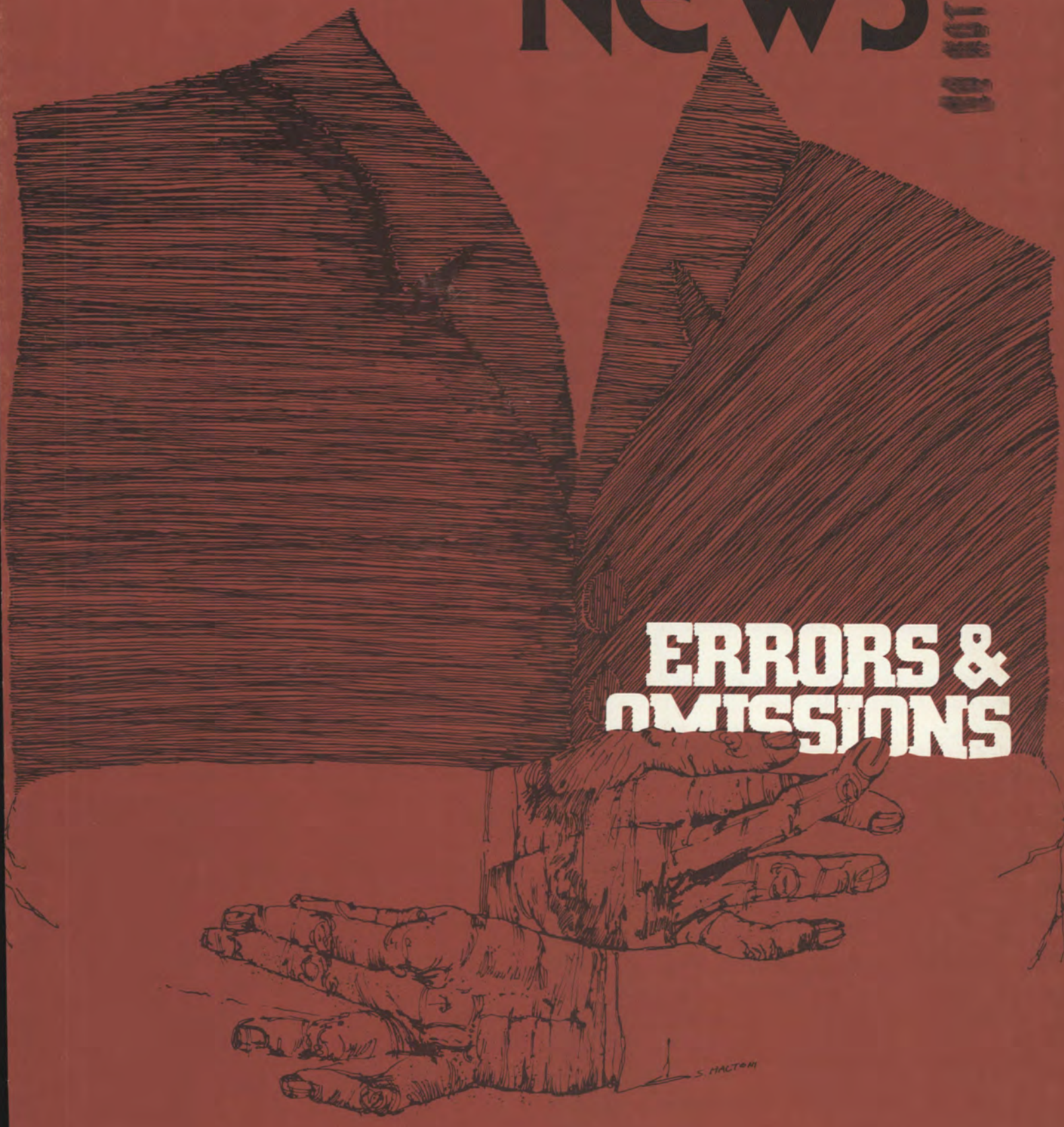
March 1980

TITLE NEWS



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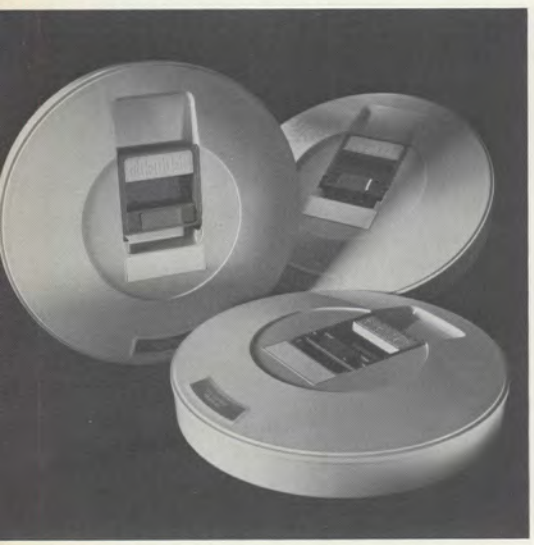

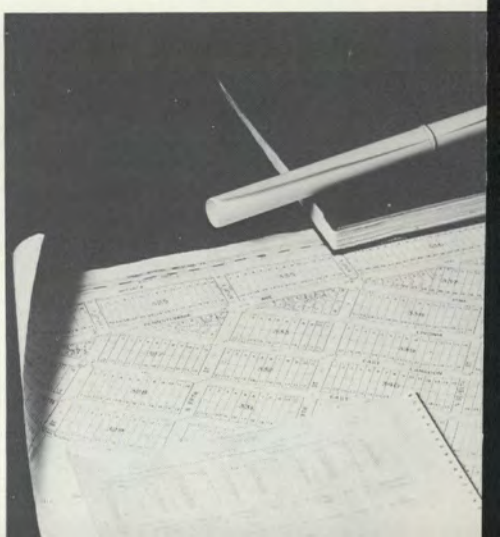

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Editorial Assistant: Barbara J. Grady

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BUSINESSMAN'S GUIDE TO

CONSTRUCTION

ROBERT F. CUSHMAN / WILLIAM J. PALMER

A practical, realistic handbook for businessmen considering a commercial construction project. And for the people who advise them: accountants, lawyers, insurance professionals and architects.

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A Message From the President-Elect

When ALTA officers and staff ask our members what subjects they want to know more about, two of those most frequently mentioned are errors and omissions insurance and means by which the small business person can provide for retirement. This issue of *Title News* casts some light on these important topics.

Just what is the "errors and omissions problem?" Earl Harper, chairman of the ALTA Errors and Omissions Liability Insurance Committee has much to say about it and what each of you can do in its solution.

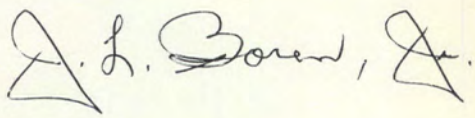
How important is errors and omissions coverage? Two authors in this issue who speak to that question are Roy Hill, president of the Title Guaranty Company of Wyoming, Inc., Casper, a member of the Errors and Omissions Committee, and Thomas D. Jones, chairman of the board, president and chief executive officer of St. Paul Title Insurance Corp., a former member of the committee.

What is available in the way of errors and omissions coverage? The ALTA editorial staff undertook the task of finding out. The results of their inquiries are set out in this issue.

Are there alternatives to errors and omissions coverage? Mark Eggertsen, president of Security Title Co. in Salt Lake City, discusses the concept of the reserve asset fund for title and escrow losses. Charles Jones, president of Boone County Abstract Co. in Indiana, tells about the approach that he uses—which deviates from what is generally thought of as the norm and which ensures maximum coverage at the lowest possible cost. And, John Van Cleave, president of INAX, Chicago, writes about a program that can be used as an adjunct to errors and omissions coverage which has the potential of lowering risks.

On the subject of retirement plans, James Michal from the office of ALTA General Counsel Thomas S. Jackson discusses some of the choices available when the small business person begins to plan for retirement.

After you have read this issue, I encourage you to drop Editor Maxine Stough a line to let her know how well her efforts and those of the authors have helped your understanding of these problems. Your praise and your criticism are equally welcome.



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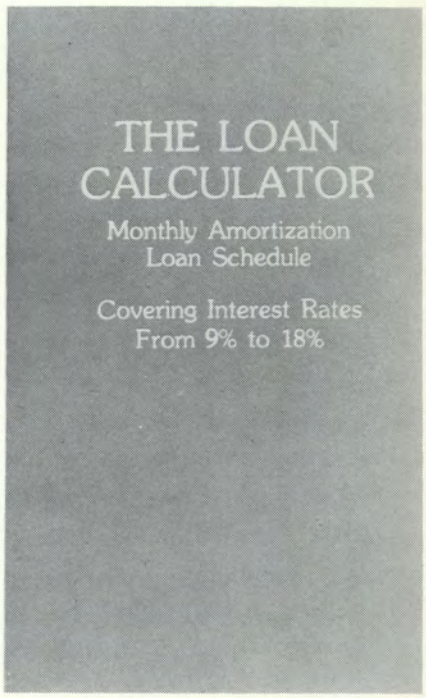

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A Guide To Using Your E & O Committee

by F. Earl Harper

Errors and omissions insurance coverage for the abstracter, the title insurance agent and the title examiner is not important. It is not important, that is, unless you do not have it or unless the premium that you are required to pay is exorbitantly expensive.

Because our company has complete errors and omissions coverage and because to date we have been able to pay our premiums, I suppose that we shouldn't worry about it.

We do worry about it though because a claim was filed under our errors and omissions coverage. We denied liability. The court determined that indeed we had no liability. We won.

"While admittedly this lack of protection might not wipe out the entire abstract business overnight, it could deplete our ranks considerably. Such an occurrence would certainly not be in the best interests of the public."

Well, we didn't exactly win. We had to pay our attorney and our appraisers. We also had to pay our expert witnesses who didn't, however, have to testify because we won on a demurrer. In addition, our errors and omissions underwriter increased our deductible by two and one-half times and almost doubled our premium.

Clearly, this demonstrates that all abstracters, title insurance agents and examiners should be interested in errors and omissions liability insurance even though they may be presently covered. It conceivably could be cancelled.

Many abstracters presently conduct their business without the benefit of errors and omissions coverage either because they are unaware that it is available or because the cost is so great that they believe they cannot afford it. Still others are partially protected. They are covered on their abstracting but not on their liability as an agent for a title insurer.

While admittedly this lack of protection might not wipe out the entire abstract business overnight, it could deplete our ranks considerably. Such an occurrence would certainly not be in the best interests of the public.

Only a few years ago, it became impossible for abstracters in many areas of the country to obtain any degree of errors and omissions coverage at any price. In response to this very serious situation, the ALTA Errors and Omissions Committee moved into action. Thanks to its efforts, errors and omissions coverage is available at present to almost everyone who wants it. Having done their job, the members of that committee then retired and the committee was filled with all new faces.

The adage that a new broom sweeps clean does not apply to committees. We have had a lot to learn. We are fortunate in that we have not been confronted with a crisis of the magnitude that our predecessors faced.

Avoiding a Crisis

The best way to continue to avoid another errors and omissions crisis is to continue to encourage strong companies to consider coverage for our business. The members of this committee are willing to donate their time to assist ALTA members with this very important concern, but we need help from the very constituency that we serve.

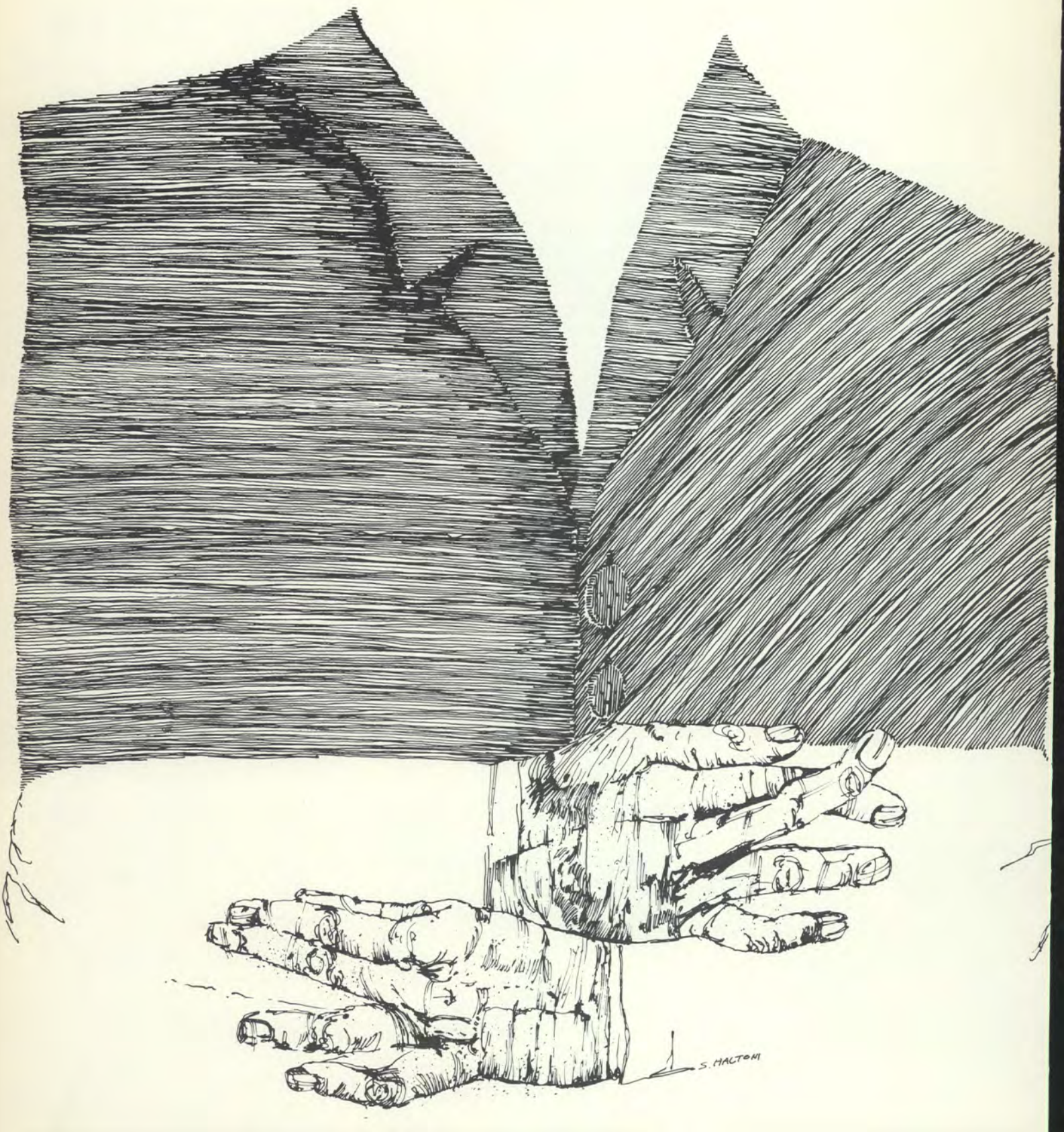
We believe that there are more than four companies interested in writing errors and omissions insurance, but finding them is another matter entirely. This is valuable information. If you are aware of sources and do not inform your committee of them, we are unable to pass this valuable information on to your fellow abstracters.

The Errors and Omissions Committee, like other ALTA committees, can be very useful to you. Each committee is an information and experience center. But before we can disseminate information, we must first obtain it. That is where each member plays an important role. We need you to feed us information.

We also need ideas for alternate protection. Perhaps you have a reserve fund for losses. How do you handle this fund when you file your income taxes? Do you pay tax on the money and then create your reserve? Or have you been success-

(continued on page 19)

Mr. Harper is president of Southern Abstract Co., Bartlesville, Okla., and chairs the ALTA Errors and Omissions Liability Insurance Committee.


S. HALTOM

Scrutinizing The Seemingly Inscrutable

The Errors and Omissions Insurance Enigma

by Barbara J. Grady

Since the early 1970s when professional liability premiums and deductibles catapulted to new highs, a major concern of the abstracter-agent has been the cost and availability of errors and omissions insurance. It was then, in many areas of the country, that title people were shocked to discover that they would have to go bare or become self-insured. Either they could not afford the price of coverage or it was unavailable to them.

"Only two of the four companies offer policies nationwide, so marketing areas and methods are important."

As the industry enters the decade of the 1980s, however, the situation is reassuringly different. At present, four major insurance companies market errors and omissions liability insurance to abstracters and agents. They are Lloyd's of London, England; the R.J. Cantrell Agency, Muskogee, Okla.; St. Paul Fire and Marine Insurance Co., St. Paul, Minn., and United Fire & Casualty Co., Cedar Rapids, Iowa.

The title abstracter or agent shopping for errors and omissions insurance can count on finding basic commonalities of coverage in each of the companies' insurance packages. Yet, there are a sufficient number of variances that he will find that selecting the one most suited to his needs requires careful research and evaluation.

All four errors and omissions insurers are generally similar with respect to the actions and persons covered under a policy and the conditions for application and cancellation. The companies vary regarding the range of deductibles and liability options, to whom coverage is available and in what locations, the extent of time included under coverage and the methods of marketing errors and omissions insurance.

Coverage Scope

By definition, each of the four underwriters provides coverage over the same general scope of liability, which is the errors and omissions of the professional.

The abstracter's policy from each of the underwriters states that the insurance company agrees to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages resulting from any negligent act, error or omission of the insured's, or of those for whom the insured is legally responsible, while performing services in his professional capacity as a title abstracter.

All four insurers additionally specify in their policies that covered abstracter services include "such memoranda, certificates issued in lieu of abstracts, notes and references to chains of title, as well as name searches, tax and assessment searches which are furnished or compiled by abstracters as a basis for an examiner's inspection."

The abstracter and agent policies, in all four cases, cover payments for court proceedings and for the hiring of lawyers for defense of a claim against the insured. Representatives of three of the companies report that deductibles on their policies do not apply to defense. This is also true of the R.J. Cantrell Agency unless it is specified otherwise by special endorsement which is rarely the case.

Also included in all four policies is coverage for the insured's partners, executive officers and employees who are involved in delivery of the insured's professional services, that is, employees whose potential mistakes might ultimately affect the service rendered by the abstracter or agent.

An important stipulation which appears on three of the insurers' policies is the exclusion from coverage of claims arising out of any opinion on title or real estate given by the insured. On the Cantrell Agency policy, which is used for abstracters, agents and examining attorneys, a similar provision excludes coverage on claims arising from any business enterprise other than title abstracting or title agency services.

To Insure Or Not?

The title abstracter or agent seeking errors and omissions coverage must be concerned with his insurability. The four insurers evaluate a number of criteria.

One very important consideration is whether the abstracter has in-house tract indices. Roy L. Ewen, vice president of United Fire & Casualty, said his company requires an in-house tract index system before issuing a policy.

At St. Paul, an in-house tract index weighs in the abstracter's favor, according to Fred Themmes, underwriting officer of the general liability department. He explained, however, that St. Paul bases its underwriting judgment on a composite of information supplied in the

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Ms. Grady is Title News *editorial assistant*

This article is based on information obtained from questionnaires and follow-up interviews submitted to the four insurance companies known to market errors and omissions liability insurance to title abstracter-agents. It is published as a general guide to errors and omissions liability insurance and is not intended to be comprehensive.

application and does not consider any individual factor a requirement.

R.J. Cantrell, president of the R.J. Cantrell Agency, said that he considers in-house tract indices a plus but not a requirement. This advantage can translate to a 10 to 20 percent reduction in premium charged, he said.

Lloyd's considers an in-house tract index system a major qualification for coverage, according to Account Executive Susan Simon of the Washington, D.C., brokerage firm of Huntington T. Block Insurance, one of the firms offering Lloyd's policies in the United States.

"Indications are that title plant automation has introduced another factor that errors and omissions underwriters will consider in the future."

Automation and Insurability

Indications are that title plant automation has introduced another factor that errors and omissions underwriters will consider in the future.

Themmes reported that St. Paul has begun to pay attention to the difference that automation can make in reducing errors. In fact, on the company's revised application form to be released at the end of 1980, St. Paul plans to include a question which asks if the applicant has automated systems in his title plant.

Cantrell and Simon both indicated that their respective companies view automated plants favorably in deciding on an applicant's insurability.

Ewen said that because the majority of abstracters in areas of the country where United Fire & Casualty underwrite do not have automated plants, his company does not consider automation when judging applications.

Other Factors

Not unexpectedly, underwriters also consider the professional experience of the abstracter or agent seeking insurance. The length of time the abstracter or agent has been in business, the size of operation, financial health of the company, and the experience of the applicant's partners and employees all are carefully assessed.

Another determinant is whether or not the abstracter-agent is a member of his state land title association. Ewen indicated that this is a requirement with his company. Themmes, Cantrell and Simon reported that although membership in a land title association is a factor that their respective companies consider, none requires it.

Perhaps the most crucial factor of all is the cause and frequency of any past claims brought against the insurance applicant for negligence, error or omission in the performance of his duties as a title professional. It is so important that it continues to be a major insurability factor long after the initial policy is issued. Poor performance can lead to something no policy-holder wants to receive: a cancellation notice.

To Cancel or Not?

The insurers claim that the size of a particular loss is less important than the cause and frequency of losses in making policy cancellation decisions.

Themmes and Ewen said strong evidence of carelessness or non-professional operation might cause a policyholder to be dropped. A good example, Themmes said, would be a claim resulting from an error made by a new employee who was sent to the court house the first day on the job, with little more than a few hours of training.

Ewen said a large loss does not spell the immediate cancellation of a United Fire & Casualty policy. Policy cancellation by St. Paul is rare, Themmes said, resulting from "an underwriting judgment based on individual risk considerations."

Cantrell said frequency of claims and negligence make the Cantrell Agency think twice about renewing a policy. Circumstances which could lead to cancellation would be "non-payment, frequent or excessive claims and dishonesty."

With Lloyd's as well, it is frequency of claims that raises eyebrows at renewal time, according to Simon. It is more common for Lloyd's to increase the premium charge than to cancel a policy in response to excessive claims, she said. However, evidence of dishonesty or fraud would result in policy cancellation.

Who Do They Cover?

Major differences between the four errors and omissions insurers begin to crop up with an examination of whether coverage is available to title agents and examining attorneys in addition to abstracters, market areas and techniques, liability limits, deductibles and rate structures.

The variable which probably is most fundamental for the title person choosing an insurer, is to which title professionals a company offers errors and omissions liability insurance.

United Fire & Casualty underwrites errors and omissions for title abstracters only.

St. Paul offers coverage to title abstracters, title agents and title attorneys. However, all three professionals who might work for the same title firm are not subsumed under one policy. Rather, each professional submits a separate application and in turn receives separate coverage.

"The companies vary regarding the range of deductibles and liability options, to whom coverage is available and in what locations, the extent of time included under coverage and the methods of marketing errors and omissions insurance."

The R.J. Cantrell Agency offers a package called Title Pac, under which title abstracters, title agents and title attorneys who render title opinions on the insured abstracter's searches are all eligible for insurance and can be covered under one, comprehensive policy.

Lloyd's offers insurance to title abstracters, agents and title attorneys. Title abstracters and agents can be included in one policy. Title attorneys are discouraged from applying for liability coverage under a joint policy with abstracters and agents. Lloyd's general practice is to supply attorneys with separate professional liability coverage.

Market Areas and Techniques

Only two of the four companies offer policies nationwide, so marketing areas and methods are important. As with other kinds of insurance, an errors and omissions insurance company can offer insurance in a particular state when its rate structure is filed with the state insurance commissioner and when it has licensed agents representing the company as an admitted carrier in that state.

"The insurers claim that the size of a particular loss is less important than the cause and frequency of losses in making policy cancellation decisions."

St. Paul offers errors and omissions coverage to title abstracters and agents in 40 states. The excluded states are Arizona, California, Louisiana, Missouri, North Carolina, Oklahoma, Oregon, Texas and Washington.

United Fire & Casualty offers errors and omissions insurance to title abstracters in Colorado, Illinois, Iowa, Minnesota, Missouri, Kansas, Nebraska, North Dakota, South Dakota, Wisconsin and Wyoming.

St. Paul and United Fire & Casualty both market title abstracter or title agent errors and omissions insurance through agents. Each company has contracts with independent agents who sell insurance as representatives of the company. Neither St. Paul nor United Fire & Casualty uses brokerage firms.

The R.J. Cantrell Agency offers insurance nationwide through Title Pac errors and omissions insurance package designed specifically for the title professional. The agency accepts and reviews insurance applications and does the primary underwriting of the policy.

The agency then refers its policies to Shand, Morahan & Co., Inc. of Evanston, Ill., the managing general underwriter of Title Pac, and to two other insurers, American Bankers Insurance Company of Florida (Miami), and Mutual Fire, Marine and Inland Insurance Co., Philadelphia, Pa.

The British Variation

Like the R.J. Cantrell Agency, Lloyd's operates in every state. But, Lloyd's—the company famous for exotic policies on such valuable commodities as Hollywood starlets' legs—is a special case.

According to Simon, Lloyd's is not a company per se, but rather an organization of individuals and individual companies whose capital resources are used as the financial backbone of Lloyd's insurance agreements.

The individual investors or members are organized into syndicates, each managed by an underwriting agent. The underwriting agent has authority to take business for the syndicate. According to Simon, Lloyd's operates basically as a trading floor.

The underwriting agent of a Lloyd's syndicate negotiates with a brokerage firm. Brokerage firms which contract to do business with Lloyd's underwriters are called Lloyd's correspondents. There are approximately 200 such correspondents worldwide.

Correspondents either market policies directly to insurance buyers or through other brokerage firms who in turn deal with the insurance buyers.

Rates and Liability Limits

The decision on which policy to buy will depend greatly on the abstracter-agent's needs with respect to liability coverage and deductibles, as well as the premiums he can afford. These vary widely from company to company and from state to state, depending on what is permitted in each state's insurance code.

In some cases, a company will use a procedure called "consent to rate," which means the supplier can charge higher premiums than are filed with the state insurance commissioner when the insurance buyer agrees in writing to accept premium rates that are above the filed rates. It allows a company to offer insurance in more states than would otherwise be financially practical.

United Fire & Casualty has one rate schedule with a choice of six premium charges corresponding with six maximum limits of liability. These vary, depending on the deductible and the number of employees on the insured's staff. The company meets the state rate structure in the 11 states in which it operates.

At United Fire & Casualty, the lowest limit of liability an abstracter can choose is $25,000 which corresponds with the lowest premium rate. The maximum limit of liability the company will underwrite is $500,000 which is the limit stated with the highest premium rate. Any of the six premium rates United Fire & Casualty offers include coverage for two members of the insured's firm. A charge of approximately 13 percent of the premuim is added for each member of employee beyond two.

The deductibles on a United Fire & Casualty policy are $500 or $1,000. A policy-holder with $1,000 deductible pays a premium rate 10 percent lower than the regular rate based on $500 deductible.

"The length of time the abstracter or agent has been in business, the size of operation, financial health of the company, and the experience of the applicant's partners and employees all are carefully assessed."

St. Paul has various rate structures which vary from state to state and comply with what is acceptable in a given state's insurance code. In a few states, the company uses "consent to rate" procedures in order to obtain adequate rates to match costs, Themmes said.

St. Paul's limits of liability range from $25,000 per claim to $1,000,000 per claim with $2,000,000 in the aggregate as the maximum. St. Paul has one system of rating for title abstracters and another system for title agents. For title abstracters, there is a specific base charge plus a charge for each member or employee of the insured's firm. For title agents, the rate is determined totally by the number of employees on the insured's staff.

The deductibles under a St. Paul policy are $250 minimum and $25,000 maximum for the title abstracter. For the title agent, the minimum is $1,000 and the maximum is $25,000.

(*continued on page 19*)

How To Bag The Right Errors and Omissions Coverage

by Roy P. Hill Jr.

Shopping for errors and omissions liability insurance that adequately fits your needs and finding it at the right price is a complex and time-consuming task. It also is a job that every abstracter or abstracter-agent who realizes the importance of protecting himself from losses will face at least once or at various occasions during his business lifetime.

"When determining what primary liabilities he needs to retain, each abstracter must assess his own type of operation and financial capabilities."

The process is complicated because there exists as much variance in coverages and underwriting practices among suppliers of errors and omissions insurance as there is among title insurance underwriters. Clearly, finding and obtaining affordable coverage that is right for your operation is not something you accomplish in one afternoon.

The abstracter or abstracter-agent who opts to purchase an errors and omissions policy instead of, or in concert with, protecting himself through a reserve asset fund will find his first problem to be locating an insurance agent who understands the type of coverage that he needs. Once that is accomplished, he will face the job of finding liability underwriters that both offer the coverage he needs and who are qualified to do business in his state.

Assuming that he is successful in finding more than one underwriter and the coverages offered are generally comparative, consideration should be given to the company with a local servicing agent and claims adjuster. This will facilitate prompt and satisfactory handling of the claims made by his customers.

Although types of abstracter and abstracter-agent operations vary widely, there are several general rules of thumb that almost every type of company can apply and should consider when negotiating coverages and premium charges.

General Guidelines

Errors and omissions coverage for abstracters, agents and on an agent's opinion of title endorsements is available with a variety of primary and maximum dollar limits. These limits of liability can be set on a per claim basis or on aggregate limits.

When determining what primary liabilities he needs to retain, each abstracter must assess his own type of operation and financial capabilities. For example, an abstracter with a good, complete title plant with excellent records and experienced, efficient personnel might want to consider larger deductible policies.

Considerable premium savings can be realized—often up to 20 percent—by purchasing a policy with a deductible of $1,000 rather than a $250 deductible. In fact, some liability carriers can provide additional premium savings for policies containing $10,000, or larger, deductibles.

Statute of limitation laws in the state where the abstracter does business is another factor which affects the types and limits of coverages that he should obtain. An ideal situation would be if a state has adequate and short term statute of limitation laws governing the clearance of items such as expired and unreleased mortgages, improperly executed instruments and abandoned easements and reservations.

Advisable Coverages

There are three areas which are highly advisable for an abstracter to have covered but which all policies do not include. One is protection for losses arising from claims made against the insured which are results of the actions of predecessors in business in their capacity as title abstracters. This type of coverage is particularly important if an abstracter purchased only an abstract plant from a prior abstract operation. It may be that the new abstract operation would be considered as a continuation of the prior abstract business. The new business, even though operating under a new ownership and name, may be liable for errors and omissions occuring under abstracts produced by the prior owner.

Mr. Hill is president and board chairman of The Title Guaranty Company of Wyoming, Inc., Casper, and a member of the ALTA Errors and Omissions Liability Insurance Committee.

Second, it is essential for the abstracter who dissolves or sells his business to obtain coverage that will protect him against claims that may arise at a subsequent date and are the result of negligent acts, errors or omissions in an abstract that his then-firm prepared when covered by the policy.

Thirdly, not all policies cover the items furnished or compiled by abstracters as a basis for an examiner's inspection. These items should be covered as part of an abstracter's services and include memoranda, title certificates, ownership and encumbrance reports as well as court, name, tax and assessment searches.

If the business is a corporation with many employees and there are several officers of the firm who are not active in the business nor are they authorized to certify abstracts or certificates, it is generally not necessary to list them as members of the firm actually engaged in the business.

Some errors and omissions companies make a charge based on the number of officers and personnel listed. Generally, they will accept a listing of those persons actually engaged in compiling, typing or checking abstracts and/or title policies. It certainly is worth checking and considering in your choice of an underwriter.

In addition to these basic considerations which all abstracters will want to look at when choosing professional liability coverage, there are special considerations that apply uniquely to four categories of abstracters. These four groups are abstracters of surface titles, abstracters of mineral titles, abstracter-title insurance agents and abstracter-agents with ownership of interest by a title insurance underwriter.

The independent abstracter who is primarily a surface title abstracter and who provides abstracts to customers for purposes of making their own examinations or issuing their own title policies does not encounter problems of securing adequate errors and omissions coverage that are of the magnitude that abstracters experience in the other three categories of operations.

Deductibles and maximum coverage limits for the surface abstracter should be governed by the average value of properties that he abstracts in addition to his financial capabilities.

Mineral Title Abstracters

On the other hand, the abstracter-agent who is involved in preparing mineral certificates of title, mineral fee or leasehold abstracts or who signs the certificates of firms that do such work is faced with special problems of liability which sometimes can reach astronomical proportions.

There is a good deal of truth to the adage that a dry hole is the best cure for an abstracter's error. The abstracter who thinks he is perfectly safe with a

Who has a LANDEX plant? How many do they have?

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Underwriters & Subsidiaries	First American Title Insurance Co.	4.87	10	2	6	2
	Standard Abstract & Title Co.		1	1		
	Title Insurance & Trust Co.	2.87	8	1	6	1
	Pioneer National Title Insurance Co.	2.14	2	1	1	
	Meridian Abstract Co.		1	1		
	Western Title Insurance Co.	2.12	6	1	4	1
	St. Paul Title Insurance Corp.	1.59	3		3	
	Memphis Title Co.		1	1		
	Chelsea Title & Guaranty Co.	1.00	1	1		
	Stewart Title Co.	1.00	1	1		
	Lawyers Title Insurance Co.	.34	1		1	
	New Mexico Title Co.		1		1	
	SAFECO Title Insurance Co.	.25	1		1	
	USLIFE Title Company of Albuquerque	.20	1		1	
	Chicago Title Insurance Co.	.14	1		1	
	Commonwealth Land Title Insurance Co.	.14	1		1	
	Title Insurance Company of Minnesota	.14				
	Missouri Title Guaranty Co.		1		1	
Agencies	American Title Co. (PNTI)	1.00	1	1		
	Coastal Bonded Title Co. (non-exclusive)	1.00	1	1		
	Lawyers Title of Louisiana (LTR)	1.00	3	1		2
	Northwestern Title Security Co. (STG)	.25	1		1	
	California Land Title Co. of Marin (TIM)	.20	1		1	
	First American Title Co. of Marin (FAM)	.20	1		1	
	National Title Co. (STG)	.20	1		1	
	Pacific Coast Title of Marin (CLT)	.20	1		1	
	Community Title Co. (STI)	.14	1		1	
	Totals	21.00	52	13	33	6

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$50,000 maximum liability policy will find that he was deluding himself if a producing oil well is discovered on a property and an error or omission in the abstract comes to light which reveals outstanding interests in others.

For this reason, it is highly advisable for mineral title abstracters to obtain a policy with maximum liability limits and/or attempt to secure catastrophe-type coverage even up to a limit of two or three million dollars.

"... it is highly advisable for mineral title abstracters to obtain a policy with maximum liability limits and/or attempt to secure catastrophe-type coverage even up to a limit of two or three million dollars."

Abstracter-Title Insurance Agents

The abstracter who issues title insurance policies for an underwriter also faces a unique set of requirements for his errors and omissions policy.

Some agency contracts may hold the abstracter-agent responsible for all losses that may arise from errors or omissions in the search or abstract of the chain of title or for faulty opinions of title or for errors in typing, compiling and showing of information in the title policy. Some abstracter errors and omissions underwriters offer coverages that take care of this eventuality. These coverages generally are provided as riders or endorsements to an abstracter's existing policy.

It is conceivable that the abstracter's title insurance underwriter would provide coverage in the agency contract for these types of losses in exchange for a slight increase in commission charge instead of holding the agent liable for them. In cases where an agreement of this nature can be reached by the abstracter and title insurance underwriter, the liability underwriter could except from his policy any liability as to claims arising from the insured's activities as a title insurance agent.

Such an arrangement between an abstracter and his title insurance underwriter would eliminate the sticky procedure which requires the underwriter to make a formal claim against his agent. In some cases, the title underwriter is required to institute a suit against the agent before the agent can make a claim on his abstracter liability and title insurance agent errors and omissions carrier.

In some states, agency contracts may contain a deductible provision for which the errors and omissions underwriter possibly could provide a better commission split.

In Wyoming, the insurance commissioner issued a ruling which potentially could change the relationship between the abstracter-agent and the title insurance underwriter where the question of liability is concerned. The ruling, which has not been tested in the courts, stipulates that a title insurance agency contract shall not contain requirements that the agent carry title insurance agent's errors and omissions policy coverage. Nor shall the agent be liable for errors or omissions in the abstract or search, for omissions or other inaccuracies in any commitment or policy resulting in loss to the underwriter unless they arise from the agent's deliberate or intentional disregard of the terms of the agency contract or other instructions given to the agent, or from any acts of the agent so grossly negligent as to constitute such disregard.

In addition, according to the commissioner, deductible amounts or primary retention of any liability of any claim or loss under a title policy cannot be shared by the agent and cannot be set out in any agency agreement.

The one action brought before the court where the commissioner's ruling in this matter would have been one of many issues was dismissed.

The Abstracter-Agent Subsidiary

It often is impossible for an abstracter-agent that may be a subsidiary of or is, to any extent, owned or controlled by a title insurance underwriter to obtain title insurance agent's errors, omissions or opinion coverages. Even in cases where the abstracter-agent issues title policies of an underwriter other than the underwriter-owner, these types of coverages may be unavailable to him.

In fact, some errors and omissions companies issue the following endorsement: "In consideration of the premium charged, coverage provided by this policy shall apply only to the insured's capacity as a title abstracter for others and shall in no event apply where the end product is a title insurance policy issued by Blank Title Insurance Co."

Another company will not provide abstracter errors and omissions coverage without including this endorsement: "This policy does not apply to claims arising out of the insured's activities as an insurance agent, real estate broker, real estate appraiser or on behalf of any title insurance company or agency."

One company will not provide coverage of this type even with a limiting endorsement.

"It often is impossible for an abstracter-agent that may be a subsidiary of or is . . . owned or controlled by a title insurance underwriter to obtain title insurance agent's errors, omissions or opinion coverages."

While admittedly many abstracters have certain liability coverage needs in common, it is also true that no two operations are exactly alike nor do they have all of the same problems.

This, together with the fact that no errors and omissions underwriter offers exactly the same coverage as the next one, means that the ALTA Errors and Omissions Liability Insurance Committee still has a long way to go in its task to assist member abstracters in securing adequate and uniform coverage. This is particularly true where the needs of the abstracter-agent are concerned.

Risk Consolidation: One Way To Shore Up E & O Defenses

by Charles Jones

When an errors and omissions crunch of sorts hit the title abstract industry in the mid-1970s, it left in its wake a lot of worried abstracters. I was one such worried abstracter, although logically speaking, I had no real reason to be concerned.

But reports that abstracters with pristine errors and omissions claims records had had their policies suddenly and unexplicably cancelled hung in the air like a sword of Damocles, waiting—so it seemed—to slice through my business.

The obvious solution was to take extra precautions to eliminate even the remotest chance of an error or omission creeping into any of my four companies' work.

But as reports of seemingly unwarranted cancellations continued, I took to watching the postman approach with a vague feeling of apprehension, each time feeling a wave of relief upon confirmation that a dreaded notice of policy cancellation was not among the mail.

Meanwhile, I began to do some serious thinking about how I conceivably could strengthen my position with my errors and omissions underwriter. It was then that I began to analyze my overall insurance situation.

My four companies—each located in four separate growth counties—were insured through four different local agents. Bills for property/casualty and errors and omissions came regularly and I paid them regularly. But, I quickly discovered that aside from that, I really did not have a very good grasp of what insurance company covered what risks.

"Meanwhile, I began to do some serious thinking about how I conceivably could strengthen my position with my errors and omissions underwriter. It was then that I began to analyze my overall insurance situation."

It occurred to me that if I were to devise a package combining my property/casualty insurance with my errors and omissions coverage for all four companies, not only would I have better control of my insurance situation but I also would present a more attractive risk to an insurance company.

The fact is that the fragmented method of coverage I had been using for 10 years made for gaps and overlaps of coverage which can be unnecessarily costly. For example, of the 35 employees who staff my four abstract companies, five of them were included in more than one er-

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Mr. Jones is president and owner of four Indiana abstract companies. They are Boone County Abstract Co., Inc., Lebanon; Taylor & Taylor, Inc., Danville; Columbus Abstract Co., Inc., Columbus, and Morgan County Abstract Co., Inc., Martinsville.

rors and omissions liability policy. This meant that I was paying twice and, in one instance, four times for this coverage on certain employees who floated between companies.

My subsequent search for an underwriter that carried multi-line coverage led me to St. Paul Fire and Marine Insurance Co. My local agent contacted St. Paul's area manager and the three of us sorted through a boxful of separate policies and endorsements to determine the coverage that I needed and what it would cost.

That was in 1976. Since then, I have determined that in addition to the other benefits, one of the greatest advantages of buying what the company calls the master policy portfolio shows up in the bottom line. I have been able to increase my coverage and save approximately 20 to 25 percent on insurance bills.

Specific Coverage

In addition to complete errors and omissions liability insurance protection, my insurance package covers four buildings which we lease and four abstract companies, each with its own set of records and equipment, and the five company cars.

The real property is insured to replacement value and the policy covers landlord liability, loss of rents, extra expense and all risks. The abstract company coverage includes personal property, leasehold improvements, valuable papers and records, other people's property, vehicles, aircraft, vandalism and malicious mischief.

General coverage includes landlord and/or tenant, total comprehensive general liability, medical protection, personal injury liability, comprehensive/auto liability, Workmen's Compensation and employer liability.

The above coverage—including the errors and omissions insurance—is all included in the master policy which is dollar coordinated to a $100,000 liability limit with $1,000 deductible.

Piggy-backed with the master policy is an excess umbrella policy which carries a liability limit of $1,000,000 with a deductible of $100,000.

(*continued on page 19*)

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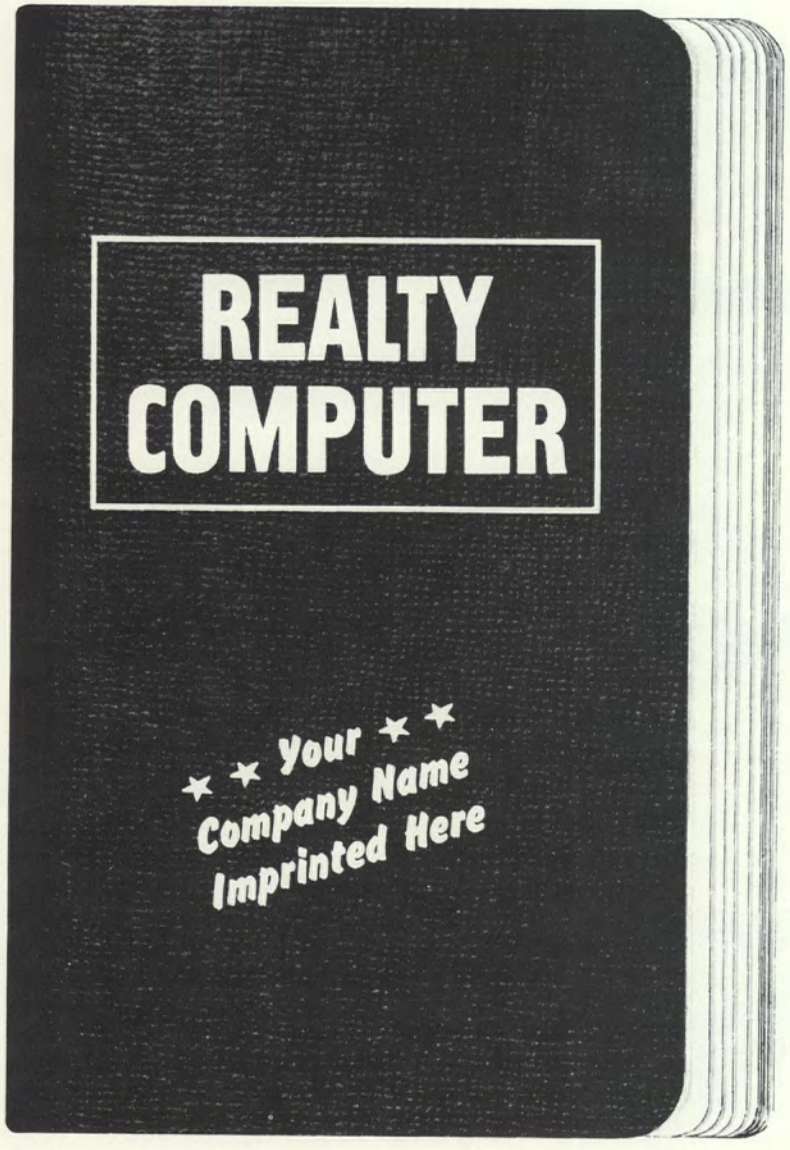

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The Enigma—*(from page 11)*

The R.J. Cantrell Agency also uses various rate structures which comply with the various state insurance codes, along with "consent to rate" when the state's insurance code rate structure is not sufficient to cover claims costs.

Lloyd's of London errors and omissions liability policies are available in all states, also. As a non-admitted carrier, the rate structures are not based on state codes but on the individual negotiations of the underwriter, broker and buyer.

The limits of liability on a Title Pac errors and omissions policy of the R.J. Cantrell Agency range from $100,000 per claim to $1,000,000 per claim, with $2,000,000 in the aggregate as the maximum. According to Cantrell, each application is individually underwritten around the needs of the particular title person and in accordance with the applicable rates in the state. He said the company has nine different rating structures and a number of possible debit and credit attachments. It is the combination of these two structures that creates the array of possibilities.

The deductibles on a Title Pac program are $500, $1,000, $2,500 or $5,000.

Again, Lloyd's is a special case. The British firm varies its premium rates and terms of coverage with each application. Therefore, Lloyd's does not have a rigid rating system, nor does it have specific schedules of deductibles and limits of liability.

Consolidation—*(from page 17)*

Frequent Reviews

I review the master policy twice yearly with my local agent and area manager to update information and therefore ensure complete coverage.

This frequent review also enables me to take advantage of any new coverage that the company might offer which might suit my needs.

It is during these reviews that information of developments such as the closing down of a tavern next to one of my companies is introduced. This event translated to an appreciable reduction in premium because of the decreased fire hazard.

I don't worry too much about errors and omissions liability coverage anymore. Since adopting this plan, I have experienced one claim under the errors and omissions portion which was settled out of court—a matter in which St. Paul negotiated the settlement.

I definitely believe that I'm in a stronger position than I was six years ago. Besides, what can be bad about saving money?

Rate Increases

During the early to mid-1970s, most errors and omissions insurance premiums skyrocketed. Spokesmen for the insurers agreed that inflation in real estate was a contributing factor. They said both the size and the frequency of claims increased substantially.

For the abstracter-agent, an assurance that a period of price stability lies ahead would be welcome. But one only needs to look at the January Consumer Price Index increase of 1.4 percent—18 percent inflation if maintained all year—to conclude that no such assurances are possible.

E & O Committee—*(from page 7)*

ful in creating a fund out of gross profits, thus letting Uncle Sam assume his fair share of the risk? Perhaps if we, as an Association, were to approach this problem with a united front, we could prevail with the Internal Revenue Service on a tax free reserve.

Defining Gross Negligence

As a title insurance agent, you should be interested in how much of the liability your underwriter assumes as a title insuring risk. Some agency contracts hold the abstracter liable only for gross negligence. What constitutes gross negligence? This is probably a question for the courts.

Although the abstracters are an ALTA majority, we sometimes act as if it were someone else's Association. We use our Association far less than we could and should.

One way to benefit from your ALTA membership is to use the information available through this committee. There are few problems which I have ever faced, as an abstracter, which had not already been faced and solved somewhere else by one of my fellow abstracters.

We have a good Association and a fine, willing and available trade publication in *Title News*. We have answers. Let's communicate with each other through our Association.

I urge you to send to *Title News* or this committee any information you have, with respect to companies now writing errors and omissions insurance for abstracters or information about loss funds, which you or someone you know have created, or any other ideas which you may have on the subject.

Cantrell Sells New Protection

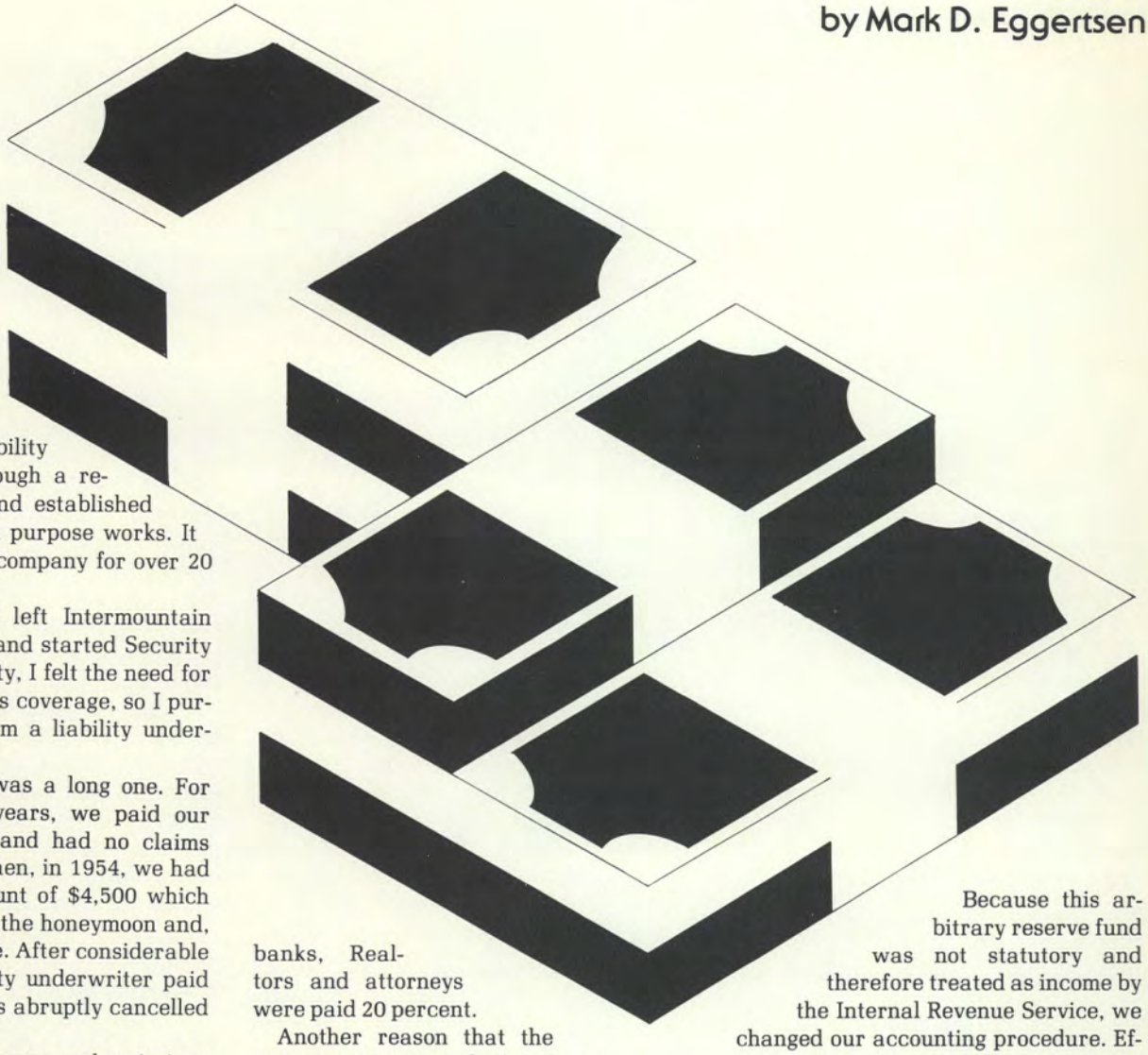
The R.J. Cantrell Agency, Muskogee, Okla., has announced that it will begin marketing an escrow errors and omissions program sometime in May, according to R. Joe Cantrell, president.

The program will cover errors in the performance of ordinary functions of escrow agents, but is not a fidelity bond, Cantrell said.

The Cantrell Agency currently markets Title Pac errors and omissions insurance for title abstracters, title agents and title attorneys.

Details of the escrow program will be announced later this spring.

by Mark D. Eggertsen



Professional liability protection through a reserve asset fund established specifically for that purpose works. It has worked for my company for over 20 years.

In 1942, when I left Intermountain Title Guaranty Co. and started Security Title in Salt Lake City, I felt the need for errors and omissions coverage, so I purchased a policy from a liability underwriter.

The honeymoon was a long one. For approximately 12 years, we paid our premiums on time and had no claims under our policy. Then, in 1954, we had a claim in the amount of $4,500 which signalled the end of the honeymoon and, indeed, the marriage. After considerable haggling, our liability underwriter paid the claim and just as abruptly cancelled our policy.

We applied for errors and omissions coverage from other underwriters. But, bad news travels fast and our applications were categorically rejected because of the 1954 loss.

After two or three years of going bare and some careful thought, we decided to set up a reserve for title losses. To accomplish this, we set aside one percent of yearly gross income both from abstracting and title insurance.

The growth of the reserve fund was slow. At that time, abstract fees were $3 per certificate and 75 cents per *entry* as compared to today's $50 certificate and $5 per *page*. Also from those fees, the banks, Realtors and attorneys were paid 20 percent.

Another reason that the one percent set aside for the reserve did not grow very fast was that the average title policy liability was approximately $6,000.

Nevertheless, by being extra careful in making our searches and examinations, we succeeded in minimizing our losses and maintaining a virtually break-even account.

We discovered that an added advantage to being self-insured is that we are able to pay claims promptly without having to fill out detailed claim forms. The seemingly interminable lengths of time required for an adjustor to approve settlement were also eliminated.

Because this arbitrary reserve fund was not statutory and therefore treated as income by the Internal Revenue Service, we changed our accounting procedure. Effective as of Jan. 1, 1975, we treat the reserve as an operating expense and thus deduct amounts drawn from it as they are paid out as a result of claims. For accounting purposes, it is called Title and Escrow Losses.

My recommendation to a title insurance agent who plans to set up a reserve for title and escrow losses would be to begin by reserving at a rate of two percent of yearly gross income at least until an adequate amount has been accumulated to meet the requirements of his un-

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Mr. Eggertsen is president of Security Title Co. in Salt Lake City, Utah.

The 2 Percent Solution: A Reserve For Title and Escrow Losses

derwriter as to the agent's liability or partial liability for his errors and omissions.

I base my recommendation on that fact that as of Dec. 31, 1979, the one percent gross in our fund would have reached the sum of $142,708, which was $150,632 short of the actual total of $293,340 charged to Title and Escrow Losses.

This much larger than usual total charged against the reserve account is attributable to a single loss in the sum of $77,720 due to an examiner's error. Were it not for this major loss, 1.5 percent would have proven adequate.

Tax Relief

In the last session of the Utah legislature, legislation was considered that would have made a reserve fund for title losses of title insurance agents statutory. Such a law would have the effect of eliminating the present tax on the reserve which is now treated as ordinary income. The provision was part of the Utah Title Insurance Act, introduced as Senate Bill 89, and had the backing of Utah Insurance Commissioner Roger C. Day as well as the governor.

Although it passed the Senate by a vote of 19 to 11, it failed to reach the floor of the House. Provisions relating to controlled business, rebates and control of escrow fees generated strong opposition from a sufficient number of underwriters and agents that the bill died in a House committee.

Since then, the insurance commissioner has directed his legislative analyst to prepare a new bill which will be submitted to the next session of the Utah legislature.

"My recommendation to a title insurance agent who plans to set up a reserve for title and escrow losses would be to begin by reserving at a rate of two percent of yearly gross income . . ."

Among other well defined requirements, the bill mandates that every title insurance agent shall establish and maintain for the protection of policyholders a fidelity bond, if available at reasonable rates, or professional liability insurance. If neither a fidelity bond nor errors and omissions insurance is purchased, an equivalent financial protection is required which is subject to the approval of the insurance commissioner. This equivalent financial protection must be adequate, in the commissioner's judgment, to assure insurance for the performance of any service in conjunction with the issuance of a contract or policy of title insurance to a minimum required amount of $50,000.

In addition, an agent would be required to establish an errors and omissions reserve fund which would be composed of assets approved by the commissioner and maintained as a separate account. In determining financial condition this reserve fund would be charged as a reserve liability of the title insurance agent.

In the first year following passage of the act, the bill provides that .5 percent of the agent's gross income of the previous year received from the business of title insurance will be entered in the errors and omissions reserve fund. Each year afterward, the amount would be one percent of the previous year's gross income.

If the title insurance agent becomes insolvent, the insurance commissioner is to use the fidelity bond and professional liability insurance or equivalent financial protection along with the reserve fund to settle any claims arising against the agent and arising from its errors, omissions or defalcation.

The commission will maintain the reserve fund free from claims of any creditor or stockholder until such time as the applicable statutes of limitation preclude any claims against the agent arising from its errors and omissions or default in the business of title insurance.

Other Provisions

Another section of the bill provides that the title insurance agent shall comply with rules and regulations created by the insurance commissioner with re-

(*continued on page 29*)

Do Title Agents Really Need E & O Insurance?

by Thomas D. Jones

The sharply increased loss development that errors and omissions liability insurance underwriters experienced in 1974 set in motion a series of events which have affected the entire title industry.

The immediate and most obvious result, of course, was significantly higher professional liability insurance premiums and a temporary decreased availability of coverage for agents.

But a part of the legacy did not surface until a few years later. Underwriters, apparently responding to agent pressure, began to drop the requirement that their agents carry errors and omissions liability insurance.

Like other title insurance underwriters, for many years we, at St. Paul Title, required errors and omissions insurance of our agents because we felt it was essential for the protection of both the insureds and the agent's financial interests and because we did not believe that the title underwriter's share of the title premium contemplated assumption of the risk.

"We live in a litigious society where many seek unusual benefits from someone else's error."

About a year ago, however, we yielded to competitive pressure and joined the ranks of underwriters who had dropped the errors and omissions requirement. Despite this fact, we remain concerned and recommend to our agents that they carry errors and omissions insurance.

Risk Continues

We live in a litigious society where many seek unusual benefits from someone else's error. This became abundantly clear when loss development on title agent's errors and omissions insurance reached levels over 150 percent of premiums in 1974.

At that time, the only substantial writer of the errors and omissions line was St. Paul Fire & Marine Insurance Co. Total premiums were in the $600,000 range, which although substantial in total, represented a number of policies across the country.

"But in 1974, when loss development reached 166 percent, premiums skyrocketed to about $1,650 for the same coverage."

St. Paul Fire & Marine is organized with 45 service centers which are separate profit centers. Many service centers had very little premium, but faced substantial losses and as a result withdrew from the line although the company continued to make a market. The effect was serious disruption in the availability of coverage in some areas.

Before 1974, premiums were relatively modest because loss development also was modest. Typical premiums for an agent with eight employees and coverage of $100,000 per occurrence with an aggregate coverage of $300,000 was about $465 per year.

But in 1974, when loss development reached 166 percent, premiums skyrocketed to about $1,650 for the same coverage.

Recent loss development on title agent's errors and omissions for St. Paul Fire & Marine has improved greatly and the company anticipates declining premium rates.

Although premiums have not returned to their pre-1974 levels, a typical premium is still small when compared to even a modest loss. The unexpected can, and does, happen and risk-sharing through some form of insuring mechanism seems justified and prudent.

A Possible Alternative

Self-insurance may be an alternative, but it is important that it be understood. Self-insuring is something to be carefully planned and prepared for before it is undertaken. To go without insurance or careful preparation is what I call going naked and may translate to the acceptance of extraordinary risk.

The liability insurance industry has opposed self-insuring reserves as being socially undesirable and therefore undeserving of encouragement through tax deductibility.

This opposition is based on a lack of regulatory mechanism which assures that reserving is done on a proper basis and the lack of a guaranty system such as exists for insurance companies in many states. The effect of these inadequacies is potentially to place the consumer in jeopardy.

On the other hand, the liability insurance industry has not opposed competition in the form of industry- or professional association-based insurance companies.

These types of companies must meet the regulatory tests of all insurance companies and therefore the public's interest is protected. A number of companies in the insurance industry have developed service capabilities which they offer to these association- or industry-based companies.

Through its risk management companies, the insurance industry not only offers services to industry-based insurance companies but also to companies which are self-insured. The risk management companies study carefully the self-insured's risks and develop a plan for risk prevention as well as other services through claims adjustment.

"To continue on the path upon which we have embarked means that we risk not only harm to some individuals but also added regulation aimed at protecting the public."

St. Paul Risk Services, Inc., advises that unless the self-insuring risk has premiums of $200,000, it is probably not economic to be self-insuring.

Self-insurance on an individual agent basis is not apparently economic. I therefore fear for the agent who places what is sometimes a substantial portion of his personal capital in potential jeopardy without as careful examination of the risk as is possible.

To continue on the path upon which we have embarked means that we risk not only harm to some individuals but also added regulation aimed at protecting the public. Consequently, I suggest that a detailed professional study of the problem and its possible solutions is warranted.

Meanwhile, I continue to be concerned about risk and potential loss to individual agents and we will continue to urge our agents to protect themselves by insuring.

Mr. Jones is chairman of the board, president and chief executive officer of St. Paul Title Insurance Corp., St. Paul, Minn. He is a former member of the ALTA Errors and Omissions Liability Insurance Committee and currently serves on the ALTA Research Committee and is a member of the ALTA Title Insurance and Underwriters Section Executive Committee.

Where Can You Obtain Up-To-Date Information Under One Cover On The Role Of Title Insurance In Conveyancing?

You can find it between the covers of ALTA's recently published *Title Insurance Handbook.* The five chapters were authored by title experts, a lender, practicing attorney and a claims expert.

In addition to being of use to title company personnel, the handbook was designed to suit the needs of attorneys, lenders, life insurance company counsels, real estate brokers and government officials.

Chapter 1—Title Insurance Coverage

A Lawyers Title Insurance Corp. senior vice president and general counsel together with a Chicago Title Insurance Co. vice president and general underwriting counsel discuss policy forms in general use, commitments for title insurance, the ALTA Closing Protection Letter and Endorsement Forms as well as affirmative coverage. *—By Marvin C. Bowling Jr. and Robert T. Haines*

Chapter 2—The Title Insurance Approach to Current Problems in Real Estate Lending and Investing

Lawyers Title's Bowling and Chicago's Haines again team in the presentation of this section focusing on current and emerging problems such as alien land owners, mineral rights, condominiums and PUDs, inflation protection, usury, riparian lands, Indian claims, the new bankruptcy law and the Interstate Land Sales Act.

Chapter 3—Use of Title Insurance by Lenders

An associate general counsel of Life Insurance Company of Georgia discusses the value of title insurance for construction lenders, for loan originators, loan purchasers and the value to the lender at foreclosure. *—By Neal M. Kamin*

Chapter 4—Use of Title Insurance by the Practicing Attorney

A practicing attorney with the Atlanta, Ga., law firm of Alston, Miller & Gaines explores the function of the attorney in obtaining coverage and elaborates on the reasons for recommending title insurance to clients. *—By James M. Ney*

Chapter 5—Title Claims

An assistant vice president and associate title counsel of Pioneer National Title Insurance Co. details how to file a claim and discusses indemnity and negligence liability, damages and the duty to defend. *—By Ted W. Morris, Jr.*

The handbook, which contains over 200 pages in an easy-to-use loose-leaf three-ring format was the basis of ALTA's seminar presented on February 22, 1980, in Atlanta, Ga. in cooperation with the Dixie Land Title Association. A limited number of them are available at a single-copy price of $20, post-paid. Orders of two or more are priced at a single-copy cost of $18. Make check or money order payable to the American Land Title Association.

To order, fill out the below coupon and mail, together with your check or money order, to the American Land Title Association, 1828 L Street, N.W., Washington, D.C. 20036.

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Risk Prevention and E & O Insurance

The Not-So-Odd Couple

by John Van Cleave

The word "agent" by its very definition—a person acting on behalf of another—clearly puts a legal burden on that person to perform in a prudent and reasonable manner. Unfortunately, this does not always happen and allegations are brought by clients—called the agent's principal—claiming damages.

It can happen for myriad reasons, some without merit. But, regardless, these kinds of actions alleging errors and omissions cause monies to be spent, if only for investigation and defense.

The consequences of a claim do not end with the monetary involvement. A claim, justified or not, can diminish respect or raise doubts in the minds of current or potential customers or fellow professionals. It also takes its toll on the smooth functioning of a business due to the fact that daily operations can be significantly disrupted while a claim is being defended against.

Mr. Van Cleave is president of INAX Underwriters Agency, Inc., Chicago, Ill., a division of Insurance Company of North America Corp.

The Emergence of Claims

Contrary to popular belief, the mid-70s was not the first crisis or the beginning of the problem of principals bringing action against agents because of their blunders. Lawyers experienced a significant frequency of claims as far back as 1840 and again in the 1880s. But, interestingly enough, it was not until 1976 that the overall claim frequency matched the rates of a century earlier.

Unlike the previous bouts of claim inflation, this time there is no sign of a downturn in the claim epidemic. Depending upon what professional one looks at, the claims frequency has gone up anywhere from very little in the past few years to several hundred times. For example, statistics released by the American Bar Association show a claims frequency increase of about 250 percent above the rate in 1973 for attorneys. On the other hand, the claims volume against architectural engineers, who have historically experienced a very high level of claims, did not increase at all during this same period.

For the most part, however, claims and suits against nearly all professionals has been on the increase in the last five years. Evidence would suggest

that abstracters and title insurance agents are no exception.

Solutions

A partial solution, of course, is for the agent to transfer this risk to an insurance company by purchasing an errors and omissions policy. In addition, however, what is needed is a thorough look at one's business operations to identify where and why errors occur and to make an attempt to minimize the possibility of errors.

Efforts in this area—loss control and prevention—can turn the escalation of claims around. The Insurance Company of North America (INA) is one of the major insurers of professionals and stands out as a unique example of a company that, in addition, has developed a loss control program designed specifically for professionals.

This loss control package is not a one-shot program, but an ongoing, well thought out, organized program. Unlike many other loss control programs dealing with such areas as medical malpractice and fire protection, loss control for other professionals cannot be based on site inspections, audits and deficiency reports. This is due primarily to the economics of a highly fragmented industry.

"A partial solution, of course, is for the agent to transfer this risk to an insurance company by purchasing an errors and omissions policy."

Instead, an effective program must depend heavily on education and awareness building. Simply stated, it requires that the loss control program provide the necessary materials to help amend practices and methods of operation leading to claims, and provide sufficient incentive to do so.

Because of the loose knit structure of most professional associations, the ready availability of insurance and the ego issues involved, obtaining full participation by professionals is the highest barrier to successful loss control. The key to success of any program is a high degree of participation by the professional involved, induced by association rules, price incentives or intellectual appeal of the program itself.

INA's objective for this program is clear cut—to reduce losses. By doing so, not only can we improve our profitability, but also hopefully offer insurance at a cost that will be attractive for the professional to purchase. We hope to provide the professional with the incentive, the knowledge and the means to actively control exposure to professional liability losses.

Eliminating Dumb Mistakes

INA's loss control program addresses itself to the practical administrative functions of an office and not to the substantive aspects. In other words, we do not presume to tell lawyers, accountants or abstracters how to practice their professions. Instead, we zero in on the administrative areas of operation so that plain, "dumb mistakes" are eliminated or reduced.

The risk is real. About 10 percent of all professionals experience claims each year. If these claims are distributed randomly, in all probability each of you will experience at least one claim within the next 10 years.

For the professional who depends only on the odds and takes no measures to protect himself, the damage of a claim

(*continued on page 31*)

The Small Business Owner and Retirement Plans

by James Michal

In these days of recession and inflation, retirement security is becoming a concern of greater importance to many employees. In fact, many labor unions are placing pension benefits at the top of their demand list when negotiating a new contract with an employer or in an industry.

> ". . . the existence of a retirement plan is becoming increasingly important to an employer in his efforts to attract and retain competent and loyal employees."

For many people, social security is the only source of retirement benefits to which they may be entitled. However, retirement benefits from that source do not provide more than basic life necessities. Therefore, even in medium and smaller sized business concerns, the existence of a retirement plan is becoming increasingly important to an employer in his efforts to attract and retain competent and loyal employees.

Although there is no law requiring an employer to maintain a retirement plan for its employees, employers have recog-

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Mr. Michal is an associate attorney with the law firm of Jackson, Campbell & Parkinson, Washington, D.C. Thomas S. Jackson is ALTA General Counsel.

●zed that there are tangible and intangible benefits to be gained by a business from the existence of an employee retirement plan.

When an employer decides to adopt a retirement plan, however, he does not have carte blanche as to how the plan will operate or as to the employees to be covered. Federal law limits an employer's ability to dictate the terms of a retirement plan.

"In most instances, then, if an employer decides to adopt a pension plan, he is faced with the decision of choosing between a defined benefit plan or a profit-sharing plan."

For example, the law prohibits an employer from discriminating against lower paid employees in favor of highly compensated officers, directors and shareholders as to eligibility for participation in a plan. It also precludes an employer from denying retirement benefits to an employee who has been with the company for a certain minimum number of years, even though an employee's termination of service may have been occasioned by dishonesty or illegality.

The federal law covering private pension plans is the Employee Income Retirement Security Act of 1974, commonly known as ERISA.[1] The act contains both tax and labor law provisions. ERISA's tax law provisions relate in large part to minimum requirements a plan must satisfy in order for it to achieve qualified tax status which enables the contributing employer to deduct his annual contributions to the plan.

The labor law provisions deal with substantive and procedural employee rights which an employer is bound to honor in any pension plan it may adopt and the protection of those rights.

ERISA also prescribes the duties of the plan fiduciaries, details the numerous reporting and disclosure filings of an employer and places limitations on or prohibits certain types of transactions in which a planned fiduciary may engage with respect to plan assets.

Which Plan?

Most pension plans are either a defined benefit plan or a define contribution plan.[2] A defined benefit plan determines in advance the amount of pension benefits one will receive at retirement but the amount of money contributed to the fund varies.

A defined contribution plan or individual account plan has a contribution formula (in many cases a percentage of profits) but the actual amount of benefits one will receive at retirement is not known. Money is contributed to each participant's separate account and invested, and the amount he receives is determined by the money in his account at retirement. A profit-sharing plan is one kind of individual account plan.

In most instances, then, if an employer decides to adopt a pension plan, he is faced with the decision of choosing between a defined benefit plan or a profit-sharing plan. From one standpoint, a profit-sharing plan gives an employer more flexibility because of the discretion he has in determining the amount of the annual contribution to be made to the plan. There is no fixed obligation to contribute certain sums each year.

Thus, in years of no profits, or in years when profits fall below a predetermined level, no contributions need be made. On the other hand, in years of high profits, contributions larger than usual may be made if the plan so provides. It is perfectly acceptable to have as the contribution formula of a profit-sharing plan one which states that the employer "will make such contributions each year, as may be determined by the board of directors."

"From one standpoint, a profit-sharing plan gives an employer more flexibility because of the discretion he has in determining the amount of the annual contribution to be made to the plan."

On the other hand, under a defined benefit plan, an employer obligates himself to make contributions on an annual basis in order to meet projected pension benefits under the plan. This is because ERISA requires an employer to fund pension credits for current service as they are earned by his employees.

Formulas are established for the funding of costs, over a specific period of time, of pension benefits earned in the past for monies which have not yet been

"... under a defined benefit plan, an employer obligates himself to make contributions on an annual basis in order to meet projected pension benefits under the plan."

set aside and for making up experience losses and charges in actuarial assumptions. There is, therefore, a definite funding obligation when a defined benefit plan has been adopted. Such an obligation may be particularly burdensome for an employer to meet in a bad business year.

The PBGC Role

From an employee's standpoint, a pension plan is usually considered the better alternative, because it provides for a certainty of a definite level of benefits, rather than the uncertainty of benefits that depend on the business fortunes of an employer and the investment performance of the trust fund. In addition, ERISA provides that defined benefits plans are to be insured through the Pension Benefit Guaranty Corp. (PBGC), a self-financing government corporation established by that law.

If necessary, PBGC will pay a participant a monthly amount for his vested benefits up to a maximum amount. It can then attach up to 30 percent of the employer's assets to cover possible losses. And the employer pays for the insurance protection for PBGC.[3]

Survivor Annuity and Tax Aspects

Another major difference between a profit-sharing plan and a defined benefit plan relates to the legal requirement on benefit payments. Under a profit-sharing plan, there is no requirement under the law that provision be made for a payment of a portion of the retirement sum to a participant's spouse. Thus, a profit-

"Under a profit-sharing plan, there is no requirement . . . that provision be made for a payment of a portion of the retirement sum to a participant's spouse."

[1] *ERISA also covers welfare benefit plans.*

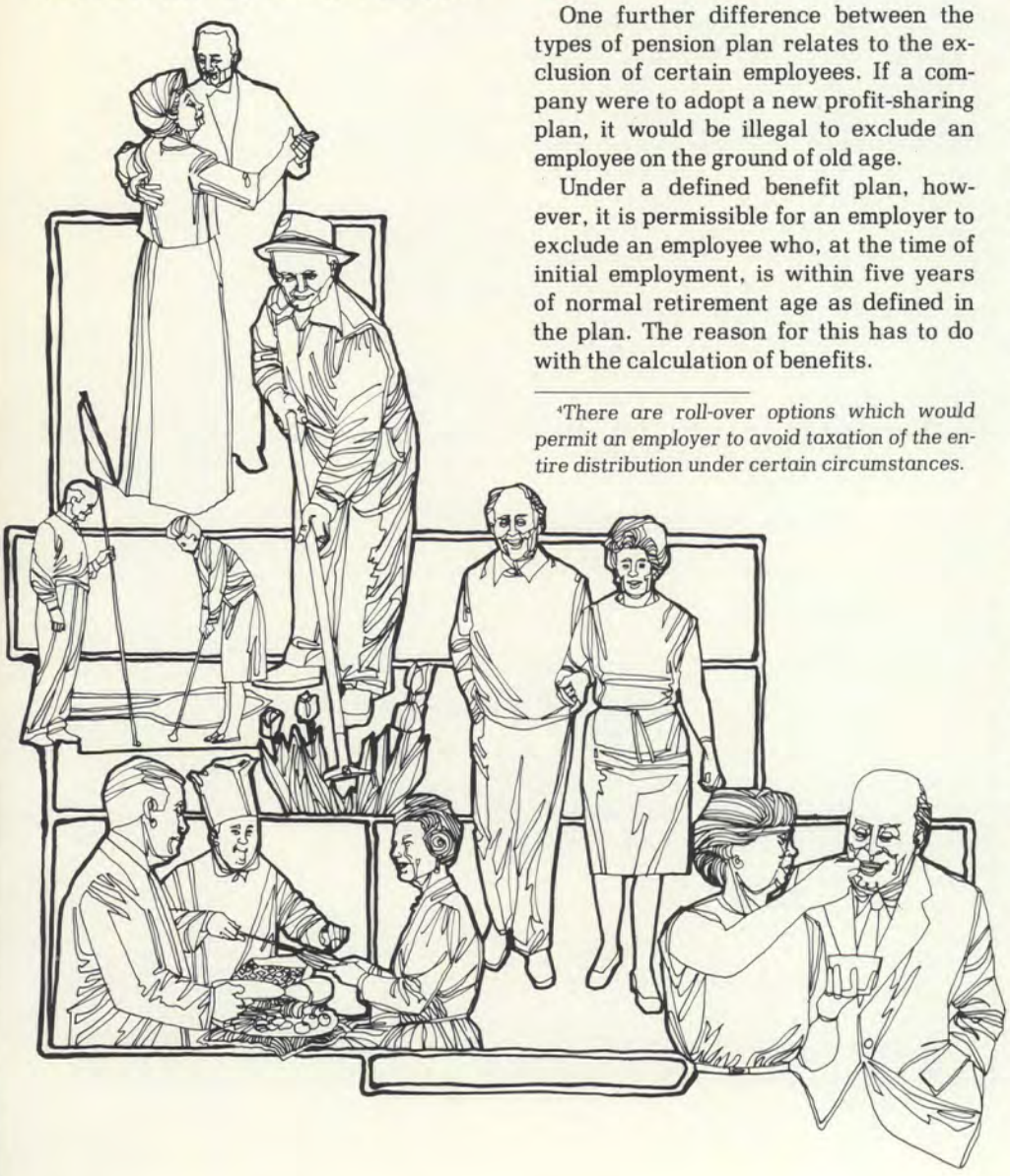
[2] *This article will not deal with Keough plans or other plans covered by ERISA.*

[3] *For single employer plans, the rate to be paid PBGC is $2.60 annually per participant.*

sharing plan may simply provide for a lump sum payment to a participant at the time when he becomes entitled to his distribution. The plan may also provide for an employee designation of beneficiaries other than his spouse to receive his profit-sharing distribution.

On the other hand, federal law requires that a defined benefit plan provide for a joint and survivor annuity unless the employee elects otherwise. The survivor annuity paid to a spouse must be at least one-half the amount payable to the employee under the joint and survivor annuity while both are living.

The plan may require the employee and spouse to have been married for at least one year on both the annuity starting date and at the time of the employee's death. In addition, if the plan allows for early retirement and the employee chooses to work beyond the early retirement age, it must allow him to elect to protect his spouse in case he dies before reaching the plan's normal retirement age while still employed. The plan must give an opportunity to choose early survivor benefits within 10 years of normal retirement age or at early retirement age, whichever is later.



"... federal law requires that a defined benefit plan provide for a joint and survivor annuity unless the employee elects otherwise."

From a tax standpoint, an employee may prefer the pension plan pay-out of benefits, since he would be taxed only on those sums received during the year, whereas a lump sum profit-sharing distribution would all be taxable in the year received.[4] On the other hand, an employee may prefer at the time he retires to receive his entire account balance, notwithstanding its potential taxability because of pressing family needs or personal desires.

Age Considerations

One further difference between the types of pension plan relates to the exclusion of certain employees. If a company were to adopt a new profit-sharing plan, it would be illegal to exclude an employee on the ground of old age.

Under a defined benefit plan, however, it is permissible for an employer to exclude an employee who, at the time of initial employment, is within five years of normal retirement age as defined in the plan. The reason for this has to do with the calculation of benefits.

[4]*There are roll-over options which would permit an employer to avoid taxation of the entire distribution under certain circumstances.*

Under a profit-sharing plan, there is no difficulty in calculating the benefit for an individual regardless of age, because that calculation is based on the profit sharing contribution for that particular year. Under a defined contribution plan, the contribution made each year to a plan is based on what the actuary informs an employer must be made in order to provide a certain level of benefits to all eligible employees. Therefore, if a plan had to include persons of ages close to normal retirement age, it would make these actuarial computations much more difficult and result in very high, and possibly prohibitive, funding costs to an employer.

"... many of ERISA's requirements such as minimum participation and vesting standards apply generally to all pension plans."

The foregoing is by no means an all-encompassing dissertation on retirement plans and the distinctions between the principal characteristics of defined benefit plans and profit-sharing plans. There may be other factors unique to an employer's situation which will influence any decision to be made. It also should be noted that many of ERISA's requirements such as minimum participation and vesting standards apply generally to all pension plans.

The 2 Percent Solution—*(from page 21)*

spect to escrows, settlements or closings.

The bill also contains a section dealing with kickbacks and rebates. Section 31-25-26 stipulates: "No title insurance company or title insurance agent, or any officer, employee, attorney, agent or solicitor thereof, may pay, allow or give, or offer to pay, allow to pay, directly or indirectly, as an inducement to obtaining any title insurance business, any rebate, reduction or abatement of any rate or charge made incident to the issuance of the insurance, any special favor or advantage not generally available to others, or any money or other considerations or material inducement as proscribed by the commissioner.

" 'Charge made incident to the issuance of the insurance' includes, without limitation, escrow, settlement and closing charges, and such services as are proscribed by the commissioner."

Names in the News . . .

Margaret Poole

Wayne Trapp

Margaret M. Poole was elected vice president of American Title Insurance Co., Miami, Fla. Poole has been assistant director of public relations and will continue her activities in this area. Poole directs the company's in-house advertising agency, Ad-Visors, and edits and supervises the production of corporate promotional literature.

Poole chairs public relations committees of three associations, the Florida Land Title Association, the Mortgage Bankers Association of Florida and the Mortgage Bankers Association of Greater Miami.

At American Title's Great Lakes Regional office in Southfield, Mich., **Edwin C. Erwin** was appointed agency representative for Illinois and Indiana. Erwin has been in the title industry since 1946.

David Cairns

Douglas McDougal

At Pioneer National Title Insurance Co., **J. Wayne Trapp** was named assistant vice president and Hamilton County manager, and will work out of the Chattanooga, Tenn., office. He is now responsible for coordinating the company's title insurance sales and service activities throughout the county.

David A. Cairns was elected president of F.S. Title Services, Inc. and its subsidiaries, Fidelity National Title Insurance Co., Southern Title Guaranty Co., Inc., F.S. Agency, Inc. and El Paso Abstract Co.

A holding company based in Denver, Colo., F.S. Title is a subsidiary of the Insurance Company of North America. F.S. Title and its subsidiaries are active in the title insurance industry in 17 western states.

James F. Betts, president and chief executive officer of Continental Financial Services Co., was named to the board of directors of Lawyers Title Insurance Corp.

Betts became president and chief executive officer of Continental Financial Services Co. in January 1980. During the seven years prior to joining Continental, he was president and chief executive officer of The Life Insurance Company of Virginia.

Betts is also the executive vice president of The Continental Group, Inc. and chairman of the board of Life of Virginia.

Thomas Rutledge

Donald Williams

Lawyers Title Insurance Corp. announced the recent election of a National Division counsel and three branch counsels. **Michael L. Pezzicola Jr.** of New York City was elected National Division counsel. He joined the company in 1974. **Douglas S. McDougal, Patrick J. Newton** and **Thomas W. Rutledge** are the new branch counsels. They work from offices in Troy, Mich.; Miami, Fla., and Los Angeles, respectively.

Lawyers Title also announced that **Donald R. Williams** was elected assistant counsel for the company's headquarters office in Richmond, Va., where, also recently, **H. Lee Ford** was elected assistant vice president/office services. Prior to his election as assistant counsel, Williams was a senior title attorney for Lawyers Title. Ford served as manager/office services for the company since 1976 and has been in the title insurance business for 27 years.

In Akron, Ohio, **Jeffrey D. Windon** was elected assistant branch counsel for Lawyers Title. Windon joined the company in February of 1979, leaving private law practice in Mogadore, Ohio.

INAX Enters E & O Market

INAX Underwriters Agency, Inc., plans to begin marketing errors and omissions liability insurance for abstracters and title insurance agents by mid-summer this year, according to company President John Van Cleave.

The Chicago-based company is a division of Insurance Company of North America Corp., which is a major insurer of professionals. Van Cleave, who reported that his firm has been studying the possibility of entering the errors and omissions field for agents and abstracters over the past several years, will announce details of his company's program at a later date.

When To Sue

"I must say that as a litigant, I should dread a lawsuit beyond almost anything short of sickness and death."—*Jurist Learned Hand*

Title Systems Committee Wants ALTA Member Queries

The ALTA Title Systems Committee, in an effort to better serve Association members, plans to develop a column to appear on a regularly scheduled basis in *Title News*. This column will be a combination of an advisory format in which questions from individual ALTA members relating to land title systems will be addressed, as well as general articles or information relating to land title systems.

Due to the wide variance of ALTA members from a geographical and size-of-operation standpoint, it is hoped that a column containing the response to specific questions or concerns will be informative and responsive to the membership as a whole.

Questions should be addressed to committee Chairman Robert Meckfessel and mailed to him at the St. Paul Title Insurance Corp., 15510 Olive St., Suite 220, Chesterfield, Mo. 63017. Each question will be distributed to members of the Land Title Systems Committee with the chairman assembling their responses and opinions.

In the unlikely event that all committee members are of the same opinion, one response will be printed. However, in most cases, several differing opinions or comments will be communicated. It is hoped that this will encourage an exchange of ideas and additional comments from the readers of *Title News*.

Because a wide range of talent and experience in diverse geographical areas are represented on the committee, it is expected that most questions will be handled by committee members. However, where warranted, outside experts may be asked to comment.

The committee will attempt to respond to all questions and inquiries as time and space permit.

The question-answer segment of the column will be supplemented by general interest articles reporting information on land title systems and updates in this area.

Who Owns Business?

"It's my conviction that the greatest barrier to better understanding of our economic system is widespread ignorance of who really owns business."—*Lewis W. Foy, chairman of Bethlehem Steel Corp.*

Prevention—(*from page 26*)

can be devastating. To a large extent a professional's business success depends upon his reputation. A single claim for an error—won or lost, justified or not—can cause great damage.

These kinds of damage—diminished respect among colleagues and clients—are not covered by insurance. Nor are the interruptions caused by the litigation of a claim.

By using specific procedures, systems and by changing attitudes, risk can be dramatically reduced. Any steps taken to simplify your operations may reduce the chance of administrative failure.

In addition to reducing risk, these actions can make you a more effective and efficient professional by improving your service to your customers and earning you increased profits. The time and cost of these controls pay off in better time use and fewer problems.

Calendar of Meetings

April 17-20
North Carolina Land Title Association
Sheraton Hotel
Myrtle Beach, North Carolina

April 24-26
Arkansas Land Title Association
Camelot Inn
Little Rock, Arkansas

April 27-29
Iowa Land Title Association
Gateway Convention Center
Ames, Iowa

May 1-3
Oklahoma Land Title Association
Hilton Inn, West
Oklahoma City, Oklahoma

May 1-4
New Mexico Land Title Association
Inn of Mountain Gods
Mescalero, New Mexico

May 8-10
California Land Title Association
Silverado Country Club
Napa Valley
Napa, California

May 8-10
Texas Land Title Association
Hyatt Regency at Reunion
Dallas, Texas

May 15-17
Tennessee Land Title Association
Fairfield Glade
Knoxville, Tennessee

June 1-3
Pennsylvania Land Title Association
Buck Hill Inn
Buck Hill Falls, Pennsylvania

June 8-10
New Jersey Land Title Insurance Association
Seaview Country Club
Absecon, New Jersey

June 13-14
South Dakota Land Title Association
Holiday Inn of the Northern Hills
Spearfish, South Dakota

June 19-21
Land Title Association of Colorado
Wildwood Inn
Snowmass Village, Colorado

June 19-21
New England Land Title Association
New Hampshire

June 26-28
Michigan Land Title Association
Sugar Loaf Mountain Resort
Cedar, Michigan

June 26-28
Oregon Land Title Association
Sun River Lodge
Bend, Oregon

June 27-29
Illinois Land Title Association
Marriott Pavilion Hotel
St. Louis, Missouri

July 10-13
Idaho Land Title Association
Elkhorn at Sun Valley
Sun Valley, Idaho

July 11-12
Utah Land Title Association
Holiday Inn Park City
Park City, Utah

July 17-19
Wyoming Land Title Association
Laramie, Wyoming

July 31-August 6
American Bar Association
Honolulu, Hawaii

August 7-9
Montana Land Title Association
Edgewater Inn
Missoula, Montana

August 14-16
Minnesota Land Title Association
Sunwood Inn
St. Cloud, Minnesota

August 15-16
Kansas Land Title Association
Ramada Inn
Topeka, Kansas

September 6-9
Indiana Land Title Association
Sheraton West Hotel
Indianapolis, Indiana

September 7-9
Ohio Land Title Association
King's Island Inn
Cincinnati, Ohio

September 7-10
New York State Land Title Association
Kutsher's Country Club
Monticello, New York

September 11-13
North Dakota Land Title Association
Holiday Inn
Fargo, North Dakota

September 17-19
Nebraska Land Title Association
Holiday Inn-Old Mill
Omaha, Nebraska

September 17-19
Washington Land Title Association
The Alderbrook Inn
Union, Washington

September 25-26
Wisconsin Land Title Association
Playboy Club
Lake Geneva, Wisconsin

September 26-28
Missouri Land Title Association
Almeda Plaza Hotel
Kansas City, Missouri

October 14-17
American Land Title Association
Honolulu, Hawaii

October 24-26
Palmetto Land Title Association
Myrtle Beach Hilton
Myrtle Beach, South Carolina

October 26-29
Mortgage Bankers Association
San Francisco, California

October 30-31
Land Title Association of Arizona
Westward Look Resort
Tuscon, Arizona

November 5-8
Florida Land Title Association
Don Cesar Hotel
St. Petersburg Beach, Florida

November 7-13
National Association of Realtors
Anaheim, California

November 16-21
U.S. League of Savings Associations
San Francisco, California

December 3
Louisiana Land Title Association
Royal Orleans
New Orleans, Louisiana

American
Land Title
Association

1828 L Street, N.W.
Washington, D.C. 20036