enactment of the graduated-payment mortgage program. For the second provision of S.664, the Young Families Housing Act, which establishes a tax credit for contributions to an individual housing account, is still pending. I am particularly pleased that S.664 has 21 co-sponsors, including the distinguished chairman of the Housing Subcommittee, Sen. John Sparkman of Alabama. I welcome the support of your organization for this proposal.

Another matter which concerns the membership of your organization is the need for improvement and simplification of land title records and transfers. The goal of minimizing the costs and complexities of transferring title was stated in *The Title Industry: White Papers,* Volume I, published by ALTA in 1976. This is a goal that is shared by all who have concerns about real estate transactions, including the Senate Banking, Housing and Urban Affairs Committee.

Since 1969, when I served as a member of the Commission on Mortgage Interest Rates, the Congress has been actively seeking to reduce settlement costs and to standardize these costs for all geographic areas. And the Emergency Home Finance Act of 1970 mandated a joint HUD-VA study of settlement costs to lead to the development of a simplified method of locally controlled recording and guaranteeing of real estate titles.

The report, which was submitted to the Congress in February 1972, found that, "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." It was proposed, therefore, that federally sponsored, computerized land parcel recording systems be authorized and funded in selected jurisdictions throughout the U.S., with a view toward the development of a uniform nationwide system which would simplify procedures and reduce costs.

The Real Estate Settlement Procedures Act of 1974 directs the secretary of HUD to establish and operate a model system or systems for the recordation of land title information in selected areas of the U.S.

HUD recently has awarded a contract to Booz-Allen and Hamilton to perform research relating to all aspects of modernized land title records systems. Other tasks to be performed under the contract include evaluating grants made to local governments for designing and implementing demonstration land title records systems; providing information and technical assistance to jurisdictions desiring to adopt model systems, and, finally, identifying and developing other federal and private resources which might permit the demonstrations to become part of broader multipurpose land data systems. Since a more detailed discussion of this undertaking will be the subject of a presentation later today by Gil Blankespoor of HUD, I will not dwell further upon this subject.

"As these land claims are more and more moving into the realm of national politics, special care must be taken by those who join in this debate. . . . No one should forget that what is at stake are legitimate but conflicting legal rights."

I would like to say, however, that I was pleased to learn that Robert C. Bates of ALTA recently was appointed by HUD Secretary Patricia Harris to serve on the Housing Costs Task Force. Among its other functions, this task force will review settlement costs. I commend ALTA for its support of this endeavor and look forward to receiving your recommendations on ways to reduce the high cost of housing and make home ownership for millions of Americans affordable again.

A third matter which I would like to review with you is the current status of our work on the Eastern Indian land claims, particularly those in Mashpee, Mass., which have been of special concern to me. Indeed, the comfortable atmosphere and the upbeat musical entertainment today strike me as being in sharp contrast to the dramatic moment when I last met with members of ALTA. That encounter came last March, when I called on your membership to join me in trying to find some way to get clear title for the besieged home owners of Mashpee.

As most of you know, that entire town is the subject of a land claim brought under the Non-Intercourse Act of 1790 by the Mashpee tribe. And, although it sounds like many other such Eastern Indian land claims, the direct effects on that tiny town and its people have been of a far greater magnitude than has been seen in other disputed areas. This suit names the individual home owners as defendants. The town is so small that its entire economy is affected and most of its resources are engaged in its own defense.

I am still deeply grateful for the responsiveness of those who came to Washington to meet me to seek some solution to this desperate and unfair human dilemma. Marvin Bowling is clearly becoming a nationally known expert on the legal aspects of these claims, and he has generously shared his expertise with me. More important, Lawyers Title made an offer to extend insurance to whatever extent the tribe stipulated it would protect the home owner in the event the claim is found to be good. Chicago Title and, later, First American Title took a different but equally valid approach and offered to cover a limited number of hardship cases of people who desperately needed to sell their homes.

As I said at the time, I think these forthcoming responses were both compassionate and sound business for the industry as well. The reality of the suit, as I see it, is that neither the tribe nor the government is going to allow any home owner's property to be taken. In the end, insurance will probably never have to be paid out on these lands, however uncertain the road to that eventual outcome. And there is no question that the functions and the use of title insurance were made abundantly clear to all people in Massachusetts, where this coverage has not traditionally been sought in the past. For example, there is one Cape bank with many mortgages in Mashpee which has always been considered very conservative. Among the other precautions it takes, it has title insurance on every property put up as collateral. Its officers are said to sleep soundly in even these troubled times. Most important to your industry, however, was the image these three companies conveyed to all as being good people and understanding people to do business with.

It will be my eternal regret that the local banking community was not so realistic nor so forthcoming. We have failed to get a single new insured mortgage even for those hardship cases where full coverage would have been available. It is to the lenders' discredit that they were unable to agree on taking some moderate and calculable risk at least on the limited number of emergency needs we know we have among the elderly and the seriously ill in Mashpee.

Of course, this is only one of many disappointments we have suffered as we have tried to mitigate the effects of the claims. The president's special representative, Justice William Gunter, did not serve as a mediator and eventually decided he could not make a recommendation to either President Carter or the Congress until the courts decide the issue of tribal status. Even the previous intermittent efforts at settlement ceased after Judge Gunter's appointment last spring. And all our efforts to revive them have failed—including an attempt only two weeks ago by the delegation to have a respected Massachusetts official preside over re-opened discussions. Emergency legislation I filed to provide special mortgage and

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Brooke—(concluded)

small business assistance during the suit has become law. But this support is clearly only a bandage and not a prescription for revitalizing the town.

As the October trial date approaches, the district's Rep. Gerry Studds, Sen. Kennedy and I are trying one last possibility—Congressional extinguishment of the claim to the residential, occupied lots only, with either the U.S. becoming the defendant and being sued, should the tribe win the suit, or else with a cash settlement to be paid before the trial. All of this, of course, is being done with the tribe's consent.

The hearings in the House on our measure will begin this morning—in fact, just a few minutes from now. There is no question this legislative strategy is a long shot. Until now, when every effort at a mutually agreeable settlement has been tried and failed, the committees in both Houses refused even to consider these bills. A variety of interests may be arrayed against them. But while we do not wish to raise any false hopes in Mashpee or elsewhere, we felt we had to try this route if there was any chance—no matter how small—to free the home owners.

As these land claims are more and more moving into the realm of national politics, special care must be taken by those who join in this debate. And many of your companies will be among the principal players in this drama. No one should forget that what is at stake are legitimate but conflicting legal rights. Land holders who bought property under procedures which, according to common law, are fair and square have learned *ex post facto* of other laws governing aboriginal rights. Some feel they are now being asked to pay reparations for past wrongs with which they had nothing to do. But the right of our citizens to sue under the laws which protect them cannot and must not be abridged. And we must protect that right for the tribes covered by the 1790 Act as we would protect the rights of every citizen covered by any other law.

Because the federal government has so far responded only legalistically, we all are being threatened with an unparalleled burst of mass reaction against legitimate minority rights. If the claims of the tribes are valid, it is because the federal government has failed to fulfill its obligation as their trustee throughout our history as a sovereign state. The appropriate federal response is not only to assume the responsibility for the prosecution of these cases and, thus, belatedly act as trustee; it should also be to free the individuals and businesses affected from the consequences of the government's past negligence. Guarantees of federal compensation should have been forthcoming a year ago.

Instead, we are seeing nationwide an ugly resurgence of anti-Indian prejudice which sometimes carries with it the threat of violence. It is the responsibility of every party to these matters to dampen this kind of reaction and to press for true justice and a fair solution. As your industry is especially visible in the case, it is particularly incumbent on you to help keep the discussion balanced, moderate and fair. I urge you to establish procedures for squelching any unfounded local rumors about possible claims. These seem to abound these days. And there is no need to fan such groundless fears.

I urge you, too, to keep a balanced view, to explain to your colleagues and clients that we are dealing with a conflict among valid rights and that the system of justice for all Americans is at stake. Without such efforts by persons of good sense and goodwill, I fear that when all the claims are resolved and perhaps paid, we could yet find that Americans everywhere have lost some basic rights to access to the courts as well as some of the sense of brotherhood and understanding all ethnic groups in this nation have been struggling so hard to re-establish. You all have, perhaps unwittingly, become a part of a judicial and political proceeding which is raising fundamental issues about the rights of Americans. As such, you must assume responsibilities as broad as the questions that are being raised. For the nation's sake, we all must hope neither you, in the private sector, nor we, in the public sector, shirk these awesome duties.

Award of ALTA Honorary Memberships to James G. Schmidt and Ernest J. Loebbecke

Loebbecke

Schmidt

ALTA Honorary Memberships were presented to James G. Schmidt, former ALTA treasurer, and to Ernest J. Loebbecke, ALTA past president. Fred B. Fromhold, ALTA treasurer and Commonwealth Land Title Insurance Co. president and chief executive officer, presented the award to Schmidt. Ticor President Richard H. Howlett, who is an ALTA past president, made the presentation to Loebbecke.

Fromhold: The honorary life membership award of the American Land Title Association, as I understand it, is the highest form of recognition and appreciation we can bestow upon one of our memebers.

It is a significant honor and I appreciate the privilege of speaking in behalf of Jim Schmidt whom you have named to receive this award.

Jim Schmidt has had a lifelong love affair with the land title industry. More than 50 years ago he started working in a title plant in Philadelphia. His initiative and ability were quickly apparent as he passed through the training years and established himself as "one of the best title clerks." He and several of his peers decided to further their education by enrolling in evening courses at Temple University Law School. Jim received his law degree in 1928.

His reputation grew and he advanced through the company, ultimately achieving the presidency of Commonwealth Land Title Insurance Co. in 1966. He served as president until 1971 and as chairman of the board to 1973. When he retired from that position, the board, in recognition, named him a director emeritus, an honorary title he retains today.

Jim's contributions have not been limited to his company. He has been an ardent and effective spokesman for the land title industry on literally hundreds of occasions, not only in these continental United States, but also in Montreal, Canada in 1966 and in Wiesbaden, Germany in 1971.

During recent Congressional hearings that culminated in the enactment of the Real Estate Settlement Procedures Act of 1974, as the representative of this Association, Jim presented expert testimony on the subject of settlement reform.

For many years, he conducted real estate law and practice classes in Philadelphia. He was a regular guest lecturer on title insurance in several law schools. For 27 years he has been a member of the Pennsylvania legislature's advisory committee on the law of estates and trusts. He contributed greatly to the drafting of the decedents estate laws of Pennsylvania which in turn have become models for use and application in a number of other states. He was also influential in revising the mechanic's lien law in Pennsylvania—a most important piece of legislation to our industry. Jim, I think you should have put a little more work into that.

He was active in the affairs of the Pennsylvania Land Title Association, serving in numerous capacities, including the presidency in 1957 and 1958.

During his long and distinguished career, he also was drafted by the Pennsylvania Bar Association to lend his special knowledge and capabilities as chairman of the real property, trust and probate section.

In Pennsylvania he has long been known and respected as Mr. Title Insurance. In a special profile published in the *Shingle,* the magazine of the Philadelphia Bar Association, he was referred to as the "Man who has answered 400,000 questions." He has always had that special knack of identifying the problem quickly and knowing the answer and the best way to work it out.

It was not only his professional and technical knowledge and experience that mattered, but his tactful and diplomatic treatment and understanding of people that endeared him, and built the outstanding reputation he has attained for himself and his company. But let's not be selfish. What Jim Schmidt has achieved has benefited all of us, and our title insurance industry. He is a titleman's titleman—completely experienced.

Now, let me comment on how he has extended his talents and energies to benefit our American Land Title Association.

His first appointment was as chairman of the Legislative Committee in 1959. Since then, at various times, he has served as a member of the Forms Committee and the Liaison Committee. He has been chairman of the Retirement Committee as well as the Committee on Veterans Administration and the Federal Legislative Action Committee. He was appointed to the Board of Governors from 1961 to 1964.

The Association had the benefit of his thoughtful services as treasurer and member of the Executive Committee from 1968

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Honorary—*(continued)*

through 1973. Most recently, he has been counsel for the Government Relations Committee and since 1973 he has been an active trustee of the Title Industry Political Action Committee. That's a total of 18 years of continuously active and devoted service to the affairs of this Association.

Life for all of us is a long line of opportunities. They come to us day by day, and add up year by year. Jim Schmidt—throughout his career, day by day, year by year and decade by decade—has aggressively sought and achieved innumerable levels of involvement and contribution to the benefit of the land title industry.

He has been active and alert. He has been conscientious and capable. His efforts have been successful because he has cared enough to work hard to achieve success. And his personal success has created long-term values for the land title industry. He is a most unusual man, and most worthy of your recognition and respect.

His life's work has been his gift to us. And the beauty of it all is that there is more to come. Jim is still active and contributing, and much more benefit will come to us because we have Jim Schmidt. This honorary life membership award to him has been fully earned and is richly deserved. I believe you will join me in applauding our honoree, Jim Schmidt.

Schmidt: It would be very difficult for me to tell you how I feel at this moment. I am deeply affected by the honor which I am receiving from you and I am greatly appreciative of the remarks which have just been made by Fred Fromhold.

I have been truly fortunate to have had the opportunity for 20 years to work with and for ALTA. During this period I have had the help and cooperation of many of you. I have also had excellent guidance from Bill McAuliffe and the members of the Washington staff. In fact, Bill McAuliffe has been more than a guide, he has been a friend. I remember back in 1966 when I spoke on the subject of title insurance at the American Bar Association meeting in Montreal. My luggage failed to come through and Bill McAuliffe offered to give me his suit. I think that is typical of those who are associated with ALTA. I am sure that any one of you would be willing to give the shirt off your back to help one of your fellow members.

But what is more important than helping one of your fellow members is your willingness and desire to help the purchaser of a family residence—the consumer in a real estate transaction. There has been constant evidence of the fact that you have been working towards the improvement and the simplification of the details of a real estate closing for the benefit of such consumer. This has been true of the Forms Committee, the Federal Legislative Action Committee and the Government Relations Committee with which I have been associated. It also has been true of each individual titleman who is a member of this Association.

I am very glad that Fred Fromhold has referred to me in his comments as a titleman. I am proud to be a titleman and I am very, very proud to be an honorary life member of this Association. Thank you.

Howlett: The American Land Title Association was founded in 1907 and in its 70 years of growth has been served by many "big" persons, who gave of their time and energy to promote the land title evidencing business within the framework of our free enterprise system. All recognized that our industry—if it were to grow and be successful—must contribute to society as much as or more than it receives. The contribution cannot be by money alone. It must be through the individual participation of its members in the political process and active individual support of local, state and national civic, humanitarian, educational, religious and business groups.

We recognize today one of these leaders who, through his personal participation and contributions to our society and industry, helped to strengthen our Association and assure its continued growth.

Ernest J. Loebbecke started in the title business in the depression years of the 1930's, with the Title Guaranty and Trust Co. of Los Angeles. He became treasurer of that company prior to its merger into Title Insurance and Trust Co. (TI). Ernie became president of TI in 1955, and chairman of the board in 1963. Upon the formation of Ticor, the holding company parent of TI, Pioneer National Title Insurance Co. and The Title Guarantee Co. of New York, he was named president and later chairman of the board and chief executive officer—the position he held upon retirement January 1, 1976. During his leadership of that organization, it grew from a Southern California title insurer to a nationwide organization.

Ernie served the California Land Title Association in various capacities: Board of Governors, Finance Committee, Executive Committee and as president for the years 1956-57.

Ernie has served ALTA as a member of the Board of Governors, Executive Committee, chairman of various committees, chairman of the Title Insurance and Underwriters Section for the years of 1955-57 and president of the Association in 1958-59. During his tenure in office, he guided the development of our strong national office by moving it to Washington, D.C., and increasing its professional staff, both in numbers and quality. He helped the Association become an effective representative of our membership.

Ernie is known for his significant service to his community, state and nation. He is often referred to as the father, mother, grandfather and grandmother—even midwife—of the Regional United Way of Los Angeles, a program conceived and brought to successful maturity by him.

He has served and led almost every humanitarian and civic cause in the Los Angeles area during the past 25 years. He has served his community, his company and his industry. He was supported by a wonderful wife, Anne, his son and daughter. In part, our recognition of Ernie is also recognition of the role his family has played.

It is an honor to represent a strong American Land Title Association and, on behalf of that Association, to express to Ernest J. Loebbecke our appreciation for his service and leadership in our growth during the past 40 years.

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Public Relations Committee Report

Patrick McQuaid, Chairman, ALTA Public Relations Committee
Vice President, Title Insurance Company of Minnesota, Minneapolis, Minnesota

When ALTA was formed in 1907, one of the primary objectives established for the Association was to help the public better understand land title services. In setting forth this goal, the ALTA founding fathers distinguished themselves as people with great vision for the future.

Seven decades later in a politically charged climate of consumerism, public understanding continues to be a top concern for our industry. Because of the complex nature of our industry, it has become essential for each of us to participate in bringing the story of what we do before legislators, regulators, media people, consumers and others.

In the years to come, it will take more than our traditional excellence and title services if our industry is to survive in its present form.

Public attitudes beginning at the consumer level are impacting directly on the governmental and economical activities that shape our very existence. If we are to successfully influence the forces of public opinion for the good of our industry, better public understanding must become a major objective for all of us. Telling our story must be given a higher priority than something to do when business slows down.

In response to this pressing need for development of better public understanding, ALTA has established two major program areas which need your support and your involvement.

One is government relations—something you'll hear more about at the Saturday morning general session at this convention. The other is public relations which is the focal point for the remainder of my commentary this morning.

Through the support of your Board of Governors and Executive Committee and through the hard work of an exceptionally capable Public Relations Committee and staff, we believe that ALTA has established one of the most effective public relations programs of any association with a comparable budget.

Each year, the public relations program is responsible for reaching a nationwide audience of literally millions with the messages that favorably identify our industry with aiding the public interest.

It's true that our program is effective in its increase in favorable public awareness of the land title industry but we need local follow-up in publicizing specifics of land title protection in individual communities.

That's where all you members of ALTA could come in. Why not set up your own continuing program of public relations activity in your community directed to your particular needs and your particular resources.

Consider the following: A schedule of speeches before local groups; showing of ALTA films; periodical articles about title protection in the local newspaper; appearances on local television and local radio programs; distribution of ALTA literature, and classes on land transfer and title protection for beginning real estate sales people and other customer groups. Schedule tours of your facilities and title plants.

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Public Relations—*(continued)*

These are just a few of the possibilities. Then consider helping your regional or state title association to create favorable public visibility for the title industry in your state. There has been an impressive upswing in public relations activity among regional and state associations during recent years and this needs to continue.

If you need help in getting started on any of these programs, contact Gary Garrity and other members of the ALTA staff in Washington.

As mentioned earlier, there is an impressive level of nationwide ALTA public relations activity for you to build on in creating a stronger positive identity for your company and for your title association. This ongoing ALTA work can reinforce your messages that contain local specifics on what it is that you do.

Here are some of the highlights among the ALTA public relations activities being implemented around the nation this coming year. Many of you will remember an exceptionally well produced public service radio spot that was played at the Mid-Winter Conference in Costa Mesa, Calif., earlier this year. For those of you who missed this particular radio spot, we would like to play it again. Here it is now. *(Radio recording was played.)*

That particular spot is largely responsible for three ALTA public service announcements being broadcast this summer on the Mutual Radio Network. Mutual is the largest radio network with some 800 affiliate stations in the U.S.

That particular spot has been so well received that this year we intend to produce *Son of Sgt. Braxton* or *The Return of Sgt. Braxton.* That particular spot also was played in Minneapolis last Wednesday. That's a sure sign of its formal acceptance. If it can play Minneapolis, it can play anywhere with, of course, the possible exception of St. Paul.

In 1977, the ALTA radio package containing eight spots has been broadcast by 1,000 individual stations coast to coast. ALTA did not pay for any of the air time. All of it was donated by the network and by stations because of the public interest and the value of our messages.

In addition to radio, I am happy to report that a 60-second ALTA film minidrama for television this year has been telecast more than 2,600 times, totaling more than 40 hours of free air time donated by 88 television stations in 40 states.

Another minidrama is being placed in distribution to television stations this fall. There are other impressive ALTA broadcast offerings this year. Our award-winning film, *1429 Maple Street,* will accumulate an audience of approximately 13 million people through television public service viewing by the end of 1977. The older ALTA film, *A Place Under The Sun,* will accumulate an audience of 11 million people by the year's end and a package of ALTA television public service slide announcements this year has been aired by 56 stations in 33 states.

Results are apparent in our effort to develop favorable print medium publicity. For example, an article on closing costs in the July *Better Homes and Gardens* includes favorable mention of owner's title insurance.

An article in *Barron's* provided an upbeat outlook on the title insurance industry. Articles under the bylines of President Phil McCulloch and President-Elect Mac McConville favorably profile our industry in *National Thrift News* as does an article by Executive Vice President Bill McAuliffe in a special savings and loan issue of *American Banker.*

Several news releases quoting ALTA officers and staff received excellent pick-up among daily newspapers across the nation. Good pick-up is also reported for monthly home buyer advice columns, bylined by officers and staff, that are sent to suburban and rural newspapers.

With the Department of Housing and Urban Development studying different methods of land transfer under Section 13 of the Real Estate Settlement Procedures Act (RESPA), we decided that public attention should be directed toward the benefits that are now being provided by the existing American system of land recordation and title insurance. In response to this need, ALTA has produced a new film for television public serv-

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Update: RESPA Section 13

Gilmer Blankespoor, Research Program Manager,
Division of Housing Research
Department of Housing and Urban Development, Washington, D.C.

I want to thank ALTA for inviting me to speak to you today. From HUD's point of view, the invitation to address this convention was very timely, since we have just selected a contractor to assist us in conducting research on improved systems of recording land titles, as required by Section 13 of the Real Estate Settlement Procedures Act (RESPA).

I will discuss that research later and describe the role of the contractor, but first I would like to share with you some of our general concerns—and those of Congress—that led to the enactment of RESPA.

If you were a foreign citizen examining real estate transactions in this country, you would probably conclude that the transaction process here is generally swift and efficient. Given the many interests which can affect or be affected by the transfer of real estate, it is remarkable that the conveyance of real property presents as few problems as it does.

Unfortunately, these transactions are also costly. Consumer outcries against high settlement costs are generally well-founded. Although some of these costs are less exorbitant than widely imagined and others, such as recording fees and transfer taxes, involve taxes rather than services, the total bundle of closing costs represents a sizeable burden to buyers at a time when they can ill afford it.

The first official recognition of the problem appeared in the 1969 Report of the Presidential Commission on Mortgage Interest Rates, which recommended that HUD and VA study the problem and propose appropriate Congressional action.

Such a study was undertaken and in January 1972, HUD and VA issued a report entitled, "Mortgage Settlement Costs." Of the ten findings presented in this study, five are pertinent here, and I will summarize them:

- The high costs of settlement stem in no small part from the basic inefficiencies in the multiple and complex systems of conveyancing, recording and assuring validity of title.
- State regulation of title insurance and other title-related costs is essential but presently is largely ineffective.
- Competitive forces in the settlement industry are directed not at consumers but at other providers of settlement services, often in the form of referral fees, rebates and kickbacks.
- Settlement charges are often based on factors unrelated to the cost of providing the services; charges are usually lower when they are not directly related to the sales price of the property.
- Most public land record systems need to be improved in order to facilitate title search and eventually reduce title-related and other settlement costs.

As you can see, the inefficiency of local title record-keeping plays prominently in the report's findings. This is one of at least three problem areas which the HUD research will attempt to address.

The poor condition of local title-related records is in large part a failure of the public sector—in particular the failure of many, if not most, of the 3,800 recording offices—to keep pace with even the most elementary advances in data storage and retrieval. The outdated systems of these registry offices, typified by endless volumes of grantor and grantee records stored in mausoleum-like rooms, results in large part from the fact that local jurisdictions themselves are not the primary users of such information. Rather, users are poorly informed consumers who pay others to examine the title records. Hence, there are very few local pressures to reform title record-keeping, although there is now a degree of consumer and Congressional interest in such reform at the national level.

Those reforms which have occurred are a function of that rare registrar of deeds who is innovative and energetic, or the ability of computer firms to convince registry officials that the cost of converting to microfilm or computer systems will be more than offset in the long run by lower operating costs. I do not mean to suggest here that all registry records should be computerized; many small rural systems cannot support the costs of computerization.

One can respond to the problems of public land records either by turning to the private sector and encouraging expanded use of private title plants, or by encouraging local jurisdictions to modernize their public records systems. Either alternative may be appropriate, depending on the quality of the local records and local practice; areas where lawyers dominate may require different solutions than areas dominated by title companies. Needless to say, however, the RESPA research will focus on improvements in local public record-keeping.

One important innovation which has been adopted in varying degrees by one-third of all recording jurisdictions is the use of parcel index systems. Expanded use of parcel index systems, coupled with appropriate technological improvements, may be the

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RESPA—*(continued)*

single most practical advance which recording offices might adopt.

Consolidation of records into a single office is another obvious improvement which could reduce title search time. In Cleveland, for example, there are 16 separate offices of state, local and federal government which may be involved in a title examination. Unfortunately, because offices which keep local records are often located in disparate and often competing agencies and jurisdictions, the prospects for consolidation of records are not good.

The poor condition of local title records is one problem addressed by our research. A second problem involves a whole set of legal impediments which inhibit the expeditious determination of title condition. I refer here to the need for marketable title legislation, curative legislation, solutions to unrecorded liens, and the like. Many of these problems, as well as suggested solutions, are listed in the white paper which was prepared by ALTA on request of HUD. Last week, in fact, several HUD officials met with ALTA representatives to discuss how some of the 26 improvements suggested in the white paper could be implemented at the state and local levels.

A third problem area involves the duplication of title search. It would seem obvious that once a title has been searched, the exact same work need not be repeated countless times in the future by other searchers, except in unusual circumstances. The only thing worse than 19th Century title-recording techniques is the specter of law clerks or lawyers spending many hours at the consumer's expense retracing a chain of title that has been retraced already a dozen times. What is needed is greater sharing of starters—past title reports—or some sort of public certification of previous title reports which would serve as the starting point for future policies.

Subdivisions are probably the best place to begin eliminating repetitive title searches. Repetitive full-history searches of each subdivided parcel sold by a single builder is the epitome of waste and unnecessary expense.

I want to stress here that these practices can, and should be, corrected by the title insurance industry and legal professions without the complications of government intervention, if at all possible. Although our research will explore ways of reducing redundancy in title search, industry groups should take the lead in this area.

These problems and others led to the enactment of the Real Estate Settlement Procedures Act of 1974. The central focus of that act is to require that lenders provide buyers with ranges or estimates of closing costs, as well as an information booklet which attempts to remove some of the mystery from the settlement process, thereby enabling the consumer to shop more intelligently for settlement services.

Next year, we hope to study the effects of advance disclosure to determine whether it has enabled buyers to cope more effectively in the settlement market, whether they are attempting to shop for services, and, if so, whether they are finding settlement services competitively priced.

Section 13 of that same act represents an attempt to help rationalize title record-keeping and searching. Specifically, Section 13 requires HUD to "establish and place in operation on a demonstration basis in representative subdivisions . . . a model system or systems for the recordation of land title information in a manner and form calculated to facilitate and simplify land transfers and mortgage transactions, and reduce the cost thereof."

To obtain assistance for the department in implementing Section 13, we have recently awarded a contract to Booz-Allen & Hamilton, Inc., a management consulting firm. The contract is a two-phase effort spanning a total of three years. Phase I will last about one year, and includes a survey of the state-of-the-art of land title recordation, legal research addressing constraints to improvement of land title recordation and title searching, and research to determine the role of maps and surveys in title records improvement. Phase II will last about two years and will involve one or more demonstrations of innovative title recordation systems by state or local governmental bodies.

The state-of-the-art task of Phase I requires the contractor to examine land title records systems which are in use, in development or proposed for use by state or local governmental bodies. The survey will be based on a search of published literature and visits to the sites of those systems which appear to be most advanced or most promising. Innovative Canadian systems will also be eligible for this study.

Systems to be studied will include, but not be limited to, those based on tract indexes, positive title registration systems (Torrens), computerized privately owned title plants, and computerized name indexes. Special attention will be focused on new and innovative systems and concepts. The survey will take into account legal, technological, economic and political factors present in the localities studied, and shall identify, to the extent possible, the elements which bear on the success of the systems. The results of the state-of-the-art survey will be delivered to HUD about April 1978.

The second component of Phase I requires the contractor to prepare a report, due in April 1978, based upon research on the role of mapping and surveying in the modernization of land title records, within the alternative contexts of:

- A conventional recording system using manual files and indexes
- A conventional recording system using computerized files and indexes, and incorporating non-title data as well as title data
- A computerized title registration system which does and does not purport to guarantee boundaries of parcels

The final research component of Phase I requires the contractor to examine the various legal constraints which may impede the improvement and modification of land title recordation systems and procedures. This task is broken down into four subtasks. They are:

- Consideration of legal constraints to more efficient recording of land titles and determination of ownership
- Consideration of methods to reduce the repetitive nature of title searches
- Application of techniques to modernize and computerize land title recordation
- Identification of legal modifications required to improve positive title registration systems

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Research Committee Report

John E. Jensen, Chairman, ALTA Research Committee
Senior Vice President, Chicago Title and Trust Company, Chicago, Illinois

The annual analysis of National Association of Insurance Commissioners (NAIC) Form 9 and of claims has been completed for the year 1976. Those reports will be distributed within the next few weeks. Summaries of each report will appear in forthcoming issues of *Title News*.

For that type of information to be helpful, it ought also to be timely. When I'm standing here in October 1977 and talking about the results of 1976, the usefulness of the data to the individual members of the industry and to regulators is rather limited. A number of regulators are asking for nationwide information to supplement state income and expense or statistical plans and we are not able to give a timely industry response to these requests.

As a result, beginning next year, we are going to set timetables for the gathering and dissemination of these two studies. We are going to be asking participating underwriters to furnish Form 9 information by April 1 and to submit their claims breakdown information by May 1. This will mean that we will get the information three to four months earlier than has been the case heretofore. This is a reasonable goal, we think, but it will require your cooperation.

Last March, your committee began attempting to collect *quarterly* information on a statutory basis from those companies who already prepare such information. Just so there is no misunderstanding, we are not asking anybody to furnish quarterly reports unless they are already required to do so by state law. What we are asking is that you furnish ALTA with a copy of any such report you prepare.

We know that we will not be able to do much with this information in 1977, but beginning with the first quarter of 1978 we hope to develop some extremely useful comparisons both for the firms in the industry as well as for the Washington staff. We will be asking for third quarter information very shortly. If you have not yet given us your first quarter and your first half reports, please include them with the third quarter data. As we get into 1978, the comparisons, we believe, will be extremely helpful.

What I would like to do now is spend a few minutes talking about the subject of profitability and profitability analysis for our industry.

As many of you are aware, we are now at a point where there are approximately 20 states and jurisdictions requiring state-oriented financial and/or statistical information concerning our business. This enables the regulators in these jurisdictions to measure industry profitability and to determine whether our prices and products meet statutory requirements.

As a result of this increased focus on industry profitability, ALTA has prepared a profita-

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Research—*(continued)*

bility paper which is part of Volume II of *The Title Industry: White Papers.* I would like to spend a few minutes summarizing that white paper and then philosophize for a second or two regarding some of our reasoning.

The paper starts out by putting to rest one more time the idea of comparing title industry loss ratios with the loss ratios of property /casualty companies. We again repeat that we are concerned with loss prevention or loss elimination and not loss assumption based on actuarial analysis.

Incidentally, the loss ratio in 1976 for our industry did fall to 7.8 per cent. It is down somewhat from the 9.7 per cent all-time high of 1975 but still is the second highest year since these ratios were collected.

Following the analysis of our losses and why our loss experience must be different from other types of insurance, we discuss the high level of skill required to perform the function of title search and examination in the issuance of title products. It is pointed out, with some forcefulness, that this is one of the factors that results in the high fixed costs of our industry. We also point out that our industry is closely tied to the real estate cycle which is probably the most volatile sector of the American economy.

You would assume that since we are in a volatile industry and since we have high fixed costs, the risks that attend these two factors should have some positive impact on our rate of profitability. In fact, the contrary applies, as will be demonstrated below.

The measure of profitability that is urged in the white paper is return on total capital. Now, there are as many measures of profitability as there are economists, accountants or financial analysts. But when talking about profitability for our industry, we are trying to talk about how a segment of U.S. capital should be invested and what's happening to that capital when it is invested in the land title industry. It appears the overwhelming weight of authority indicates the proper measure of profitability for this purpose is return on total capital.

In calculating this return, the numerator is *all* statutory income, operating and investment income and realized and unrealized capital gains (or losses). The denominator is effectively all of the assets employed by the firm, except for those committed to short term liabilities.

As a result of this type of analysis, the range for the profitability for the industry has been between 1.8 per cent in 1974 to 6.6 per cent in 1976. We have compared these profitability results with those of companies that file with the Securities and Exchange Commission and the Federal Trade Commission where the range under the same measure is between 10 per cent and 12.6 per cent in 1976.

We think this quite clearly makes the point that the profitability of the title industry is not only *not* excessive but, by many measures, is inadequate.

As this white paper was being prepared, there was a great deal of discussion as to what numbers to use for the numerator and denominator. Should we be using data from financial statements prepared under Generally Accepted Accounting Principles (GAAP) or should we be using our statutory data.

We concluded that the proper numbers are the statutory ones. I would like to give you the reasons we believe that the correct data base to use in measuring the profitability of the industry is based on the statutory results.

First of all, statutory numbers are available and GAAP financial statements are not. The latter are published by only a few firms in the industry.

Secondly, the statutory numbers are reasonably consistent and provide a reasonably consistent method of presentation. This is not true of the GAAP financial statements of members in our industry. The method of presentation between firms is not consistent.

Trying to put those numbers together, even if they were available, would result in trying to mix apples, potatoes and steak to make a fruit salad. It would be impossible.

Finally and most important, we must remember that when analyzing the profitability of our industry, we are not preparing a brochure for an investor. It is not a document intended for lenders. What we are trying to do is make an economic analysis of the use of resources committed to our industry and that these resources are subject to the constraints of a regulated insurance industry.

When you are preparing a GAAP financial statement, you are preparing it for shareholders or potential investors, lenders perhaps. Those are the people that the data is aimed at and those are the people to whom it is useful.

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New Developments in Unauthorized Practice Cases

Thomas S. Jackson, ALTA General Counsel
Partner, Jackson, Campbell & Parkinson, Washington, D.C.

A number of lawyers in New Mexico purporting to represent the State Bar of New Mexico and the San Juan County Bar Association brought a suit in 1976 against Basin Title Company, Guardian Abstract and Title Company, Inc., and the San Juan County Abstract and Title Company seeking to enjoin those defendants from the "illegal practice of law" consisting of rendering legal advice, preparing deeds, mortgages, notes and other documents.

Guardian and San Juan appealed from an adverse decision.[1] The trial judge found the defendants guilty of practicing law without a license when they filled in the blanks on forms including such documents as those described above, many of which were statutory forms, and filling out the papers necessary to effect a closing. The court enjoined the defendants "from practicing the profession of law in the State of New Mexico, as now *or hereafter defined,* either individually, collectively *or through their attorneys*, including, *but not by way of limitation*, the giving of legal advice, the selection of and preparing instruments and contracts by which legal rights are affected, including the drafting, by use of forms or otherwise, Warranty Deeds, Special Warranty Deeds, Quitclaim Deeds, Real Estate Contracts, Promissory Notes, Mortgages, Deeds of Trust, Release of Mortgages, Easements, Affidavits, Security Agreements, Financing Statements, Lien Waivers, and HUD Disclosure Settlement Forms and all other documents (excluding correspondence) pertaining to land transactions or personal property transactions used in the closing of real property transactions." (Emphasis added)

The court, reciting that the case was one of "first impression in this State" stayed enforcement until the time for taking an appeal expired. The injunction, therefore, will go into effect if the Supreme Court should affirm the decision of the trial judge. The defendants employed very competent lawyers in Santa Fe, Messrs. Sommer, Lawler and Scheuer. Mr. Sommer, with his very able associate, Thomas A. Simons IV, represented the defendant title companies at trial and have been conducting the appeal.

[1]During the course of proceedings in the trial court, Basin Title Company entered into a compromise settlement with plaintiffs and was dismissed as a defendant.

The New Mexico Land Title Association and ALTA joined in applying to the court for leave to file a brief *amicus curiae*, which was granted, and a brief on behalf of those associations was filed by the office of Jackson, Campbell & Parkinson, of which firm Thomas S. Jackson is ALTA general counsel. Thomas Penfield Jackson and Patricia D. Gurne, especially the latter, assisted in the preparation of the amicus brief. With commendable cooperation, Mr. Simons shared his time with ALTA's general counsel in making the oral presentation of the case to the New Mexico Supreme Court on September 15.

Mr. Simons, in his brief and oral argument, addressed primarily matters which related directly to the trial and to New Mexico local state law.

The contribution of the two associations as *amicus curiae* were to present to the court arguments which flow from significant new trends of the courts in dealing with the practice of law generally, and in dealing with restrictions and limitations upon lawyers arising out of their use of the Code of Professional Responsibility and the Canons of the American Bar Association to maintain—it is said—a monopoly. In this posture, it was contended that the Goldfarb decision in the Supreme Court of the United States removed from the practice of law the fiction that lawyers in their activities are not subject to the antitrust laws;[2] and that, because of this new concept, in certain activities lawyers perform through their offices, they must be prepared to compete, on a commercial basis, one might say, with non-lawyers in fields in which the latter are equally or even more competent. As a matter of fact, this has been the contribution of ALTA to the whole subject of the controversy between lawyers and title companies from the earliest days when ALTA first became involved with the American Bar Association over the creation of a National Attorneys Title Insurance Company restricted to lawyers and sponsored by the American Bar Association. ALTA has been successful in persuading some groups within the American Bar Association that creation of a bar-sponsored title

[2]*Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975).

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Unauthorized—*(continued)*

insurance company would be unlawful, and not merely unwise.

More important, it seems to counsel for the association, is the following new contention raised in the New Mexico case.

In the absence of a constitutionally valid definition of what constitutes the practice of law, either through a statute enacted by the legislature or by a rule of court wherein laymen are permitted to participate in the consideration of its provisions, there may be no prosecution, by injunction or criminal proceedings, against laymen for "unlawfully" engaging in the practice of law.

In other words, decisions in the courts "on a case-by-case" basis is a thing of the past. Such case-by-case determination, in the absence of such a statutory definition, denies, to such persons as the defendants in the New Mexico case, due process of law under both the federal and state constitutions. Counsel for defendants established that the title company defendants had engaged in the business for nearly two decades. They had, therefore, we contended, established a substantial property interest in the right to do so. The trial judge in his opinion had noted that there was no evidence that the public had in anywise been damaged by the defendants' activities. Counsel for the defendants and the associations stressed that the trial judge had confused the "public interest" with the economic interest of lawyers. Even so, there was substantially no evidence of any economic loss to the lawyers themselves. Most of the argument in the case turned on the extent a layman (as lawyers would put it) could be enjoined in filling in blanks in statutory forms of deeds and mortgages and settlement and closing forms such as those prescribed under RESPA by HUD.

We were encouraged that the New Mexico Supreme Court is taking the case seriously, and has been made aware that its decision will be watched carefully, possibly with the view that this constitutes a pilot case which can serve to procure from the Supreme Court of the United States a rational statement of what constitutes the protected or exclusive area of the practice of law.

It seems desirable to underscore for the benefit of all interested parties the position we have been advancing in our representation of the title industry. We believe that excessive zeal on behalf of what amounts to a small segment of the Bar has resulted in a gross misconception of the right of lawyers to exclude non-lawyers from competing with them. It is our contention the courts have the power to exclude unlicensed lawyers from any and all fields *related directly to the administration of justice*, in which knowledge of the law is beyond what is comprehensible and generally usable by laymen. Thus, we concede the courts have a right and duty to exclude non-lawyers from representing others in all judicial and quasi-judicial proceedings before courts and tri-

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ACTIVITIES OF LAWYERS

EXCLUSIVE

Rendering legal advice to a client or clients without conflicting interests by lawyers who hold themselves out as qualified to practice law and who receive compensation for such legal advice

EXCLUSIVE

Representing clients in court or before quasi-judicial tribunals

NONEXCLUSIVE

Activities which may be performed by lawyers in competition with skilled lay specialists:

- Lobbying
- Organizing business ventures
- Preparing tax returns
- Giving tax advice
- Giving investment advice
- Negotiating contracts (labor, real estate, loans, etc.)
- Estate planning
- Acting as corporate directors
- Serving as legislator
- Representing foreign nations seeking American business
- Preparing settlement and closing forms and statements (for all parties)
- Acting as trustee, executor and other fiduciary
- Conducting title searches and preparing abstracts of land title
- Filling in forms of legal documents (prepared in the first instance by lawyers)
- Giving business advice
- Maintaining corporate records
- Giving marital advice-parental advice
- Maintaining financial books and records

Unauthorized—*(concluded)*

bunals designed to resolve legal controversies between citizens; and, related to this, courts have the right and duty to exclude non-lawyers from giving legal advice, in the broad sense, where there is a holding out of expertise in knowledge of the law generally. Beyond that, the courts may not go: that is to say, the power of the court, in the absence of a legislative pronouncement at least, must be confined to activities related directly to the administration of justice.

Whether the legislature has a broader power is not involved in the New Mexico case or any of the other pending unauthorized practice cases. We would deal with a legislative act when we come to it, but it would seem that a definition of the practice of law constitutionally enforceable contained in a prohibiting statute would have to be nondiscriminatory, and would have to be sufficiently clear and precise that it could be understood with reasonable certainty. The mere use of the words "practice of law" as a prohibited activity is too vague and would be insufficient. And, except to the extent the courts have acted within their sphere relating to the administration of justice, by an appropriate rule of court, it would seem that a statute, which takes away an established property right by a new and broader prohibition than had theretofore obtained, would deprive the owner of that property right (as for example a title business) of his property without due process of law.

We have, earlier in this article, referred to the new concepts of the practice of law and the control of it. It is no accident, in our view, that the Goldfarb case developed in Virginia and involved practices related to title matters.[3] The Bar in Virginia grossly overreached. There is pending before the Fourth Circuit, United States Court of Appeals, a decision of a federal judge in Virginia that the Virginia State Bar has attempted to exclude laymen from proper fields in violation of the antitrust laws through the rendering of ethics and unauthorized practice of law.[4] While we cannot predict whether that decision will be wholly sustained either in the Circuit Court of Appeals or the Supreme Court, we believe the Nader forces who are pursuing it have made a persuasive argument. It is strange for us to find ourselves on the same side.

Also, the recent decision of the Supreme Court of the United States in *Bates v. State Bar of Arizona*, the case of advertising by lawyers is significant.[5] Although rejecting a claim that rules prohibiting advertising by lawyers were subject to a Sherman Act challenge, the court held that neither the legislature nor the courts may prevent lawyer-advertising, at least under some conditions, because of the First Amendment rights to free speech. What has been overlooked is that *Bates* does not go so far as to hold that courts would have the right, through judicial decision or rules of court, to exclude non-lawyers from fields in which the latter are equally competent, and not directly involving the administration of justice, without running afoul of federal or state antitrust laws.

There is quite enough law business to keep all competent lawyers more than adequately busy and prosperous without resorting to the indignity, such as has occurred, for example, in the New Mexico case, of holding the filling in of forms can only be done by persons who have gone through all of the stages of a legal education so as to be admitted to practice in the courts.

Consumer advocates are having increasing influence in the United States Department of Justice. A special assistant to the assistant attorney general in the Antitrust Division, in a speech before the Florida Bar Convention in June 1977 said, "Competition from nonlawyers is knocking at the door of the bar—and the bar would do well to examine its traditional opposition to such competition. It is time the legal profession asked itself what it can do to better fill the legal needs of the great majority of Americans who have never been able to afford legal services. To the extent that the bar continues to raise the ancient rule prohibiting the unauthorized practice of law as a shield to restrict competition and protect its economic self-interest it is not only flirting with antitrust liability, it is turning its back on its professional responsibilities."

Speaking as a lawyer proud of his profession I feel strongly that the dignity and usefulness of that profession will not be damaged, but strongly fortified, if the courts and legislatures will help us see to it that we lawyers "stick to our knitting," and avoid building artificial supports to avoid competition with others equally able to serve the public.

In the New Mexico trial court's findings of fact, it is noted that none of the defendants had, as employees, members of the Bar admitted to practice. This is an interesting sidelight. It supports one provision of an agreement reached with the Bar of the District of Columbia on behalf of title insurance agents, that they would not be disturbed if they had an attorney, a member of the Bar, as an employee reviewing the legal documents prepared by them in cases in which they have applications for title insurance.

Bar associations' memberships are not composed solely of those who are in private practice. Most if not all such bar associations, including the American Bar Association, have as members very competent lawyers employed by business firms. It is hard to see how, except as a matter of the "economics of the practice of law" the Bar can argue that only a lawyer engaged in private practice can prepare legal documents and conveyances.

The U.A.P. bar argument is that parties to a real estate transaction must have *independent* legal representation; but we all know that title attorneys in private practice do, more often than not, prepare such instruments for *all* parties in the ordinary closing, without really representing any one of them independently.

[3] *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

[4] *Surety Title Insurance Agency, Inc. v. Virginia State Bar*, 431 F.Supp. 298 (E.D.Va. 1977)

[5] *Bates V. State Bar of Arizona, U.S. , 45 U.S.L.W. 4895 (1977) (U.S. June 27, 1977).*

Government Relations Committee Report

Philip B. Branson, Chairman, ALTA Government Relations Committee
Senior Vice President, Title Insurance and Trust Company, Los Angeles, California

Mark E. Winter, ALTA Director of Government Relations

Branson

Winter

Branson: Speaking to you this morning here in Washington, D.C., I find it very hard to believe that only two years ago when we met in Chicago, there was no such thing as a government relations program.

In October 1975, the concept of government relations was the subject of a strongly worded memo from Jim Robinson of American Title in Miami to the ALTA Board of Governors. The memo called attention to the fact that our industry was facing very serious problems in the area of government relations, that we weren't organized to meet these problems and that we should do something quickly.

Jim's memo acted as the catalyst, and a number of activities started to take place right there and then at the Chicago Convention.

The Executive Committee in Chicago approved the concept of the program, and under the leadership of then-President Dick Howlett, things really started to move.

A small group was asked to formulate a charter and search for staff. Earlier this week, we honored Jim Schmidt from Commonwealth Land Title. He spearheaded putting together the entire charter for the government relations activity. By the Mid-Winter Conference at Greenbirar the charter had been approved, the program had been funded and Director of Government Relations Mark Winter was on board.

Last year at the Convention in Seattle, we were able to present you with a report of our first year of activities. A legislative contact program was under way, the Association had conducted a formal Capitol Hill visit by a group of ALTA members and the committee had sponsored a Washington seminar targeted at Congressional staff members.

You will recall Seminar '76. It covered the basics and was simply a description of what we, in the title business, do for a living.

At that time, we also published a set of position papers which were basic, but on target. In fact, I'm pleased to announce that *The Title Industry: White Papers* Volume I, is now in its third printing and has sold in excess of 20,000 copies.

In reviewing our records and the early files on the committee, it wasn't much more than a year ago that part of our program was to communicate to ALTA membership the serious nature of the problem in Washington. Some people really didn't believe it. Others thought that the best answer to the problem, if in fact it did exist, was to keep a very low profile and hope it would go away.

Today, the level of awareness of our government relations challenges is no longer a problem. This Convention's agenda started with Sen. Brooke. The Public Relations Committee's new film is basically Torrens-related. We heard a presentation on RESPA, Section 13, by the research program manager of HUD's Division of Housing Research. John Christie brought us up to date on problems related to antitrust. Many, many of the topics that we are analyzing and discussing this week are government-related.

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For instance, I'll be followed this morning by Frank O'Connor who will discuss TIPAC. We'll have George Will with a Washington Profile and finally, we'll conclude with a panel discussion on the great Indian uprising.

1977 has been an exciting and challenging year for the ALTA Government Relations Program. We started the year with a very nice clear set of goals and objectives, timetables and expectations. This makes a chairman's heart feel glad. Everything was organized and set.

That was January 1. On January 11, the whole thing was thrown out. That was when the Seattle office of the Federal Trade Commission (FTC) called a special hearing. We were very fortunate that the officers of the Washington Land Title Association spotted a real problem and requested help. What had been billed by the FTC as a three-day seminar on housing was, in fact, a general attack on the current system of land recordation and on title insurance specifically.

Fortunately, I think you can say we came out "whole" in Seattle. It was our objective to give balance to the press accounts of the conference and to see to it that the title insurance industry story got into the record because a verbatim transcript was to be sent to Washington.

The deck was stacked against us in Seattle. The hearing chairman was the same one who went after the funeral directors successfully the year before. Having that hanging from his belt he was looking for another coup.

It was no accident that we came out well. It started with an alert response by the state association, followed by excellent ALTA staff support and the participation of a number of member companies.

I particularly point out the efforts of Ron Gandrud from Minnesota Title. He came in from Minneapolis to tell these gentlemen what the Torrens system is all about in the real world.

John Hall, from Transamerica Title, San Francisco, emerged winner in a furious tangle with Professor Dale Whitman, a hired Torrens advocate brought in for the seminar by the FTC.

Dick Hogan of Pioneer National Title Insurance did a fine job in seeing to it that the transcript accurately portrayed the contribution of the title insurance industry. I would certainly be remiss if I didn't thank Gary Garrity and Mark Winter of the ALTA staff who did marvelous jobs.

Another major effort of the Government Relations Committee this past year has been the Arthur D. Little Torrens study. Now we're hearing more and more of Torrens as the magical solution to high closing costs.

Unfortunately, it is not sufficient to point out to Torrens advocates that the search of records is a very small portion of closing costs. They're convinced that the salvation of the homebuying public relies on reforming the title industry.

During the year, Arthur D. Little was chosen from a list of selected consultants and a subcommittee was formed to monitor progress. Within a few weeks, we're going to be publishing the most thoroughly documented tome in existence on the Torrens system.

This study analyzes the Torrens system as it exists today and has existed for over 50 years. The study is objective, and I have heard the comment that it is too objective because it actually has a few nice things to say about the Torrens system. But its conclusions come down right where you would expect them.

A recent article in the Washington *Post* quoted Arthur D. Little's Irving Plotkin as saying, "Preliminary conclusions of an extensive study into the various land registration systems throughout the U.S. clearly show that placing a piece of residential real estate in a registration system is an unwise investment from the point of view of the individual who must bear those costs, or from the point of view of society."

Plotkin is further quoted, "The Torrens system offers no positive solution for elimination or reducing settlement costs for the residential homebuyers. Rather, the Torrens system produces a cross subsidy from the small home owner to the large commercial developer, builder or speculator."

If history is any judge of what we can expect of the future, we're going to continue to hear from Torrens advocates. Their solution is so simple. It can be explained in two paragraphs in a newspaper article. However, whenever a legislative body starts to seriously consider the implementation of a Torrens-type registration system, we're ready to make sure that they address themselves to the facts as outlined in the Arthur D. Little papers.

We have documented good reasons against their spending millions of dollars of the taxpayers' money to set up a new Torrens model, when we've had dozens of Torrens-type systems in place for 50 years.

I have in my hand Volume II of the White Papers. It will be distributed within the next couple of weeks. Volume II includes papers on areas such as profitability of the title insurance industry, the abstracting function in the overall conveyancing process, a series of recommendations on how to modernize and improve the existing recording system and a background paper on the Indian claims problem.

In a few minutes, you'll see some of the photos of various activities that went on during the year, but our recent seminar entitled Seminar '77 is featured.

This year's seminar objective was to communicate to Congressional staffers and key agency personnel some suggestions of how we can improve the current land recordation system. It also reviewed the finding of the Arthur D. Little report. One of the photos you'll see is of Martin Lobel. You might wonder why he's there. Why would you put one of your industry's strongest critics up there? Well, we came to the conclusion that even with our most articulately vocal adversaries, we have nothing to fear. The facts are in our favor.

This was in conjunction with our day on Capitol Hill, which we did a little differently this year. Instead of having a group visiting key people, we encouraged members of ALTA from across the country to see Representatives and Senators on an individual basis, and they did so.

Many stopped by the office beforehand and went to the Hill armed with White Papers and ALTA background data. There was also information on the Indian claims problem.

Our federal reception, by the way, was held here in this very room. We had over 300 participants, most of whom were committee and Congressional staff members. They may not be as colorful as the politicians, but they're people we're really trying to get to know.

I will admit to having been very impressed with the opportunity to chat with Sen. Curtis from Nebraska and with Sen. McClure from Idaho, as well as FNMA President Hunter and GNMA President Dalton.

Unfortunately, time won't allow us to go into all the activities of 1977 because I want to go into a few of the objectives for 1978. But first, I'd like to share the podium with Mark Winter, our director of government relations.

As chairman of the committee, I get to make the fancy speeches but frankly, here's the fellow who, along with Bill McAuliffe, does the real work and should take the credit for what has been a successful program to date. Mark?

Winter: I thought I would start off my brief comments prior to a slide presentation with a short quiz. It's a two-part quiz, very simple. I'm sure you'll do well on both questions. The quiz relates to the reason why this Government Relations Committee was formed.

The first question. What sovereign body promulgates 150,000 regulations per year governing business?

The second question. What sovereign body has promulgated 35 million regulations governing business?

Well I can tell you, it isn't Australia. It's right here and right in this city and our business, our industry is no exception.

I call your attention to the Convention program and some of the remarks made by Ralph Smith, the Convention chairman. He said, "Congress and several federal agencies seem to have focused a permanent spotlight on our industry. That focus continues to vitally affect all of our futures."

How true that is. I'd like to show you now some of the highlights from the Seattle Federal Trade Commission hearings, the ALTA Seminar and Federal Reception. *(Whereupon the slides were shown and narrated.)*

As you can see, our educational program is off and running. This is the second year that we've had a seminar and it's the second year that we've done some sort of visitation program to Capitol Hill. It's the first year that we've had an extensive ALTA Federal Reception.

The Government Relations Committee has also worked closely with the Federal Legislative Action Committee and the Indian Land Claims Committee. Of course, our program is very dependent on the success of TIPAC. You'll be hearing from TIPAC Chairman Frank O'Connor who will give you a report on TIPAC.

Working in conjunction with these other committees, ALTA staff has monitored pending legislation that affects the title industry. Such bills include the Indian claims question.

Recently a statute of limitation extension was passed, extending the period by which the Justice Department can file claims on behalf of the Indians for another 3½ years. In addition, there is a bill pending that is purported to relieve some of the problems facing Mashpee home owners but ALTA, in conjunction with Tom Finley, Sheldon Hochberg and John Christie, submitted a statement raising some very serious questions about that legislation.

Also before Congress—probably the most discussed financial measure this year—the Safe Banking Act which addresses some of the Bert Lance problems of overdraft and insider loans and deals with interlocking boards of directors. The interlock provision deals with whether title company officers can sit on financial institution boards or vice

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Government Relations—*(concluded)*

versa. ALTA has submitted a statement in opposition to that provision.

In addition, a federal tax lien bill has been introduced with the help of ALTA and its members. The bill would eliminate the present dual indexing system. The House Ways and Means Committee has reported out this legislation, and it should come up for House consideration shortly. However, the Senate has yet to consider this legislation.

Also Sen. Brooke mentioned an omnibus housing bill signed into law this year. The bill resolves the Section 245 graduated mortgage payment interest on interest problem.

There are, of course, a number of other legislative measures that have some bearing on this industry. Due to the cooperation of the ALTA members, your contact work on the Hill, your legislative contact card response, I think an identity now has been created.

Members of Congress now know what ALTA is, what our business is and what we represent. Not only have we established identity, I think we've established credibility. Throughout the Indian claim situation, we have seen Congress coming to us and asking us for suggestions. I think that speaks well for our credibility.

There are a number of things that will be coming up next year. We have touched on the Real Estate Settlement Procedures Act (RESPA) Section 13. Also, Section 14 mandates HUD to report to Congress by 1980 regarding changes in the RESPA law. That provision will also look into whether lender pay is a viable alternative.

The Indian problem obviously will be with us next year.

Torrens, a subject that I think we will be well armed to combat, could come up also. On the Torrens subject, I think of Bert Lance when he said, "If it ain't broke, don't fix it."

I hope that is the position Congress will take if they should consider a federal Torrens program.

In closing, I want to thank Phil Branson for generating such interest in the Government Relations program. Phil is resigning as chairman of the Government Relations Committee, but he still will be a member of the committee.

Dick Howlett has been nominated to be next year's chairman. I think the committee has taken more than a small step. I think we're in a gallop now—thanks to Phil Branson.

Branson: Thank you, Mark. I wish I could say we had time to sit back and take a breather, but the new chairman will be looking at a great many challenges ahead in 1978.

By the end of the year, you're going to become very familiar with Section 13 of RESPA. This section directs the federal government to investigate ways of improving land title records. From what we have seen of the program implementation so far, there appears to be a rather significant bias towards Torrens. We're going to have to watch this one very, very closely. I would hope that Number 13 will be more unlucky for the Torrens advocates than for ALTA.

You can also expect further proposals for modified Torrens programs. Within the past few weeks, another one just popped up in one of the adjoining counties to the District of Columbia. I think, with the ammunition we can bring to bear, the Torrens advocates are going to have to make some proposal adjustments and changes. One thing is for sure, they'll be back.

We may see our old friend lender-pay surface again. Unfortunately, this is another one of those simple-minded, well-intentioned propositions designed to help the homebuying consumer, but which could cost everyone a lot of money.

The assignable policy is an interesting concept, and I think it's going to be around for a while.

A new idea that Reid Patterson of HUD mentioned at our seminar, is to require all back title evidence to be recorded with each deed. Theoretically, this would save the consumer money because it would eliminate the need for title plants—very interesting.

Of course, there are the Indian claim problems which we'll hear more about later this morning. You just never know what kind of ideas are going to attract the attention of the advocates and the innovators and in the legislature.

An interesting one that came up in California recently, was that the state would franchise one title company to operate a plant in each county. The various title companies could bid to run the title plant. Everyone else—all other title companies, of course—would buy their searches from the plant. It would be regulated like a public utility and of course it is assumed that it will save the consumers money. It's interesting, but the point is, you just don't know where the next thrust will come from.

After looking at the program the past couple of years and some research on government relations in general, we can reasonably say that the success of a government relations program is based on three key factors.

First, you must have *demonstrable technical expertise.* We don't have any problem here. Just look at Marvin Bowling and the work that his Indian Claims Committee did. The ALTA study that was put together on Torrens is another example of our expertise. And, consider the individuals who come to our assistance—Mr. Winter, Mr. Jackson, Mr. Finley, Mr. McAuliffe and the various experts from our member companies. We have demonstrable, technical expertise.

The second major factor in a successful program is, *Congressional awareness.* Here, we've got a long way to go. We had our day on the Hill. We've had our second annual seminar. We have our position papers. It's a nice start, but if we're going to face the facts of the situation, we have only begun.

The third factor in a successful program is, *constituent response.* Yes, we have our contact card program. It's a start—a successful one on which we can model future activity—but it's only a start.

The foundation provided by these three factors is definitely in place. We have momentum. We have an effective ALTA Government Relations Program. We have an Association with the desire to succeed and the leadership to carry it off.

The Association's Government Relations Program has come a long way since the Convention in Chicago two years ago. But make no mistake, we have a tremendous distance to go. In fact, I think it would be very doubtful if there will ever be an end to this Association's requirement for a viable, effective government relations program.

P.R. Committee—*(concluded)*

ice showing in quarter-hour time slots and for purchase by members of the Association.

The new film is entitled *The American Way* and supports ALTA government relations objectives. Let us now enjoy a premiere showing of your new film. *(Whereupon the film was shown.)*

In order to achieve a film that is acceptable for use in free public service time on television, the movie was developed with a very soft-sell message. ALTA members who purchase copies of this movie will also receive a script that has been prepared by the ALTA staff, which imparts what we would like to say on television but which we dare not because no stations would run it in free public service time if it were that self-serving.

As to the presentation of the film, I am happy to report we also have received the confirmation of experts when a jury of the Council of International Non-Theatrical Events (CINE) awarded our film the Golden Eagle Award—the highest recognition of that prestigious international organization.

CINE will publicize our award among the television stations that we hope will air the film in the coming year. In addition, they will distribute and promote the film to foreign film festivals of English-speaking nations as one of the best products of its kind produced in the U.S.

All of the items that I talked about today and more are being accomplished, thanks to a very dedicated ALTA Public Relations Committee and staff. At this point, let me extend special thanks to my fellow committee members, Randy Farmer, Frank O'Connor, LeNore Plotkin, Jim Robinson, Ed Schmidt and Bill Thurman and to Bill McAuliffe, Gary Garrity and Maxine Stough of the ALTA staff.

All that is being done at the national level by the Public Relations Committee will be much more effective if you, the individual members of the ALTA, will go back to your community and tell your own story. Go back to your communities, to the consumers, to the legislators and to the media and tell it like it is. If you do not, then you cannot complain when those same consumers, those same legislators and the same media are influenced by outsiders who tell it like it isn't.

Research—*(concluded)*

As a regulated industry in the field of insurance, we are not only responsible to shareholders and investors, we are responsible to *policyholders.* Solvency and financial stability are of critical importance. Policyholders cannot be subjected to "normal" investment risk. And statutory statements are designed to present financial information on this solvency basis.

When we are measuring our resources, we must take into account the fact that we are talking about providing security to policyholders. Therefore, talking about the "real" numbers and what can be done with the resources committed to our industry, it is clear that the proper data base is statutory. Measuring that data and determining our return on capital shows where we stand in the American economy.

Once again, committee members were extremely active and helpful this year. The Washington staff, as always, provided invaluable assistance. However, the real success of our operation depends on your cooperation and assistance. I urge you to help us meet our goals on the reporting timetables so that we can continue meaningful work on programs that you suggest.

TIPAC Report

Francis E. O'Connor, Chairman, Title Industry Political Action Committee Board of Trustees
Senior Vice President, Chicago Title and Trust Company, Chicago, Illinois

As most of you know, the Title Industry Political Action Committee (TIPAC) was formed in 1973 as a voluntary, non-incorporated committee, unaffiliated with any political organization.

At the time of TIPAC's creation, our industry was under severe attack in Congress. The basic reason for the committee was to develop an organization which would assist the title industry in acting, rather than reacting to federal legislation and regulations that could be harmful to the operation of our individual companies.

Briefly, the purposes of the political action committee (PAC), as stated in the constitution, are:

- To promote and strive for the improvement of government at all levels
- To encourage persons engaged in the land title industry and others to know and understand the nature and actions of their government
- To assist persons engaged in the land title industry and others in organizing themselves for more effective political action
- To support, without regard to party affiliation, those candidates and office-holders whose expressed philosophy or records in office are consonant with the concepts of government through the private-enterprise system
- To do any and all things which are permitted by law and which are necessary or desirable for the achievement of the purposes stated herein

Implicit in this statement is the most important purpose of the PAC—to provide a vehicle through which the title industry can command attention and have its voice heard in Congress. This reasoning, of course, is based on the premise that Congressmen who receive financial support from an organization are quite willing to meet with its representatives, listen to their problems and allow them to present their views.

Originally, the PAC constitution provided for the appointment of a minimum of five and a maximum of 15 advisory trustees to assist the executive trustees and also to serve as advisors and consultants.

This limitation on numbers inhibited our efforts as attested by the fact that from its inception in 1973 through 1976, TIPAC received approximately $40,000 in contributions, practically all of which went to candidates running for federal office last year.

I know you will agree that this $40,000 response to numerous solicitations over 3½ years is a rather small achievement. So, in the fall of 1976 the Executive Trustees of TIPAC concluded that the only feasible method of raising funds was through the establishment of a grass roots organization throughout the country. It was quite obvious that our past efforts, consisting mainly of written solicitations and appeals for support at various title meetings, were simply not doing the job.

In order to form the type of structure required for us to be more effective, the TIPAC constitution was amended to provide for an unlimited number of advisory trustees to allow us to gain the flexibility necessary to achieve the goals of the PAC and assure a healthy response to future solicitations.

The plan that evolved led to the appointment of many more advisory trustees, charged with the responsibility for:

- Contacting title companies and securing permission for TIPAC to solicit executive and administrative personnel
- Managing the fund-raising efforts of TIPAC at the local level
- Compiling information on candidates for federal office in their particular states to whom TIPAC might consider lending financial support

We now have TIPAC advisory trustees in 47 states and the District of Columbia. These fine title people will be of immeasurable help to us.

To digress, however, at this convention we lose the services of Jim Schmidt, who has been an executive trustee from the date TIPAC was formed. Jim's wise counsel will be sorely missed. With the aid we received from these dedicated advisory trustees, we are confident that our PAC will be even more effective than it was last year—a year when we accomplished much with limited funds. Incidentally, the names of the advisory trustees appear on our solicitation folders which are available at the ALTA registration desk. Pick one up.

Last July 19, a meeting of all advisory trustees was held at the Sheraton O'Hare Hotel where we were privileged to hear a fine presentation by Federal Election Commissioner Joan Aikens on the recently adopted political action campaign rules and regulations. At this meeting the advisory trustees established fund-raising goals for each state. If all goals are met, it will result in some $70,000 being contributed to TIPAC this year.

We still need every assistance that can possibly be given to obtain the goals that have been established. It would be extremely helpful if all underwriters who have given permission to us to solicit administrative and executive personnel would contact the Washington office of ALTA for additional solicitation membership cards and see that they are distributed throughout their organizations at the management levels. Most formal solicitations from ALTA headquarters are addressed only to those whose names appear in the ALTA *Directory* and obviously do not reach all potential contributors. Your cooperation in disseminating solicitation material will be appreciated.

The importance of raising a considerable sum of money becomes quite apparent when we look at some of the challenges facing our industry at the federal level. These have been covered quite adequately by Phil Branson and Mark Winter. Consumer advocates and certain influential members of Congress are expressing interest in a national Torrens system, requirement that lenders pay all closing costs, McCarran-Ferguson repeal, prohibition of interlocking directors as con-

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TIPAC—*(concluded)*

tained in the Safe Banking Act, and other legislation which, if enacted, will have an adverse impact on our industry.

In considering the importance of TIPAC, I would like you to reflect on the following items.

- TIPAC helps to promote better and more responsive government at the federal level.
- TIPAC is a vehicle through which all ALTA members may get involved in the election process.
- TIPAC enables ALTA members to combine their resources to provide needed funds for the best candidates for federal office no matter where such candidates are located.
- As I stated earlier, last year TIPAC provided financial aid to candidates for federal office in the sum of approximately $40,000 of which 55 per cent went to Republican candidates and 45 per cent to Democratic candidates. Our average gift was $500 and to date, TIPAC has raised $15,000 which is available for making political contributions. Only 270 ALTA members have given us support and I know again you'll agree that this is a rather small percentage of the people in our industry.
- 1978 will be an election year and it is imperative that we have at least a $70,000 fund by that time. At this point, we are far from reaching the goal.
- In order to develop an optimum response, solicitation material, as I mentioned, must be distributed to all managerial and executive employees throughout our industry. Your help is needed.
- Tax treatment for TIPAC contributors remains the same. Individuals making contributions are still permitted either a tax deduction or a tax credit.

As I have stated many times before, in addition to supporting TIPAC, we can and should become more involved in the federal legislative processes by establishing communication with our elected representatives.

It is important that we become more skilled and active in the political arena and commence consistent, cooperative, industry-wide relationships with our Congressmen. This requires a personal dedication on the part of all of us. Before I conclude, I would like to share with you an item that appeared in the September 30 issue of *Congressional Action,* a publication of the U.S. Chamber of Commerce entitled, "American Business: Here's a Little Food For Thought."

It reads: "Here's a little food for thought about the importance of American business from Mr. Norwood P. Dixon, a retired partner in the accounting firm of Ernst & Ernst and now on the faculty of Texas Christian University.

As published in the Fort Worth *Star Telegram* under the headline "What is Right with American Business?" Mr. Dixon answered the question of "What are some of the things businesses do besides make profits?" Here are a few:

"Pay dividends which benefit, directly or indirectly, nearly every American. Provide more than 90 million jobs. Pay one-half of all Social Security taxes. Pay all of the unemployment taxes. Pay all workmen's compensation insurance. Contribute more than $1 billion annually to worthwhile, charitable and educational causes. Provide retirement income to millions of Americans. Provide various fringe benefits to employees such as life and health insurance, paid vacations, recreation facilities, scholarships for employees' children, health facilities, etc. Spend billions of dollars on research developing products to enhance the health and enjoyment of the American citizen. Pay income taxes to help finance the government and its many welfare programs. Encourage its executives and employees to devote millions upon millions of company-time hours annually in volunteer work for charitable, health, educational, arts and many other such organizations."

Now, when was the last time *you* reminded your elected representatives just how much *you* contribute to society?

Honorary Memberships—*(concluded)*

Loebbecke: Those of you who have known Dick Howlett and Ernie Loebbecke during their 30 years of relationship know that we never can let anything go on a serious note. Those are the first kind words Dick ever said about me. Seriously, he is a man I admire greatly.

I want to echo Jim Schmidt's words. What an honor it is first to have had the opportunity and to have had this Association's confidence in being elected its president and then to be recognized with this very single honor. It means a tremendous amount to me for, as Dick indicated, my entire business life has been connected with the title insurance industry.

I couldn't help but think as Sen. Brooke talked about current problems and as I have listened to the things that have happened since my presidency, what a tremendous challenge faces each man as he assumes the leadership of this organization.

Those of you who were around in 1959 remember that I always love to give advice. I have a bit now. Our problems looked awfully big then, but they weren't really as big as those you have faced since and that will face you in the future.

One thing that we have learned—and I hope that you will always keep it in mind—is that the problems were always solved because our Association pulled together. We didn't let the little things within the Association betray our interest. Rather we were shoulder to shoulder as we met the problems head-on. I know that the American Land Title Association will continue to do that in the future.

It is an industry that I love and I would like to talk much longer about it, but you have heard too much already so please just let me express to you my very deep appreciation for the honor that you are bestowing on me today. Thank you.

The Great Indian Claims Uprising

Benway

Bowling

Christie

This discussion featured the Hon. George A. Benway Jr., a selectman (city councilman) in Mashpee, Mass., who also is a real estate business owner in the same town. Chairman of the ALTA Special Committee on Indian Land Claims Marvin C. Bowling Jr. who is senior vice president and general counsel for Lawyers Title Insurance Corp. in Richmond, Va., and John C. Christie Jr., ALTA special Indian research counsel, also participated in the discussion. Christie is a partner in the law firm of Bell, Boyd, Lloyd, Haddad & Burns, Washington, D.C.

Bowling: A little over a year ago one day when I was having coffee, Bob Dawson turned to me and said, "Have you been reading this material about Indians?" I said, "I read some newspaper articles."

He said, "I think you ought to take some interest in what they're doing." Little did he know what he was getting me into because I've spent a lot of time on that problem, as you know.

Last year in Seattle, I spoke to you for about a half-hour on the Indians. A lot has happened since then and it is our thought today to bring you up-to-date on where we stand now regarding Indian claims and, also, to give you some insight into one area where an Indian claim situation is particularly acute.

I have been to Mashpee. I have talked to the people there and I think if you could go there and if you could see what's going on in that town, you'd have a much deeper feeling and a much greater sense of urgency as to what has to be done and has to be done quickly.

We're going to hear from John Christie. As I told John, he needn't worry about being too sophisticated in talking about the law, because a large segment of our audience either went to law school or are pretty good lawyers, even if they didn't go to law school. So he's going to fill you in on the legal aspects of the Indian situation.

We especially appreciate Mr. Benway being here. He will have insight, thoughts and ideas that we cannot possibly have because he has been involved on a personal basis and you can't beat that kind of evidence. Mr. Benway, would you come forward? We're all looking forward to hearing from you.

Benway: Thank you very much, and I appreciate very much the opportunity to be here today and to be able to share with you people our situation in Mashpee and how it affects us directly and personally. I would hope, also, in listening to my remarks that possibly the best way that you can appreciate what I have to say is to consider and compare how they would affect you—wherever you come from, whatever property you own—whether it's just a home or an extra lot, or possibly a few acres of land somewhere else in your city or town.

What I'll do is describe briefly the town of Mashpee. I will describe the suit in which the town is now presently involved, a little bit of town history and then the effect of the suit and where we in Mashpee stand today.

The town of Mashpee is on the south side of Cape Cod, Mass. It's a town of approximately 16,000 acres. The population is approxi-

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Indians—*(continued)*

mately 4,200. In the summer—being a resort community—it jumps to about 12,000. Now, the economy of the town is basically a retirement, second home-type construction development economy consisting of developers, builders, plumbers and the associated subcontractors.

In August 1976, out of the blue a suit was filed on everybody in the town of Mashpee. It is based on the Indian Non-Intercourse Act of 1790. Now, in the beginning, I had to explain to people that that wasn't a dirty phrase; but now I have to say that some times I wonder. The Non-Intercourse Act was an act regulating trade between Indians and Indian tribes with the rest of the country, passed in the first Congress of the United States, which said basically, "all land transactions between such parties must be approved by Congress."

Now, the suit itself, filed by the Tribal Council in Boston Federal District Court, cited all the present property owners in Mashpee as a class and requested that all the lands presently owned by the class be returned to the tribe. Unbelievably, this suit and its claims came out of the blue. There was no history of land claims prior to the filing of the suit. There were no discussions held between us and Indian leaders to indicate what they might be thinking or what they may want.

It hit everybody one day—the fact of suddenly having a clouded title on all property within the town of Mashpee and, therefore, the resulting consequences of no mortgage money available because no certification of free marketable title, thus, economic paralysis, both private and municipal.

We were also in the process of selling Mashpee Municipal Bonds for a new middle school. Prior to the suit, Mashpee had an AA rating, but the sale was postponed because of the title problems and was finally only effected because the Commonwealth of Massachusetts came to our aid and co-signed the municipal bonds.

A *lis pendens* also was filed in the local Registry of Deeds so that there would be no mistake by anybody searching Mashpee titles that litigation was proceeding against all property and, there was, in fact, a cloud on all the land. In effect, a full financial blockade was set up as a strategy to paralyze Mashpee.

Now, here's a little bit of history. What do we find in Mashpee? Well, in 1834 the commonwealth of Massachusetts made the area of Mashpee a district which is just short of a town—a common and usual evolutionary stage in development of Massachusetts towns. It had district selectmen, district treasurers and district clerks. The same form of township-type government, except it was a district.

Between 1834 and 1870, the people of Indian descent living in the town of Mashpee petitioned the commonwealth of Massachusetts for town charter so that they could govern themselves, "just like their neighbors in Sandwich, to the north, Barnstable, to the east and Falmouth, to the west. In fact, the commonwealth of Massachusetts in 1842 gave every individual adult in Mashpee, female and male, 60 acres of land. In 1870, finally, the petitions to the commonwealth were heard and the commonwealth voted the town its charter. Then, at a special Mashpee town meeting in 1870, it was approved and accepted.

In 1872, the first voting for national elections was held. The votes in Mashpee were counted and they were good votes. Mashpee residents were U.S. citizens in every capacity.

To jump ahead, in 1974, the Tribal Council in the town became incorporated. In 1975, the town, at a town meeting, transferred 55 acres of town-owned land to the Tribal Council, at their request because they said they needed a land base in order to apply for monies from certain federal programs.

Then, as stated above, in 1976 we got hit with a suit. Now, what are the results of the suit? Besides polarization, which is becoming more extreme as time goes on, we've got a 35 per cent unemployment rate. Buying, selling and building of property has ceased. Normal financing is unavailable. The normal money flow has been stopped. Foreclosures and personal bankruptcies are becoming a reality.

Our population is made up of many senior citizens who have moved from the communities of Boston, Providence, New York and other areas. In most cases, they have their entire homes paid for with no mortgages. These are people who had their entire estates pretty well in order. Now, suddenly, they find that their property is in jeopardy and banks tell them that technically their property isn't worth anything on their financial statements. These people are, as you can imagine, highly unnerved and upset.

Town businesses are frozen; taxes are not coming into our treasury. We have had to raise $125,000 so far for legal fees. More is necessary. We figure in the next three months, the fees will come to approximately $200,000.

We have half-completed homes. We have families who must move because of health reasons or because of transfers of employment. They cannot sell their homes. In the few cases where homes have been sold, they've been sold at 30-35 per cent off what is considered market value. In addition, they've been sold only on a cash basis or on a basis where the seller is able to take back a mortgage. It is not a pretty picture.

Now, the important thing to realize in Mashpee is that the people of Mashpee, just like you people sitting here today, are guilty of nothing. They couldn't be guilty of anything in this case because they weren't around in 1790, or 1834 or 1870. But, there were two entities that were around in those days and that's the commonwealth of Massachusetts and the federal government.

So, we looked to the commonwealth of Massachusetts for help and we got none. It's interesting to note that one of the primary reasons for the suit, as mentioned by the plaintiff in this case, is that the commonwealth of Massachusetts took land from the so-called tribe in 1870 when it made it a town; yet, the commonwealth is the defendant only inasmuch as it owns land in the town of Mashpee, not in any other sense.

The federal government, on the other hand it seems, is responsible (if a wrong has been committed), because it didn't take action, if, in fact, it was supposed to under the Indian Non-Intercourse Act of 1790. We pleaded these issues before a federal judge that both the commonwealth and the federal government were indispensable parties. The motions were not allowed.

"We have half-completed homes. We have families who must move because of health reasons or because of transfers of employment. They cannot sell their homes. In the few cases where homes have been sold, they've been sold at 30-35 per cent off what is considered market value."—Benway

We next went to our Congressional delegation and said, "You're the guys that have got to help us. We're a small town. We're a municipality. We don't have the money to keep this thing going forever." Sen. Kennedy told us that the only way he could help us was for us to sit down with the Tribal Council and come up with some type of legislation which was compatible and agreed upon by both parties and then he said he'd see what he could do. So, we told him, "Senator, if that's all you can do for us, we don't need you."

We went to Sen. Brooke. Sen. Brooke has tried to help us with your industry, the title insurance industry. But unfortunately, no matter what you do, or he does or can't do, we still don't have a free, clear market of title. Only Congress can rectify that particular defect because the Indian Non-Intercourse Act of 1790 specifically requires Congressional action. The plaintiff cannot just drop the case and have everything return to equal and be hunky-dory again because some other party could bring up the same claims that are made today. Therefore, this problem will take Congressional action somewhere along the line.

Now, another interesting point is our plaintiff in this case is not a "recognized tribe" of Indians. It has no federal status. Presently it is trying to be recognized by the Department of Interior because, obviously, it would strengthen their position in the present litigation. Yet, the federal courts have ruled that if the plaintiff claims to be an Indian tribe, it can still bring action under the Indian Non-Intercourse Act of 1790 and obviously, just bringing the action in any community will do to that community what's happened in Mashpee.

Now just Thursday morning—approximately 14 months after this suit was instituted—there was a bill heard in the Subcommittee of the Property Select Committee on Indian Affairs. It's a very simple bill. It seemed to be a simple bill. Remarks of the previous speaker are very pertinent because Congress can take something so simple and turn it around and make it something that is completely indistinguishable and so complex that you can't believe it.

Both parties agreed to the fact that at least the home owner should be out of the suit. The little guy with one acre or less of land and his home should be out. He didn't do anything to anybody. We agree with that. We've been calling for it for a year. Finally, the plaintiffs agreed to it. We appeared before the subcommittee on Thursday and everybody's testifying and going along with it until the Office of Management and Budget (OMB) comes up and says no. We asked why.

They said, "Well, it's going to cost us some money."

Now, Rep. Roncalio, a very nice gentleman, looked in disbelief and said, "Gentlemen, it would seem to me that somewhere along the line, it's recognized by everybody that the final liability lies with the federal government."

"Well, yes it does." OMB says, "But, we don't want to shoulder that responsibility right now. We don't want to go at it piecemeal." Keep in mind that two-thirds of the

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state of Maine is facing—I underline facing—the threat of a court case identical to what we have in Mashpee. They are not yet sued. That's coming up in January. I don't know what's going to happen in Maine. But, I can say, very selfishly from my point of view, I hope Maine gets sued. Because, if Maine gets sued, I see Congress reacting a lot more quickly in helping Mashpee. Right now, we're a very, very small, badly hurting community—but very small.

The White House also tried to help us with the appointment of Judge Gunter as a personal advisor to the president. We've had negotiations and many discussions with him here in Washington and also in his Atlanta office. We were hoping that he would come up with a recommendation somewhat similar to what he recommended in Maine; but, he had difficulties and one of the main difficulties was, in Maine, they stipulated they had "Indian tribes." In Mashpee, that is the first question in the court trial coming up this Monday. They have to prove whether they have any standing as a "tribe." So, Judge Gunter deferred making any recommendation until that is answered.

What we had hoped and what we thought he was going to recommend, and which seemed to make sense, was to say, "Look, Congress, let it go through the court, but get all private property out of the suit. The people who own private property bought it with good hard earned money in good faith and had nothing to do with what is claimed in the court case." But, he didn't make that recommendation and it looks like with what happened Thursday, even if he had, OMB would have testified against it and it would have had no chance.

So, what we're stuck with right now, is the town of Mashpee raising another $70,000 or $80,000 to go through eight weeks of trial. The trial itself is going to decide approximately seven or eight different issues. The trial could last two years. Appeals could last six to eight years, with each one of the issues going to the Supreme Court. By that time, the town of Mashpee will have disappeared.

Well, I'm going to fight as hard as I can to see that that doesn't happen. The people of Mashpee feel the same way at this time, but we need help. We need Congressional help. We need Congressional awareness.

I'll close with one observation. Our attorney made the following observation Thursday. The situation which we face in Mashpee today has been identified up and down the East Coast in the original 13 states and in some areas east of the Mississippi in approximately 450 locations. We will not identify the names of these locations and these towns because all it takes is one name of a town and before you know it, nobody wants to go in there. But, the facts of life are such that what has happened in Mashpee could happen up and down the East Coast.

Bowling: Thank you very much Mr. Benway. That certainly captures our concern and I think I can speak for all the members of this Association, that we are deeply concerned with your problems there and in many other areas in our country.

I will talk very briefly about some of the things that have happened since I spoke to you in Seattle and then John Christie will give us the legal background of the problems we are facing.

First, what have the member companies done? We have done exactly what we exist to do. We have defended on behalf of our insureds. In the Mashpee case, the title insurance companies on behalf of their insureds have employed Goodwin, Proctor and Hoar, a Boston law firm, and they are vigorously defending the insureds under our title insurance policies.

"The Justice Department has indicated that because of that (trust) relationship, they might bring suit against the state of Maine, against private land owners, against the municipalities and by Jan. 15, if Congress doesn't act."—Bowling

They are also in the Narragansett case in Rhode Island, vigorously defending the insureds under our title insurance policies.

What has ALTA done in the past year? First, your Executive Committee appointed an Indian Land Claims Committee, with myself and Irving Morgenroth of Commonwealth, Robert Haines of Chicago Title, Hollis Carlile of Pioneer, Oscar Beasley of First American and Frederic Hofmann of American Title as members.

We felt that our best effort would be made in providing defense assistance to any company who had to defend on behalf of an insured.

After much search, we hired John Christie, who is now located in D.C. and is a member of the Chicago law firm of Bell, Boyd, Lloyd, Haddad & Burns. We gave him the task of preparing selected legal opinions which would be furnished by our committee, by ALTA, to any member of the Association who under its title of policy insurance, was obligated to defend against the Indian tribal claims.

John has prepared a number of research papers. We have furnished them to the attorneys who have been retained by some member companies. We feel this will be of help to our various members because the problems, as you're well aware, are legion.

The legal research is complicated. It is a new field of law for most of us and most of the defendants and their attorneys are quite a few years behind the Indian attorneys.

The research that they have been doing has been going on for a number of years and it's up to us to catch up. We feel that this will be a good service to our member companies.

Not long after this committee was formed, Judge Gunter was appointed for the purpose of recommending to the Carter administration what steps might be taken in connection with the Maine case.

With the help of the Indian Claims Committee, the Federal Legislative Action Committee, aided by counsel, John Christie, Tom Finley and Sheldon Hochberg, prepared and delivered to Judge Gunter in person, I believe (on two occasions at least, he was approached by ALTA) a position paper which I think was sound. I think you would have been proud of the presentation that your representatives made to Judge Gunter.

Without trying to pass on the political situation, without trying to say whether the Indians have been treated fairly or unfairly, without trying to say whether they should be given money or not, the approach we made was in keeping with our cause and that is, that the backbone of this country is good, defensible, valid status of real estate title, that the Indian claim in Maine and everywhere else is and will tremendously disturb status of title and that it is incumbent upon Congress to restore the validity of these titles.

We offered our expertise in helping establish this status of title by Congress. Therefore, we presented legal reasoning, and I think a very excellent opinion, to indicate to Judge Gunter that Congress did have the Constitutional power and authority to re-establish the title to home owners, to owners of vacant land and commercial owners, so that industry and commerce could continue.

I believe it satisfied many of the objections that he and his staff had as to whether Congress could accomplish this result.

At this point, we stand ready to assist Congress in its deliberations on the Mashpee bill and we are going forward with our meetings to provide any type of assistance which ALTA can render in Congress or any other arena, which would re-establish title to real estate.

Now there are some significant things that have happened in the past year, which I'll quickly run over. Congress extended the time in which the United States may bring suit for damages on behalf of Indian tribes to April 1, 1980. There was quite a bit of publicity about this that you may have seen.

Bear in mind, this involves the time in which the United States, the trustee for Indians, may on their behalf bring action. Now this may or may not be significant, because we find the Indian tribes seem to be very capable of bringing suit on their own behalf.

There was a favorable decision in the Federal District Court in Alaska, which seemed to say the Native Alaskan Claims Act did extinguish land claims of Indian tribes and that the United States was not responsible for damages to the Indian tribes.

This I think may set a good precedent on the type of thing we think Congress can do here in the East.

You will recall that in the Maine case, which was the granddaddy of them all, the federal courts held that there was a trust relationship between the United States and the tribe.

The Justice Department has indicated that because of that relationship, they might bring suit against the state of Maine, against private land owners, against the municipalities and by Jan. 15, if Congress doesn't act.

Gunter's recommendation in that case, you will recall, was to give $25 million to the tribes and 100,000 acres of state land. If the Indians didn't agree to that idea, then extinguish their claims to private land, let them sue for state land, but if Maine didn't agree, then Congress would give $25 million to the Indians and let them sue for state land and extinguish their claims to private land.

It appears that the attorney general of Maine will take that last option. Let Congress go ahead and give the Indians the $25 million and clear up the private land and they'll fight in connection with any suit for state land.

I think all parties there and many other places are hoping that Congress will take action before all of that happens.

Now there's recently been an appointment by the administration of a commission to try to implement the settlement. Three men, A. Stephens Clay, a Mr. Cutler of the Office of Management and Budget and Mr. Krulitz of the Interior Department, will work as mediators to further that agreement.

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You have heard where Mashpee stands. It is to go to trial next week unless Congress can in some way pass a bill.

In New York, the St. Regis Mohawks are claiming 10,000 acres, the Cayugas 62,000 acres and the Oneidas 200,000 acres. The Federal District Court has assessed damages against the county of Oneida because in 1795 a transfer violated the Non-Intercourse Act and that action is now on appeal to the Federal Circuit Court. There has been an action brought by the Oneida Indians against the federal government and individuals claiming title to property on West Road in Madison County adjoining the Indians' reservation. So in New York, we do have ongoing claims against both the county and private land owners.

The Catawba Indians have not brought suit as yet. The Interior Department has indicated that they do appear to have a claim to 144,000 acres which comprises almost all of York County and part of Lancaster County in South Carolina.

There's been negotiations there with Chief Blue and some indication that perhaps the Indians would take an expanded reservation and some additional money, but the negotiation has not been fruitful at this point.

The towns of Rock Hill and Fort Mill are having problems even though no suit has been brought. In the Connecticut Indians situation, a gentleman by the name of Hamilton who claims to be Sachem of the Mohegans has brought suit against the state for some 600 acres, part of which I understand includes the state police station and against one individual for 4½ acres. This is in Montville.

The Pequots in Ledyard have brought suit against 20 land owners for 800 acres and the Schaghticokes in Kent have brought suit against ten land owners. The cases are in the pleading and trial stages.

In two of the cases, however, the judges have followed the decision of other district courts and have, in effect wiped away the ordinary common law defenses of laches and adverse possession that one would ordinarily use against a claim 150 years old.

In the Rhode Island case, the Narragansett tribe is claiming title to a state park and some surrounding private property in Charlestown. The District Court has swept away normal defenses and this case is set for trial January 16.

In Louisiana, the Chitimacha tribe has brought suit for the return of 7,000 acres against 80 land owners in St. Mary Parish. Most of this property is oil producing land. I understand that 230 Indians want 7,000 acres and $100 million.

The defendants are individual owners but include companies like Amoco, Tenneco and Atlantic Richfield. We have, of course, read about the Sioux tribe—Russell Means claiming title to North Dakota, South Dakota, Montana, Wyoming and Nebraska.

These claims are made in the newspaper. They seem to be made without much thought as to what happens to people who live on these lands and as our previous speaker indicated, these claims and rumors of claims are very dangerous to any locality.

I think this is a rundown of where we stand now on most of the Indian claims that have any serious impact around the country. I think this indicates to you that we must continue to do whatever this Association can to try to assist those who are hoping that Congress, that really has the responsibility in this, will clean up these titles and in the meantime, as title insurers, we must take care of our insureds.

Most of the people that I have talked to about the Indian claims, seem to be incredulous that our *law* would allow any such problems to come upon unsuspecting citizens, such as in Mashpee and it is also difficult to explain to anybody why we're in the mess that we're in.

Therefore, I thought it would be helpful to you if you could hear from our Indian law expert, who can give you the legal background of the claims. John?

Christie: The chairman of the ALTA Special Indian Claims Committee, Marvin Bowling, has suggested that I devote my time to a discussion of the legal underpinning of the Non-Intercourse Act claims, together with an analysis of precedent as it currently stands relating to some of the defenses available to such claims. I do so with some trepidation inasmuch as the issues in these cases are complex and are not easily dissected in the short period of time available this morning. It is also true that virtually all of the issues presented by these claims remain to be litigated and determined at least by appellate review and therefore analysis of precedent can only be preliminary.

However, having voiced all of these reservations, I shall proceed, with apologies to those who have already studied these matters with a high degree of sophistication as well as to those who may feel that they are hearing more about the legal intricacies of these claims than they care to know. Although personally and as counsel to the Association's Indian Claims Committee I have my own views on the merits of the various issues to be discussed, I shall endeavor this morning to speak descriptively and not as an advocate.

"These claims are made in the newspaper. They seem to be made without much thought as to what happens to people who live on these lands and as our previous speaker indicated, these claims and rumors of claims are very dangerous in any locality."—Bowling

One of the first orders of business of the first Congress following the Revolutionary War and the formation of the federal government was the passage of The Indian Non-Intercourse Act of 1790. This act, with certain amendments over the years, remains as a part of the federal code today to be found at 25 U.S.C. Section 177. It provided in relevant part: "*No* sale of lands made by any Indians, or any nation or tribe of Indians within the United States, *shall be valid* to any person or persons, or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." In other words, the language of the act on its face appears to comprehend some approval of the federal government of any land transfers from an Indian tribe as a prerequisite to the validity of the transaction.

The Non-Intercourse Act was essentially drafted by our first secretary of war, General Henry Knox, who, in writings to General Washington, had expressed appreciation for Indian battle efforts on behalf of the colonies during the Revolutionary War and concern for their well-being following the War. The intent of Congress in creating the act, as subsequently interpreted by the Supreme Court, was to obligate the federal government to protect a "simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races" and to act "to forestall fraud" and to "prevent the unfair, improvident or improper disposition by Indians of their lands."

The obligation to provide this sort of protection to Indians was seen to arise from the Constitution which vests in the federal government, as opposed to the states, exclusive power and responsibility over Indian affairs. As subsequently discussed by Chief Justice Marshall, the Indian tribes occupied a unique position which he denominated as "domestic dependent nations." As such he suggested that their "relation to the United States resembles that of a ward to his guardian." In the time since Justice Marshall's opinion, numerous federal court opinions have made references to the federal government's guardian-like role vis-a-vis the Indians with the implication that it had a fiduciary's obligation to speak and act on behalf of the Indians' best interests.

Needless to say, the United States has performed this fiduciary's role with varying degrees of care and attention. In the years following the passage of the original Non-Intercourse Act of 1790, this was particularly so with respect to Indian tribes remaining in those lands which had belonged to the 13 original colonies. Those Eastern tribes were largely ignored by the federal government and whatever was done for them or to them was done by the states concerned. The so-called "Western Indians," on the other hand, were traditionally conceived of as "federal Indians" and dealt with more or less exclusively by the federal government.

In the context of today's Non-Intercourse Act claims, the Indians essentially have alleged the following, First, that they are an Indian "tribe" within the meaning of the Non-Intercourse Act. Second, that the parcels of land at issue are covered by the act as tribal land—either because they roamed over the land "since time immemorial," hunting and fishing, and thereby acquiring a right of occupancy or aboriginal title or because their interest in the land had been more expressly acknowledged by the federal government, a colonial state or the King of England. Third, that the United States has never consented to the original transfer or alienation of the tribal land to a third party within the meaning of the act—that transfer often having been a grant or treaty with a state resulting in the transfer of land to the state. Finally, it is alleged that the special trust relationship between the United States and the tribe has never been terminated or abandoned. The relief prayed for has consistently been to restore the plaintiff tribes to possession of the alleged tribal lands. In many of the cases they also claim damages, alleging that the defendants have trespassed upon and damaged the lands and used them for their own without the consent of the plaintiff tribes or the United States.

Defendants have responded by general denials and a number of affirmative defenses. A partial list of those defenses are that the Non-Intercourse Act is not applicable to Eastern tribes or to those tribes which were surrounded by colonial settlements; that the Indians had abandoned the land either before or after the transfer complained of; that the tribe was not a "tribe" within the meaning of the act at the time of the transfer

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or as presently constituted; and that the passage of time without a claim and the substantial reliance by present day landlords on their own titles and the effectiveness of the transfer operates to bar the claim upon a statute of limitations, laches or theory of estoppel. The defendants in certain of the cases have also filed counterclaims in which it is urged that if the Indians should succeed, they are liable to the defendants for the increased value of the land due to the improvements, development and maintenance performed by the defendants and their predecessors in interest to avoid unjust enrichment.

With this brief look at the history of the Non-Intercourse Act and the basis of the tribes' complaints, I would like to spend the remaining time discussing some of the decisions involving these claims to date and the resolution made, albeit preliminary, of certain of the issues raised.

On June 22, 1972, attorneys for the Passamaquoddy Tribe in Maine filed a lawsuit in the U.S. District Court for the District of Maine against Rogers Morton in his official capacity as the secretary of the Department of the Interior, the U.S. attorney general and the U.S. attorney for the District of Maine. The state of Maine was subsequently granted leave to intervene as a party defendant. Thus began the first of the major present Non-Intercourse Act lawsuits.

The immediate aim of this litigation for the Indians was to obtain a judgment that the tribe was entitled to the assistance of the U.S. in the prosecution of a claim under the Non-Intercourse Act for the return of all of the original tribal or aboriginal land. The Justice Department had previously refused such assistance upon the determination that ". . . there is no trust relationship between the United States and this tribe. . . ."

The land transfer complained of was a treaty in 1794 between the tribe and Massachusetts in which the Indians relinquished whatever interest they had, if any, to certain lands in exchange for approximately 23,000 acres which was specifically reserved to them. The Indians alleged that this treaty was never approved by the federal government as the Non-Intercourse Act required and therefore it, together with all subsequent transfers of the land, were void.[1] Subsequent to the date of the treaty, Massachusetts passed legislation which permitted, with the consent of Congress, the separation of the District of Maine from Massachusetts and the establishment of Maine as an independent state. In 1820 Congress approved and Maine became a state, assuming all of the previous "duties and obligations" of Massachusetts to the Indians within Maine.

On Jan. 20, 1975, Judge Gignoux held that the Non-Intercourse Act itself established a trust relationship between the United States and the Passamaquoddy Tribe and that the United States acted improperly in refusing to prosecute the action against the state and private landowners solely upon the grounds that such a relationship did not exist. Almost exactly a year later, on Dec. 23, 1975, the Court of Appeals affirmed and no subsequent appeal was taken.[2]

It is important to an understanding of the Indian litigation to understand what the Court of Appeals did and did not decide in this case, In the first place, it was not a decision "on the merits" of the tribal claims to the land. In fact, the Court of Appeals went out of its way to state that ". . . we are not to be deemed as settling, by implication or otherwise, whether the act affords relief from, or even extends to, the tribe's land transactions with Maine." The court even suggested that its decision in several respects might be less than final: "(W)hen and if the specific transactions are litigated, new facts and legal and equitable considerations may well appear, and Maine—as well as other defending landowners—should be free in any extent of arguing positions and theories which overlap considerably those treated" in the opinion. With all of that said, the court did express concern that the tribe might not secure a judicial determination of its claims without an immediate decision as to whether the refusal of the United States to prosecute was proper.

"The obligation to provide this sort of protection to Indians was seen to arise from the Constitution which vests in the federal government as opposed to the states, exclusive power and responsibility over Indian affairs."—Christie

In determining that that refusal was improper, the court concluded that the Passamaquoddies were a "tribe" within the meaning of the act despite the absence of previous recognition of the Passamaquoddies by the federal government. In doing so the court assumed that Congress, in passing the act, had intended to exercise its power fully in order to prevent the unfair disposition of Indian lands, although it was acknowledged that the presence or absence of federal recognition might be significant in instances in which the tribes' identity was otherwise under challenge. It is important to note, however, that it had been stipulated below for the purpose of this hearing that the tribe was a "tribe" in both the racial and cultural sense, determination which would otherwise necessarily have to be litigated.

Secondly, the court determined that the Non-Intercourse Act imposed upon the federal government a fiduciary's role with respect to protection of the lands of a tribe covered by the act. The court, however, carefully refrained from any effort to spell out the nature of those trust responsibilities and whether they would make assistance in the litigation necessary.

Finally, the court determined that any withdrawal of the federal government's pre-existing trust obligations to the tribe must be "plain and unambiguous," refusing to find such a withdrawal on the record before it which demonstrated only inactivity on the part of the United States in relation to the tribe and an occasional refusal of requests for assistance. Again, however, the court did so cautiously by noting that its decision was not intended to foreclose later consideration "of whether Congress or the Tribe should be deemed in some manner to have acquiesced in, or Congress to have ratified, the Tribe's land transaction with Maine."

The Court of Appeals thus returned the litigation to the District Court for trial. Following its decision, the United States, through the Interior Department and the Justice Department, reconsidered its earlier refusal and determined that its newly discovered trust relationship with the tribe required it to prosecute the Indian's claims against Maine as well as against all private landowners whose interests were adverse. In announcing this decision to the District Court, however, the Justice Department stated that "(I)t is impossible to overemphasize . . . the fact that litigation is not the best method to resolve the issues" and asked for time within which to attempt such a solution and for President Carter's special representative to make his study. Since then, the Maine litigation has been essentially at a standstill.

Several other issues of interest have been determined at the trial court level. In three cases—in Rhode Island, Connecticut and New York—it has been determined that state statutes of limitations and adverse possession do not operate so as to bar Non-Intercourse Act claims.[3] In the first case, arising in Rhode Island, the issue arose upon a motion to strike those defenses which had been raised in the defendants' answers. In granting this motion, the court referred to what it called the "rudimentary proposition" that Indian title is a matter of federal law and can be extinguished only with federal consent. For that reason it was held that "neither the defense of laches, nor statute of limitations/adverse possession, nor estoppel by sale can overrule the operation of federal law if plaintiff establishes a violation of the act." Furthermore the court concluded that the right to assert the sovereign interests was not limited to suits brought by the United States as trustee for the Indians but applies as well to actions which can be maintained by the protected Indian tribes.

This decision and the other two lower court decisions on state statutes of repose have not yet been reviewed by an appellate court. Nor do they foreclose the possibility that the Indians might be barred by the operation of a federal law of laches or estoppel, for example.

I would like to briefly comment on another issue which has been brought before the courts for I believe that it is illustrative of some of the complexities of Indian litigation. In the Mashpee case, involving land on Cape Cod, the defendants filed a third party complaint against the United States—not previously a party—alleging that if the tribe should recover possession of the property in dispute, the United States was liable in tort for the value of the property lost. The theory for recovery urged was that these present-day landowners would have lost their property as a result of the federal government having wrongfully failed to recognize and treat the tribe as a tribe under the act and that this failure, together with actions over the years treating the landowners as if title were theirs, resulted in reasonable reliance by the landowners to their detriment.

The United States moved to dismiss for want of jurisdiction and Judge Skinner granted

[1]The land claim area originally claimed represented 12.5 million acres of Maine land and $25 billion in alleged back rents and damages for improper use of the land since 1794. This constituted approximately 58 per cent of the land area of the state, one-third of its population and over 100 of its cities and towns.

[2]388 F.Supp. 649 (D. Me. 1975), *aff'd*, 528 F. 2d 370 (1st Cir. 1975).

[3]*Narragansett Tribe v. So. Rhode Island Land Development*, 418 F.Supp. 798 (D.R.I. 1976); *Schaghticoke Tribe v. Kent School*, 423 F.Supp. 782 (D. Conn. 1976); *Oneida v. County of Oneida, New York*, 434 F.Supp. 527 (N.D.N.Y. 1977).

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Washington Report

William J. McAuliffe Jr., ALTA Executive Vice President

The American Land Title Association in 1977 is an association that is involved, that is taking the initiative, that is known and respected.

President Phil McCulloch, in his talks at affiliated title association conventions, has urged all members to be involved in the affairs of their industry. With such a commitment, he sees a bright future for the title business.

The ALTA activities in the Seattle Federal Trade Commission housing conference mentioned by Phil Branson and Mark Winter this morning is a good example of our involvement. So is the ALTA federal seminar held here in Washington a few weeks ago, featuring an in-depth discussion of the pros and cons of the Torrens system—and the advocacy of ALTA in the New Mexico unauthorized practice of law suit. This type of initiative has made ALTA prominently visible as the national representative organization of your industry.

News media and government frequently turn to ALTA for information concerning title matters—and this is impressive evidence of our established identity and respect.

The strong and positive identity of ALTA didn't just happen. It has taken the combined dedication of the members—the officers—the various committees—the staff—and our outside professional help.

Your Association has approximately 2,000 members; some 90 of these are underwriters, and about 1,900 are abstracters and title insurance agents. In addition, we have 140 associate members.

In 1977 the membership will pay some $720,000 in dues, and the total income of the Association will be approximately $880,000. This year, the Association will spend over $1 million.

Perhaps more important than dollars paid by the membership is the contribution of the time and talent of titlemen who serve on ALTA committees—the Executive Committee—the Board of Governors—the 17 standing committees and the seven special committees. The contribution of individuals who serve on these committees cannot be measured. It is tremendous.

Recently, your Association made a spot check among local members across the nation to determine the services of ALTA that they consider to be of greatest value. By far the most often mentioned response was that the Association is a good source of information for the land title industry.

As you continue in your work through the year, I urge you to remember that ALTA indeed offers a useful informational resource in Washington. In addition to the bulletins and publications that we send to you, your Washington staff will be pleased to help with your individual inquiry.

So call us or write us if you need help. Whether you need:

- An update on a Congressional or regulatory matter
- A status report on ALTA committee work
- Assistance with a public relations problem
- Information on an ALTA meeting
- Statistical information on your industry
- Help that involves liaison with another national association of the real estate industry
- Information regarding the ALTA *Directory*
- Assistance with submitting news for *Title News*

Let us in the ALTA Washington office hear from you. We're there to assist you and we will help in any way possible.

A great asset in providing assistance to ALTA members is your very capable and well qualified Association Washington staff. At this time, I would like to express a word of appreciation to each of these talented people.

Richard McCarthy, our part-time director of research, who works with the Research Committee.

David McLaughlin, our business manager, who does so many things, such as handling the arrangements for this convention—keeping our books—and working with the Membership and Organization Committee.

Maxine Stough, the managing editor of *Title News*, who has brought significant improvements to this magazine—who is our photographer—and who, despite illness and a myriad of problems beyond her control, saw to it that our program for this convention was printed in time.

Mark E. Winter, our director of government relations, who works with our Government Relations Committee, the Federal Legislative Action Committee and TIPAC. Mark is our "Hill" man, who, together with the Government Relations Committee, put on our recent successful federal reception and seminar.

Gary L. Garrity, director of public affairs, who, working with various committees, is responsible for much of our media liaison—and much of our written material distributed to the public, to media, and to government. He also can take a bow, along with others, for the successful radio and TV spots that ALTA distributes, and for the award-winning ALTA film, *The American Way*, which was shown Thursday.

In April of this year, the ALTA staff moved into very attractive office space on the seventh floor of 1828 L Street, here in Washington. You are invited to visit us anytime.

But your lineup does not end with the staff. You also have the following distinguished professionals working for you: Thomas S. Jackson, the ALTA general counsel, who not only handles various legal problems that arise from time to time, but who—as he reported this morning—represented the Association recently before the New Mexico Supreme Court in an unauthorized practice of law suit involving a title insurance agent; Tom Finley, legislative counsel, working on the Indian claim problem, and who has been a guiding force in the RESPA legislation and regulations; John Christie, attorney, doing legal research in connection with the Indian claim problem, and Irving Plotkin of Arthur D. Little, an able economist and consultant in research matters and insurance regulatory matters.

Let me emphasize that this is an impressive group of professionals who give great strength to your Association. I am proud to work with all of these fine people.

In 1977, the title industry has been faced with very serious concerns, many of which have been discussed at this convention. Examples are Indian claims, tax problems, the interest in Torrens, the question of what title companies can do and cannot do and RESPA Section 13.

For the Association to continue to address these and other problems, as President Phil McCulloch has said, we need a commitment to involvement. Not just from a few, but from many title persons.

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RESPA Update—*(concluded)*

The contractor will prepare reports summarizing the results of this research, including model statutes which could be enacted by state legislatures to allow for the implementation of improved title recordation systems and procedures. The reports are due to be delivered to HUD in mid-1978.

In order to provide assistance and advice to the contractor and HUD on substantive matters regarding Section 13, the contractor will assemble an advisory panel consisting of representatives from concerned public interest groups, industry groups, academia, and appropriate local, state and federal agencies. Of course, ALTA will be invited to designate a representative to serve on the advisory panel.

Following its review of the findings generated by the research described in Phase I, HUD will make a decision regarding the feasibility of supporting Phase II demonstrations of innovative title recording systems and/or procedures. If one or more demonstrations appear warranted, the contractor will monitor and evaluate them. About halfway through the demonstrations, around October 1979, the contractor will provide HUD with an interim report summarizing the activity of the demonstration sites and providing as much information as possible to assist the department in reporting to Congress the initial results of the research.

Following completion of the approximately two-year demonstration phase, the contractor will submit a final analysis and evaluation report which will recommend to HUD the course which it believes future development of land title records systems in the U.S. should take.

The fact that we are beginning an intensive three-year effort indicates, I feel, that we are taking the Congressional mandate very seriously and further, that we have a genuine interest in reforms related to title recording and searching. We recognize that the cost-savings to consumers resulting from such reforms may be long in coming and may not be as substantial as some might wish. Nonetheless, the process of filing documents related to title condition, as well as the process of locating and analyzing those documents, is highly susceptible to improvement, in our view. We are hopeful that our research activity will not only uncover such potential improvements but also stimulate local governments, as well as industry groups such as ALTA, to promote innovation and reform wherever possible.

USLTA—ULTA Perspective

James M. Pedowitz, Chairman, ALTA Special Committee on the Commission on Uniform Laws
Vice President and Regional Counsel, Pioneer National Title Insurance Company, New York, New York

The Uniform Land Transactions Act (ULTA) was approved by the National Conference of Commissioners on Uniform Laws two years ago and the Uniform Simplification of Land Transfers Act (USLTA) was approved by them last year. The American Bar Association (ABA) has not yet approved either act, but they have already been preliminarily introduced into some state legislatures. The current drafts of both acts reflect changes suggested by special committees of the ABA Real Property, Probate and Trust Law Section, which is now expected to make its decision as to approval at its February 1978 mid-winter meeting.

ULTA is designed for adoption as a separate act but is expected to be utilized in conjunction with USLTA that was originally part of ULTA. ULTA covers real property contracts, sales, and secured transactions (mortgages/deeds of trust), plus some general provisions. USLTA covers conveyancing, recording and public land records, marketable title provisions, notices of pending proceedings, statutory liens and mechanic's liens (referred to in the act as "construction liens").

The stated purposes of ULTA (Section 1-102 (b)(1) are to simplify, clarify and modernize the law governing real estate transactions, to protect consumers, to promote the interstate flow of real estate financing funds and to accomplish uniformity.

To a considerable extent, the Uniform Commercial Code has been used as a model and a guide in drafting ULTA. This has resulted in considerable criticism from many quarters, particularly from those who emphasize the unique character of real estate and its traditionally different treatment from personal property.

There are many defined words and terms. A clear understanding of the act requires a familiarity with them.

Some of the more significant definitions are

(a) "agreement" as meaning the actual bargain of the parties (1-201(2)

(b) "contract" as meaning the total legal obligation that flows from the agreement (1-201(3)

(c) "organization" which includes any entity including trusts and associations (1-201(11)

(d) "person" which includes an individual or an organization (1-201(13)

(e) an advance "pursuant to commitment" includes one made notwithstanding that the borrower's default may have excused the lender from making it (1-201(15)

(f) "real estate" includes, in addition to our usual definition, minerals, easements, rents, leaseholds, and any interests in real estate (1-201(16) mortgages (deeds of trust) are also considered real estate (3-103(7)

(g) a document is "recorded" when it is accepted by the recording officer and there is an entry in a daily log or notation on the document of an identifying number (1-201(17)

(h) "value" includes a commitment to extend credit, or security for or satisfaction of a pre-existing claim (1-201 (20)

(i) "notice" and "knowledge" mean actual notice or knowledge for the most part (1-202).

The act also creates the concept of a "protected party" (1-203). It is a complex definition which includes words that are themselves defined terms. Basically, a "protected party" is an individual owner-occupant of residential real estate and as such gets special protective treatment throughout the act.

(j) "Residential real estate" as defined is limited to no more than four dwelling units on limited acreage, except as to lands constituting the common elements of a condominium. The number of acres is deliberately left flexible, for each state to specify.

Herewith are some of the more significant aspects of the act insofar as title people are concerned:

Although many of the act's provisions can be avoided by agreement of the parties certain specified provisions may not be waived or varied under any circumstances (Section 1-103(a), and they are listed in Section 1-103(c).

Agreements or provisions deemed to be unconscionable by a court will not be enforced (Section 1-311).

Seals are eliminated as non-essential for contracts, sales or security interests in real estate (Section 1-307).

The doctrine of automatic merger of the contract into the deed is abolished (Section 1-309). It will still be possible to affirmatively contract for such a merger, but in that case there are special notice safeguards as to a protected party (Section 2-517).

In most states, the assignee of a negotiable note secured by a mortgage is treated as a holder in due course. This status and protection is eliminated as to assignees of subordinate mortgages (deeds of trust, etc.) with respect to any defenses by a protected party mortgagor. Assignees of first mortgages remain unaffected by these new provisions. (Section 1-313(b). A written estoppel certificate, however, is effective in the hands of a good faith assignee for value and without notice of the defense (Section 1-314).

When a contract is assigned, the assignee automatically assumes the obligation of its performance, absent specific language or circumstances indicating a contrary intent (Section 1-315(c).

Contracts and conveyances

The statute of frauds is modified. A contract to convey real estate no longer requires that all essential terms be included in the written agreement so long as it contains an identifiable description, a means of fixing the price, and an indication that a contract to convey has been made. Certain oral agreements when coupled with partial performance also are enforceable.

There is a provision for "firm offers" (Section 2-205) under which written open offers to sell or buy, even if made without consideration, are irrevocable by the offeror for six months.

The phrase "time of the essence" is scrapped, although the concept of "time of the essence" remains if the effect of the provision is specifically spelled out in detail. (Section 2-302)

Seller's title obligations (other than leasehold), absent specific provision to the contrary, are that (Section 2-304):

a. title must be marketable at the time for conveyance, even if the contract only calls for "good and sufficient" title, and even if the purchase agreement only calls for a quit claim deed: (an exception is made if the agreement is only for whatever interest the seller may have in the real estate):
b. seller will deliver such title as required by the contract and unless specifically disclaimed therein the deed will automatically contain all the warranties as set forth in Section 2-306*, thus making it a general warranty deed unless the sale is made under a court order which does not provide for them:
c. Possession must be available to purchaser at the time of the delivery of the deed:
d. title evidence and documentation is to be provided by seller at seller's expense either by: (1) an abstract, or (2) a title report or commitment to insure by a title insurance company reasonably acceptable to the buyer or (3) a title opinion, certificate or report prepared by an attorney reasonably acceptable to the buyer or (4) in those states where it is acceptable, or there is a history of usage, a Torrens certificate or other acceptable title evidence.

A warranty of title runs both to the buyer and to all successors in title (Section 2-312(a). Thus, even though a subsequent owner breaks the chain of warranties, a prior warrantor remains liable until the effect of the warranty is terminated.

A seller is entitled to receive written notice of title defects within a reasonable time after evidence of title is received by the buyer. Seller then has a reasonable time to cure. The closing or settlement date is not extended thereby unless the written notice to the seller was not given within 10 days after the title evidence was delivered to the buyer.

Leaseholds—Title Obligations of Seller (Section 2-307). A lessor is also called a seller. The seller of the leasehold warrants:

(a) quiet and peaceable possession from the beginning of the term; and

(b) that the seller has power and right to convey the leasehold.

There is no warranty, however, as to the existence of any superior lien or mortgage interests as to leases for a term of five years or less.

A provision that a buyer may put the real estate only to a specified use results in an express warranty that the specified use is lawful (Section 2-308 (a) (4).

*Section 2-306 (Warranty of Title in Deed.) A seller who executes a deed not providing to the contrary impliedly warrants that: (1) real estate is free from all encumbrances; (2) the buyer will have quiet and peaceable possession of or right to enjoy the real estate conveyed; (3) the seller has power and right to convey the title which he purports to convey; and (4) the seller will defend the title to the real estate conveyed against all persons lawfully claiming it.

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Pedowitz—*(continued)*

Sellers in the business of selling real estate, other than mortgagees who re-acquire the property by foreclosure or deed in lieu of foreclosure, assume additional warranties as to suitability for ordinary use, freedom from defective materials and good workmanship. Such a seller also impliedly warrants to a protected party that applicable law will not be violated by continuation of an existing use contemplated by the parties (Section 2-309).

One of the potentially troublesome provisions is that a transaction may be revoked for breach of warranty or other contract obligations (Sections 2-401 and 2-402). The revoking buyer must tender an instrument that would revest title in the seller as it was prior to the seller's conveyance. This may be a hurdle impossible to overcome in most situations, because of subsequent financing, etc.

A vendor's lien or a vendee's lien may be recorded and enforced as a security interest (Sections 2-508 and 2-512).

The six year statute of limitations on an action for breach of any obligation arising out of a contract to convey or a conveyance may be reduced contractually, but not to less than one year (Section 2-521).

Perhaps the most necessary part of ULTA is its Article 3 on "Secured Transactions (Mortgages)."

There is no differentiation in enforcement methods between consensual security interests, regardless of form, whether or not legal title passes to the creditor under local law, (Section 3-202), and whether in form a mortgage, deed of trust, trust deed, security deed, contract for deed, land sales contract, lease intended as security for an obligation (Section 3-102), or an assignment of leases or rents intended as security, except as to certain minor exclusions in Section 3-104. Under the act's terminology any such interest is a "security interest" and the encumbered property is called the "collateral" (Section 3-103(1).

A "security interest" is an interest in real estate (Section 3-103(7). As an interest in real estate a mortgage (deed of trust) could no longer be treated as personal property. However, the official comment to Section 3-102 states that the assignment by a mortgagee of the right to receive payment is covered by U.C.C., Article 9.

Both the obligor and the present owner of the burdened real estate (the "collateral") are called the "debtor" (Section 3-103(a)(3).

A "purchase money security agreement" includes both one taken or retained by a seller, or taken by a third party who furnishes value to enable the debtor to acquire the collateral (mortgaged property) (Section 3-103(a)(4). No deficiency judgment can be obtained on a purchase money security agreement made by a protected party notwithstanding any agreement to the contrary. (Section 3-510(b).

A "construction security interest" is one that secures an obligation incurred for the purpose of making an improvement to the burdened real estate and must be identified as such on the first page of the instrument creating it (Section 3-103(a) (2).

Part 4 of Article 3 covers "Maximum Finance Charge and Usury." Maximum interest rates are eliminated as to any obligations secured by real estate unless made by a protected party (Section 3-403), and to the extent applicable is to be fixed separately by each state. Uniformity is sought with the language and concepts of the federal truth-in-lending law and terms such as "finance charge" (Section 3-401(c) and "additional charges" (Section 3-404) track that act. This will result in a higher gross "finance charge" than what we presently refer to as the "interest rate" (Section 403(b).

The penalty for unlawful usury, when applicable, is the restitution of any excess charges paid plus damages of treble the excess amount received by the creditor, but not over $5,000 (Section 3-405(a). A protected party may also recover costs and reasonable attorneys fees. However, the real estate security interest remains valid (Section 3-405(b).

A security interest, even if recorded, is ineffective until "value" has been given (Section 3-203(a)(3), but as to all future advances value is deemed to have been given at the time value was first given (Section 3-203(c). "Value" is defined in Section 1-201(20) and the definition is taken from U.C.C. 1-201. In addition to the giving of value the other requirement for an effective security interest is that there be a signed security agreement covering described collateral in which the debtor has an interest.

The debtor may be given the power by the creditor in the security agreement to dispose of the collateral free of the security interest (Section 3-204). These provisions will probably find very little use.

After-acquired property can be covered by a security interest, but such provisions are ineffective as to non-contiguous residential real estate of a protected party unless specifically described (Section 3-205(b).

A security interest is effective to cover future advances (Section 3-205(c), but notwithstanding any agreement to the contrary future advances can only be incurred by the then owner of the collateral (Section 3-205(d).

Even though a security agreement does not provide for future advances, or provides for future advances up to a specified maximum amount only, it nevertheless will secure future advances or obligations incurred under a construction loan for the completion of a contemplated improvement or in any case if made "for the reasonable protection of the security interest in the real estate" (Section 3-205(e).

Such an advance under a construction security interest to enable completion of the contemplated improvement is given priority over any known intervening recorded security interest even though it would result in exceeding the maximum amount stated in the construction security interest (Section 3-301(b) (4). This provision should bring cheer to the hearts of construction lenders. Unfortunately, mechanic's liens do not come within the ULTA definition of "security interest." However, USLTA contains other provisions that help with respect to priority over mechanic's liens.

An assignee of a security interest can empower its assignor to continue to act as a servicing agent with power to make effective modifications in the security agreement with the obligor (Section 3-206(b).

A lessee under a lease made in the ordinary course of business and which is not specifically made subordinate to a pre-existing security interest can remain in possession for up to two years, notwithstanding foreclosure, if the rental is reasonable and complies with other specified requirements as to fairness and legitimacy and so long as the lessor is not in a bankruptcy or insolvency proceeding when the lease is made (Section 3-207).

"Due on sale" clauses are recognized as effective, but restraints on sale without consent of the secured creditor are banned (Section 3-208).

A creditor who goes into possession after a debtor's default is empowered to execute leases that are deemed reasonable and customary, and to manage the property under prudent standards (Section 3-504(b) and (c).

A real estate security agreement automatically covers rents (3-210(a) and no additional assignment of rents is necessary.

On default the secured creditor may foreclose by either of the following methods, after first having served a written "Notice of Intention to Foreclose" upon the debtor and other prescribed parties (Section 3-505(f), the contents of which are specifically prescribed (Sections 3-505 and 3-506): (1.) By exercise of a power of sale (Section 3-508). This is the preferred method of enforcement, or (2.) by judicial sale (Section 3-509).

As to a protected party the Notice of Intention to Foreclose by judicial proceedings must be given at least five weeks before commencement of the proceeding (Section 3-505(b). An additional provision in favor of a protected party is that no Notice of Intention to Foreclose may be issued as to a property containing a dwelling unit "occupied by a protected party or a person related to a 'protected party' " until five weeks after a default.

A foreclosure sale may be by public sale or by private negotiation, as a unit or in parcels, for cash or credit so long as every aspect of the sale, including method, advertising, time, place and terms are all "reasonable" (Section 3-508(a).

All post-sale statutory redemption periods are eliminated.

Upon disposition of the property pursuant to a foreclosure a purchaser for value takes title free of any defects or omissions in the required procedures (Section 3-511(a). Recourse, if any, is against the enforcing creditor only (Section 3-513). The purpose of this radical provision is to eliminate "the necessity of a rigorous title examination" (Comment to Section 3-511). Constitutional due process provisions would still apply to any unusual situations.

Let us now examine USLTA. USLTA has purposes similar to those of ULTA plus that of the furtherance of the security and certainty of land titles.

USLTA contains numerous provisions designed to simplify and shorten title examinations. Basically, the method used is to presume validity in favor of a purchaser who has recorded as against any claimant who has not recorded or commenced an action and recorded a notice of pendency.

Most of the definitions are identical to those in ULTA. Among the new definitions found in this act are:

- *1-201 (4) Document* which broadly takes in all writing, maps and any information which can be converted into legible form
- *1-201 (5) General Lien* meaning a lien that attaches to all of the lien debtor's real estate in the recording district
- *1-201 (9) Lien* which excludes consensual security interests
- *1-201 (10) Organization* which includes all private and government entities as well as unincorporated associations, joint ventures, trusts, etc.

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• *1-201 (24) Restriction* which includes not only a covenant or condition but also an easement

• *1-201 (27) Specific Lien* which means a lien on real estate specifically described in a recorded lien document

• *1-201 (29) Title* which includes not only the right to an interest in real estate, but also the interest of a lessee, a possessor, a lienor, a holder of a security interest, and a beneficiary of a restriction including an owner of an easement. The holder of any of these interests has a title.

A conveyance (2-201) other than a lease for one year or less requires only: (1) reasonable identification of the grantor, grantee and the real estate; (2) manifestation of an intent to make a present transfer of an interest in the real estate, and (3) that it be in writing and signed by the grantor or his representative. No acknowledgment, seal or witness is required.

Transfers of real property may also be made to and title taken in the name of an organization or of an office. Unless otherwise provided by statute, a defunct or dissolved organization continues in existence for the purpose of transferring real estate (2-203). A grantor can also be a grantee in the same conveyance (2-204(a).

The old rule that voids an exception or reservation in favor of a third party is specifically abolished and reversed (2-204(b).

The act also contains an excellent section on the sale of real estate affected with a future interest, which is similar to existing legislation on the subject in a number of states based upon the model act prepared by Simes and Taylor, the authors of "The Improvement of Conveyancing by Legislation."

As between the parties, a conveyance takes effect upon delivery (2-202), but a third party can obtain a good title notwithstanding nondelivery unless the facts of non-delivery are placed on record before the conveyance to that third party (3-201 and 3-202).

Nearly all restrictions on eligibility for recording of documents are abolished, so long as adequate indexing information is furnished to the recorder. The indexing instructions may be on the document itself or on a separate signed instruction document (2-303). Oral indexing instructions are not permitted. Care must be taken to furnish adequate and complete indexing instructions, especially where a grantee is identified but not fully named in the document.

Recording becomes effective and takes priority from the moment the document is accepted by the recording officer with adequate indexing information (3-202(b). Once accepted, the failure to record or properly index the document can result in liability of the recorder (6-211) but it will nevertheless be as effective as though properly recorded and indexed.

Affidavits can also be recorded and are then presumed true as they relate to the use or ownership of real estate (2-307).

Provision is also made for the recording of master forms (2-309) which can later be incorporated into documents in whole or in part by reference in order to save typing and recording space. Other recorded documents, or parts thereof, such as a description can also be incorporated by reference (2-311 and 2-312).

A recorded signed document is given very broad evidentiary effect by presumptions that it was: Genuine; voluntarily executed by a competent party; made for consideration; effectively delivered, notwithstanding a long time lapse between its date and recording; that the grantee or beneficiary acted in good faith at all times; that the grantor acted within the scope of authority when purporting to act as an agent or attorney in fact pursuant to a recorded power of attorney or authority, or as an officer or fiduciary; that all recitals in the document are true, and free of a number of other minor defects usually referred to in validating acts. (2-305).

The recording of a memorandum of lease complying with specified requirements has the same effect as if the entire lease were reproduced (2-310).

As an adjunct to the Marketable Title Act which is also included, provision is made for the recording of a "Notice of Intent to Preserve Interest" (2-308) whose function is to preserve claims and interests under the Marketable Title Act.

In addition to transferring all the interest which the grantor had or had actual authority to convey (3-201), a conveyance gives a purchaser for value who has recorded a title free of adverse claims, whether or not the transferor had actual authority so to convey (3-202), unless the adverse claim comes within one of the following categories:

1. created or evidenced by a document previously recorded,
2. of a person in possession and discernable by reasonable inspection or inquiry,
3. one of which purchaser had knowledge at the time,
4. in favor of a spouse,
5. ineffective because of:
   (i) forgery, alteration, unsigned or with an unauthorized signature,
   (ii) infancy, duress or illegality if it is regarded as a nullity under existing law, or
   (iii) fraud in the execution,
6. of the United States, unless otherwise provided by federal law,
7. recorded afterwards but relating back (as provided for in 3-204),
8. based on an advance under a recorded security interest (as provided in 3-209),
9. based on a general lien (as provided in 3-210),
10. based on a real estate or other tax lien (as in 3-212).

Other provisions on the priority of claims are that they are also subject to:

(1) provisions in the Marketable Record Title Act (Part 3 of this article),

(2) extinguishment of claim because of passage of time limitations under Part 4 (3-203(a).

If an adverse claim is precluded by one provision of the act, it may still be asserted under any other applicable provision (3-203(b).

If none of the priority rules in Article 3 determine priority, priority is determined in the order of recording (3-203(e).

Under certain specified provisions, the priority of a claim can relate back to a time before the time of recording. For instance, a specific lien converted from a general lien relates back to the time of recording of the general lien, etc. (3-204).

A purchaser takes subject to any adverse claim of which he has knowledge or which has come to the attention of his counsel or agent while acting in the transaction. A real estate broker who also acts for the seller is not the purchaser's agent under this provision (3-205).

Recorded options and contracts to convey only remain effective as record notice for six months after the recorded performance date. If there is no date of performance or recorded extension thereof the six months run from the date of recording. If a Notice of Pending Proceedings is recorded the effectiveness is extended accordingly. (3-206).

Reference to documents other than by their record location is ineffective as notice of them (3-207). Some examples of ineffective general references are:

• "Subject ot the terms of a deed dated July 4, 1976 from A to B"

• "Subject to a mortgage from A to B"

• "Subject to mortgages (or easements) of record," etc.

Except as to self-dealing or where there is knowledge of the infirmity, a person who has a power of disposition and makes a conveyance purporting to exercise that power, transfers a title to the purchaser that is not subject to attack because either:

(1) the state of facts necessary to authorize exercise of the power does not exist,
(2) required notices were not sent or received,
(3) required leave of court was not obtained, or
(4) the power was exercised improperly or irregularly.

However the injured party can recover damages from the person who improperly exercised the power (3-208). The following categories of advances or obligations are given a priority back to the recording date of the security interest (subject in some cases to construction lien rules under Section 5-209):

(1) if made "pursuant to a commitment" entered into before secured party had knowledge of intervening interest to the extent that advances do not exceed maximum amount stated in the record;
(2) to the extent of advances or obligations outstanding when the secured party obtained knowledge of the intervening interest (but not exceeding the maximum amount stated in the record), even when not made pursuant to commitment.
(3) if made or incurred for reasonable protection of the security interest such as for taxes, insurance, etc., whether or not the advances exceed the maximum amount stated in the instrument, and notwithstanding that the secured creditor had knowledge of the intervening interest;
(4) if made under a "construction security interest" to enable completion of the improvement, whether or not the advances exceed the maximum amount secured stated in the instrument, and notwithstanding that the secured creditor had knowledge of the intervening interest.

The foregoing provisions should be extremely helpful to construction lenders and title insurers.

In order to encourage the conversion of general liens into specific liens and to cut down the title search period, the effectiveness of general liens, other than those in favor of the United States, is limited to three (3) years (3-210).

Specific liens normally take priority from the date of recording. But a specific lien that was converted from a general lien retains the earlier priority date of the general lien (3-211).

Real estate tax liens, though unrecorded, remain prior to all other claims to the real estate (3-212).

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Pedowitz—*(continued)*

When a secured creditor obtains a money judgment lien on the underlying note or obligation before foreclosing, and there is an appropriate notation on its record, it will date its priority back to the priority date of the security interest. If a judgment is preceded by an attachment, the judgment can provide that it take the priority date of the attachment (3-214).

Article 3 Part 3 consists of a complete Marketable Title Act similar to several acts already operative in various states. It is designed to limit title searches to 30 years. This is so notwithstanding any interest, defect, lien or encumbrance that may antedate that date, and even though the 30 year old "root of title" is a nullity. (3-301(4).

There are exceptions as to interests and defects apparent in the "root of title," or inherent in the 30 year chain; and for interests preserved by existing Torrens title provisions, if any (3-303).

There is also a limited list of interests that are not barred by the Marketable Title Act provisions. They are:

(1) restrictions (including easements) observable by physical evidence of use;
(2) interests of persons in occupancy or use obvious from inspection or inquiry;
(3) rights of a person listed on the real property tax rolls within the past three years;
(4) claims of the United States, still valid under federal law; and a 5th category (that is optional) of mineral, oil, gas, etc., interests. This latter exception, if adopted, could negate most of the benefits of this part of the act in many states where these interests are normally found only by complete title searches (3-306).

A claim or interest can be preserved successively for an additional 30 year period by the timely recording of a Notice of Intent to Preserve an Interest. (3-305)

Notwithstanding the expiration of the 30 year period a party who has a direct contractual obligation or liability is not excused from its performance. (3-307)

Part 4 of Article 3 contains provisions as to limitations as well as extensive curative provisions. Most minor defects in documents are cured after one year from recording. Many other defects are made actionable only within three years from recording of the document. Included in this latter category are claims of lack of jurisdiction or defects in probate, judicial or administrative proceedings on which title is based (3-402(a).

Limitations are not limited to defenses only. (3-410)

The basic period of the statute of limitations is 10 years. On an action to enforce a restrictive covenant it is three years. (3-402(b).

The period for adverse possession is five years if the possession is under a recorded conveyance and taxes were paid before delinquency in three of the five years preceding the action; otherwise it is 10 years. As against the state or the United States however the period is 20 years. (3-404(a). Claims under Torrens titles are not precluded by these limitation provisions (3-404(b).

Adverse possession normally extends only to the area actually possessed; however, possession of a significant portion extends it to the whole parcel if:

(1) the whole parcel is recognized in the community as a single defined parcel,
(2) the possession is under a record conveyance, or a will,
(3) the conveyance or will purports to give title to the whole parcel,
(4) the possessor or those through whom claim is made, paid taxes in three of the five preceding years, and
(5) no other person is in possession. (3-405).

Adverse possession under a recorded document is presumed to have commenced from the time of recording (3-406(a).

Payment of taxes creates a presumption of possession unless the property is in the actual adverse possession of another (3-406(b).

Possession by a co-tenant for 20 years when another co-tenant has not shared in rents or profits creates a presumption adverse to the other co-tenant (3-406(c).

The period of limitation is tolled during infancy up to age 18 and during incompetency, but not for more than a total of five years (3-407).

A recorded security interest expires 10 years from the last record date for performance or 10 years from the date of recording if there is no record performance date. If the record performance date is variable based on off-record facts the interest expires 30 years from recording (3-408(a). The expiration is the equivalent of a recorded release or discharge (3-408(b).

Except under Torrens, a possibility of reverter or right of entry for condition broken is extinguished after 30 years from its recording or that of the most recent notice of intent to preserve the interest (3-409).

The policy of USLTA in Article 4 as to miscellaneous liens and encumbrances is to recognize them as created by other law, and to provide for uniformity in their application and enforcement.

Unless the statute creating the lien provides a shorter period, the time limitations on enforceability as contained in Article 3 apply (4-101(b); and unless a specific foreclosure procedure is provided, foreclosure is in the same manner as for a real estate security interest (4-101(c).

It is the policy of the act to encourage specific liens as against general liens. A lien creditor is entitled to aid from the courts in discovering and identifying particular real estate owned by the debtor (4-201), and provision is made to permit the conversion of a general lien into a specific lien on identified real estate (4-202). Under 3-210 a general lien is only effective for a maximum of three years while the specific lien can remain effective for up to 10 years.

There is provision for an owner to compel a lien claimant to discharge an improperly recorded lien or be answerable for damages, with a minimum of $100 (4-203).

Judgments of both state and federal courts are effective against a purchaser for value only after recording of a certified copy of the judgment. Federal tax liens must also be recorded in the recording office of the recording district where the real estate is located. (4-204).

Article 4, Part 3 covers Notice of Pending Proceedings. The Notice of Pending Proceeding, applicable only when the use, enjoyment or title of real estate is affected, is effective for six years, plus recorded extensions. The act also requires the recording of the final determination in the action. It is then effective retroactive to the date of recording of the Notice of Pending Proceeding (4-301). For the notice to be effective against a defendant, service of process in the action must be made upon him or publication commenced within 90 days (4-302).

A Notice of Pending Proceeding can be cancelled by court order substituting security in place of the property if the court determines that money can afford adequate relief. (4-306).

Perhaps the most controversial, and yet most needed portion of the USLTA, is its Article 5 on construction liens. The drafters revised the article innumerable times in their efforts to reach a result that would both be consistent with their convictions and still satisfy contractors, subcontractors, materialmen, lenders and builders. They finally settled on a compromise solution that is a delicate balance, and in the opinion of many, essentially fair—but not nearly satisfactory to those who will end up with less than they now have in any particular jurisdiction.

A good summary can be gleaned from the following extracts from the official comments of the drafters:

"The basic structure of this article owes much to the Florida mechanic's lien law which was adopted in 1963."

"In this act, liens are allowed to any person who furnishes services or materials pursuant to a real estate improvement contract, no matter how far he is from the contracting owner."

"Most prior acts gave a lien to a materialman only if the materials were delivered to the site. This act relaxes that requirement somewhat and allows a lien if seller's belief that the goods are to be used on a particular site is evidenced either by a notation on the sales contract, by a delivery order, or by actual delivery to the site."

"Preparation of plans, surveys, and architectual or engineering plans are improvement contracts for which a lien is allowed. . . . (and) whether or not the planned improvement is actually made."

"This act adopts a notice recording device, first developed in Florida, under which the owner, prior to beginning the work on the improvement, records a 'notice of commencement' which puts third parties on notice that construction liens may be claimed against the real estate. If a lien claimant records his lien during the effective period of a notice of commencement, his priority date as against third parties is the date the notice of commencement is filed."

"The notice of commencement is effective for the time stated therein (but at least six months), or, if no time is stated, for one year. The owner may, however, terminate the notice of commencement by recording a notice of termination which is effective at the time stated therein, which may not be earlier than 30 days after the notice of termination is recorded. If an owner terminates a notice of commencement, except in connection with stoppage or completion of the work, he is personally liable to construction lien claimants to the extent that his termination prevents realization on a lien. If an owner has not recorded a notice of commencement, any claimant may, but need not, record the notice."

"If a notice of commencment is not recorded, lien claimants take priority from the time of visible commencement of the improvement, as under most existing statutes."

On the question of possible double liability when the owner pays the general contractor in full, but where a subcontractor or materialman nevertheless files a lien, many states

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Workshops

Antitrust Pitfalls and the Land Title Industry

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Antitrust pitfalls should be avoided and the subject of my talk this morning is directed toward that end. My hope is that some discussion of antitrust problems in a practical context will increase your awareness of the circumstances which might create those problems for you and your company, thereby reducing the potential for exposure in the future.

The field of antitrust law is a complex one, characterized by a rapidly changing body of law. Its application to the land title industry which is regulated by state and federal law only serves to increase the complexity. Of course, the underlying premise of the antitrust laws is the national policy favoring competition—presumably the more, the better. On the other hand, an underlying premise of those industries which are regulated is the notion that the public will be better served and protected if it is regulated in such a way as to assure reliability even if that occurs at the expense of lessening the amount of competition between participants. It is thus in the context of these conflicting goals that antitrust questions in your business arise and must be answered. However, despite the complexity and the changing rules of law, certain principles remain intact and certain guidelines can be regularly adhered to with confidence. Justice Brandeis once commented upon a claim that the Sherman Act left businessmen to function in considerable uncertainty by saying, "If you are walking along a precipice no human being can tell you how near you can go to that precipice without falling over because you may stumble on a loose stone, you may slip, and go over, but anyone can tell you where you can walk perfectly safely within convenient distance of that precipice. The difficulty which men have felt generally in regard to the Sherman law has been rather that they have wanted to go the limit than that they have wanted to go safely."[1]

Before getting into a discussion of the antitrust laws and the title industry, let me briefly discuss the need for sensitive observance of antitrust laws. Antitrust compliance today is not merely good citizenship; it is good business.

As I am sure most of you know, in 1974 violations of the Sherman Act became a felony and the sanctions for violations dramatically escalated. For a corporate defendant, potential fines for each violation increased from $50,000 to $1 million. For individuals, the potential increased from $50,000 in fines and one year imprisonment to $100,000 and three years, together with potential loss of other citizenship rights as a "felon." In the wake of this change the immediate past head of the Justice Department's Antitrust Division announced, ". . . we certainly intend to emphasize Congress' dissatisfaction with the (pre-existing) level of penalties. . . ."[2] In the same interview he indicated that he was ". . . very anxious to bring felony cases and to emphasize to the business community the seriousness of this offense. . . ." To back this up, the division released sentencing guidelines for the first time in February of this year which contain a "base" recommendation for a "typical price-fixing conspiracy" of an 18-month sentence which could only be reduced by a substantial offering of mitigating factors, such as cooperation with the government.[3] In cases involving such factors as affirmative concealment, predatory conduct or unlawful activity over a lengthy period of time, the recommendation would only increase. The guidelines suggest that "fines are usually poor alternatives" to imprisonment for individuals and "should be used and viewed only as a second choice."

The new administration appears to stand strongly behind severe treatment of antitrust offenders. In a speech earlier this year, Judge Griffin Bell, the attorney general, stated, "I believe firmly that hardcore price-fixing is a serious crime and should be prosecuted accordingly. I support the guidelines the Antitrust Division recently issued to its attorneys for recommending sentences in criminal antitrust cases.

"These guidelines are an effort to increase the risks for price-fixing. They make clear to price-fixers that the Antitrust Division will move against them individually (and not just against their corporations) and that the division will recommend stiff prison sentences upon securing convictions."[4]

In addition to these dramatically more severe sanctions for violations of the federal antitrust laws it is important for this industry particularly to be aware of state antitrust laws. Most of the states do in fact have "little Sherman Acts" in one form or another, providing generally for fines or other penalties and often for private causes of action. As I will discuss in more detail later, an exemption from the federal antitrust laws by application of the McCarran-Ferguson Act does not *necessarily* mean that the same conduct is exempt from the operation of these state antitrust laws. Although traditionally these laws were largely forgotten by prosecutors as well as possibly by businessmen, a growing number of state attorney generals and private claimants have instituted proceedings based upon them. Whether this was caused by the rising tide of consumerism or a realization of the political capital to be made by bringing this type of case, prosecution has become more intense and more skillful.

In addition to the greater potential for severe consequences of antitrust violations in the context of these new sanctions, is the extraordinary cost of antitrust litigation. Treble damage possibilities are available under federal law and treble or single damage actions are frequently express or implied remedies under state law. It also should be realized that any sort of antitrust litigation becomes a significant burden upon the company—both in terms of attorney's fees as well as in terms of the time and effort required from the company personnel who would otherwise be involved in more profitable pursuits.

With this rather unhappy preamble to my talk this morning behind us—and assuming that it has at least succeeded in increasing your interest in hearing the rest of this—let me turn to a discussion of the antitrust laws, particularly as they apply to your industry in the context of state rating bureaus and land title associations. To do this requires some brief commentary upon certain of the basic principles of antitrust with my apologies to those of you to whom such a discussion is very familiar.

The primary antitrust statutes with which the industry should be concerned in the context of my discussion this morning are Section 1 of the Sherman Act, Section 5 of the Federal Trade Commission Act and their state antitrust law counterparts.

Section 1 of the Sherman Act makes unlawful "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade. . . ."

Section 5 prohibits all "unfair methods of competition." Section 5 has been interpreted to encompass the same type of conduct prohibited by Section 1 and more in that it reaches "in their incipiency" arrangements and practices that may develop into violations of Section 1.

Those trade restraints prohibited by the Sherman Act include a broad range of activities resulting in a lessening of competition such as agreements to fix rates, to divide territories, to allocate customers or to engage in group boycotts. It should be emphasized that the "agreement" to restrain trade is unlike an "agreement" in the contractual sense where the parties must act in fairly explicit terms to have legal significance. Under the antitrust laws an "agreement" may be found upon oral, tacit or implied understandings that would not otherwise be viewed as legally binding.

I can demonstrate the severity of this test with a recent Sherman Act case involving six real estate brokers and three of their employees. The defendants were indicted on a charge of having violated the act by agreeing to raise commissions at a dinner meeting at a local country club. According to newspaper reports of the evidence presented by the government, one of the participants at the dinner announced he was increasing rates to a given percentage because his business was "going down the tubes," adding that he did not care what anyone else did. Only one of the other guests indicated his assent by saying that he had already increased his commissions to that level. The remaining dinner guests either said they would remain at the old level or said nothing. Upon the basis of this as well as the subsequent rise in the commissions level in the area by all of the brokers, the judge allowed the jury to decide the issue and the jury determined that the defendants were guilty of a violation of the Sherman Act, liable under the felony amendments I have referred to.

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[1]Senate Committee on Interstate Commerce, Hearings on Control of Corporations, Persons and Firms Engaged in Interstate Commerce, 62 I. Cong., p. 1161

[2]BNA Interview with Donald L. Baker, ATRR, No. 787 November 2, 1976

[3]BNA ATRR, No. 803, March 1, 1977

[4]BNA ATRR, No. 806, March 22, 1977

Antitrust—*(continued)*

Any consideration of the application of these general antitrust principles to the land title industry must, however, take into account the McCarran-Ferguson Act. Prior to 1944, the business of insurance was not considered to be in interstate commerce and the Sherman Act and other federal antitrust laws were believed not to be applicable to the insurance industry generally. For 75 years prior to that time the Supreme Court had consistently held that the individual states possessed the sole power to regulate and tax insurance companies within their respective jurisdictions. *Paul v. Virginia,* 8 Wall. 168 (1868). During that period the states understandably had adopted numerous and varied laws affecting the business of insurance. Then in 1944, the Supreme Court changed its position and held that insurance was interstate commerce and accordingly was subject to the federal antitrust laws. *United States v. South-Eastern Underwriters Assn.,* 322 U.S. 533 (1944), *rehearing denied,* 323 U.S. 811 (1944).

Promptly reacting to the South-Eastern Underwriters case, Congress in 1945 determined that there were significant public policy reasons for the states to continue their regulation of the insurance industry and adopted the McCarran Act stating, "Congress declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest . . ." (15 U.S.C. Section 1011.) Consistent with this intent, the act provides that "(t)he business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business." (15 U.S.C. Section 1012 (a).)

At the same time, Congress recognized that there were various federal statutes—including antitrust laws—that might, under the holding in South-Eastern Underwriters, be considered potential constraints on the very state regulation Congress sought to encourage. Accordingly, the McCarran Act provides, "No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance . . . unless such act specifically relates to the business of insurance: Provided, that . . . the Sherman Act . . . shall be applicable to the business of insurance to the extent that such business is *not* regulated by state law." (15 U.S.C. Section 1012 (b).) (Emphasis added.) Finally, even if the McCarran Act would in other respects apply, there is an exception for acts of or agreements to engage in "boycott, coercion or intimidation." That is, with respect to this kind of activity, the Sherman Act continues to apply despite the McCarran Act.

Thus any analysis of the application of the McCarran Act in such a way as to render the federal antitrust laws inapplicable depends upon whether (a) the business of insurance is involved within the meaning of the act, (b) whether the conduct complained of is "regulated by state law" and finally (c) whether there exists any coercion, boycott or intimidation. Much of the recent precedent on these threshold questions has been developed in the context of the land title industry and it is primarily to those cases that I shall turn this morning.

In the very first case to be filed, *Commander Leasing Co. v. Transamerica Title Insurance,*[5] the plaintiffs sued 12 title insurers and two of their agents doing business in Colorado alleging that they had combined and conspired to fix rates for their services in violation of the Sherman Act. The defendants moved to dismiss the complaint based upon the McCarran Act which was granted by Judge Chilson and affirmed by the Tenth Circuit Court of Appeals.

The plaintiffs first argued that the "business of title insurance" was not the "business of insurance" as that phrase is utilized in the McCarran Act.[6] Although in effect conceding that that part of the premium assessed for the risk itself was "insurance" the plaintiffs focused upon the portion of the total premium which they alleged represented simply a service charge covering expenses incurred by the title company in examining the title record prior to the issuance of a policy and argued that that service was not "insurance." In rejecting this notion, both the lower and appellate courts held that "title insurance is insurance as that word is used in the McCarran Act." Moreover, they emphasized that "the business of title insurance cannot be . . . fragmented . . ." and, therefore, the fact that prior to the issuance of a policy the defendants make an examination of title and include in the rate ultimately charged the purchaser a charge therefore does not make it any less insurance. Relying upon an earlier Supreme Court case[7] which held that the fixing of insurance rates as well as all other activities of insurance companies "which relate so closely to their status as reliable insurers" constitutes the "business of insurance" the court concluded that examination of title preparatory to issuance of title insurance policy would fall "easily" into this category.[8]

In determining whether the business of title insurance was "regulated by state law" the court examined in some detail the statutory scheme of insurance regulation within the state of Colorado, concluding that the state "not only has regulated the title insurance business but has done so in great detail." Included in a very comprehensive insurance code were rate regulation and rate bureau provisions as well as statutes prohibiting unfair methods of competition in the insurance business. These provisions were applicable to title insurance. Although the plaintiffs attempted to argue that the statutory scheme did not afford what they called "meaningful" or "effective" regulation and were a "mere sham," the court suggested that its job was *only* to determine whether the state had by legislation regulated the business of title insurance and not "whether this regulation could be better and more effectively done."

Before continuing on, one other comment might be made about Commander Leasing. The plaintiffs also argued that those defendants who were title insurance agents should be left in the case even if the underwriters were dismissed because the agents were not insurance companies. However, the court of appeals assumed that the complaint against the agents was directed toward their participation in the business of title insurance and affirmed their dismissal as well. In doing so it held that in applying the McCarran Act there was "no reason to distinguish between a principal and an agent, because both were engaged in the business of insurance."

On the question of what constitutes the "business of insurance" within the meaning of the McCarran Act, several other cases have explored the issue in a title industry context. In *Mitgang v. Western title,*[9] filed in a federal court in San Francisco against title insurers in California, the plaintiffs attempted another frontal attack claiming that title insurance was not insurance within the meaning of the McCarran Act, this time arguing that it was not so by alleging that "there is almost no risk in title insurance." In rejecting this contention Judge Oliver Carter held that "(a)lthough a person receiving title insurance gets a different sort of policy than one receiving life insurance, the same basic relationship—that of policyholder and insurer—would seem to pertain." The court also found comfort in the fact that the California statutory scheme regulating title insurance was to be found in the state's insurance code.

In *McIlhenney v. American Title Insurance Co.,*[10] filed in Philadelphia, the plaintiffs complained of allegedly concerted activity by the title insurance defendants which required purchasers of newly constructed residences to buy mechanic's lien insurance as part of the services provided at settlement. The plaintiffs claimed in effect that, because the services of the defendant company were indispensable at settlement, insuring over mechanic's liens involved in reality not the business of insurance but the "business of real estate sales." Judge Ditter rejected this novel argument, saying that "(T)he mere fact that the services performed by a title insurance company are an indispensable part of the transfer of real estate does not remove those services from the sphere of the insurance business"—to hold differently, he argued, would put every risk insured against by title insurance companies beyond the "business of insurance" parameters.

The plaintiffs in McIlhenney also attempted to argue that where there has been a waiver of mechanic's liens, there was no risk and thus nothing to insure. However, the court stated that "the obtaining of a waiver and the willingness of a title insurance company to issue its policy are not simply ships which pass in the night but are engine and hull of the same vessel." The court noted, "Obviously, the company's insistence on a waiver of mechanic's liens is one of the ways it tries to minimize the risk of loss—in much the same way that a workman's compensation carrier will try to minimize its risk of loss by requiring an employer to institute certain safety practices. In neither case, however, does the attempt mean that liability is eliminated, entirely. So far as mechanic's liens are concerned, 'waivers' have been held to be entirely defective, insufficient and fraudulent."

On the subject of what constitutes the "business of insurance," one further important case deserves to be mentioned for it comes up in the context of ancillary services provided by a title company or agent in connection with the issuance of a policy. In *Schwartz v. Commonwealth Title,*[11] a class of plaintiffs sued a number of title insurers doing business in Pennsylvania and the Pennsylvania Rating Bureau complaining about

[5]477 F.2d 77 (10th Cir. 1973)

[6]In fact, they did not even call it title insurance. The complaint alleged that the business involved was that of "title proof and assurance."

[7]*SEC v. National Securities,* 393 U.S. 453 (1969)

[8]In this connection it might be mentioned that the trial court viewed the plaintiff's complaint about "abstract services" as directed toward abstract services furnished in connection with the issuance of a title insurance policy. The court below gave the plaintiffs leave to file an amended complaint to complain about abstracting services *not* rendered in connection with the issuance of a policy, suggesting that such a complaint would have survived a McCarran Act motion. No amended complaint was filed, the plaintiffs choosing to appeal instead.

[9]1974-2 Trade Cases paragraph 75,322 (N.D. Cal. 1974)

[10]418 F.Supp. 364 (E.D. Pa. 1976)

[11]374 F.Supp. 564 (E.D. Pa. 1974)

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the joint imposition of a so-called "sellers' charge." That charge was made to sellers at a closing for the performance of certain closing services when the closing occurred at the offices of the defendants. Included in those services were certain escrow functions, the provision of transfer stamps, recording necessary papers and so forth, all of which enable the seller to perform his agreement to convey insurable title. On two separate earlier occasions rate filings submitted by the rating bureau had included the seller's charge and each time the insurance department had excluded from its approval that charge upon the grounds that it was not a statutorily defined "fee" and therefore need not (and could not) be filed by the rating bureau.

In ascertaining that the institution of the seller's charge was part of the "business of insurance," Judge Becker concluded that it was necessary to make a close and realistic examination of the relationship of that charge to the transaction represented by the title insurance policy. The court reasoned that the seller was as much a part of the real estate transaction as the buyer and the title policy is issued only after an examination of the validity of the seller's title to the property. Certainly "(t)he investigation of the risk of loss prior to deciding whether to insure that risk is . . . part of the business of insurance" and therefore it would be "ostrich-like" to separate the title search from the "pure insurance" aspect of the title companies' activities. The court likewise dismissed the notion that a charge to the seller for these ancillary services is not insurance because the seller is not the insured. Judge Becker found the seller's charge to be so "closely integrated" with the issuance of a title insurance policy as to come within the ambit of the business of insurance by having been made to the party who sells the policyholder the property which is the subject of the title policy.

The question of what constitutes sufficient "regulation by state law" to activate the McCarran Act has also received additional judicial scrutiny in a title industry context. In two cases the plaintiffs charged a conspiracy among title companies to establish rates in states in which the statutory system for rate approval and rating bureaus specifically exempted title insurance. *Crawford v. American Title* (Alabama)[12] and *Harrison v. Chicago Title* (Kansas)[13] [14]

In each case the court determined that the provisions of the state insurance codes generally regulated the business of title insurance but that the more critical question was whether the states had regulated by state law the specific conduct alleged. In determining that they had, both courts relied upon the Insurance Unfair Practices Act contained in the insurance laws of Alabama, Kansas and many other states. This act, a model act drafted by the National Association of Insurance Commissioners in the wake of the McCarran Act, in its most commonplace form, prohibits all "unfair methods of competition" in the business of insurance, some of which are expressly defined and the others left to administrative determination by the insurance department. Findings that that phrase has generally been broadly interpreted as encompassing unauthorized agreements to fix premium rates and other monopolistic or anti-competitive practices, they concluded that those acts "place the very conduct charged in the complaint within the ambit of activities over which the insurance commissioner has broad regulatory power." In doing so, they focused upon the fact that the activity complained of was the conduct of the defendants in setting the rates and not the rates themselves, thereby making the statutory exemption of title insurance from the rating provisions without relevance.[15]

The last of the three threshold questions which must be asked in evaluating the application of the McCarran Act is whether "coercion, boycott or intimidation" exists so as to come within the exception to the McCarran for such activity. This is an area which is

[12]518 F.2d 217 (5th Cir. 1975)

[13]1974-1 Trade Cases paragraph 75,321 (D. Kans. 1974)

[14]In a third case, *Mitgang v. Western Title, supra,* this occurred as well, although in finding regulation by state law Judge Carter appeared to take some comfort in the subsequent statutory amendment in California which provided for regulation of title insurance rates.

[15]In the appeal of the Crawford case to the Fifth Circuit, the court affirmed, with one lengthy dissent, by Judge Godbold. In the dissent Judge Godbold takes issue with much prior precedent by suggesting that in a McCarran Act context the courts must consider not merely whether the state is regulating but whether it is doing so adequately, finding support for such a proposition in legislative history. Upon such a standard he found the Unfair Practices Act "to meet only the farther reaches of unfair competition and trade practice problems" and concluded that it was designed simply to supplement a rate-setting statute and could not standing alone operate to displace antitrust remedies.

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perhaps the least clearly defined in terms of present precedent.

Almost all of the courts which have considered this question have determined that these terms as utilized in the McCarran Act have a somewhat different and more narrow meaning than they do generally under the Sherman Act. This more narrow meaning would not include such acts when directed toward insureds or potential insureds. In the Mitgang and McIlhenney cases which we have already discussed this morning, the plaintiff policyholders attempted to argue that they came within the exception because they were "coerced" to buy coverage at the allegedly fixed rates inasmuch as coverage was unavailable to them at any other rate. In rejecting this ingenious argument, the courts read legislative history of the McCarran Act exception as evidencing an intent that it comprehend only a narrow area of trade activity, namely insurance company "blacklists," which prohibit agents from selling insurance for a particular company on pain of being cut off entirely by a governing organization of insurance companies. These and other courts also quite properly reasoned that were the exception to be read so broadly as including such activity as unauthorized rate fixing, it would render the general provisons of the act itself meaningless.

However, beyond excluding acts of "coercion, boycott, or intimidation" directed toward insureds from the exception, these and other cases do not spell out very clearly precisely what type of conduct would come within it. There is, however, considerable language to the effect that it applies at least to particularly pernicious conduct among or between insurance companies and agents.[16]

With that review of the McCarran Act precedent in mind, let us for a moment consider the application of the state antitrust laws to the title industry. It must be remembered that the McCarran Act renders inapplicable *only* the *federal* antitrust laws in certain circumstances. However, the possible application of a state's antitrust laws must also be considered and it is an important concept to remember.

Although there may be exceptions, I am assuming for the purposes of our discussion this morning that the state antitrust laws contain no express statutory exemption for the business of insurance. In the absence of such an express exemption, one must find one to be implied through the operation of the judicially applied doctrine of exclusive jurisdiction. As any student of this subject knows, the ground rules are considerably less clear and the precedent more obscure than that which exists under express grants of immunity such as contained in the McCarran Act.

However, in situations where courts have determined that the legislature, in enacting a regulatory scheme, intended to override the policies contained in the antitrust laws they have found an exemption to exist. This intention to override need not be expressly stated but has been found to exist through implication from the regulatory scheme.

In making a determination as to whether such an antitrust exemption exists most courts have been influenced by whether the regulatory scheme is a pervasive one and whether it is essentially inconsistent with or repugnant to the pro-competitive policies underlying the antitrust laws. If so, the doctrine of exclusive jurisdiction has been applied to accommodate those conflicting standards of pervasive regulation and the antitrust laws in order to protect the integrity of the administrative scheme and in recognition of the fact that the regulatory agency's daily experience with the industry in question leaves it better equipped to deal with the issues involved than the courts. Whereas the "sole aim" of the state antitrust laws is the promotion of competition, the insurance code is usually drawn with different goals and different standards in mind and the insurance department is directed to regulate primarily for the protection of the insured through the maintenance of the financial viability of insurance companies doing business in the state.

Applying these general principles to particular factual situations defies generalization. It requires a close study of the statutes involved, such legislative history as is available, and the activity under scrutiny. However, by way of specific example one might cite a rating bureau expressly sanctioned by a state's insurance laws as one kind of activity which is likely to be found within the scope of the sort of implied immunity concept from the state's antitrust laws which we have been discussing, assuming that the bureau is licensed and is operating within the scope contemplated by statute. Such an activity, inconsistent with the state antitrust laws, requires immunity from those latter laws to preserve the integrity of the state's system of insurance regulation and to spare the participants of inconsistent statutory direction.

What lessons can fairly be drawn from this relatively brief summary of case law? First of all, with respect to the McCarran Act, it appears without question that title insurance is "insurance" within the meaning of the act, despite the frequent efforts of plaintiffs' attorneys to find features to distinguish it from other sorts of insurance. Secondly, I would conclude that title insurance is insurance within the meaning of the act even though certain of the functions performed in connection with the issuance of a policy for which a charge is made may not, in another context, be characterized as insurance functions. Finally, there is precedent to the effect that other services provided by an insurance company or agent which are so "closely integrated" with or ancillary to the issuance of a policy may come within the scope of the McCarran Act, although the law is much less defined here.

With respect to what constitutes "regulation by state law" within the meaning of the McCarran Act, it is presently clear that what is relevant is state statutory law and not what sort of regulation occurs in fact. Moreover, these cases stand for the proposition that state statutory regulation which permits or prohibits the specific conduct in question will constitute sufficient regulation even in states which lack a comprehensive system of rate regulation. Finally, although the majority of existing case law suggests that the boycott exception is inapplicable to activity directed toward insureds, collective conduct of boycott, coercion or intimidation directed toward competitive companies or agents would be considered within the exception.

In the context of state antitrust laws, application of some sort of antitrust immunity is much less certain. It is more likely to be found when there is substantial inconsistency between the antitrust laws and the statutory scheme for the regulation of insurance and when the regulatory scheme clearly requires or contemplates the conduct in issue.

Before leaving I want to emphasize one last point. My aim today is simply to encourage you to be aware of the antitrust laws and to discuss some of the issues involved in their application to the land title industry. However, a short talk such as this can in no way serve as a guide in the conduct of everyday business. Where a potential antitrust problem or question is identified it should be brought to the immediate attention of your company's law department. Legal counsel's ability to deal successfully with a problem often depends upon the time available to investigate the facts and propose a course of action. If today's discussion will have assisted in earlier recognition of such a problem, I will have accomplished my purpose.

What follows is the question and answer period immediately after Christie's speech.

Question: The problems of discussion of coverage, between agents, between principals and between reinsureds. It is a three-stage question, and I think that all of us have the problem, how much can we talk to each other about limitations of coverage or agreements with respect to coverage, either expressed or implied?

Christie: That is a good question, and it is also a question that calls for an answer that consumes more time than I already have taken. By "coverage," I take it you mean discussion of the content of policy forms.

Generally speaking, I would have no problems with discussion of coverage as between a company and its own agents, assuming that these were discussions which occurred within their own house, so to speak, and related to efforts by both the company and the agents to understand, in effect, the legal significance of the policy language. I would say the same with respect to discussion concerning policy content as between two parties to a reinsurance agreement.

The discussion of coverage among underwriters and agents involving different companies, however, obviously presents a more complicated question. The problem to be concerned about in any such discussion of coverage is whether those involved have arrived at any agreement or mutual understanding with respect to which risks will be insured and which will not be insured. The potential exists for someone to argue that the companies, through these kinds of discussions, have effectuated a restraint on competition by limiting the availability of insurance for certain kinds of risks.

I think the guiding principle for discussion of policy forms between and among representatives of different companies is to assure that

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[16]One caveat in this area. Two circuit courts of appeals—the First and District of Columbia—have very recently adopted a much broader reading of the exception with respect to acts of coercion directed at policyholders. *Barry v. St. Paul Fire and Marine*, 1977-1Trade Cases paragraph 61, 431 (1st Cir. 1977); *Proctor v. State Farm Mutual Insurance Co.*, 1977-1 Trade Cases paragraph 61, 481 (D.C. Cir. 1977). They reject the rulings of two other circuit courts—Fifth and Ninth—and 15 different district courts by relying upon their own reading of legislative history and the pro-competitive policy of the antitrust laws. Although my own feeling is that the narrow reading more closely comports with the structure of the McCarran Act and with its purpose, these decisions have cast some uncertainty over the one aspect of the exception that had heretofore appeared rather clear. A petition for certiorari has just been filed in the Barry case and in view of the significant split in opinion it is possible that the Supreme Court might be persuaded to take it and, for the first time, consider the scope of the exception. (Note: On October 31, 1977, the Supreme Court announced that it would accept the Barry case for review.).

Title Insurance and Underwriters Section Meeting

The Federal Insurance Act of 1977—A Discussion

Ellis

Buckley

Lead-off speaker in this discussion was Jeremiah S. Buckley, minority staff director of the Senate Committee on Banking Housing and Urban Affairs, Washington, D.C. He was followed by Robert E. Ellis, general corporate counsel for Chicago Title and Trust Co., Chicago.

Buckley: The Brooke Bill grew out of the Senator's concern about the $7 billion in underwriting losses which were experienced in 1974 and 1975 by the property/casualty industry, and a prospect of the failure of the Government Employees Insurance Company (GEICO). At that time, the New York *Times* had an article where it was said to be doubtful that the present system of guaranty funds could handle the intense claim activities of a GEICO failure. We wondered what would happen to policyholders if a company of this size failed.

The underwriting situation in the property/casualty business, as you know, has turned around now. *Best's Review* indicates that the losses in 1976 were only $2.2 billion. But, saying that they were only $2.2 billion gives some indication of how bad things were. In the first quarter of 1977, the losses are estimated at about $584 million, but it is likely that the situation is turning around, and that the underwriting results will be considerably better during the last half of this year.

But what the trauma of the last few years has brought home to us is the need to improve the protection of policyholders before the next disaster. Even in the absence of a major company failure, there are good reasons to want to improve the quality of regulation for solvency purposes.

On May 25 of this year, the Washington *Post* carried an article regarding the New South Life Insurance Co., based in Columbia, S.C. That company has 175,000 policyholders, who are mostly poor blacks living in the rural areas of South Carolina. New South has been insolvent since 1971, according to the Washington *Post*. Yet the company continues to market new policies. The policyholders are not able to obtain the cash-to-lender value of their policies, as they are promised in the contract. The only way that they can collect is to die. The insurance regulators in South Carolina continue to let the company write new policies.

Recently, the Empire Mutual Co. of New York was reorganized by the New York Insurance Department. However, Empire is not being liquidated. It is just being reorganized. The policyholders out of state are not being paid by the Empire Mutual Co. on their automobile claims. The insurance funds in the states where these policyholders live say, "We have no obligations. If the company were liquidated, then yes, we would have to come and pay under the guarantee fund to meet your claims. But since the company is only being reorganized, and the New York Department refuses to pay claims of out-of-state policyholders, we don't have any obligation either. So, too bad."

Then there is the case of the All Star Insurance Co., which is based in Wisconsin. That company is going under. It has been writing a lot of surplus lines of insurance. The surplus lines concept, which I am sure you are familiar with, is where a state does not have sufficient capacity in the companies, that are licensed or chartered in the state, to fill the demand of, for instance, malpractice insurance or product liability insurance. So the state allows companies which are not licensed in the state to come in and write surplus lines insurance for these lines. However, the policyholders who buy that insurance and their claimants are not protected by the present system of the guaranteed funds.

These examples, then, give you some reasons why we want to see if anything can be done to improve the present system for dealing with the insolvency of insurance companies.

The state guarantee funds, which I mentioned, grew up during the late sixties and in the early seventies. They exist in most states for property/casualty companies—I think about 48 states. About 20 states have them for life insurance companies. But most of the states have not adopted a system for dealing with the insolvency of life insurance companies. And the funds have yet to be faced with the claim activity in major company failure, such as GEICO would have presented to their system.

Each state has its own fund. The effort to prevent insolvencies and to deal with them when they occur is necessarily fragmented. There are no uniform standards for state guarantee status. All the states could wind up—in the case of a major company insolvency—scrambling for the asset of the failed company that happened to be located in their state, to satisfy the claims of policyholders in their state, with no orderly mechanism for distributing the proceeds of the liquidation across all of the states in which the company was doing business.

The assessments for insolvency come after the fact. They come when all companies are in a position of weakness. If GEICO had gone under, just when all the other companies were being pressured because of poor underwriting results, it might have easily brought about a domino effect, causing other companies to go into insolvency as well. Only in New York have they established a "preassessment" fund, where they collected about $240 million in fees in their insolvency fund. Then the New York legislature turned around and took that money and used it to buy New York State obligations, which were, of course, totally illiquid at that time. So at the very time that you would have needed the funds, they were not there. They were tied up in illiquid obligations.

So we don't feel that the present state system has worked very well. In October of last year, Sen. Brooke introduced a bill, S.3884, which offered a federally chartered alternative to insurance companies—similar to that which is available to banks. Under the bill, insurance companies can either charter at the state level or at the federal level. The bill also provided for guarantee status for those companies which chose to be federally chartered and their policyholder obligations would be guaranteed under a system which would be very much like what the Federal Deposit Insurance Corp. (FDIC) offers to banks.

The bill was introduced in October, just before Congress adjourned, so that it would be in the public domain and available for comment. It got quite a bit of helpful comment, which we incorporated into a revised version of the bill, S.1710, which the Senator introduced June 16, 1977.

Title I of the bill would set up a Federal Insurance Commission consisting of three members. Executive authority in the commission would be vested in a chairman of the commission—one of the three members—who would be appointed by the president. The bill would also establish an advisory committee to this Federal Insurance Commission, which would consist of industry representatives, consumer representatives and representatives of government agencies which have an interest in the insurance business—such as the Treasury Department and the Department of Housing and Urban Development.

It would also establish a federal insurance guarantee fund, which would offer guarantee status to both state chartered companies and federally chartered companies. Essentially, this federally guaranteed fund, modeled after the FDIC, would offer protection to policyholders of all companies which obtained federal guarantee status.

Title II of the bill offers a federal charter alternative to insurance companies, and all federally chartered companies would have to be federally guaranteed. State chartered companies would have the option of whether they wanted to obtain a federal guarantee or not. As you can see, there is a great deal of similarity to the way we regulate the banking industry.

Federally chartered companies would be authorized to do business in all states, except where a state has petitioned the Federal Insurance Commission to revoke this right to do business, because of some activity which the insurance company is engaged in in that state. Federally chartered insurers could elect at any time to surrender their charter and to obtain state chartered status, with the free movement back and forth, as is in the banking system right now. Federally chartered insurers would be exempt from the following provisions from the state law: State reserve requirements (and, of course, federal reserve requirements would be imposed); participation in the state guarantee fund (this would also be true of any federally guaranteed company), and state guaranty fund assessments.

Federally chartered companies would be exempt from regulation of their investments at

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the state level, but subject to federal investment criteria. They would be exempt from any law providing for fixing of rates or premiums, except in the case of a residual market mechanism. Where they were doing business in a state, they could still be required by state law to participate in the assigned risk plan. They would also not be exempt from state rate regulation. In areas where insurance results from competition for producers business, of course, the exemption from state rate regulation would not exist. If there were state rate regulations, and you were part of a federally chartered company, or your company obtained a federal charter, then this provision might be important to you. I think it is pretty widely recognized that in title insurance in some states, the competition is for the business that will be given to you by the mortgagee, not the borrower. Thus you have reverse competition. Credit life would be another example of reverse competition.

I can tell you very frankly that we did not have the title insurance business in mind when we drafted this bill. I am not sure that we want to have title insurance companies offered the federal chartering alternative or federal guarantee status. I don't know whether you would like to be in on it or not. I have not heard very much from title insurance companies one way or the other, but we certainly did not have you in mind. If you don't want to be in on it, we would not force you to be in on it. We have not been that concerned about the title insurance business. I am not aware of serious abuses or, at least, they have not come to my attention. Maybe there are some, but I am not aware of them.

We had hearings on S.1710 in September, and we heard from Chairman Williams of the Securities and Exchange Commission (SEC); Robert Hunter, acting head of the Federal Insurance Administration (FIA), and from the Deputy Assistant Attorney General of the Justice Department in the Antitrust Division, Joe Simms. The Justice Department supported the bill. They took their position on federal chartering. They favored that from the freedom of rate regulation.

None of the government witnesses spoke with the blessings of the Office of Management and Budget and the administration, but Hunter for the FIA pointed out some of the problems with the bill. He said it was good that it was being discussed. Chairman Williams did not take a firm position on the bill. He was not sure it was needed, but he did describe the abuses that have been uncovered by the SEC in its limited investigation of the insurance industry. He told us that the SEC was expanding its investigation of insurance companies.

The National Association of Insurance Commissioners sent Wesley Kinder, the insurance commissioner from the state of California. Not surprisingly, they testified against the bill—as did Commissioner Mathias from Illinois. But Commissioner James Stone from Massachusetts supported the insolvency mechanism that Brooke had proposed. So there was a division, although I think that Stone is a very distinct minority among the insurance commissioners.

The American Insurance Association testified in support of the federal insolvency mechanism, but not necessarily the Brooke approach. The National Association of Independent Insurers and the American Mutual Insurance Alliance testified against the bill, and said that they did not think that we needed it.

The American Council of Life Insurance also was not in favor of the bill, although I know that some companies favored the bill. But those in favor of an approach carry the burden of convincing their fellow members that it is the right idea. The status quo does tend to prevail. I have heard from many large life insurance companies that they do favor this approach, and that their views were not represented by the American Council of Life Insurance.

The insurance agents groups generally did not think that we needed the bill. But State Farm Insurance testified in favor of the freedom from rate regulation provision. The League Insurance Group testified for the bill.

I would say that generally, the testimony was negative, that the witnesses did not feel that there was any need to take this approach.

So, where do we go from here? Well, the bill will be put aside until the end of this year. The Senator has said that he does not intend to ask for a mark-up session or for further hearings on the bill before the end of this year. I think that at the staff level, we will be sitting down and talking to some of the people in the industry, to see whether there are any further revisions that should be made in the bill. We may ask for additional hearings next year. We really are just evaluating the testimony that we received.

". . . we did not have the title insurance business in mind when we drafted this bill. I am not sure that we want to have title insurance companies offered the federal chartering alternative or federal guarantee status."—Buckley

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This is not the kind of thing that is going to be passed in a few months. These things often take several years to gain acceptance. The idea is out there for consideration. It may be—and I hope that this does not happen—that we will have major insolvency, and the need for action will be further demonstrated. Then there would be a public move to do something. But right now, we are in the process of evaluating the testimony and seeing if there are any further revisions that would make the bill more acceptable.

The administration is also reviewing the subject. They have not taken a position for or against it. They may have their own proposals. The president has a pretty full plate with Panama, the energy problem and so forth. So, I don't know how much attention the administration could give to this type of issue but we will see.

Now, perhaps I violated my own rule on talking too long.

Ellis: First, I would like to thank Mr. Buckley for not giving my speech. There is always that danger when two people are addressing the same subject without forewarning as to what the other is about. I also want to thank him for very nearly eliminating the need for me to speak at all on the subject of federal chartering of insurance companies—particularly title insurance companies—because of his reference to the fact that the title insurance industry was really not what Sen. Brooke had in mind when S. 1710 was formulated and introduced earlier this year.

However, with all due deference to this disclaimer, I believe it would be well for us to take this legislative proposal seriously, since it is the first significant congressional effort to involve the government in the insurance business. Regardless of its fate in the coming session, it may well be the forerunner of further efforts at federal involvement in the insurance regulatory process.

Looking to the terms of S.1710, I think it important to observe that the proposal really cannot be understood without reference to the report of the U. S. Justice Department published in January 1977, entitled *The Pricing and Marketing of Insurance.* The subject of that report, with which many of you are familiar, was the effect of state regulation in these areas of insurance, and was directed to the Presidential Task Force on Antitrust Immunities.

The immunity in question here is naturally that provided by the McCarran-Ferguson Act, which exempts the business of insurance from the reach of the federal antitrust laws where the state has undertaken to regulate that business. The department's 372-page analysis concludes that existing state controls on pricing are in many cases incompatible with a desirable competitive climate, and that the industry does not require antitrust immunity. The department's recommendations are that a federal regulatory system be created, providing for the federal chartering of insurance companies as an alternative to the present state regulatory systems; that state provisions regulating rates expressly be made inapplicable to federally chartered companies, and that, in turn, the federal antitrust laws be fully applicable to the pricing activities of federal insurers. The proponents of the bill characterize it as the catalyst for creation of a dual regulatory system analogous to that prevailing in the banking industry. Under it, insurers would be afforded an option of operating under a federal charter free from state rate regulation, but absent the antitrust protection afforded by the McCarran Act. Neither the Brooke Bill nor the Justice Department report advocates outright repeal of the McCarran Act.

The result is that the bill reflects what I would surmise is Sen. Brooke's primary interest in providing for the protection of policyholders through the federal guarantee of insurer obligations, and the Justice Department's interest in price deregulation. The bill is thus divided into two parts. The first part deals with the federal guarantee fund, and the second the federal chartering of insurance companies. Common to both is the regulatory authority proposed to be exercised by the Federal Insurance Commission which would be created under the terms of the bill. The power of this agency would extend to virtually every facet of insurance, with authority to examine into and prescribe requirements in the financial, organizational and operational activities of insurers. Reserve requirements would be established by the commission, not only for federally chartered companies but for state chartered companies electing to participate in the federal guarantee fund. Investments of federal insurers would be regulated, and, predictably, reports and audits of regulated companies called for. In short, the alternative federal regulatory system is total in its proposed form and operation.

All lines of insurance, including title insurance, would be eligible to apply for federal charter; however, if the applicant is a member of a group of insurers subject to

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common control, all companies would require federal chartering; a successful applicant would be vested with the corporate—as contrasted with the insurance—powers of a business corporation formed under the laws of the District of Columbia; it would be deemed a citizen of the state where its principal office is located; all rights and privileges under its former state charter would be deemed null and void, and it would immediately be authorized to do business in all states.

There is no limit on the number of lines for which an applicant for federal chartering could seek approval, with the sole exception of life and property and liability insurance, where any state statute prohibiting this combination would be respected. S.1710 in its present form thus embodies an "all-lines" concept which would supercede existing state single-line statutes. Consequently, as far as I can see, there would be nothing to prevent Allstate or State Farm, for example, or Metropolitan from adding title insurance to their list of approved lines, other than residual discretionary power in the Federal Insurance Commission to prohibit such an addition. It would also be necessary under the terms of the bill to obtain commission approval to do any business other than the particular line or lines of insurance that the company is engaged in. This naturally could have application to any company engaging in or contemplating conducting an unrelated business, either directly or through subsidiaries, and conceivably could have application to certain services which are now considered ancillary or reasonably peripheral to the business of title insurance.

The provision of the bill which has been perhaps the subject of greatest comment, and controversy, stands out curiously enough as a deregulatory concept. I refer here to Section 204, which reads in part: "A federally chartered insurer shall be exempt from the provisions of the law of any state . . . which provides for the regulation or fixing of rates or premiums or of classes of risks established by insurers operating in that state." This exemption from state regulation does carry with it the consequence earlier mentioned, to wit: Full exposure to the federal antitrust laws in the area of pricing.

The next step, logically, would be to evaluate, as best we can, the loss of the McCarran Act exemption in the area of pricing. However, before proceeding, we cannot overlook the perplexing and singular position to which the title insurance industry may lay claim under the proposal as it now stands. This is the result of a provision in Section 204 which excepts from the operation of the exemption from the state rate regulation ". . . any line of insurance (other than reinsurance) in which the commission determines that the insurer competes principally with the producers business rather than the business of the ultimate consumer."

This is what the Justice Department in that section of its report covering title insurance has styled "reverse competition"—that is, competition for the business of an intermediary, broker, agent, attorney, etc. The report leaves no doubt of the department's view that title insurance is aptly defined that way. It might be noted that we are not without company in this regard—credit life, health and life insurance come in for some mention. Title insurance, however, clearly receives the greatest emphasis in the report.

Assuming, then, that title insurance should be thus characterized under a newly enacted S.1710, what would be the result? If we take the terms of the bill literally, we should continue to be subject to state rate regulation in its present form. Presumably, too, the McCarran Act would continue to be available to us, since its coverage is only to be eliminated when the insurer is exempted from state rate regulation. It is not difficult to recognize the absurd results to which this construction could give rise. Much of the regulatory climate in which title insurance currently operates is clearly one of open competition. If we are to continue to be subject to state regulation in its present form, as the bill would clearly seem to provide, we would do so immunized from the federal antitrust laws, while other lines of insurance operating under comparable systems of open competition would not be so protected.

The short answer is that the concept of reverse competition as reflected in S.1710 plainly has not been thought through. Perhaps in a subsequent version of the bill, the issue, to the extent it is perceived to be one, would be left to the general regulatory powers of the Federal Insurance Commission.

". . . with all due deference to this disclaimer, I believe it would be well for us to take this legislative proposal seriously, since it is the first significant congressional effort to involve the government in the insurance business."—Ellis

Reverse competition aside, the more intriguing question actually is, just what would the loss of the McCarran Act exemption mean to an insurer opting for federal chartering.

It might be well here to review the extent of the protection which the McCarran Act now offers, in order to correct, if nothing else, the fairly common impression that the act provides an all-inclusive protection for any company engaged in the business of insurance. First, the exemption applies only where the acts or practices in question qualify as part of the "business of insurance." That phrase was construed by the Supreme Court to have reference to the contractual relationship between insurer and insured and to include such matters as rate-making; the coverage, selling and advertising of policies; the licensing of companies and agents, and other matters "closely related to the companies' status as reliable insurers." In applying this definition, lower courts have found the antitrust laws fully applicable, despite McCarran, to practices that may be more or less peripheral to the central insurer-insured relationship, including tying arrangements, mergers involving insurance companies and certain activities involved in the insurer-agent relationship. Additionally, McCarran Act protection is expressly inapplicable to agreements or acts of boycott, coercion or intimidation.

I think we all can agree that our industry, as well as other segments of the insurance industry, do not consider themselves, and have never considered themselves, free to engage in price fixing or other anticompetitive activity simply because of the presence of the McCarran Act. However, the McCarran Act has stood very well as a bulwark against federal intervention into state regulation, particularly with regard to rate-making functions, and the courts have gone rather far in sustaining the underlying principle of the act that Congress did make a decision to permit the regulation of the insurance industry to remain with the states.

The principal change proposed by the Brooke Bill would make the exemption inapplicable in the area of rate regulation, and the Justice Department's efforts are clearly directed at the elimination of joint rate-making by insurers, principally under the sponsorship of state rating bureaus. The announced aim of the department is the fostering of open competition through elimination of rating mechanisms requiring prior state approval or mandatory adherence to rates, and by fully exposing the rating process to the federal antitrust laws. In the process, however, the Brooke bill would eliminate every vestige of state regulation, and there would appear to be little remaining in the way of permissible state requirement, other than perhaps to call for an informational rate-filing. It is difficult to envision federally chartered insurers operating without guidelines or accountability other than the federal antitrust laws in the area of pricing. My guess is that the statement submitted by the National Association of Insurance Commissioners (NAIC) during the recent legislative hearings on the Brooke Bill was squarely on point when it suggested that federal rate regulation was inevitable under the terms of S.1710.

Apart from pricing, there are other joint activities which characterize the title insurance industry, and it would seem appropriate to briefly review several of the more prominent in view of the proposed tampering with the McCarran Act. Reinsurance and coinsurance, or any joint underwriting are examples. Here the Justice Department has been unequivocal in expressing its lack of concern. It does not view these activities as related to pricing or price fixing, or otherwise anticompetitive in nature. As to joint title plants, there is little likelihood of antitrust implication, so long as these arrangements are not entered into for anticompetitive reasons. There is some benefit to be derived also from the precedent which has been established in the banking industry, where joint data processing systems designed to produce efficiencies and which are made accessible to all competing institutions have achieved the department's blessing. Standard forms and normal trade association activity similarly, under the traditional justifications advanced for these activities, should be little affected by the fate of the McCarran Act.

The real answer as to whether elimination or modification of the McCarran-Ferguson Act would be of any significance lies in the basic premise of the McCarran Act itself. That is, the desirability of continued state regulation of the business of insurance, and the corollary of federal non-involvement in that process. In other words, the significance of the presence or absence of the McCarran Act is not at heart a question of whether particular acts or activities should be immunized from the federal antitrust laws, but whether or not federal involvement and the dual regulatory system it contemplates makes any sense for us and the public we serve.

If the Brooke Bill is ever enacted along its present lines, I think it fair to predict that a form of Gresham's Law would begin to operate. And without judging whether either system, state or federal, is good or bad, in my view one system would inevitably drive out the other. At all events, there is plainly a good deal to think about.

Title Insurance Forms Committee Report

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I have been to so many different committee meetings, I have to stop and think where I am. Somebody asked me about all the hats that I am wearing. I suppose I can take off the blue coat and trooper's hat that I have been wearing with the Indian claims bunch and maybe put on my army helmet to deal with the Title Insurance Forms Committee. The interesting thing, in case you did not see it, is that the name of the committee has been changed to Title Insurance Forms Committee. We dropped the word "standard." It is a sign of the times. I would like to ask the members of the committee who are here if they will come up and sit in the front row. That also will give me an opportunity to give credit to a very hard working committee.

These people have met numerous times for long hours. Bob Haines and Bob Manuele, Don Waddick, Ed Healey, Chris Papazickos, Gene Tully, Oscar Beasley, Gordon Granger, Irv Morgenroth, John Goode and Paul Plack. I want them to get both the credit and the blame, for whatever ensues as we go over our report.

I will take most of the time today discussing our closing protection letter, but I do want you to know the present status of the work of the committee. The Executive Committee authorized us over a year ago to begin work on some condominium endorsement forms. As condominiums came on line and began to be the subject of all types of investment in real estate interests, including leasing and mortgaging and time sharing, and various types of condominiums were set up under state statutes, it became apparent that certain assurances were to be required of title insurance companies regarding this new form of interest in real estate.

The request came from our customers, and in many instances it was volunteered by us, because we knew that it was a different animal than we ordinarily set up in our policies, included such things as a method of assessing for taxation, determination that state statutes had been followed in creating the animal and that certain encroachments had not taken place because of the proximity of the wall of one unit to another in the common elements.

These are just some of the many things that customers have approached us on in the country. The companies responded as usual, in a good competitive fashion, by giving all sorts of different coverage. Some was met with approval, and some was not. I believe Jim Murray of FNMA was somewhat dismayed at all the various types of condominium coverage that he was getting and suggested to the Liaison Committee with the Mortgage Bankers Association that perhaps it would be helpful to suggest some wording to our association, so that his various offices could ask for the ALTA form, and then know what kind of condominium coverage they were getting. So, in addition to working on a closing protection letter, we then drafted some condominium coverage, and hopefully after this convention, we will be able to turn our full attention to it. In addition to that, the American Bar Association (ABA) through its Residential Real Property Committee, chaired by Professor James Casner of Harvard, has been working on real estate problems and the cost of real estate to the home owner-consumer. They have prepared, as you may recall, a booklet entitled, "The Role of the Attorney in the Residential Real Estate Transaction." They were particularly concerned in making certain that the home owner, as a borrower, having to pay for title evidence in favor of the lender also was getting some coverage himself.

I was asked to go with Bill McAuliffe and Tom Jackson, our counsel, to meet with the committee. One of our ideas was to require the issuer of any kind of title evidence, attorneys opinion or abstract, that whenever he issues whatever he issues to a lender, that it would automatically protect the borrower. This was to be a model statute. I think almost all of the industry represented at this meeting thought it would not work too well. Certainly, the title insurance companies were worried about how mortgagee policies could be protecting a borrower, because the language does not fit, and we give much better protection under an owner's policy. They modified that and went with a model statute, which in a number of states already exists. This requires the title company or the attorney, whenever he is furnishing whatever he furnishes to the lender, to give the borrower an opportunity to say yes or no to an owner's policy. They drafted a statute which this Association's representatives did not think was adequate. They submitted it to the real property section of the ABA and they did not think it was adequate and the ABA sent it back for further study. The Committee on Residential Real Estate Transactions has now been made a permanent committee, and they will address again this type of statute and we will have our input.

In connection with that, the committee wanted to know what the title insurance industry could voluntarily do to encourage home owners to buy owner's policies. They felt that it was a good thing to do and the only question was the best way to do it. They came up with the idea of a joint protection policy. Of course, they suggested that the policy run in favor of the owner and the lender in a residential real estate transaction, that it be in simplified language and that it provide broad protection.

The ALTA Executive Committee also thought that it would be a worthwhile project, the theory being that where there is a joint protection policy of this type, the borrower, in furnishing title insurance to the lender, could order this type of policy and have protection for himself. The Executive Committee has asked the Title Insurance Forms Committee to draft such a policy, and we will begin work on that in the near future.

The Executive Committee, over two years ago, in response to complaints that various types of closing protection letters were issued by the companies, authorized my committee to draft a suggested closing protection letter. We prepared one that was explained to you at this meeting last year in Seattle. We sent out to many customers and the liaison group with the committee a proposed letter with an explanation last November. We got back comments from 30 various sources, including our customers. We went over each one of those points that were raised. We redrafted the letter and in July of this year we sent it out again and asked for more comments and got some more comments. We invited anyone who wanted to, to come and meet with the committee. On one occasion, four people representing our customers did come and meet with us.

We have again worked on the letter and you see before you the letter which we will ask you to approve, which is the custom. We will ask this section to recommend to the general meeting Saturday that it be adopted as an ALTA form, bearing in mind that we are talking about a suggested form, with each company using all, any or none of the provisions as it wishes. *(Form appears on page 44)*

The reason for insured closing service letters to begin with is the continuing problem in unclear law and understanding, especially between title companies and their customers and their agents, as to what kind of responsibility a title insurer should have for actions of its title insurance issuing agent and its approved attorneys when they close real estate transactions. It is understood that title insurance companies appoint agents in writing solely for the purpose of issuing the policy of title insurance. They approve practicing attorneys solely for the purpose of saying, "We will, based on your certificate of title, issue a title insurance policy."

However, title insurance companies perform other services. They close real estate transactions as part of the service to their customers and title insurance companies are well aware that their issuing agents close and that their approved attorneys close.

Of course, the title insurance company is willing and legally bound to satisfy its customers in connection with their closing instructions, when closings are conducted by their own employees. The law is not clear, and seems to shift back and forth, depending on jurisdiction, as to what the title insurance company's liability is when its issuing agent closes a transaction. It seems to depend a great deal on what is the obvious holding out that a title insurance company may make of its agent, what its apparent responsibilities are, what the customer thought when he dealt with an insurance agent. Did he think he was dealing with a title insurance company's alter ego?

The problem becomes even stickier when we talk about an attorney closing. Who ordered the closing from the attorney? What did the customer think when he told the attorney to get a title insurance policy for him? What did he think when he asked the title company to get a title insurance policy through an attorney? Whose attorney is the attorney when he is closing? Is he the attorney of the parties to the transaction, or would they all like to say that he is the title company's attorney and is its agent for everything that he does, including practicing law?

There have always been those problems because of the necessity of dealing on a local basis with local agents and local approved attorneys, rather than with the title company in its home office or branch office.

Early on, the title insurance companies said, "Let's put the question to rest, and put in black and white what our responsibility is." Various types of insured service closing letters were issued for the purpose of putting it in black and white. It is clear that any kind of liability can be put in black and

(continued on page 43)

Forms—*(continued)*

white. The only problem that the title insurance companies might have in putting anything that it thinks is right in black and white is what the insurance commissioner thinks is the business of title insurance, as they view their own insurance laws. To what extent can X Insurance Co. under the laws of X state indemnify against loss because of the acts of a practicing attorney when he is closing real estate transactions?

The Florida insurance commissioner, I understand from what I heard a couple of days ago, is going to be asked that question. We have had that question asked of our insurance department in Virginia some years ago. Is the issuance of an insured closing letter a part of the title insurance business? We felt then that it was and we did convince the insurance commissioner, that in order to establish insurable title there had to be a proper closing, proper disbursement of the funds, paying off of prior liens, recording of documents and what have you, and that it was just as essential as title examination. So, within those guidelines, the indemnity letter that the title insurance companies put out, if it is a part of the process of doing a title insurance business, then to that extent, title insurance companies are involved in what they should be involved in. To the extent that it gets beyond that and gets into other areas of business, then it depends on state law, a title company's charter and what have you.

With that background in mind, I would like to explain to you the document which you have before you. It is put in the form of a letter, but of course, the title insurance company may want to make a fancy certificate out of it with a blue border, which always looks good. The rate, of course, would be optional, but I think the rest of the letter, except for the parenthetical statement at the bottom of the reverse page, would be adopted, and the term "ALTA Closing Protection Letter—1977" that you see at the bottom, could be used on the letter, only if all of the material between the beginning word, "When" and the closing words, "Accepted by Title," is an official part of the form.

I think the first thing we might look at is that the first line requires that title insurance of the company issuing the letter be specified. Certainly, title insurance companies would have some problem in insuring closings when they were not even involved as a title insurance issuing entity. It says, "When blank title insurance company is specified." The form of letter that is used by many companies says "specified by you," which meant that the lender had to do the specifying. This concerns some of our lending customers, because they delegate that responsibility to third parties, perhaps to a local mortgage broker or an attorney, or what have you. They felt that it was too restrictive, so we took out that restriction, and you can perhaps read in, "is specified by anyone for your protection."

So as soon as an order is placed for title insurance to an agent, or specified in any way so that the evidence of the specification is there later on, then this protection comes into play automatically.

Of course, we are speaking of closing a real estate transaction, in which the addressee is to be either a lessee, or a purchaser of an interest in land, or a lender secured by a mortgage. Three different entities are covered. If it is addressed to Dupont, and they buy or lease land, or whoever, if it is issued to Equitable as a mortgage lender, they are covered, and you see farther down that we have a circumstance under which a borrower on a one- to four-family residence can be covered even though the letter is not addressed to him, which again is certainly a broadening of the coverage.

The company, subject to the conditions and stipulations, agrees to reimburse you for actual loss incurred by you. We all hope that actual loss incurred by you puts us in the category of an indemnification letter. We don't intend to be involved in all types of indirect loss, including, I believe, pain and suffering. This is a reimbursement letter for actual loss incurred by the addressee.

Closings are covered when conducted by an issuing agent, which is defined as an agent authorized to issue title insurance, or an approved attorney, an attorney upon whose certification of title a company issues title insurance—a classic definition. One of the things that concerned the title insurance industry, and certainly our committee, was that if we put out a letter saying that we are responsible for compliance of any type of instruction that you give an agent or approved attorney, then we are completely at the mercy of the lender or the purchaser or the lessee, without our knowledge of what has been required, to require of that closer the performance of functions entirely foreign to the vesting of title or the securing of a proper lien—areas in which title insurance or the real estate industry are not really involved, from the standpoint of title and lien. You will recall, for example, that when truth-in-lending came along, when RESPA came along, when the Flood Insurance Bill came along, the industry was aware of the requirements of all of those acts, and some of the companies chose to specifically indicate that this was not an instruction with which they could guarantee compliance by attorneys and their agents. I give these by way of illustrations.

We are aware of requests by lenders, for example, that money not be disbursed unless the proper rent rolls have been met and that money not be disbursed unless the construction is completed in accordance with the blueprints. I am sure that those of you who are more directly involved in closings than I am can think of those types of instructions which, for a third party to guarantee compliance with, is beyond the pale of a closing protection letter.

We thought that the title insurance industry should be involved in closings to the extent that it relates to what our policy relates to, *i.e.,* the status of title, or the validity and enforceability and priority of the lien of the mortgage. This includes, as it says, however, the disbursement of funds and the obtaining of documents necessary to establish the status of title or lien. While the first part of it certainly covers those kinds of instructions, we thought that we should make it clear to the addressee that those two most important areas of his instructions are covered: To the extent that his instructions, relating to the disbursement of the money and the obtaining and recording of documents, affects the status of the title or the lien.

Now there are, of course, other documents that a lender or a purchaser must have. While those documents may not affect the lien and the status of title, we felt that, to the extent that an attorney or a closer was required to obtain those documents, we should furnish coverage. But we did not think we should be responsible for the attorney or agent to properly determine the validity and enforceability of those documents, because then we are getting into guaranteeing the proper practices of law. These documents are legal documents and for us to guarantee that they will be effective, for example, to prevent mechanic's liens from being filed, that they are effective to satisfy the insurance laws or the lending laws of a particular state, this was in fact a determination that was beyond the scope of our indemnity letter.

So, while we are saying that if you require that a termite inspection be obtained, that the agent will get a termite inspection and that it will be a document which will be executed and will say that it is a termite inspection. Whether the document is legal and binding on the termite company is not insured. To do so would have us insure that the termite contract is binding on the termite company. So we are saying that he will get the document, but we will not insure its validity and effectiveness and enforceability.

The collection and payment of funds to you are covered. We had covered disbursements under Paragraph A. That is usually the disbursement of the lender's or the purchaser's money, but we have not covered the collection of other people's money, and the turning over of that money to the lender. And so under Paragraph C we are guaranteeing instructions which tell the closer to collect money for the lender and pay it over to him.

The next item is a consumer-oriented statement. We felt that the home owner is not aware of closing protection letters and he does not write in and get them. So we thought it was proper for the title insurance company to say to the lender, "If we had issued you a letter and you are covered under this letter and if your borrower is getting an owner's policy, then he will be covered, whether the letter is addressed to him or not." You will notice that it says, "If you are a lender protected under the foregoing paragraph, your borrower will be protected as if this letter were addressed to him." Therefore, the coverage that he obtains is the same as if this form or letter had his name up here on the address, and the first sentence requires that title insurance of blank company be specified for your protection. So, if the borrower on a one- to four-family home is getting an owner's policy, and his lender has this letter, then he will be protected to the same extent as if he had the letter.

Some of the conditions and exclusions are familiar, because they were in most of the letters issued by the member companies, such as failure of the approved attorney (this applies only to the approved attorney) to comply with closing instructions which require title insurance inconsistent with the binder. We have talked about this quite a bit. The approved attorney is not trained to decide what a title insurance company can insure or cannot insure against. Without this exception, a lender or a purchaser or a lessee could say to the approved attorney, "Don't disburse unless you can get a title insurance policy insuring against mechanic's liens or unpaid taxes." The approved attorney could close the transaction without getting an interim binder and then the title insurance company would have to insure against those matters. What we are saying here is that when you send instructions to an approved attorney, an interim title insurance binder should be issued, and those instructions for title insurance coverage must not be inconsistent with what the binder shows. This allows the agent or the

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ALTA Closing Protection Letter

BLANK TITLE INSURANCE COMPANY

Name and Address of Addressee

Date:

Re: Closing Protection Letter

Dear

When title insurance of Blank Title Insurance Company is specified for your protection in connection with closings of real estate transactions in which you are to be the lessee or purchaser of an interest in land or a lender secured by a mortgage (including any other security instrument) of an interest in land, the Company, subject to the Conditions and Exclusions set forth below, hereby agrees to reimburse you for actual loss incurred by you in connection with such closings when conducted by an Issuing Agent (an agent authorized to issue title insurance for the Company) or an Approved Attorney (an attorney upon whose certification of title the Company issues title insurance) and when such loss arises out of:

1. Failure of the Issuing Agent or Approved Attorney to comply with your written closing instructions to the extent that they relate to (a) the status of the title to said interest in land or the validity, enforceability and priority of the lien of said mortgage on said interest in land, including the obtaining of documents and the disbursement of funds necessary to establish such status of title or lien, or (b) the obtaining of any other document, specifically required by you, but not to the extent that said instructions require a determination of the validity, enforceability or effectiveness of such other document, or (c) the collection and payment of funds due you, or

2. Fraud or dishonesty of the Issuing Agent or Approved Attorney in handling your funds or documents in connection with such closing.

If you are a lender protected under the foregoing paragraph, your borrower in connection with a loan secured by a mortgage on a one to four family dwelling shall be protected as if this letter were addressed to your borrower.

Conditions and Exclusions

A. The Company will not be liable to you for loss arising out of:

1. Failure of the Approved Attorney to comply with your closing instructions which require title insurance protection inconsistent with that set forth in the title insurance binder or commitment issued by the Company. Instructions which require the removal of specific exceptions to title or compliance with the requirements contained in said binder or commitment shall not be deemed to be inconsistent.

2. Loss or impairment of your funds in the course of collection or while on deposit with a bank due to bank failure, insolvency or suspension, except such as shall result from failure of the Issuing Agent or the Approved Attorney to comply with your written closing instructions to deposit the funds in a bank which you designated by name.

3. Mechanics' and materialmen's liens in connection with your purchase or lease or construction loan transactions, except to the extent that protection against such liens is afforded by a title insurance binder, commitment or policy of the Company

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ALTA Closing Protection Letter

B. If the closing is to be conducted by an Approved Attorney, a title insurance binder or commitment for the issuance of a policy of title insurance of the Company must have been received by you prior to the transmission of your final closing instructions to the Approved Attorney.

C. When the Company shall have reimbursed you pursuant to this letter, it shall be subrogated to all rights and remedies which you would have had against any person or property had you not been so reimbursed. Liability of the Company for such reimbursement shall be reduced to the extent that you have knowingly and voluntarily impaired the value of such right of subrogation.

D. Any liability of the Company for loss incurred by you in connection with closings of real estate transactions by an Issuing Agent or Approved Attorney shall be limited to the protection provided by this letter. However, this letter shall not affect the protection afforded by a title insurance binder, commitment or policy of the Company.

E. Claims shall be made promptly to the Company at its principal office at _____. When the failure to give prompt notice shall prejudice the Company, then liability of the Company hereunder shall be reduced to the extent of such prejudice.

F. The protection herein offered does not extend to real property transactions in the State of Texas. An Insured Closing Service Letter has been promulgated under the law of the State of Texas.

The protection herein offered will be effective upon receipt by the Company of your acceptance in writing, which may be made on the enclosed copy hereof and will continue until cancelled by written notice from the Company.

Any previous insured closing service letter or similar agreement is hereby cancelled except as to closings of your real estate transactions regarding which you have previously sent or within 30 days hereafter send written closing instructions to the Issuing Agent or Approved Attorney.

Blank Title Insurance Company

By_____

_____
(Title)

Accepted:_____19___

_____

By:_____
(Title)

(The name of a particular issuing agent or approved attorney may be inserted in lieu of references to Issuing Agent or Approved Attorney contained in this letter and the words "Underwritten Title Company" may be inserted in lieu of Issuing Agent)

ALTA Closing Protection Letter 197__

Forms—*(continued)*

branch office of the title company to issue the binder, place it in the hands of the attorney, and he is then in a position to look at our binder, to look at the instructions of the lender, and then to close and get that kind of title insurance protection.

We have made it clear, however, that if the binder shows an exception or the binder has a requirement in it with instructions from the lender to get out that exception, or comply with that requirement, are not inconsistent instructions. This places the title company in a position of saying that it will make requirements and we will make exceptions, and we will guarantee that the attorney and agent will comply with them, which is pretty good protection, I think, for our customers.

Item 2 is self-explanatory. That has been in most of the letters. As long as the attorney or agent complies with instructions to put the money in X Bank, we will not be responsible if the bank goes down the drain. If he does not comply with the instructions to put it in X Bank, and puts it in Y Bank, and Y Bank goes insolvent, then this letter would be applicable.

An exception to mechanic's liens was added by a number of the companies some time ago and we have inserted it in this letter. The basis of that is that instructions from a lender to an agent or an attorney not to close unless we have priority over mechanic's liens is a situation that we did not feel should come under the closing protection letter, but should come under interim binder and policy coverage, carefully worded and thought out by the company who issues it. It is simply a matter that is too complicated and technical and a high degree of risk to be undertaken under a closing protection letter.

Item B on Page 2 goes along with A-1, which says that where an approved attorney only is closing, before you transmit your final closing instructions and say to that attorney to disburse the money, you should have an interim binder in hand so that you can see what the requirements and exceptions are and can tell the attorney which ones you, as lender, can live with and must have taken out. And, as I said before, once you make that requirement regarding requirements or exceptions, this letter in effect says that an approved attorney will comply with those requirements.

The subrogation section says that when we have reimbursed you for your loss, whatever rights you may have against someone else we would like to have them and before you, Mr. Lender, or purchaser voluntarily give up any rights because you have this letter, you had better check with us first.

Under Item D, we have indicated that this letter is our responsibility in black and white without any ifs, ands or buts, and this is the coverage that we want to give you and when problems in closing arise, this letter will control.

Under E, we indicate where the notice of claim should be sent and you will notice that we don't have any time period involved in which to file the claim.

Under F, we indicate that Texas has a closing protection letter and you should be aware that only that letter may be used in connection with Texas real estate transactions. Therefore, the two letters should complement each other. In a Texas transaction, the Texas letter controls. If it is not a Texas transaction, if it is somewhere else, this letter will control.

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Reinsurance Committee Report

Chris G. Papazickos, Chairman, ALTA Committee on Reinsurance
Vice President and General Counsel, American Title Insurance Company, Miami, Florida

Before giving a report as to the current activities of the ALTA Committee on Reinsurance, perhaps it would be helpful to the members of this section if they were apprised of the formation of the committee, and, briefly, of the background for the necessity of this particular committee.

While I was preparing this report, my curiosity was aroused as to the origins of reinsurance, and soon I found myself doing some historical research. Permit me, therefore, to digress for just a moment and let me share with you a few informational facts that I found fascinating, and which may be of some interest to you.

We are all aware that title insurance is a unique American phenomenon of relatively recent origin. However, unlike title insurance, general reinsurance itself is probably as old as the early forms of basic casualty insurance coverage.

Although it differed from our more modern approach, such general risk-sharing (or reinsurance, as we know it today) conceivably was used literally centuries ago in Europe and naturally grew out of usual insurance lines. Indeed, there is some evidence to support the proposition that a variation of reinsurance concepts was being utilized by the early seafaring Greeks when they adopted the practice of requiring "respondentia bonds" on the hull or cargo of vessels. Quite probably, therefore, with this beginning, it is not surprising to learn that the need for any reinsurance at all was most likely first felt in the field of marine insurance where risks were heavy and a catastrophe often produced total losses.

As this theory developed over the years, history tells us that a marine risk evidently was reinsured in Genoa as early as 1347; that definitive reinsurance contracts first appeared in 1720 around Rotterdam; that the first independent reinsurance company was chartered in 1852 in Cologne; and, that one of the earliest American fire reinsurance treaties was arranged in 1866.

As increased trade and commerce among the nations of the world expanded the need for basic insurance protection, so, too, did such trade enlarge the scope of reinsurance. Gradually, customs and usages became more formal, and there soon evolved basic procedures culminating into usable treaties and specific facultative agreements. Soon, as a matter of course, a body of law developed which to some extent tried to deal with the problems necessarily inherent in reinsurance as an adjunct to traditional forms of marine, fire and casualty insurance. There have been attempts on a case basis to consider the construction of reinsurance agreements, to establish the liabilities and obligations of the parties thereunder; and to protect the rights of the original policyholders. At least we can conclude that reinsurance, in the strict sense of the word, may be defined as a contract whereby one party, the reinsurer, agrees to indemnify another, the reinsured, either in whole or in part, against loss or liability which the latter may sustain or incur under a separate and original policy of insurance with a third party, the original insured.

Well, enough of the history for general reinsurance. Turning now to reinsurance in the title industry, I suppose we should first ask ourselves—what has history taught us? Can this concept of risk-sharing be adapted to title insurance policies? Under what conditions can it be applied to our needs?

Certainly, with the advent of title insurance, sound business judgment would naturally call for the use of reinsurance as another way to provide increased protection to our policyholders. Accordingly, in earlier years, efforts were made to adopt reinsurance features for title insurance transactions. Thus, a form of facultative agreement was devised by the ALTA in 1961; companies prepared various forms of contemporaneous coinsurance clauses; and, a hybrid form of coverage between reinsurance and coinsurance, known as the direct access agreement, has seen limited use.

And yet, we may well wonder whether the concepts of ancient reinsurance are readily applicable to our policies, if for no other reason than the fact that title insurance differs radically from other insurance lines. In our field, we require the basic title search and examination; we must at times make title continuations; and, we cover the assignment of mortgage liens from an interim lender to a permanent investor. In this context, we perhaps have not been able to grasp fully the impact of reinsurance liability between companies. For, as Oliver Wendell Holmes once said—the best part of man's knowledge is that which teaches us where knowledge leaves off and ignorance begins—and I would like to think that we have that better part of knowledge.

In any event, for these reasons ALTA was requested by several of its members to consider the possibility of sponsoring an educational conference for the benefit of the reinsurance administrators of all ALTA title insurance underwriters, and there to discuss matters of common concern or interest in the operation of reinsurance. Responding to that request, ALTA arranged a meeting that was held in Denver this past August, attended by representatives from over 30 title underwriters. During the course of that two-day seminar, where ideas were actively exchanged, it became apparent that continuing dialogue among all companies was essential, not merely to understand the administrative and mechanical procedures of reinsurance or coinsurance, but also to consider the fundamental philosophy encompassed by this form of risk-sharing and risk-assumption.

Buoyed by the success of the meeting and recognizing the obvious need for continuing the educational work in such a complex field, ALTA has decided to form a Committee on Reinsurance to carry out this ongoing task, and has seen fit to appoint me as chairman of the group.

Since production of any meaningful work for the Committee could really result only from the conscientious efforts of smaller groups, it was decided for the moment that our primary attention be concentrated on six specific subjects handled by subcommittees. To

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Reinsurance—*(concluded)*

that end the following tasks have been assigned to separate subcommittees:

- To survey and keep updated applicable statutory requirements on reinsurance mandated by the several states
- To explore the retention capacity of the entire title insurance industry and review the practice of layering risks
- To consider the feasibility of a check list for extra hazardous risks, and to discuss the duty of disclosure for specific unusual risks
- To analyze the potential problem of possible catastrophic loss to an underwriter arising from a single risk or the issuance of multi-policies based upon a single chain of title
- To review the obligations incurred by coinsurers and the effect of a so-called "lead company"
- To research the actual liabilities assumed by reinsurers upon the execution of a facultative agreement, and, if possible, to determine the scope of that liability

It is anticipated that these subcommittees will be ready to report to the full committee at another reinsurance conference to be convened within the next six or eight months.

It has been my privilege to present this report, and thank you for your attention.

Antitrust—*(concluded)*

the Justice Department would believe to be anticompetitive. The Antitrust Division of the Justice Department in recent years has made very vigorous efforts to voice concerns about certain of the regulatory activity of other agencies of government. If you want to keep your antitrust house clean, I don't think that you can always rest in complete comfort that what you are doing is free from an antitrust problem simply because it is done within the regulatory context of a governmental agency, whether federal or state.

Question: Would you comment on the recent Virginia case?[22]

Christie: Is there a particular aspect of it that you are interested in?

Question: I thought perhaps you might just generally comment inasmuch as it involves antitrust law and the title industry.

Christie: I personally am critical of the organized Bar's efforts to extend the concept of "unauthorized practice" into what I would consider to be, in many respects, the heart of what this industry is all about. I believe the court was correct in holding that those efforts were essentially anticompetitive and without necessarily improving the services rendered to the consuming public.

Forms—*(concluded)*

Then there is set forth a method by which the letter becomes effective and the last paragraph allows a company to substitute this letter for the presently existing letter. There is a place for the addressee to accept the letter and then an indication that if you want to write it for one attorney or one agent or want to change your designation, like in California, to refer to the underwritten company, instead of the issuing agent, you may make those changes in the letter and it will still be the ALTA Closing Protection Letter.

[22] *Surety Title Insurance Agency v. Virginia State Bar*, 431 F. Supp. 298 (D.C. Va. 1977)

Railroad Claim Problems

Sweat

Lynch

Burek

Railroad claim panel participants were Ray E. Sweat, James J.D. Lynch Jr. and Anthony S. Burek. Sweat, senior vice president and senior title counsel for Pioneer National Title Insurance Co., Los Angeles, chairs the ALTA Special Committee on Railroad Titles. Lynch is a member of that committee and is assistant counsel for Commonwealth Land Title Insurance Co., Philadelphia. Burek is assistant general counsel, Chicago Title Insurance Co., Chicago.

Sweat: In Seattle, Mac McConville, our president-elect, asked me to get some people together who could take a look at railroad-related title problems. I talked to John Connelly of Minnesota Title, John Goode of Lawyers, Vic Krauchunas and Bob Haines of Chicago Title, as to what they saw as problems and also for recommendations of people to serve on this committee.

I had no problem arriving at Jim Lynch as a good candidate for this committee, because he has been living with the Penn Central from the very beginning. John Goode recommended Dwight Shipley, Ohio state counsel for Lawyers Title in Columbus. Dwight unfortunately could not make this convention, and will not appear today on our panel. I wish that he could have been here because he had a problem that would bring tears to a grown man's eye. He had an order for a $500 policy. The description was horrendous, with a right-of-way station number as a reference. He had a railroad valuation map point as a reference in his description, and he had a lateral cut, identified as line code 3633-248.3, which is not too meaningful as far as title people are concerned. I believe that you would hear more about those problems which go largely to descriptions.

Before we have a railroad-related title problem, we must have some interest in the railroad. So we have to look pretty closely at the grant to the railroad. It can be an easement for right-of-way. It can be a determinable fee, for so long as, or on condition that, the property is used for railroad purposes. It could be a fee simple. A fee simple, of course, will carry the entire title including the minerals in the right-of-way.

Most deeds are interpreted against the grantor, but that may not be always true, as far as railroads, public utilities and other grantees, who have their own forms, and send out their own agents to procure grants are concerned. If we have time, we will go back and take a look at a Pennsylvania case which goes into whether a fee was granted or something less.

At this time, I would like to introduce to you the committee members who are here today, and who will be speaking to you on the problems relative to railroads as they relate to our industry.

On my left is James J.D. Lynch Jr. Jim is a Philadelphia lawyer. After some three years in private practice, he joined Commonwealth's home office in Philadelphia, and serves as assistant counsel. He will speak to you first and will concentrate largely on Penn Central problems.

On my right is Anthony S. Burek. He is not a Philadelphia lawyer; he is a Chicago lawyer. Tony has worked for Chicago Title for 25 years, and now serves as assistant general counsel.

Jim, would you tell us about the railroad problems that you have observed over the past seven years or so in the Penn Central case?

Lynch: June 21, 1970 was a Sunday, and perhaps a very memorable day, for around 2 p.m. the Penn Central Transportation Co. went, hat in hand, to one of the federal judges in Philadelphia, and filed a formal petition for its reorganization under Section 77 of the Bankruptcy Act.

This was a rather unusual thing to occur on a non-business day, but the railroad at the time knew that it was up against the wall. Now with the fall of the Penn Central, and subsequent other Northeastern railroads, the nation entered its third historic railroad reorganization period. The first was in the last three decades of the 19th Century and, of course, the other was during the depression of the 1930's.

The railroad reorganization procedure is Section 77 of the Federal Bankruptcy Act, and that particular section deals, for the most part, with the concept of determining whether or not a railroad can be reorganized within the terms of the act while continuing to operate and dealing with its property and other assets, creditors, liabilities and stockholders during that period.

On behalf of our company, I was assigned the task of monitoring the Penn Central bankruptcy as soon as it occurred. I have been living with it ever since. What makes most people shudder or tend to shy away from a bankruptcy and, of course, when you mention railroad reorganization they tend to back even farther away, is the complexity of the law, issues and interests involved. I sort of felt the same way initially, but I had one good thing running in my favor. I understood the history and operations of the Penn Central, since I am a ferroequinologist (rail fan) as an avocation. So that was a plus asset. All I had to do was to brush up on Section 77.

Section 77 was, shall we say, very idealistic. There are a lot of things that occurred in the Penn Central bankruptcy that had no really specific basis in the Bankruptcy Act. We had to live with some interesting as well as innovative concepts.

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Railroad Claims—*(continued)*

As you all know, the Pennsylvania Railroad prior to its merger in February 1968 was the largest private land holder, outside of the federal and state government in this country. With the merger of the New York Central, they became an even larger corporate land holder. Both railroads for many years, had been selling off parcels of land to generate cash to cover their railroad operating losses, and of course, this is one of the things the railroad continued to do after the filing for reorganization in 1970.

Needless to say, with Penn Central and our company both headquartered in Philadelphia, we developed a rather interesting working relationship. If I had a problem in trying to understand a specific aspect of the reorganization section of the Bankruptcy Act, or if the railroad had a particular problem of "how to go about making a matter insurable," we would think nothing of picking up the phone and talking to each other.

The railroad approached us regarding how we would feel about the possibility of handling or making insurable hundreds of small parcels of real estate, where the consideration was less than $100,000. This gave rise to the famous "blanket order" to sell free and clear of all liens and encumbrances, parcels not needed in railroad operations for sums less than $100,000 per transaction. There is nothing in the Bankruptcy Act to permit such a blanket order but there was precedence. The New Haven Railroad had gone into bankruptcy many years before the Penn Central. They also had multi-parcel holdings in the various states in which they operated and the counsel to the New Haven at that time was a rather ingenious attorney. He devised the concept of a "blanket order" permitting the railroad to sell without having to go to court each time to seek permission for the sale.

Penn Central of course, came up with their famous Order 78, which was adopted from the New Haven "blanket order." However, when we first reviewed Order 78, we ran into some serious constitutional problems.

In order to sell free and clear of encumbrances and other interests, due process has to be observed. Notice has to be given to various persons who are entitled to notices as a matter of constitutional right and also as a matter under the particular Section 77(0). Initially, Order 78 had already provided for notice to mortgagees and certain tax authorities but made no provision for notice to judgment or lien creditors and others who were entitled to notice under the act. Consequently, yours truly, decided to talk to Judge Fullam to point out the fact that Order 78 was constitutionally defective. Judge Fullam agreed that there were some very serious problems with it and in talking to the railroad, we came up with an amendment to Order 78 which became known as Order 602 which took care of the problem regarding those tax authorities which had not been given notice of any judgment lien creditors where a parcel was being sold subsequently on which there were judgment liens.

In Order 602 there is a provision whereby the railroad will give notice within 21 days prior to the sale. The judgment lien creditors have 14 days in which to respond and if they would file objections to the sale the sale would be held up pending a further hearing by the court to determine the validity or the effect of that objection.

Order 602 was recently amended in June of this year to raise the ceiling per transaction from $100,000 to $300,000. This particular order has been adopted and modified in subsequent bankruptcy procedures of certain other insolvent Northeastern railroads, such as Reading Co., Lehigh Valley.

Now in those situations where the consideration was in excess of $100,000 or where the railroad property was being used as an operating property, then a special petition to the court to sell free and clear was necessary, and of course this required that notice. Therefore a title search had to be made to disclose all liens and encumbrances with notice being given to the holders of those liens or encumbrances or other persons having a direct interest in the property, before the court could authorize a sale free and clear.

The proceeds of course were paid over to the hands of certain trustees or put into special bank accounts pending a further determination by the court as to their respective interests on the funds. In other words, the liens were transferred from the real property to the proceeds.

As you know, the Penn Central, like most railroads, has a very complex corporate family relationship. Penn Central has many rail subsidiaries which were more or less dependent upon the revenues generated by the Penn Central as lessee under long term recorded and unrecorded leases. In the summer of 1972, 15 more or less wholly owned subsidiaries of Penn Central filed for bankruptcy and protection under Section 77. These were the so-called "secondary debtors" or the so-called "leased lines." There were other Penn Central leased lines who did not file. I could never really understand why because some of the leased lines were in relatively bad shape but nevertheless, they did not seek protection of the Bankruptcy Act.

Now a similar "blanket order" to sell under $100,000 was adopted for each of the "secondary debtors" and those particular orders were more or less exact duplicates of the orders of the Penn Central. Again during the summer of this year the blanket amounts were raised from $100,000 to $300,000 on the secondary debtors.

A more serious problem occurred in situations where non-bankrupt affiliates of Penn Central hold title to property and were attempting to sell it but which was leased to either the Penn Central or one of the bankrupt secondary debtors. This brought into question whether the reorganization court in Philadelphia had jurisdiction to authorize the sale of the non-bankrupt's interest free and clear of any liens and encumbrances against the property. The specific problem giving rise to litigation seems to have been real estate taxes. If the non-bankrupt had been paying its taxes right along and there were a few of them, it would really have been no problem. The problem occurred where the non-bankrupt taxes had not been paid by the lessee, Penn Central.

This problem of course, has been raised in a number of reported court cases. I might call your attention to one that was reported in 1976 in 413 Federal Supplement, page 99 in "re Sale of leasehold interest to A and G Plastics Corporation" in New York. There the court considered the problem of whether or not it ought to rule on the issue of jurisdiction over a non-bankrupt subsidiary or affiliate line of Penn Central, then declined to specifically rule on the issue because the court did not want to set precedent in future transactions. Rather, the court exercised its equitable powers to protect the bankrupt estate of the Penn Central by authorizing that the sale be made free and clear of the non-bankrupt tax liability, but then, in order to cover its tracks, the court authorized the Penn Central to go back and seek out a tax compromise from the city of New York and to pay the taxes out of the proceeds.

Of course, by this time Conrail had come into the picture and Tony Burek will cover that problem in a few minutes. After Penn Central went under, there was a domino effect in the Northeast. The Reading Co. filed for bankruptcy in Philadelphia as well as the Lehigh Valley Railroad. The Erie Lackawanna filed in Cleveland; the Jersey Central had already been in reorganization prior to the Penn Central bankruptcy.

The other bankrupt railroads, of course, had land holdings not as extensive by any means compared to that of the Penn Central, but they also wanted to sell off properties to generate revenues to continue operating and financing their rail operations. The Reading Co. adopted a similar order to that of Penn Central but the ceilings for sales free and clear were under $50,000, and a $35,000 limit was adopted by the Lehigh Valley.

We ran into a problem with the blanket order in the Central Railroad of New Jersey which was a $10,000 limit. We found out that there was no provision for notifying or providing for notice to subsequent lien orders or encumbrance orders who acquired their interest after the issuance of that blanket order. Consequently, we felt that as an insurer, that particular order was constitutionally defective and recommended to the Central Railroad of New Jersey Trustee Counsel that the order ought to be modified along similar lines to that of Penn Central in order to correct the constitutional difficulties. To my knowledge that has not been done.

Now most of the bankrupt railroads are no longer in the railroad business but are in the process of winding up their affairs under various plans of reorganization that have been filed, none of which has really been approved due to the fact that many objections have been filed by interested parties. One of the recurring problems that we have experienced in railroad reorganization in the selling of real property, interest free and clear of liens, is the problem of real estate taxes. Many of the taxing authorities have been very obstinate and have caused a lot of problems to the railroads notwithstanding court orders to sell free of all liens regarding the problem of delinquent taxes as reflected on the tax assessment records or the tax records of the particular municipality. In fact, for a time in the state of Ohio, some of the local recorders refused to accept deeds for recording until the delinquent taxes were paid.

This did present a problem for the railroads and in fact, the Penn Central was about ready to take one of the taxing recorders, and tax auditors of a rather large Ohio city

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"The description was horrendous, with a right-of-way station number as a reference. He had a railroad valuation map point as a reference in his description, and he had a lateral cut, identified as line code 3633-248.3, which is not too meaningful as far as title people are concerned."—Sweat

Railroad Claims—*(continued)*
into court to convince them the only way to abide by the court order to sell free and clear, was to accept the deed for recording and not to harass the railroad or the purchaser of the railroad. That particular matter was settled amicably and now that the proposed settlement of delinquent taxes and tax claims is in the offing, it is hoped that within the next year or two many of these delinquent taxes will be paid and the records will reflect that the liens have been extinquished.

Mr. Chairman, these are basically the problems that we have seen with pre-Conrail matters involving railroads, reorganization and real estate problems.

Sweat: Thank you, Jim. Tony, will you now tell us about the attempts that Congress has made to help out by various acts?

Burek: As Jim pointed out, the Penn Central has been before the bankruptcy court for over seven years. Other railroads servicing the Northeastern and Midwestern sections of the U.S. are also insolvent and before the bankruptcy courts. It appeared that the railroads could not formulate an acceptable plan of reorganization, and the government was concerned that this region would be threatened with cessation of rail service. Therefore the Regional Rail Reorganization Act of 1973 was enacted, with the intent to reorganize the railroads in this region, to an economically viable system, capable of providing adequate and efficient rail service to the region.

The act established and incorporated a nonprofit association, known as the United States Railroad Association, which is a government corporation of the District of Columbia. The primary function of the association is to engage in the preparation and implementation of the Final System Plan, issue obligations and make loans, and provide assistance to states and local and/or regional transportation authorities.

The Regional Rail Reorganization Act provides that the Final System Plan shall formulate a plan for the creation through a process of reorganization of a financially self-sustaining rail system in the region, and for the acquisition of properties by the National Railroad Passenger Corp., commonly known as Amtrak, to improve high speed passenger service within the Northeast corridor, meaning service primarily between Boston and Washington, D.C.

Pursuant to the act, the United States Railroad Association made an exhaustive study of the rail service in the region, and prepared a plan of reorganization for the restructure, rehabilitation and modernization of railroads in reorganization. The plan, identified as the Final System Plan, was approved by Congress, and was certified to the special court created under the act.

The special court sits in Washington, D.C., and is composed of three federal judges. The court is authorized to exercise the powers of a district judge in any judicial district, and such powers include those for reorganization courts. On March 25, 1976, the special court, pursuant to the plan and the act, ordered the conveyance of rail properties to the Consolidated Rail Corp., commonly known as Conrail. Said conveyance was effective as of April 1, 1976.

"Rail properties," as defined under the act, means "assets or rights, owned, leased, or otherwise controlled by a railroad or a person, (which is the term used in the act to denote railroad or other entity) leased, or otherwise controlled by a railroad, which are used or useful in rail transportation service." The plan provided for transfer of all interest that the transferor may have in specific property, and also for the transfer of options to acquire rail property; transitional leases, meaning a railroad in reorganization leases to Conrail for a term, not exceeding two years, those premises occupied by personnel, or properties being transferred to Conrail; operating rights, which are rights to conduct operations over a line of railroad being conveyed to it, to a third party; and rolling stock equipment, and administrative assets.

The plan designated the rail properties of the railroads in reorganizations which were to be conveyed to Conrail or other transferees, such as a profitable railroad, or a state, or a regional transportation authority, and also designated which of the conveyed rail properties were to be purchased, leased or otherwise acquired from Conrail by Amtrak. Those properties designated for Amtrak have apparently been deeded to them by Conrail, although such conveyances are not of record.

After conveyance, the special court was to decide whether the conveyances were in the public interest, and were fair and equitable. This question is still before the court.

That act also established the Consolidated Railroad Corp., commonly known as Conrail, which is intended to be a for-profit corporation, created under the laws of a state, and not an agency or instrumentality of the federal government. Conrail is a corporation of the Commonwealth of Pennsylvania. No provision of the Regional Rail Reorganization Act gives Conrail any special authority to transfer rail property. Transfers, therefore, would be permitted only in the same manner and subject to the same procedures and conditions that transfers of property by railroads customarily require. The act provides that Conrail shall have all the powers conferred upon it, under the laws of the state or states in which it is incorporated, and the powers of a railroad in any state in which it operates. The act specifically provides that Conrail shall be deemed a common carrier by railroad under Section 1.3 of the Interstate Commerce Act, and shall be subject to the provisions of the Regional Rail Reorganization Act, and to the extent not inconsistent with such acts, shall be subject to applicable state law.

Conrail's articles of incorporation state that the purpose of the corporation is to engage, and do any lawful act, for which corporations may be incorporated under the Pennsylvania Business Corporation Law. However, so long as 50 per cent or more (as determined by the secretary of the treasury) of the outstanding indebtedness of the corporation, consists of obligations of the United States Railway Association, or other debts owed to or guaranteed by the U.S., the corporation shall not engage in activities which are not related to transportation. Conrail is authorized to issue stock and other securities in order to carry out the Final System Plan.

The act also makes provision for the secretary of transportation to provide financial assistance to a state, or a local or regional transportation authority for the purpose of rail service continuation subsidies. It sets forth lengthy and specific provisions for protection of railroad employees who may be affected by the act. It specifically states that the provisions of the Interstate Commerce Act and the Bankruptcy Act are inapplicable to transactions under this act, to the extent necessary to formulate and implement the Final System Plan, whenever a provision of any such act is not consistent with this act.

"The specific problem giving rise to litigation seems to have been real estate taxes. If the non-bankrupt had been paying its taxes right along and there were a few of them, it would really have been no problem."
—Lynch

An amendment to the act, effective Feb. 28, 1975, is of some interest. It provides that, notwithstanding any other provisions of law, no railroad in reorganization shall withhold from any state or any political subdivision thereof, the payment of the portion of any tax, owed by such railroad in such state or subdivision, which portion has been collected by such railroad from any tenant thereof. The provision was construed under the matter of Penn Central Transportation Co., 402 Federal Supplement 106, and the matter of Penn Central Transportation Co. in resale of the Waldorf Astoria Hotel, 430 Federal Supplement 467, that prohibiting a railroad in reorganization from withholding from any state, or political subdivision, payment of a portion of any taxes collected by such railroad from any tenant, was intended to apply only in amounts collected by trustees from tenants after enactment of this section, and not to sums theretofore collected.

A new act, the Railroad Revitalization and Regulatory Reform Act of 1976, commonly known as the 4R Act, was enacted to improve the quality of rail service in the U.S., through regulatory reform, coordination of rail services and facilities and rehabilitation and improvement financing.

The 4R Act amends the Interstate Commerce Act in several respects, one of which is to create a new independent office affiliated with the commission to be known as the Office of Rail Public Counsel. The office is administered by a director, who is appointed by the president, by and with the advice of the Senate. The responsibility of the Office of Rail Public Counsel is to have standing to become a party to any proceeding before the commission which involves a common carrier by railroad. The act also provides that the Interstate Commerce Commission modernize and revise the Interstate Commerce Act, and submit to Congress prior to Feb. 5, 1978, a final draft designed to simplify the present law, and to harmonize regulations among the several modes of transportation subject to regulations under the Interstate Commerce Act.

Of specific interest to title insurers is that the 4R Act also implemented the Final System by adding a provision that all transfers or conveyances of rail property, made under the Regional Rail Reorganization Act, shall be exempt from any taxes, imposts or levies, now or hereafter imposed by the U.S. or by any state, or by any political subdivision of a state, on or in connection with such transfers or conveyances, or on the recording of any such transfers or conveyances whether imposed on the transferor or the transferee. Such transferors or transferees shall be entitled to record any deed upon payment of any appropriate and generally applicable charges to compensate for the cost of the service performed, and also provides that the

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Railroads—*(continued)*

Conrail deeds may be executed on behalf of the trustees, by the person authorized to perform such acts, on behalf of the trustees by the district court of the U.S. having jurisdiction of the reorganization. Such instruments shall have the same legal effect as they would have had if the trustees had themselves executed such instruments.

Another new act, the Rail Transportation Improvement Act, became effective Oct. 19, 1976. The act amends the Rail Passenger Service Act to provide financing for Amtrak, and amends the Regional Rail Reorganization Act of 1973 to increase the amount of loan authority under such act, and made further amendments to the Interstate Commerce Act relating to discontinuance and abandonment of rail services.

This concludes a very brief, general review of the Regional Rail Reorganization Act, the 4R Act and the Rail Transportation Improvement Act. As you may have surmised, the acts are extremely detailed and complex, and therefore examination of railroad titles affected by the acts is no simple matter.

Insuring title to property being conveyed by a grantor, subject to the Regional Rail Reorganization Act, requires that it be determined that the property has not been conveyed, pursuant to the Final System Plan, to Conrail or other transferees. Therefore, the unrecorded deed to Conrail must be examined. I do not believe that anyone would deny that it would be difficult to prevail in an argument that the unrecorded Conrail deeds were not notice to third parties.

The Conrail deed, executed pursuant to the special court order, is standard in form, conveying all of the grantor's right, title and interest in real property located in a specified town or county, as described in an Exhibit A, (except for property, excepted and reserved as described in an Exhibit B) together with general utility and access easements over the property accepted and reserved for the benefit of the property conveyed. The deed provides for a release of easements not used or reasonably needed by the grantee, or for relocation at the grantor's expense. Reciprocal easements and rights are reserved in favor of the grantor over the property conveyed for the benefit of the reserved parcels. A typical legal description reads as follows: All of the grantor's right, title and interest, legal and equitable in and to the real property located in the county of La Salle, state of Illinois, as described in Exhibit A. The Exhibit A description conveys the Penn Central Transportation Co. line of railroad, known as the Kankakee Branch, and being all the real property in the county, lying in, under, above, along, adjacent to or connecting to such line. Such line enters the county near Streeter, passes through Vulcan, and leaves the county near Priscilla. This is the legal description of the property being conveyed to Conrail. This description alone, of course, is totally indefinite, but when read together with the descriptions set forth in Exhibit B of the deed, which are the properties excepted and reserved from the conveyance, you can generally arrive at a description of the property intended to be conveyed.

The Exhibit B description is more definitely described, for instance: "All that parcel of land situated in the town of Streeter, county of La Salle, being designated parcel number so-and-so, and as shown on railroad evaluation map number so-and-so, was revised, and being all of the land of the Penn Central Transportation Co. as shown on the map, which lies southerly of Londe Street, and easterly of the following described line, which line is specifically described." The maps are also certified to the special courts in Washington, and together with the description and the maps, you are generally able to determine the property that has been conveyed. However, if the descriptions continue to be ambiguous and indefinite, the deed provides that the parties agree to execute such documents as may be necessary to confirm or modify a more precisely described property, in order to carry out the intent of the deed, and the Final System Plan, which provision is in compliance with the order of the special court, when ordering the conveyances.

The same order of court also provides that until the conveyance documents to Conrail are of record, the property conveyed or reserved and excepted from the conveyance shall not be transferred, unless the instrument of conveyance provides that the property is subject to any easement, encumbrance, right or benefit that may have been created or recognized in or by such conveyance document. It would appear that the validity of any conveyance that does not comply with such order may be questionable. All the deeds that I have seen complied with this provision.

The same order of court also provides that the conveyance or acceptance by the transferee shall not constitute a waiver of any right that such trustee or transferee may have to object to or challenge the conveyance or the terms and conditions of any such document. The special court ordered July 1, 1977 as the final day to file such challenges with the court. Several such challenges were made, which include allegations that rail properties necessary to implement the Final System Plan have not been conveyed, but have been retained by the railroads. The petitioners asked for a conveyance of such properties.

One additional comment and concern is the fact that the conveyance documents are now being reviewed and descriptions are being revised. Several of the revised descriptions have been recertified to the special court. I am sure that all of us will feel more confident in insuring railroad titles when the Conrail conveyance documents are recorded. But until this is done, I am inclined to say that we are being "railroaded."

Sweat: I think that puts it very well Tony. The problem, of course, is in the description, the fact that the deed to Conrail is not recorded, those descriptions are still being tinkered with, and the fact that the taxing authority will normally tax in the name of the record owner, and the taxing authority has had some problem accepting payment for less than the amount due, and would normally insist that the older taxes be paid before the most recent taxes could be paid. In bankruptcy, the most recent taxes are costs of the administration, and the taxes that accrued prior to the bankruptcy is a secured type of indebtedness.

Some states, such as New York, give the taxing authority some leeway in making adjustments, because of the bankruptcies of the railroads. I believe that some of the other states have similar laws. Jim tells me that Ohio has a similar law.

Our committee has addressed itself principally to the bankruptcy of the Northeast railroads and the description and other problems. We are not unaware that we have other problems. I would like to call to your attention *Leo Sheep Company v. United States*, where the 10th Circuit Court of Appeals reversed the U.S. District Court and held that in grants to Union Pacific Railroad in 1862 odd numbered sections were subject to an implied easement in favor of the retained even numbered sections.

You know that in the 1800's to encourage railroads to build lines to the West they were granted huge tracts of land up to 40 miles, 20 miles on each side of the railroad. These were the odd numbered sections. You get a checkerboard effect. The odd numbered sections would block access to the even numbered sections, retained then by the U.S. Government. In this case in Corbin County, Wyo., still retained by the federal government, the district court held that the federal government had no right to cross this odd numbered section to get to the even numbered section. The problem was to get people to a reservoir on the even numbered section. The U.S. Court of Appeals in the 10th Circuit reversed the district court and said there was an implied easement in the statutory grant by Congress to permit this. Does that cause a problem for the title insurers? Well, it will if you write an extended coverage policy, and you don't have something in Schedule B to take out this implied easement. I looked at our exception, and I remember when I was studying patent exceptions, we have exceptions in patent exceptions in the West. Tom McKnight told me that you not only had to worry about the expressed patents reservations, but also the acts authorizing the patents. And this is what this court said. The court said that the act authorizing this patent or grant to the Union Pacific Railroad implied a right to go across the odd numbered section to get to the even numbered section.

Someone in the audience asked if the reverse were true as to properties retained by the federal government.

Sweat: I believe under the Federal Enclosures Act you do have that right, but the Federal Enclosures Act did not give a right to cross private property. So the court went for the implied easement, and if you had the exception, easements or claims of easement not shown on public records, which is normal under the ALTA, or if you had reserva-

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Washington Report—*(concluded)*

How can you, as an individual, answer this call?

I believe that the best way is to start at the local level—in your own state or regional association.

Serve on a state association committee—hold an association office—support candidates for state office. Thereafter, move on to the national level, by letting ALTA officers know of your willingness to serve on an ALTA committee. Also, remember to support candidates for federal office—your Representatives and Senators—and contribute to TIPAC. Advise ALTA that you would be willing to contact your Representative or Senator. Do your part through local public relations activity to tell your story accurately and often. Keep abreast of title industry issues through ALTA *Capital Comment* and *Title News*.

Major concerns of the title industry in 1977 will carry over into 1978. I am confident that your elected officers will meet them with the same dedication and effectiveness as in 1977. On behalf of your ALTA staff, I wish to express our ongoing commitment to your best interests in 1978.

Railroads—*(concluded)*

tions or exceptions in patents or laws authorizing the issuance thereof, presumably, you would not have a Leo Sheep problem.

We have very little time left, but I did tell you that we would get back to the Pennsylvania case, which tried to determine what was granted in 1902, when for $300 an owner granted a strip four rods wide, over a 90-acre piece of real estate. I guess the simplest thing would be to read very briefly this deed.

"The grantor, for and in consideration of $300 duly paid by the grantee, grantor granted, bargained, sold, released and conveyed unto the grantee, a strip of land four rods in width, and such additional widths that may be needed, for slopes, etc., together with the right to enter upon said land, and layout, construct, maintain and operate a railroad, over and across the lands, belonging to the parties above mentioned, taking and using such earth, stones and gravel as may be needed for grading and filling such road, and hereby fully releasing said railroad from all liability by reason of the location, construction, operation of said railroad. The acknowledgement reads personally appeared before the subscriber, a justice of the peace, the grantors, who in due form of law acknowledge the foregoing *release* to be their act and deed, and the same might be recorded as such."

All right, did that document grant an easement for right-of-way? Is this a determinable fee, or is this a grant in fee simple?

Well, first we have a dissent. It looks to me like two holdings—one, an easement for right-of-way, and another a determinable fee, both in the majority opinion. That was sufficient for this case to resolve the question; who owned the minerals? The grant of right-of-way, an easement for a right-of-way, or a determinable fee, so long as, or on condition that it is used for railroad, would not pass the minerals.

We, in the underwriting operation of our companies, cannot do that. We have to make up our minds. We have to vest an easement, determinable fee, or a fee simple absolute. But courts can have differences of opinion.

Indians—*(concluded)*

the motion.[4] The court held that it had jurisdiction for any negligent act of the United States only where the government owed some duty to the complaining parties whereas here the only duty imposed upon the United States by the Non-Intercourse Act was toward the Indians. Moreover, in Judge Skinner's opinion, the decision by the United States to consent or refuse to consent to the transfer of tribal land as contemplated by the Non-Intercourse Act is an activity which is not reviewable by the federal courts.

If the present and future Indian litigation continues to completion, these issues and others which have received preliminary consideration will receive appellate review, ultimately, by the Supreme Court. Numerous other critical issues remain to be litigated such as: Does the act apply to the Eastern Tribes? Does the act apply to tribes in lands which were settled at the time of its adoption? Did the tribe abandon the land? Did the United States in one form or another approve or acquiesce in the transfers? Was the tribe a tribe at the time of the original transfer? Is the tribe presently constituted so as to properly claim or has it become so assimilated with the rest of the community as to have lost its tribal identity? Did the tribe actually have an interest in the land at the time of the transfer or had it in fact been previously lost or abandoned?

My purpose here is not to suggest to you how these different issues will be resolved or should be resolved if the litigation proceeds its course. What I have hoped to accomplish by this "short course" on Indian claims is to have provided a description of some of the background and present precedent which you will find useful in understanding the nature of these claims as the story of continuing litigation and possible legislative solutions unfolds.

[4] *Mashpee Tribe v. New Seabury Corp.*, Civil Action No. 76-3190-S (D. Mass.) (Memorandum and order dated July 20, 1977)

Election of National Officers

By proper nomination and second, the following officers were unanimously elected for 1977-78:

President—**C.J. McConville,** president, Title Insurance Company of Minnesota, 400 Second Ave. South, Minneapolis, Minn. 55401

President-Elect—**Roger N. Bell,** president, The Security Abstract & Title Co. Inc., 434 N. Main St., Wichita, Kan. 67202

Treasurer—**Fred B. Fromhold,** president and chief executive officer, Commonwealth Land Title Insurance Co., 1510 Walnut St., Philadelphia, Pa. 19102

Chairman, Finance Committee—**Robert C. Dawson,** president, Lawyers Title Insurance Corp., 3800 Cutshaw Ave., Richmond, Va. 23230

Board of Governors (Term expiring 1980)

W.H. Little, president, SAFECO Title Insurance Co., Box 2233, Los Angeles, Calif. 90051.

Francis J. Morrato, senior vice president, New Mexico Title Co., 301 Gold Ave., S.W., Albuquerque, N.M. 87102

Carloss Morris, chairman of the board, Stewart Title Guaranty Co., 2200 West Loop, South, Houston, Texas 77027

David F. Upton, president, Southwestern Michigan Abstract and Title Co., Box 380, St. Joseph, Mich. 49085

Joseph J. Hurley, president, The Title Insurance Corporation of Pennsylvania, 10 South Bryn Mawr, Bryn Mawr, Pa. 19010

Election of Title Insurance and Underwriters Section Officers

By proper nomination and second, the following officers were unanimously elected for 1977-78:

Chairman—**Robert C. Bates,** executive vice president, Chicago Title Insurance Co., 111 W. Washington St., Chicago, Ill. 60602

Vice Chairman—**Frank Lucente,** executive vice president, Title & Trust Company of Florida, 200 E. Forsyth St., Jacksonville, Fla. 32201

Secretary—**Fred H. Benson Jr.,** president, St. Paul Title Insurance Corp., 13601 Preston Rd., Suite 912 W, Dallas, Texas 75240

Executive Committee

Joseph D. Burke, executive vice president, Commonwealth Land Title Insurance Co., 1510 Walnut St., Philadelphia, Pa. 19102

Seymour Fischman, chairman of the board, Security Title and Guaranty Co., 630 Fifth Ave., New York, N.Y. 10020

Morris E. Knouse, vice president, Berks Title Insurance Co., 101 N. Sixth St., Reading, Pa. 19603

Richard C. Mohler, senior vice president and regional manager, Pioneer National Title Insurance Co., 719 Second Ave., Seattle, Wash. 98104

Member-At-Large, Executive Committee

John E. Flood Jr., president, Title Insurance and Trust Co., 6300 Wilshire Blvd., Los Angeles, Calif. 90048

Election of Abstracters and Title Insurance Agents Section Officers

By proper nomination and second, the following officers were unanimously elected for 1977-78:

Chairman—**J.L. Boren Jr.,** president, Mid-South Title Co. Inc., 12 S. Main St., Memphis, Tenn. 38101

Vice Chairman—**Glenn F. Kenney,** president, Surety Title Co., 2021 Eleventh Ave., Helena, Mont. 59601

Secretary—**Elizabeth Linker,** owner, Trenton Abstract Co., 910 Main St., Trenton, Mo. 64683

Executive Committee

Joseph W. McNamara Jr., president, Crosby Abstract and Title Co., 406 S. 19th St., Omaha, Neb. 68102

John D. Mennenoh, president, H.B. Wilkinson Co., 500 N. Cherry St., Morrison, Ill. 61270

Glenn Nichols, president, Abstract & Guaranty Co., 812 Manuel Ave., Chandler, Okla. 74834

Phillip B. Wert, manager, Johnson Abstract Co., 109 N. Buckeye St., Kokomo, Ind. 46901

Member-At-Large, Executive Committee

Thomas S. McDonald, president, The Abstract Corp., 109 W. Commercial Ave., Sanford, Fla. 32771

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ALTA action...

The ALTA Executive Committee met Jan. 13 in Tarpon Springs, Fla.—the day following a meeting in the same city of the ALTA Planning Committee. Among agenda items at the Executive Committee meeting was a discussion of the ALTA Mid-Winter Conference program to be held March 7-10 in Phoenix, Ariz.

ALTA Executive Vice President William J. McAuliffe Jr. met Jan. 11 in Boca Raton, Fla., with representatives of the Florida Land Title Association to plan for the 1978 ALTA Annual Convention. This latter meeting will be held Sept. 24-28 in Boca Raton, Fla. Following his meeting with FLTA representatives, McAuliffe went to Tarpon Springs where he attended both the meeting of the Planning Committee and Executive Committee.

There was a meeting Jan. 13 in Miami, Fla., of the ALTA Liaison Committee with the U.S. League of Savings Associations. On the agenda was a discussion between ALTA and U.S. League representatives about their respective political action committees.

Title Industry Political Action Committee Board of Trustees Chairman Francis E. O'Connor and ALTA Director of Government Relations Mark E. Winter were among participants.

Public service television and radio activity of ALTA and the American Dental Association are the subject of a recent article in Association Management, *monthly national magazine of the American Society of Association Executives. In the article, it is pointed out that—over the past six years—ALTA radio spots have been broadcast by about 20 per cent of 5,900 radio stations to which they were sent, ALTA television celebrity announcements have been aired by about 35 per cent of some 700 stations receiving them, ALTA 60-second consumer minidramas featuring land title problems have been telecast by approximately 40 per cent of 200 stations to which they were sent, and ALTA television slide announcements have been used by some 25 per cent of 300 stations on the related distribution list.*

The ALTA broadcast material is developed through the Association's Public Relations Program. Stations use the announcements in free air time they donate in the public interest.

"It's worth putting the effort into making an entertaining PSA (public service announcement) because once your spot is aired, it has the potential to reach thousands, even millions, of people," the article states in citing ALTA as an outstanding example of such broadcast activity.

Production of the broadcast material is a responsibility of the ALTA Public Relations Committee.

ALTA continues to gain in prominence as an informational source for media across the nation. In a recent example of the growing visibility of the Association among media personnel, ALTA Director of Public Affairs Gary L. Garrity received a long distance call from Chris Peterson of Meredith Corp. in Des Moines, publisher of *Better Homes and Gardens.* Ms. Peterson placed an inquiry in connection with an article she was writing for the first issue of *How To Buy A Home,* a new Meredith publication, and her questions centered on RESPA and truth-in-lending regulations. After conferring with land title industry sources, Garrity called Ms. Peterson the following morning with the answers to her inquiry.

In the December meeting of the ALTA Government Relations Committee, a draft of the Arthur D. Little Inc. Torrens study was critiqued and the possibility of a spring ALTA federal reception was discussed. The committee also developed a plan for government relations coordination with state and affiliated associations.

The ALTA Liaison Committee with the Mortgage Bankers Association of America met Jan. 19-20 in Scottsdale, Ariz.

St. Paul solves parking problem

A severe parking problem at the Clayton, Mo. office of St. Paul Title Insurance Corp. prompted the company to open a walk-up window. Customers stop their auto in a loading zone outside the office and may pick up or drop off documents necessary for production, escrow closing and recording.

Valley of the Sun is site for March ALTA conference

The newest and largest hotel in the city that the U.S. National Weather Service has termed the nation's warmest, driest and sunniest will host the 1978 ALTA Mid-Winter Conference March 7-10.

In addition to its 734 rooms, the Hyatt Regency in Phoenix, Ariz., offers an outdoor swimming pool, an eight-story, open-atrium lobby and a downtown location. The revolving rooftop lounge which rises 20 stories above the plant-filled lobby, provides a panorama of the Valley of the Sun.

The annual meeting will get underway on the evening of March 8 with the traditional Ice-Breaker Reception, followed on the morning of March 9 with the opening general session. The Title Insurance and Underwriters Section and the Abstracters and Title Insurance Agents Section will meet concurrently the afternoon of March 9. The conference will close with the final general session the morning of March 10.

Phoenix's Sky Harbor International Airport is located approximately 10 minutes away from the hotel and is served by all major airlines. A one-way ticket on the shuttlebus connecting the airport with the hotel costs $2.25 per passenger. Taxicabs also are available.

Conference-goers will find the average March daytime temperature in Phoenix conducive to filling their spare time with golf, tennis or sightseeing. Typically, temperatures during the early weeks of March linger in the 70's with the mercury dipping into the high 40's after sundown.

Local points of interest for the sightseer include the Heard Museum which houses a collection of American Indian arts and artifacts and the Desert Botanical Garden.

For the golf enthusiast, there are 57 golf courses in the Phoenix area to choose from, one of which is five minutes from the Hyatt. Tennis is available through the hotel.

Registration fees for the conference are $50 for both members and nonmembers. Members will receive registration material through the mail in pre-conference mailings and should make hotel reservations directly with the Hyatt before the February 8 cutoff date. Deadline for returning the ALTA registration form to the ALTA office is February 24.

The Hyatt Regency Phoenix will be the site of the 1978 ALTA Mid-Winter Conference.

City title control to Florida bar fund

Control of City Title Insurance Co. in New York City has been transferred to Lawyers Title Guaranty Fund of Florida, a Bar-related company, it recently was announced by Paul B. Comstock and City Title founders Saul and Otto Fromkes.

Comstock was elected chairman of the board of directors and William T. Margiotta Jr. was elected president and chief executive officer.

According to the announcement, additional members may be added to the board to include Florida Fund participation.

Lawyers Title Guaranty Fund was organized and licensed in 1947 to underwrite title insurance in Florida.

The Fromkes will remain associated with the company.

Titlemen to speak at PLI forum

Seven title industry representatives will play major roles in a forum, sponsored by the Practising Law Institute, which will examine title insurance in major real estate transactions. The forum will take place March 16-17 at the Americana Hotel in New York City and will be repeated at the Sir Francis Drake Hotel March 30-31 in San Francisco. James M. Pedowitz of the Title Guarantee Co., New York, is the program's faculty chairman.

In addition to Pedowitz, industry representatives participating in the meeting are Oscar H. Beasley of First American Title Insurance Co., Santa Ana, Calif.; Marvin C. Bowling Jr. of Lawyers Title Insurance Corp., Richmond, Va.; Ray E. Sweat of Pioneer National Title Insurance Co., Los Angeles; Robert T. Haines of Chicago Title Insurance Co., Chicago; Robert Rove of Title Insurance Company of Minnesota, Minneapolis, and William J. McAuliffe Jr. of ALTA's staff.

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Forum—*(concluded)*

Also participating will be Roger L. McNitt, chief deputy insurance commissioner of California who will appear only at the West Coast forum. He will talk about the state regulator's role in relation to fair and adequate pricing, investment control, rating boards and licensing and admission controls.

In his discussion of the nature and development of title insurance, Beasley will touch on such topics as the industry's history, statutory definitions and prohibitions and hidden risks insured against.

Bowling will compare various title policy forms such as ALTA Owner's A and B, mortgagee, the New York Board of Title Underwriters single form and attorney guaranty fund policies.

Endorsements and special forms of coverage such as mechanic's lien protection, Form 100 coverage and affirmative insurance as to restrictive covenants and easements are topics that Sweat will discuss.

Haines and Rove jointly will discuss claims against title insurers. They will explore the breadth of the insurer's obligation to defend and discuss defenses of the insurer.

ALTA Executive Vice President McAuliffe has been invited to discuss the Torrens system in relation to title insurance and land recordation.

A block of rooms has been reserved at special rates for the meetings in both hotels. Persons wishing to attend the meeting may contact K.C. Varkey at PLI headquarters, 810 7th Ave., N.Y., N.Y. 10019 for registration information. Registration fees are $175.

Nevada group elects Fike

Ed Fike of Lawyers Title of Las Vegas Inc. was elected president of the Nevada Land Title Association at the 1977 annual meeting in Las Vegas.

Other officers are Hal Crandall of Transamerica Title Insurance, Reno, who was elected first vice president; John Woods, Title Insurance and Trust, Las Vegas, second vice president, and Robert Bowen of First American Title Insurance, Reno, secretary-treasurer.

ALTA film earns top CINE award

ALTA's new government relations film, *The American Way,* has received a Golden Eagle, top award of the Council on International Nontheatrical Events (CINE), which is generally considered to be one of the most prestigious awards available to short films.

The ALTA production was among films chosen to receive Golden Eagles from an initial entry list of more than 800. Winning entries were determined after preliminary, semifinal and final rounds of judging by qualified film experts. In the judging, the ALTA film was praised for "its brevity, competent direction and treatment."

Emphasis in *The American Way* is on the importance of land recordation systems and land title services in a healthy real estate market. The 13½-minute, 16 mm, color, sound film tells about the experience of a middle income family in purchasing real property. Further details are in an article published in the October 1977 *Title News.*

A primary purpose of the film is to increase public awareness of the benefits in the existing systems of land recordation and land title protection at a time when the federal government is looking at different methods of real estate transfer.

Prints of *The American Way* have been placed in nationwide television public service distribution effective January 1978, and are available for purchase by ALTA members at $125 each plus postage. Association members sending film orders to the ALTA Washington office also receive —at no additional charge—a model speech and a speech outline for use in developing individual commentary to accompany local showings.

CINE advises television stations across the nation of its Golden Eagle award winners.

Producer Dick Ridgeway of Corporate Productions, Inc., Toluca Lake, Calif., and ALTA Director of Public Affairs Gary L. Garrity were on hand to accept the Golden Eagle for *The American Way* at CINE award ceremonies held in December in Washington, D.C. Garrity served as technical adviser during production of the film, working in coordination with the ALTA Public Relations Committee and Government Relations Committee.

ALTA Director of Public Affairs Gary L. Garrity, left, and Producer Dick Ridgeway exchange congratulations during Washington, D.C., awards ceremonies where the Association's film, The American Way *received a Golden Eagle from the Council on International Nontheatrical Events (CINE).*

Calendar of Meetings

March 7-10, 1978
ALTA Mid-Winter Conference
Hyatt Regency Hotel
Phoenix, Arizona

April 16-18, 1978
North Carolina Land Title Association
Quality Inn—Fort Magruder
Williamsburg, Virginia

April 20-22, 1978
Oklahoma Land Title Association
Hilton Inn West
Oklahoma City, Oklahoma

April 27-28, 1978
California Land Title Association
Islandia Hyatt House
San Diego, California

April 27-29, 1978
Arkansas Land Title Association
DeGray Lodge
Arkadelphia, Arkansas

April 27-29, 1978
Texas Land Title Association
Houston Oaks
Houston, Texas

April 30-May 2, 1978
Iowa Land Title Association
Roosevelt Royale
Cedar Rapids, Iowa

May 12-13, 1978
New Mexico Land Title Association
Inn of the Mountain Gods
Mescalero, New Mexico

June 4-6, 1978
Pennsylvania Land Title Association
Pocono Hershey Resort
White Haven, Pennsylvania

June 11-13, 1978
New Jersey Land Title Insurance Association
Seaview Country Club
Absecon, New Jersey

June 13-15, 1978
Idaho Land Title Association
Sun Valley Lodge
Sun Valley, Idaho

June 15-17, 1978
Land Title Association of Colorado
The Inn at Estes
Estes Park, Colorado

June 15-17, 1978
Utah Land Title Association
Sweatwater Hotel
Sweatwater, Utah

June 15-18, 1978
New England Land Title Association
Granite Hotel and Country Club
Kerhonkson, New York

June 16-17, 1978
South Dakota Land Title Association
Holiday Inn
Aberdeen, South Dakota

June 18-20, 1978
Michigan Land Title Association
Grand Hotel
Mackinac Island, Michigan

June 22-24, 1978
Oregon and Washington
Land Title Associations
Thunderbird Inn at Jantzen Beach
Portland, Oregon

June 23-25, 1978
Illinois Land Title Association
Breckenridge Pavilion Hotel
St. Louis, Missouri

August 3-10, 1978
American Bar Association
Annual Convention
New York, New York

August 17-19, 1978
Minnesota Land Title Association
Normandy Hotel
Duluth, Minnesota

August 25-26, 1978
Kansas Land Title Association
Holiday Inn & Holidome
Hutchinson, Kansas

September 9-12, 1978
Indiana Land Title Association
Indianapolis Hilton—Downtown
Indianapolis, Indiana

September 10-13, 1978
New York State Land Title Association
Buck Hill Inn
Buck Hill Farms, Pennsylvania

September 14-15, 1978
Wisconsin Land Title Association
Midway Motor Lodge
Green Bay, Wisconsin

September 14-16, 1978
North Dakota Title Association
Williston, North Dakota

September 15-18, 1978
Missouri Land Title Association
Tan-Tara Resort
Lake of the Ozarks
Osage Beach, Missouri

September 20-22, 1978
Nebraska Land Title Association
Lincoln Hilton
Lincoln, Nebraska

September 24-28, 1978
ALTA Annual Convention
Boca Raton Hotel & Club
Boca Raton, Florida

October 21-25, 1978
American Bankers Association
Annual Convention
Honolulu, Hawaii

October 29-November 2, 1978
U.S. League of Savings Associations
Annual Convention
Dallas, Texas

October 30-November 1, 1978
Mortgage Bankers Association
Annual Convention
Atlanta, Georgia

November 10-16, 1978
National Association of Realtors
Annual Convention
Honolulu, Hawaii

American Land Title Association

1828 L Street, N.W.
Washington, D.C. 20036