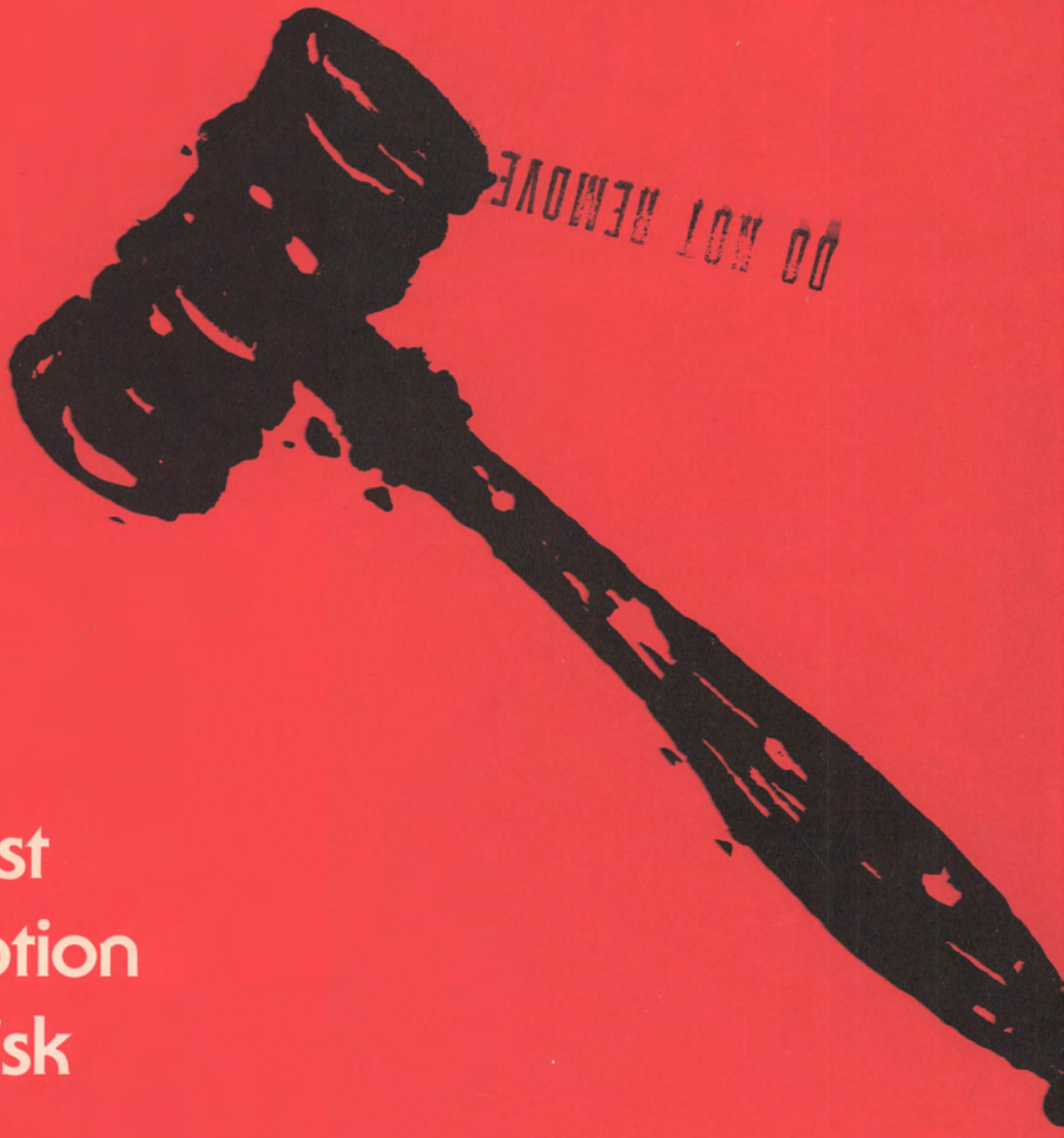
August-September

# TITLE NEWS




## Antitrust Exemption And Risk

# TITLE NEWS

Volume 62, Number 7

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## Contents



## Front Cover

Articles on antitrust exemption and risk are featured in this issue. Joseph C. Mascari discusses the Noerr-Pennington Doctrine and its exemption of legislative and regulatory activity under the First Amendment. Robert G. Rove looks at the activity of rating bureaus. John C. Christie, Jr., esquire, presents an update on judicial developments in antitrust law applicable to the land title industry. In other subject areas, Bert V. Massey, II, comments on abstract certificates and the unauthorized practice of law; Ray E. Sweat examines the need for Congress to act soon in re-establishing a uniform method of insolvency adjudication in bankruptcy; and J. Herman Dance tells about his title company's pursuit of automation.

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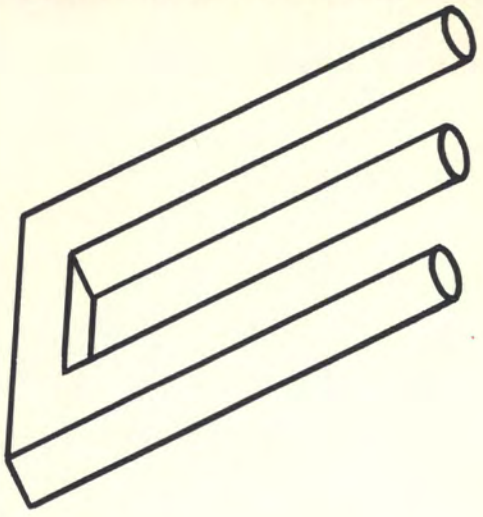

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# A Message From The President

On July 6, 1983, the U.S. League of Savings Institutions Homeownership Task Force released "Discussion Paper #1: The Challenge to Homeownership in the 1980's." Leonard Shane, chairman of the League, gave me an advance copy of this report. The League has marshalled its best forces to serve on this most important committee. They discerned early in their deliberations that no other group, public or private, had undertaken the task of looking at homeownership from all angles.

Some alarming facts have emerged from this endeavor. Homeownership in the 80s in America is declining. From the 1930s through the 1970s, homeownership in the U.S. rose from less than one-third of the families, to over two-thirds. It has declined by more than 1 per cent in just two years, and the factors in place for the rest of the 80s indicate a steady drop in the number of persons who can obtain the number one American dream—homeownership.

Two forces working against each other contribute to this dilemma: The baby boom of the 50s produced families that are ready, willing, but *unable* to buy their first home. The lean years of the 30s did not produce people who save a portion of their income, a policy which is necessary to satisfy the needs of today. The 30s did produce, however, the financial tools that brought us to the highest percentage of homeownership of any nation on earth—F.H.A. programs, federally-insured savings and loan institutions, and a general commitment to homeownership.

I have committed ALTA to serve on a yet-to-be-formed task force dedicated to solving this most severe problem. We can do it, we must do it, we will do it.

This is the final ALTA officer's message that I will write for *Title News*. I am coming to the close of a beautiful chapter in my life, serving as chairman of the Abstracters and Title Insurance Agents Section for two years, president-elect for a year that found me in the president's chair a little early, and as your president this year. I am very proud of the Association, its staff, and its hundreds of members. I have learned three things from this good experience: I love and respect the people in this industry; I love this beautiful country more than ever; and I love to travel and be with number 1A.

Tom McDonald

Thomas S. McDonald

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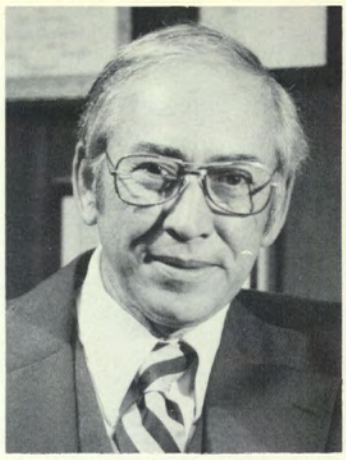

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# Uniform Insolvency Law—Expiration by Default?

By Ray E. Sweat

Bankruptcy is statutory. The earliest English Statutes, 34 and 35 Henry VIII Ch. 4 (1542) like the Statute, 13 Elizabeth I, Ch. 7 (1571), were directed against fraudulent debtors, allowing the seizure of their estates and division among their creditors but afforded no relief to the debtor in the discharge of his liabilities.

In the United States, the control over the administration of bankruptcy is divided between the federal and state governments. The United States Constitution (Art. I, Sec. 8) gives Congress the power to establish "uniform laws on the subject of bankruptcy throughout the United States." The United States Supreme Court has held that the states have power to establish and administer their own insolvency laws in the absence of action by Congress, and subject to certain restrictions on impairing the obligation of pre-existing contracts. The contract clause of the United States Constitution (Art. I, Sec. 10) prohibits a state, but not Congress, from passing any law impairing the obligation of contracts.

Over the years, Congress has enacted five different sets of insolvency statutes. The first act was passed in 1800 and repealed in 1803. The second statute was passed in 1841, took effect in 1842 and was repealed in 1843. The third statute was passed in 1867 to alleviate the economic crises of the Civil War and was repealed in 1878. The fourth statute was enacted in 1898 and was extensively amended as the Chandler Act in 1938. The 1898 act, as amended in 1938, hereinafter referred to as, "The Bankruptcy Act," endured until the Bankruptcy Reform Act of 1978, Pub. L. 95-598, hereinafter referred to as, "The Bankruptcy Code," was enacted in 1978.

The early American acts, like the English acts, emphasized dividing the debtor's estate among his creditors. However, the enactments have become ever more debtor-oriented, designed to give the debtor a "fresh start." The bankruptcy or debtor statutes in the United States have always had political connotations. This fact must not be overlooked in trying to assess where we are or where we are likely to go.

Under the Bankruptcy Act, the substantive law of bankruptcy was taken from the state laws and the bankruptcy court system evolved. The referee in bankruptcy was originally envisioned as an administrative assistant to the United States district judge. The referee was appointed by the district court for a period of six years to conduct administration of bankruptcy cases under the general supervision of the district judge.

*Ray E. Sweat is chairman of the ALTA Judiciary Committee and Committee on Reinsurance. He is senior vice president and chief underwriting counsel for Ticor Title Insurance Company, Los Angeles, California.*

One of the purposes of the Bankruptcy Code was to free the bankruptcy judges of their role as administrators of insolvent estates and make them of judicial statute and function.

Art. III, Sec. 1 of the United States Constitution provides:

> "The judicial power of the United States, shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and Inferior Courts, shall hold their offices during good behavior and shall, at states times, receive for their services a compensation, which shall not be diminished during their continuance in office."

Under the Bankruptcy Act, the jurisdiction of the bankruptcy court was limited. Bankruptcy courts were vested with "summary jurisdiction"—that is, with jurisdiction over controversies involving property in the constructive or actual possession of the court, or jurisdiction based on consent, actual or implied, by the adverse claimant.

Under the Bankruptcy Code, the jurisdiction of the bankruptcy court was extended and distinction between summary and plenary jurisdiction was eliminated. The Bankruptcy Code granted bankruptcy courts jurisdiction over all "civil proceedings arising under Title 11 (bankruptcy section of the United States Code) or arising in or related to cases

under Title 11." (28 U.S.C. Section 1471(b) supra.) In its discretion, the bankruptcy court could abstain from exercising its jurisdiction and permit an action to be continued or commenced in another court, while actions pending in another court could be removed to the bankruptcy court.

### Jurisdiction Challenged

The broadened jurisdiction of the bankruptcy court was challenged in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.* In the bankruptcy court, Marathon sought dismissal of the suit seeking damages for alleged breach of contract and warranty, as well as for misrepresentation, on the ground that the act unconstitutionally conferred Art. III judicial power upon judges who lacked life tenure and protection against salary dimunition. The bankruptcy court denied the motion to dismiss (6 B.R. 928 (1980)) but, on appeal, the district court sustained the motion and dismissed. (12 B.R. 946, (1981)). The case was then appealed to the United States Supreme Court which, on June 18, 1982, affirmed the district court, and further provided that its holding should not apply retroactively but only prospectively and that its ruling be stayed until October 4, 1982. The purpose of the limited stay was to afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication without impairing interim administration of the bankruptcy laws. The October 4, 1982, extension was in turn extended to December 24, 1982. (*Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 102 S. Ct. 2858 (50 Law Week 4892) (1982))

The Supreme Court decision was not unanimous. The majority held that although Congress could, within its discretion, when it creates a statutory right, create a tribunal to adjudicate such rights, Congress cannot in case of rights not created by Congress make substantial inroads into functions that have traditionally been performed by the judiciary. Northern's claim for damages for breach of contract, warranty and misrepresentation involved a state created right independent of and preceding the bankruptcy and jurisdiction of the bankruptcy court.

The Court held the section that follows unconstitutional in its entirety. The Court could have held only Subsection "C" of the section unconstitutional, but found that the unconstitutional portions could not be severed from the constitutional ones and ruled that the entire section was invalid.

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under Title 11.

(b) Notwithstanding any act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under Title 11 or arising in or related to cases under Title 11.

(c) The bankruptcy court for the district in which a case under Title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

(d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under Title 11 or arising in or related to a case under Title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

(e) The bankruptcy court in which a case under Title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case. (28 U.S.C. 1471)

**"Congress should be mature enough to realize that something should be done to re-establish a uniform method of insolvency adjudication . . ."**

Section 28 U.S.C. 1471 was enacted in 1978 to become effective April 1, 1984.

This leaves us with 28 U.S.C. 1334 which is presently effective and provides that the district courts shall have original jurisdiction exclusive of the courts of the state in all matters and proceedings in bankruptcy.

The transition rule found in Section 404(a) of the Bankruptcy Code provides that the courts of bankruptcy existing on September 30, 1979 shall continue through March 31, 1984 to be courts of bankruptcy for the purposes of the code as a separate department of the district court which is the court of bankruptcy under the Bankruptcy Act.

Rule 102(a) of the Bankruptcy Rules provides that, upon filing of a petition, the clerk shall refer the case forthwith to a referee.

Rule 801(a) of the Bankruptcy Rules provides that an appeal from a judgment or order of referee to a district court shall be taken by signing a notice of appeal with the referee within the time allowed by Rule 802.

Rule 802 of the Bankruptcy Rules allows 10 days for an appeal from the referee and 30 days for an appeal from the district court.

We concluded that this left bankruptcy courts, as far as jurisdiction and procedure were concerned, pretty much where they were prior to October 1, 1979, the effective date of the Bankruptcy Code. The courts could continue to handle pure bankrupt matters such as lifting stays, allowing exemptions, setting aside preferences, setting aside fraudulent conveyances, abandoning cumbersome assets, selling free and clear, etc.; but the court could not adjudicate related matters which were based on rights and obligations not within the Bankruptcy Code.

Our conclusion has been supported by the federal appellate courts in the following cases: *In Re Braniff Airways, Inc.* 700 F. 2d 214, CCA 5 '83; *First National Bank of Tekamah v. Hansen* 702 F. 2d 728, CCA 8 '83; *White Motors Corp. v. Citibank* 704 F. 2d 254, CCA 6 '83; *Gray v. Snyder* 704 F. 2d 709, CCA 4 '83.

### Uniformity Threatened

But this theory is sustainable only up to and including March 31, 1984. If Congress does not act come April 1, 1984, I see no logical conclusion other than to say that Congress has failed to abide by its constitutional mandate to establish uniform laws of bankruptcy throughout the United States, and we do in fact have no bankruptcy courts.

As noted above, insolvency proceedings could be conducted by the state courts subject to the United States Constitution prohibition against impairing contractual obligations under the contract clause. This limitation would prevent cram downs and perhaps prevent the courts disregarding ipso facto or

**Continued on page 21**

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# Abstracts and Unauthorized Practice

By Bert V. Massey, II

I suppose everybody has to speak about abstract certificates and the unauthorized practice of law from his own background and we have some rather strong cases in Texas in regard to what title companies, agencies and abstractors may or may not do. We also have what is known as the "State Bar Act," which is basically designed, so the courts have said, to keep those who are morally unfit, who do not have the proper background and training, from engaging in the practice of law. Actually, I think it is an excuse to require all of us who have a law license to pay ever increasing dues each year. Some of our more well-known title agencies and abstracters have been sued on the premise that they were engaging in the unauthorized practice of law.

Basically, the courts have said that actions constituting unauthorized practice of law are such regardless of whether or not a fee was charged for such actions. The inaccurate legal advice given by a layman is equally injurious, whether he was paid for it or not, so the courts say. The facts of each case will, however, control, so the state supreme court has said, and its courts have claimed in Texas that the courts have a duty to protect the public from those lacking in training and qualifications to practice law.

Lawyers practicing law must be members of the state bar association and have graduated from a law school as a general rule and must have passed a marathon endurance contest called the state bar examination.

Now we do issue abstracts at Brown County Abstract Company, Inc., primarily for oil and gas purposes; but, occasionally, we have a house or a land transaction in which the parties have carefully preserved those abstracts from us and we have not been able to steal them to store them in our files and thus force them to come back to us to do business.

Our certificate has evolved over a number of years after careful study. The fellow from whom we bought the company was using it, so we are still using the same thing that he used. I never cease to be amazed that occasionally our 30-year veteran abstracter comes in to me and asks me how I want to limit a certificate and put exculpatory language in it. The best I am able to offer him is that I do recognize it is a certificate that he is going to put in the abstract.

Basically, all we say is we've got it all. For a particular period of time, it is all in this abstract, and, furthermore, we have a complete abstract plant. In Texas, there is no regulation of abstracters and there is no Texas Land Title Association recommended form.

I did look at a number of certificates from other states, and I would like to thank those who sent them to me, including Iowa Title Company; Capital Abstract and Title Company; Bryan County, Oklahoma, Abstract Company, Inc.; Southern Abstract Company and Security Abstract and Title Company in Kansas, and also Kansas Security Title and Abstract Company, Inc.; in Missouri, the Central Missouri Abstract and Title Company; and, in Arkansas, Tucker Abstract Company.

I thought the certificates that I saw were frankly magnificent compared to mine. If I can persuade my partner, who believes that there has been no worthwhile change since Teddy Roosevelt retired from the Presidency, we are going to do some changing on our certificate in light of what I have learned in preparing for this talk.

A common thread I found in all of those states where members were kind enough to send me certificates is that they are very particular in what they do cover, and they have exculpatory language as to those records which they do not cover.

**"... any time you promulgate a uniform certificate, I would suggest that you involve antitrust counsel ..."**

### Unauthorized Practice

From my standpoint, if I were appointed the czar of abstracting, and wanted to determine whether or not abstracters were practicing law, I found two things that could, in Texas at least (and I am sure you have covered this in your states and know this is not the case) constitute the unauthorized practice of law.

These are that it is very common to find in these certificates a statement to the effect that "All acknowledgements are regular or are in statutory form except as shown," and that constitutes, I am afraid, the abstracter passing judg-

**Continued on page 21**

*Bert V. Massey, II, is secretary-treasurer of The Brown County Abstract Co., Inc., Brownwood, Texas, and is a member of the ALTA Board of Governors. This commentary is adapted from a presentation during the 1983 ALTA Mid-Winter Conference.*

# Antitrust Exemption and Risk

Joseph C. Mascari

Robert G. Rove

John C. Christie, Jr., Esquire

## *Seeking Legislation*

## Joseph C. Mascari

You will repeatedly note reference to the term, "antitrust," and references to the Sherman Act (15 USC §§1-8), the Clayton Act (15 USC §§12-27), the McCarran-Ferguson Act (15 USC §§1011-1015), the Robinson-Patman Act (15 USC §13) and the Federal Trade Commission Act (15 USC §§41-58), all of which combined constitute the basis of our federal antitrust laws. To put all of these laws into proper focus, it is important that we understand both their background and concept.

It all started with the period shortly following the Civil War or, if you prefer, the War Between the States. At that time, this country went through an industrial revolution that spawned giant business corporations and conglomerates, which developed and built a whole new generation of industries. In the process of doing this, however, there arose many abuses, which resulted in national scandals and which cried out for legislative relief.

In response to this demand and need, in 1890, over 90 years ago, Congress passed the Sherman Act, which, as amended in 1976, is still with us. The Sherman Act of 1890 declared that every contract, combination and conspiracy in restraint of trade is illegal. There are two principal findings required to establish an unlawful activity. First, there must be a combination and, second, there must be an unreasonable restraint of trade. Concerted activity will be found to be unreasonable restraint of trade if the effect of such activity is to fix or maintain prices.

The basic purpose of the Sherman Act when it was passed was not only to correct the abuses that existed at that time, but also to preserve and promote free competition. As late as 1972 in the case of *U.S.* v. *Topco Associates, Inc.*, 405 US 596 (1972), the Supreme Court described the Sherman Act with this language:

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion and ingenuity whatever economic muscle it can muster."

The basic concept of the Sherman Act appears to be straightforward and concise, *i.e.*, every contract, combination and conspiracy in restraint of trade is illegal. If it is so clear, and unambiguous on its face, why do we have so many problems in interpreting the law? The answer, very simply, is that the courts have consistently applied the test of "reasonableness." Only unreasonable activity is prohibited, so that in every factual situation we must first ascertain if the activity is reasonable or unreasonable, which is almost always a subjective test. Even the courts will disagree, with the district court holding one way, the court of appeals either affirming or

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reversing, and eventually, the Supreme Court deciding the final question.

### The Noerr Case

In 1961, a landmark case was decided by the United States Supreme Court, which is referred to as the *Noerr* case. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 US 127 (1961).

The background of this case is interesting. After World War II, the railroads found that the trucking industry was seriously cutting into their lucrative business of hauling heavy freight across the country. To protect their interests, the railroads joined together and hired a public relations firm to conduct a publicity campaign against the trucking industry and to lobby for the adoption of law enforcement policies restricting competition from the trucking industry. The trucking industry sued the railroads, alleging violation of the Sherman Act. The district court in Pennsylvania found for the trucking industry. The railroads appealed, and the court of appeals affirmed. The Supreme Court then granted a petition for certiorari, and reversed the decisions of both the district court and the court of appeals. Why?

The Supreme Court said, in effect, that the First Amendment to the United States Constitution, which guarantees freedom of speech and guarantees freedom to petition the government for a redress of grievances, supersedes the antitrust laws, even where there is an ulterior motive to restrict competition. The court held that the Sherman Act was intended to regulate only "business" activity, not "political" activity. In the *Noerr* case, the court stated:

> "A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them."

The *Noerr* decision was subsequently reaffirmed in *United Mine Workers of America* v. *Pennington*, 381 US 657 (1965), in which the Supreme Court held that the Sherman Act was inapplicable to joint lobbying efforts of both large mine operators and the union, who joined together to persuade the Secretary of Labor to increase the minimum wage scale for miners, which would have the effect of forcing some small mine employees out of business. Again, the First Amendment to the U.S. Constitution prevailed.

**" . . . joint efforts to secure legislation, to secure insurance department regulations, to influence the legislators and administrators, are all exempt from the antitrust laws . . . if these efforts are bona fide and are carried out by the proper means."**

### Exempt Joint Efforts

So, what is the Noerr-Pennington Doctrine as it applies to our industry? Simply stated, joint efforts to secure legislation, to secure insurance department regulations, to influence the legislators and administrators, are all exempt from the antitrust laws as a permissable exercise of the First Amendment right to petition the government, if these efforts are bona fide and are carried out by proper means. Obviously, there is a catch—if; that "if" does impose certain limitations or guidelines that must be followed in pursuing these activities. We might compare it to driving a high speed car down a highway. If we stay within the two white lines we have no problem, but if we cross over these white lines, which are easily identifiable, we will crash head-on into the Sherman Act, and will not have the Noerr-Pennington protection.

What are these guidelines or exceptions? The most important exception is called the "sham" exception. This was first referred to in the *Noerr* decision, where the court left open the possibility that the Sherman Act may apply where the joint efforts are merely a sham. The Court said, "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified."

The "sham" exception was further developed in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 US 508 (1972). In that case it was charged that the defendant trucking companies jointly carried out a plan to oppose, in regulatory agencies and in the courts, all applications for operating rights filed by carriers seeking to compete with the defendants. In holding that such activities were not immune from antitrust scrutiny, the Court expanded the "sham" exception, stating that the pursuit of "a pattern of baseless, repetitive claims" designed to harass another party is not protected under the Noerr-Pennington doctrine since it constitutes an abuse of the administrative or judicial process "effectively barring [the other party] from access to the agencies and courts."

The Court outlined the types of abuses which would give rise to a cause of action under the antitrust laws. Among these are perjury, fraud, bribery, conspiracy with a licensing official and any activity that would constitute an abuse of the judicial or administrative process.

As *Noerr* and its progeny make clear, the difference between protected activity and "sham" action does not depend on the competitive or anti-competitive purpose of the persons engaged in lobbying activities. Rather, it depends on whether the attempts to influence governmental action result in subverting the integrity of the governmental process or effectively barring a competitor from these processes.

What conclusion can we draw from these cases? We can join together, in concert, to legitimately seek legislation if we act ethically, if we act in good faith and with complete integrity. I am sure that these characteristics are inherent in all of you.

I would like to go one step further and say we not only have a legal right, but also an obligation to ourselves to join together in seeking appropriate legislation that would assist the title insurance industry in better serving the public.

## *Rating Bureaus*

## Robert G. Rove

In an analysis of the activities of rating bureaus with respect to the federal antitrust laws, you should start at the very beginning. The Supreme Court very recently stated, "The starting point in a case involving construction of the

McCarran-Ferguson Act, like any starting point in any case involving the meaning of a statute, is the language of the statute itself."

We need not go back as early as Genesis. We can start in 1869 when the Supreme Court held that the issuing of a policy of insurance was not a transaction in commerce. It was thus believed when the Sherman and Clayton antitrust acts were adopted that these laws did not effect, nor apply to, the insurance industry.

In the early 1940s, the Department of Justice attempted to apply the federal antitrust laws to alleged conspiracies involving insurance companies, which were in violation of the Sherman Antitrust Act. This resulted in 1944 in the landmark Supreme Court decision, *United States* v. *Southeastern Underwriters*.

This case held that insurance can fall within the ambit of interstate commerce. Insurers were subject to the Clayton/Sherman acts.

Congress felt that the insurance industry was best regulated by the several states; therefore, they immediately followed *Southeastern Underwriters* by enacting the McCarran-Ferguson Act exemption, which says in part, "Congress declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest." The "business of insurance," remember that phrase—"the business of insurance" we'll get back to it, "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. Nothing contained in this chapter shall render the said Sherman act inapplicable to any agreement to boycott, coerce, or intimidate, or acts of boycott, coercion, or intimidation."

Go back to the phrase, "the business of insurance." The majority of recent decisions construing the act have focused on the meaning of that phrase, "business of insurance." This phrase, used in the act, was not defined by it. This left it to the courts to define that phrase. The court's decisions are sometimes confusing. There was one clear concept that shines through. The quoted phrase, "business of insurance," will be narrowly construed. This is particularly true since the 1979 decision in the *Royal Drug Case*, a United States Supreme Court decision.

Prior to 1979, a 1969 Supreme Court case, *National Securities*, laid down guidelines for the interpretation of the phrase, "business of insurance." The court in *National Securities* said that the McCarran-Ferguson Act does not make the state supreme in regulating all activities of insurance companies. It only provides an exemption from the antitrust laws when the state regulates activities of insurance companies constituting the "business of insurance." The court in *National Securities* held state laws regulating the relationship between the insurance company and their policyholders, directly or indirectly, are laws regulating the business of insurance.

**" . . . I personally would recommend that retained counsel, experienced in both title insurance and the antitrust laws, be present at all meetings of the rating bureau."**

The court added that there are other activities so closely related to the insurance company's status as reliable insurers that they must also be included in the business of insurance. There was no indication by the court as to what these other activities might be.

In 1979, the Supreme Court in the *Royal Drug* case construed the definition of the phrase, "business of insurance." That case involved a health insurance company that contracted with several pharmacies to provide prescriptions for its insureds. The insureds paid $2.00 per prescription with the company paying the balance. The company was willing to deal with all pharmacies in the area on the same basis. Several non-participating pharmacies refused. The company did not treat their policyholders as favorably if they went to these non-participating pharmacies. These non-participating pharmacies sued the insurer on the grounds that the insurer's acts caused the policy holders to not do business with them. This they argued was an unlawful restraint on trade, a violation of the Sherman antitrust law. The defendants relied on the McCarran-Ferguson Act exemption.

In applying the guidelines of the *National Securities* case, the court in *Royal Drug* noted that the agreement complained of was not between the insured and the insurers, but between the insurance company and several third-party pharmacies. The court also rejected the defense that the agreement so closely affected defendant's status as a reliable insurer as to be within the act's exemption.

The court said that practically every business decision affects the insurer's reliability to some extent, and such a broad interpretation would be contrary to the intent of Congress. The court did place a strong emphasis on the spreading of risk and the underwriting of risks. The court then said, "It would be plainly contrary to the language of this chapter, which exempts from the antitrust laws, the business of insurance, and not the business of insurance companies to interpret this chapter so that every business decision of an insurance company could be included in the business of insurance.

The *Royal Drug* case was followed by *Pireno* v. *New York State Chiropractic Association*, which held that, "This section's antitrust exemption for the business of insurance is to be strictly limited to the quintessenal insurance functions."

The *Pireno* court stated that under *Royal Drug* there are three relevant issues in determining if a particular business activity is part of the business of insurance.

One: Does the practice have the effect of spreading the risk?

Two: Is the practice an integral part of the policy relationship between the company and the insured?

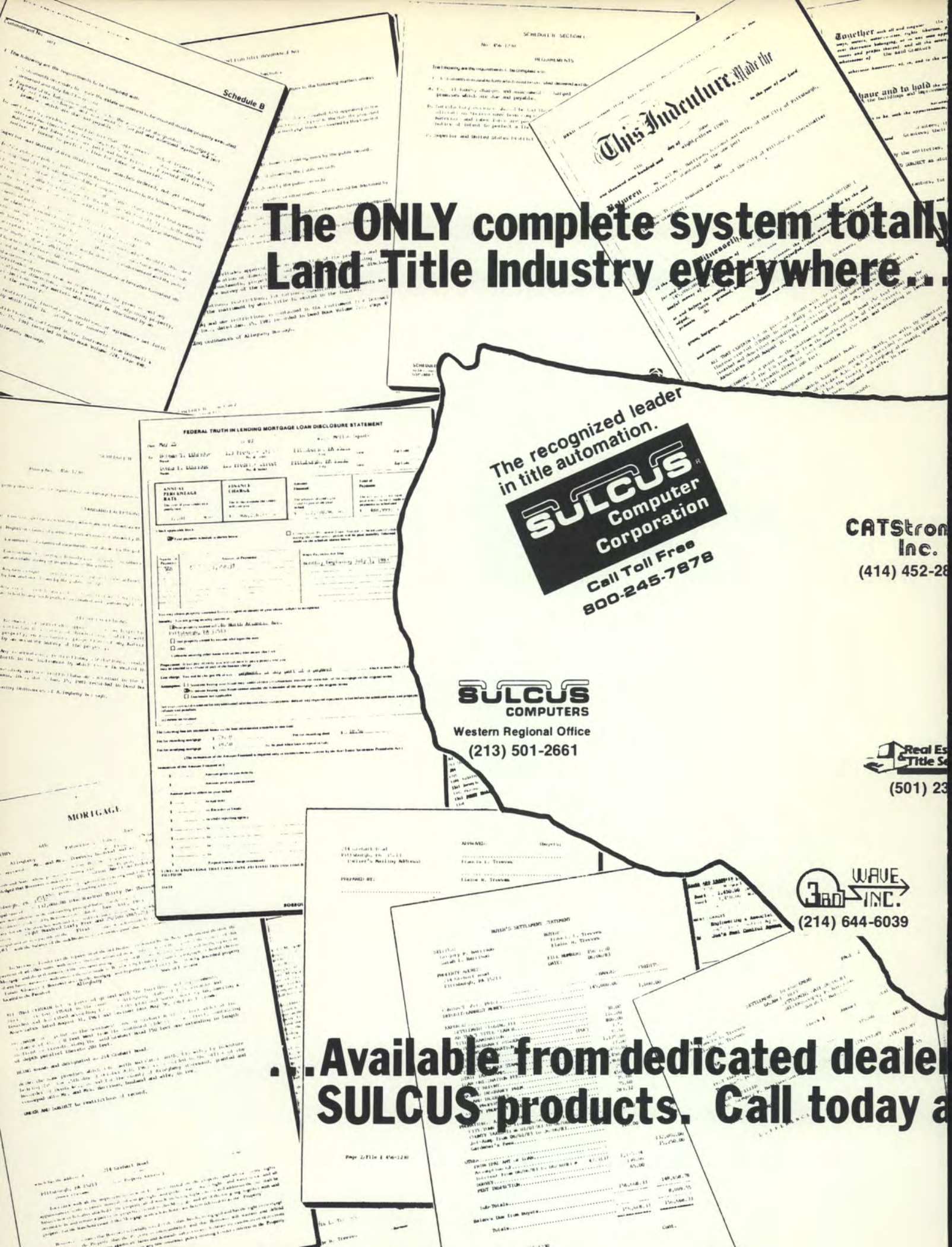
Three: Is the practice limited to entities within the insurance industry?

The court did say that no one of these criteria standing alone is necessarily determinative of the issue.

After reviewing *Royal Drug* and *Pireno*, it is apparent that cases prior to *Royal Drug*, interpreting the phrase, "business of insurance," must be reviewed in light of *Royal Drug*. That is not to say that they can or should be ignored, not at all, but they should be measured against those decisions in *Royal Drug* and its progenies before reliance on them can be made.

### State Regulation Exemption

The McCarran-Ferguson Act also is designed to exempt from federal antitrust regulations conduct in the business of insurance if the state regulates the business of insurance. A state is said to regulate the business of insurance within the meaning of the act when it generally proscribes, permits, or au-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thorizes certain conduct on the part of insurance companies, and whether the state's statutory plan for regulating insurance embodies the wisest and most effective type of regulation is not for the courts to decide. However, it is very important to remember that, no matter how stringently regulated, an insurance-related regulation does not exempt a business activity of an insurer unless that activity is within the business of insurance.

Similarly, a state's determination of what is the business of insurance is not determinative. In a recent district court case in Phoenix, *United States* v. *Title Insurance Rating Bureau of Arizona*, the District Court said, "Although the state of Arizona has promulgated statutes which indicate that it considers escrow services to be the business of insurance, a state's determination is not conclusive." It then went on to find that escrow services as performed by title insurers and their agents in Arizona were not within the business of insurance, and this case was recently affirmed by the Ninth Circuit Court of Appeals. It was affirmed between the time I wrote this talk and the time that I am giving it.

The application of these doctrines to rating bureaus—what does all this mean to the operating people in the title insurance industry that sit on rating bureaus? Remember, a violation of the federal antitrust laws is not ony a civil wrong, but it can be a criminal offense.

First, I would suggest we must look at the operation of the rating bureau. In some states, a risk rate is determined by the rating bureaus and filed with the insurance commissioner or department. Assuming that the state law regulates the title insurance industry, and that the rating bureau is authorized in such state, such activity is clearly within the McCarran-Ferguson Act exemption.

In some states, an all-inclusive premium is filed with the department or commissioner. This is probably equally permissible as being an exemption within the McCarran-Ferguson Act.

In some states, a combination rate is filed. That is a risk rate and a search and examination rate that are set forth separately. Obviously, there is nothing wrong with the risk rate. We have already covered that.

Searching and examining could be activities of the insurers or their agents, so closely related to the insurers with respect to their status as reliable insurers, that they should also be included in the business of insurance. These activities should also come within the business of insurance as activities of spreading the risk and underwriting the risk.

The court in the case of *United States* v. *Title Insurance Rating Bureau of Arizona* determined that the provision of escrow services in Arizona by the defendants did not serve to spread risks among policyholders. As a consequence, these services were not the business of insurance and, therefore, not within the McCarran-Ferguson Act exemption from the antitrust laws.

I am not sure that I agree with it. As a matter of fact, I can honestly say that I do disagree with it; however, that is the law as enunciated, not only through the district court here in Phoenix, but also by the Ninth Circuit.

### Rating Bureau Activities

Again, what does all this mean to the operating people in the title insurance industry who sit on rating bureaus? First, I would suggest that the activities of the bureau be closely considered in the context of these and other recent McCarran Act decisions.

In addition, I personally would recommend that retained counsel, experienced in both title insurance and the antitrust laws, be present at all meetings of the rating bureau. This should be an independent counsel, not an employee of a member company. This lawyer should review the proposed agenda and approve it before the meeting. Non-agenda items should not be discussed without his or her prior approval. Accurate minutes should be kept of all meetings, and the lawyer should review them for accuracy and completeness, and should so signify on them that he or she has done so. Discussions should not be held outside of his or her presence.

In conclusion, I think you should remember that there are some activities of insurance companies that are clearly within the McCarran-Ferguson Act exception. There are others that are clearly outside of the exception. The problem area is those activities that we think are within the McCarran-Ferguson Act exemption, but where recent court decisions have created some uncertainty as to their status.

In the latter cases, I think decisions as to what we should do should be made keeping in mind *Royal Drug* and its progeny. In any event, it would be prudent for us to review all of our activities and make sure that they are within the exception of the McCarran-Ferguson Act. I think you should also remember that an ounce of prevention will save you a ton of money on litigation.

# *Antitrust Update*

## John C. Christie, Jr., Esquire

Some six years ago—in the fall of 1977—I was asked to speak to another ALTA Convention on this very same subject. Since that time a lot has happened in this industry, and since that time it is fair to say a lot has happened in the judicial development of the federal antitrust laws as they apply to this industry.

Then the industry had benefited by an impressive string of antitrust successes in cases challenging various industry activities. Many of you will recall them — *Commander Leasing*,[1] *Schwartz*,[2] *McIlhenny*,[3] *Crawford*,[4] *Mitgang*,[5] *Harrison*.[6] In all of those cases, the courts rejected the claims of treble damage plaintiffs by holding that the McCarran-Ferguson Act worked to render the federal antitrust laws inapplicable.

Judicial interpretation of the McCarran Act exemption, however, has taken a definite turn in a more conservative direction. This has largely been spurred on by three Supreme Court decisions since 1977, interpreting the McCarran Act in a casualty insurance context—*Barry*,[7] *Royal Drug*[8] and *Pireno*.[9] All of these decisions have emphasized the limited nature of the exemption and that it is to be narrowly construed. This judicial conservatism has had an impact on the lower federal courts which has now directly affected the title industry in the *TIRBA* decision involving the Arizona Title Insurance Rating Bureau.[10] My theme today is essentially to preach the notion that the antitrust immunity thought to be a part of this regulated industry in the past may be much less expansively interpreted by the courts today, and to suggest some ways in which the title insurance industry ought to react to this.

Of course, neither the McCarran Act nor other antitrust exemptions such as Noerr-Pennington and state action, have ever given title insurers blanket protection from the application of the antitrust laws. As most of you know, antitrust regulation of the industry involves a rather complicated mesh of state and federal laws regulating business practices generally and title insurance in particular. For this reason, the question of whether and how antitrust principles apply to a

**Continued on page 18**

# The Quest for Automation

By J. Herman Dance

One of the on-stage trademarks of the late comedian Jack Benny was that he was very tight with a dollar. In a television skit which he created, Benny was accosted by a mugger who poked a pistol in his ribs and said: "This is a stick-up. Your money or your life!" Following a silence, the gunman poked harder and said, "Well-l-l-l?" Benny, in a very annoyed tone, shouted, "I'm thinking it over!"

After 26 years in the title business—the last 10 as founder and president of Gold Coast Title Company—I recently have done a lot of serious thinking with my associates about rising costs and tougher competition in our markets. Call it "technology scare" or what you will, our motivation has been to keep a prosperous business going and even to improve the prosperity by increasing our office productivity.

It wasn't exactly "our money or our lives," but the situation did appear to demand that we shell out money for office automation or close the store and get into some other business.

We, in the title industry are not manufacturers; we carry no inventory and have minimal material costs. What we do have is the most labor-intensive clerical cost of any business we know about. As those costs have risen substantially in recent years, price competition has become increasingly severe in response to a poor real estate market.

*J. Herman Dance, a past president of the Florida Land Title Association, has been in the title business since 1958 and is president of Gold Coast Title Company, Boca Raton, Florida, a concern he founded in 1971. In his earlier days in the industry, he recalls learning of a Sunday deadline for a home refinancing closing the preceding Friday afternoon and working feverishly to have the papers ready on time. With his company's present automated equipment, he says, the task requiring two days could now be completed in less than two hours.*

Thus we have a two-way squeeze on our profit margines. I doubt that this comes as a surprise to the readers of *Title News*.

### Cost, Error Reductions Needed

More than a dozen years ago, while employed as an underwriter at another company, I came to the conclusion that we must find a way to cut clerical costs, and, especially, to minimize the last-minute clerical errors in escrow closings. Thus, I began a systematic study of existing office automation systems. What I discovered at the outset was that they were few in number, limited in their application to our paperwork and costly to buy or lease.

What we obviously needed was computer equipment that would produce the many documents—many of them repetitive—required in title closing: property descriptions, agreements of sale, amortization schedules, notes and mortgage guarantees, tax forms and checks for escrow fund disbursement.

**Continued on page 22**

CHRISTIE—continued from page 16

particular industry practice has always been a somewhat complicated matter, even for those of us who have been dealing with issues of this kind in the title insurance industry for some time.

If anything, the evolutionary changes taking place in the courts make this process even more complex and unpredictable. While it is impossible to tell exactly how this will affect the title industry in the long run, there are a number of things which are clear from the changes which have taken place over the recent past. First, it is increasingly likely that even longstanding industry practices may come under closer antitrust scrutiny, particularly where they involve cooperative activity among title insurers. Second, a re-evaluation is appropriate with respect to whether various activities are a part of the "business of insurance" as that term has more recently been interpreted. Third, and perhaps most important for our purposes today, those of you directly involved in the industry should do your best to try to foster an increased sensitivity to antitrust issues and risks in dealing with competitive situations on a day-to-day basis.

### American Airlines Case

Putting aside exemptions for a moment and focusing on Sherman Act problems generally, I thought it might be useful to speak to a very topical case about which I am sure a number of you have read. It's a case which the Justice Department has recently filed in Texas against American Airlines and its president, Robert Crandall.[11]

The case alleges a violation of the Sherman Act, and it is premised primarily upon a telephone conversation which Mr. Crandall is alleged to have had with the president of Braniff Airlines, a Mr. Putnam. A transcript of the conversation was made because it turned out that Mr. Putnam had a tape recorder on his telephone the day Mr. Crandall called, anticipating that Mr. Crandall would be angry because Braniff had engaged in some competitive practices which had had an adverse impact upon American. Inasmuch as conversations such as these rarely find themselves in print, I thought it might be educational to read to you from the transcript. (The transcript includes a number of expletives. Not wanting to offend anyone's sensibilities, I will do a little editing.)

**"... the development of increased corporate sensitivity concerning possible antitrust problems will be beneficial to the underwriters concerned as well as to the industry as a whole."**

Crandall: I think it's dumb as [bleep] for [bleep] sake, all right, to sit here and pound the [bleep] out of each other and neither one of us making a [bleep] dime.

Putnam: Well—

Crandall: I mean, you know, [bleep], what the [bleep] is the point of it?

Putnam: Nobody asked American to serve Harlingen. Nobody asked American to serve Kansas City, and there were low fares in there, you know, before. So —

Crandall: You better believe it, Howard. But, you, you, you know, the complex is here — ain't gonna change a [bleep] thing, all right. We can, we can both live here and there ain't no room for Delta. But there's, ah, no reason that I can see, all right, to put both companies out of business.

Putnam: But if you're going to overlay every route of American's on top of over, on top of every route that Braniff has — I can't just sit here and allow you to bury us without giving our best effort.

Crandall: Oh sure, but Eastern and Delta do the same thing in Atlanta and have for years.

Putnam: Do you have a suggestion for me?

Crandall: Yes. I have a suggestion for you. Raise your [bleep] fares twenty percent. I'll raise mine the next morning.

Putnam: Robert, We—

Crandall: You'll make more money and I will too.

Putnam: We can't talk about pricing.

Crandall: Oh bull-[bleep], Howard. We can talk about any [bleep] thing we want to talk about.

There are a number of observations to be made about all of this. First of all, obviously it found its way into print by way of the tape recording that Mr. Putnam made. In that sense, and because these kinds of conversations rarely find their way into print, I am sure it will serve antitrust prosecutors, defense lawyers, and teachers of antitrust laws for years as the prototype example of discussions among competitors that should not occur.

The second thing I find very interesting about all of this is that the conversation involved executives at the very highest level of both of these companies. This is somewhat unique in my experience because, as I'm sure you can appreciate, companies more frequently get into antitrust problems because of the activities of employees at a much lower level of management. There one generally finds a lower level of sophistication and people who oeprate on a daily basis without the advice of lawyers which top management more frequently receives.

The third thing I find interesting about all this is that the United States brought this case in a situation in which the alleged conspiracy failed; that is, there is no allegation in this complaint that any prices were actually fixed, or that anything in the competitive relationship between these two companies actually changed as a result of the conversation. Instead, the complaint alleges an attempt to monopolize, in violation of Section 2 of the Sherman Act.

The fourth and final comment I would make on this complaint is a comment which I think the CEO's here among us would particularly appreciate. It is a comment on the relief which the complaint demands. Generally, in a civil case like this, the government would ask for an injunction against further conduct of this sort. However, in this case the government seeks an injunction which would prohibit Mr. Crandall from acting as the chief executive officer of American Airlines or any other company providing scheduled airline passenger service for a period of two years.

This I find to be a very novel and untested remedial theory.

In summary, this is an example of the general antitrust problems that people can get into and it is a particularly convenient one because of the fact that the conversation has been preserved for posterity. Against this background, the particular position of the title insurance industry and the potential application of the McCarran Act must be viewed. I want to spend a few minutes talking about that Act, the *TIRBA* case, and particularly the Court of Appeals decision which was just received several days ago.

As all of you know, the McCarran Act provides a statutory exemption from the federal antitrust laws when (1) the activity in issue constitutes the "business of insurance," (2) the activity is "regulated by state law," and (3) when the activity does not constitute an act or agreement of "boycott, coercion or intimidation."[12] In many of the title industry's earlier cases of which I spoke the primary issue was whether there was sufficient "regulation by state law" to activate the exemption. The courts in those cases—and many others—have held that that requirement is fulfilled when state legislation generally proscribes, permits or otherwise regulates the conduct in question and authorizes enforcement through a scheme of administrative supervision.[13]

## 'Business of Insurance'

In more recent times, the focus of most McCarran Act attention has been on whether the activity in issue constitutes the "business of insurance" as that term is used in the McCarran Act. This was the focus of the McCarran Act issue in the *TIRBA* cases which serves as a good example of this newly found judicial conservatism of which I speak.

In wrestling with the "business of insurance" question, you have to start with two premises. First, the question is a matter of federal law for federal courts to decide—no state statute or administrative judgment can be determinative.[14] Second, not all activities of an insurance company are necessarily the "business of insurance"—or, as the Supreme Court has put it on several occasions, it is the "business of insurance" that is potentially exempt, not the "business of insurance companies."[15]

The most recent Supreme Court decision on this issue—*Union Labor Life Ins. Co.* v. *Pireno*[16]—articulated three criteria for ascertaining the meaning of this phrase in a McCarran Act context:

(1) whether the practice has the effect of transferring or spreading a policyholder's risk;

(2) whether the practice is an integral part of the policy relationship between the insurer and the insured;

(3) whether the practice is limited to entities in the insurance industry.

In the *Pireno* case, the Court found that none of these criteria was present and therefore did not discuss the significance of one or another as among and between them nor what would occur if one or more but less than all was present. Justice Brennan simply said "none of these criteria is necessarily determinative in itself. . . ."

In the *TIRBA* opinion,[17] the Ninth Circuit recognized this three-fold test, found none of these cases cited by either side very helpful and therefore suggested that it would have to make its own "independent analysis" of the applicability of these criteria to the facts of the case. Unfortunately, I do not see in

what follows either independence or analysis. Instead, the Court simply paraphrases arguments made by both sides and offers in a conclusory fashion its own opinion that none of the three tests is met by the provision of escrow services by title insurance companies in Arizona, at least on the record as it existed before that Court. Nonetheless, in attempting to discern what caused the Court to affirm Judge Muecke's decision, one can decipher at least certain factors that appeared to influence the Court.

With respect to underwriting or risk-spreading, the Ninth Circuit appeared persuaded that escrow services simply result in the transfer of title and consideration from one party to another. All of the additional functions performed by escrow officers employed by title insurers—such as verifying that liens have been removed so as to allow for the removal of exceptions in the ultimate title insurance policy—were described as "purely administrative with no unique insurance characteristics." The Court suggested that the use of escrow agents to perform services which the title insurer could perform itself "at most reduces costs to the insurer."

The Court went on to conclude that the escrow services were not an integral part of the relationship between insurer and insured because of its perception that certain indicia of "separateness" were present. These were, in the Court's opinion, separate agreements to purchase title insurance and escrow services, that some buyers purchased one and not the other, and that escrow services were performed by persons in a department separate from title officers or by an independent agent who retained the entire escrow fee. Why the manner in which a title insurer determines to organize internally or why its choice as to whether to do business directly or through an agent should be determinative the Court does not explain. Moreover, the record clearly indicated that in Arizona the vast majority of purchasers of real estate purchase title insurance and escrow services from the same source at one and the same time.

The last *Pireno* criteria is whether the challenged activity is limited to entities within the insurance industry. The record was that virtually all of the escrow services provided in Arizona in connection with a real estate transaction were provided by title insurance companies or their agents in connection with the issuance of a policy. However, the Ninth Circuit opined that because "other entities besides insurance companies performed escrow services," this test was not satisfied.

These then were the factors referred to by the Ninth Circuit in reaching the conclusion which it did. Although we argued strenuously that these factors were either not supported by the record, were irrelevant or were mischaracterizations of the process which ultimately leads to a title insurance policy, this Court at least came out the opposite way. However, much as I have strong disagreement with the outcome and the Court's way of getting there, I believe it prudent for the decision to be carefully studied by company counsel in the context of continuing antitrust counselling. I would also have to acknowledge that it is yet another example of a tendency by the federal courts today to read the Mc-

Carran Act more restrictively than in the past which will have to be squarely addressed.

### Non-Risk Activities

There are, of course, in this industry and others many cooperative or joint activities that are beneficial and without antitrust risk as long as properly structured and conducted. In addition to those already mentioned this morning, I would refer to some other longstanding and promising new activities which fall in this category. One is the joint title plant which has for many years been utilized in various locations around the country. Another would be the cooperative development of computer systems for use in the title insurance industry. The benefit to the public in terms of an improved product and the potential for cost-saving through the avoidance of duplicate facilities and efforts has led antitrust law enforcers to give general blessing to these kinds of activities. Nevertheless, in each case care must be taken to assure that the joint effort is not undertaken or conducted for the purpose of eliminating competition and the arrangement must contain no restrictions on the activities of the participants which unreasonably restrain competition or create unreasonable barriers to entry for other competitors. The precise legal requirements demanded by the antitrust laws would depend, of course, on the specifics of the project involved and the market setting in which it occurs, but these possibilities need not necessarily be foreclosed by the legal requirements of the antitrust laws.

Another form of permissible joint activity is, of course, participation in industry trade associations at the ALTA, state or local level. These associations serve legitimate and useful functions not only for the members but for the public as well. As a result, involvement in such organizations is not only permissible but should be encouraged. However, those who are involved and do attend should constantly have in mind that the context in which they are operating calls for some discretion in connection with association business as well as in a purely social context.

Professor Baxter, the current head of the Antitrust Division, was recently quoted in the *Wall Street Journal* as having suggested that all telephone conversations between chief executives should be prohibited unless they are taped—he says "I don't want them even calling each other up to discuss their golf scores."[18]. This is going way too far in another direction but caution is appropriate.

Because of the changing rules in antitrust doctrines applicable to the title insurance business and the increasing costs associated with any involvement in antitrust litigation—not to mention the more stringent penalties for any violation—the development of increased corporate sensitivity concerning possible antitrust problems will be beneficial to the underwriters concerned as well as to the industry as a whole. That development might take the form of improving the channels of communication between operating people and the company's law department. Seeing the potential for a problem and discussing it in advance with company counsel will tend to avoid lots of down-the-road difficulty.

How do you do that? The best approach might well vary from company to company but I would offer some suggestions. Consider the development of a company compliance manual which would discuss the law, speak in practical terms of dos and don'ts and spell out the appropriate source within the company for the resolution of any questions. Such a manual ought to be comprehensible to operating people rather than a theoretical exercise and ought to address rather specifically the kinds of situations that may give rise to antitrust problems as might be encountered during the ordinary course of business. Consider occasional meetings in the field between company lawyers and operating people to discuss issues as they arise in a practical everyday sense. Consider an occasional antitrust audit by company counsel designed to isolate areas of concern before they become litigation problems.

All of these suggestions will by no means guarantee the absence of any antitrust problems but they might start you down the road toward a constructive antitrust compliance program that will hopefully keep you away from the courts and from antitrust defense lawyers such as myself.

1. *Commander Leasing Co.* v. *Transamerica Title Insurance Co.*, 477 F.2d 77 (10th Cir. 1973).
2. *Schwartz* v. *Commonwealth Land Title Insurance Co.*, 374 F. Supp. 564 (E.D. Pa. 1974).
3. *McIlhenny* v. *American Title Insurance Co.*, 418 F. Supp. 364 (E.D. Pa. 1976).
4. *Crawford* v. *American Title Insurance Co.*, 518 F.2d 217 (5th Cir. 1975).
5. *Mitgang* v. *Western Title Insurance Co.*, 1974-2 Trade Cas. ¶ 75,322 (W.D. Cal. 1974).
6. *Harrison* v. *Chicago Title Insurance Co.*, 1974-2 Trade Cas. ¶ 75,321 (D. Kan. 1974).
7. *St. Paul Fire & Marine Insurance Co.* v. *Barry*, 438 U.S. 531 (1978).
8. *Group Life & Health Insurance Co.* v. *Royal Drug*, 440 U.S. 205 (1979).
9. *Pireno* v. *New York State Chiropractic Association*, _____ U.S. _____, 102 S.Ct. 3002 (1982).
10. *United States* v. *Title Insurance Rating Bureau of Arizona, Inc.* ["TIRBA"], _____ F.2d _____, 1983-1 Trade Cas. ¶ 65,261 (9th Cir. 1983), *aff'g* 517 F. Supp. 1053 (D. Ariz. 1981).
11. *United States* v. *American Airlines, et al.*, Civil No. CA 383-0325D (N.D. Tex., February 23, 1983).
12. 15 U.S.C. § 1011 *et seq.*
13. *See*, for example, *Crawford*, *supra*; *Lawyers Title Co.* v. *St. Paul Title Insurance Corp.*, 526 F.2d 795 (8th Cir. 1975); *Commander Leasing*, *supra*; *Mitgang*, *supra*.
14. *Securities and Exchange Commission* v. *Variable Annuity Life Insurance Co.*, 359 U.S. 65, 69 (1959).
15. *Pireno*, *supra*, 102 S.Ct. at 3007, 3010.
16. *Pireno*, *supra*.
17. *TIRBA*, *supra*.
18. *Wall Street Journal*, February 25, 1983.

**SWEAT—continued from page 8**

bankruptcy clauses. These are arguably positive benefits. The real problem would seem to be in the administration of insolvent estates with properties in more than one state.

The Bankruptcy Code and the Bankruptcy Act, which preceded, have their faults and the Code should be amended in many particulars, but over the past 85 years we have become accustomed to a uniform insolvency law and should not let it expire by default.

Congress should be mature enough to realize that something should be done to re-establish a uniform method of insolvency adjudication, and honor the constitutional mandate to establish uniform laws on the subject of bankruptcy throughout the United States.

**MASSEY—continued from page 10**

ment on whether or not the acknowledgement on a particular certificate is, in fact, in the state promulgated form, which could be determined to be a lawyer's function.

I also found statements to the effect that there are no unreleased judgments except as shown. Now I would presume that to mean that the abstracter has read the judgment and read the release and made a determination that the release is properly drawn, and effectively releases

the judgment of record, and that's probably—or at least would be in Texas—the unauthorized practice of law.

Now, believe me, I did not come up here to presume to tell those of you who are in the abstract business in a heavy way that I know what is the unauthorized practice of law in your state and what is not. I merely want to point out two areas that you might wish to look at. I would tell you that, when we used to type abstracts, we did the same thing in our abstract company by virtue of the fact that instead of typing out the acknowledgement, if we thought it was in regular form, we would simply say "acknowledgement in regular form," and here we went. Now we don't do that anymore because we are mechanized to the extent that we have microfilm of the county clerk's records and our abstracters simply duplicate the records of the county clerk, the whole instrument.

I would, however, additionally point out this development to you: There is a very recent case that you ought to be concerned with in all of your state trade associations. (In Kansas, in Oklahoma, and I think in Missouri there are uniform certificates which have been put together and are recommended by your particular state associations.)

**Association Standards**

In a recent case entitled, "American Society of Mechanical Engineers, Inc. vs. Hydrolevel Corporation," The Supreme Court of the United States in a 6-3 decision determined that an association that produces standards is liable for acts of its agents under antitrust laws when acts are committed with the apparent authority of the association, even though the association's directors or staff did not ratify the acts, and even though the acts did not benefit the association. An association is responsible for preventing antitrust violation through the actions of its agents, including members who are merely unpaid volunteers, including committee members.

In that particular case, the American Society of Mechanical Engineers was involved in promulgating standards and it has a committee to say (which has as its duty answering public inquiries, and I am simplifying greatly) as to whether or not a particular product meets the standards promulgated by the ASME.

Hydrolevel had a particular product with a unique feature, and this committee determined that it did not meet the standards of the ASME. At the same time, one of the members of that committee happened to be an employee of a company that made a competing product which used a different system. Hydrolevel as you can guess went broke, sued the American Society of Mechanical Engineers and recovered a $7.5 million judgment. The U.S. Supreme Court affirmed that judgment on a split decision.

I think if that has a message for us, it ought to be this: Knowing how excited you would be about spending some more money on an attorney, any time you promulgate a uniform certificate, I would suggest that you involve antitrust counsel and be sure that he feels you are clear of the provisions of the Clayton and Sherman antitrust acts.

# J. M. (Jim) DeCourcey Elected 1983-84 Oregon Land Title Association President

J. M. (Jim) DeCourcey, executive vice president, Josephine County Title Company, Grants Pass, Oregon, was elected 1983-84 president of the Oregon Land Title Association at the recent convention of that organization held at Gleneden Beach, Oregon.

**J. M. DeCourcey**

ALTA President Tom McDonald was a principal speaker at the meeting. President McDonald reported he had called a meeting of affiliated title association officers and representatives for July 13 in Chicago to develop an updated perspective on what is being done about the title insurance controlled business problem at the state level, and to explore ways in which ALTA can be of greater assistance to affiliates in this endeavor.

Other featured speakers included Richard McGavock, Oregon state insurance department supervisor of rates and forms, who commented on recent passage of joint plant legislation, and David G. Frohnmayer, state attorney general, who reviewed pending state legislation affecting the title industry—which pertained to wetlands, common law liens, a one-year moratorium on mortgage foreclosures, a revision in the notice of sale in trust deed foreclosures, and a court-imposed fee for reviewing court records.

In an educational seminar chaired by Charles T. Hemphill, Jr., the following delivered presentations: Michael Magnus—bankruptcy; Tom Stapleton—title to wetlands; Jeff Steffen—foreclosures; and Rick Pay—computer applications.

**DANCE—continued from page 17**

Automation was most needed during the panic period of final preparation of papers for signatures when last-minute changes and time pressures made the staff error-prone. With manually-prepared papers, even minor typographical errors could be very costly, requiring hours of retyping and even more hours securing new signatures on corrected documents. With the time pressures of closing, a $10 error in escrow fund disbursement might require reworking the file three times, with possibilities of new errors each time.

Seeking solutions, from about 1970 through 1976, I searched vigorously for computer equipment suited to our work. In the first year, I discovered a leading maker of word-processing equipment (Lanier) offered a system that would automate one function involved in closing FHA and VA mortgages. Besides its functional limitation, it was slow, and it was available on lease for about $750 a month. By the end of 1976, I had looked into some four systems. Some would perform one task, others two or three. Not one system could perform 70 per cent of our paper work, and all were prohibitive in cost. By that time, I was fully occupied in development of my own relatively new business, so I abandoned the quest for automation in discouragement.

My interests revived faintly the next year, 1977, when IBM at Orlando

showed a computer capable of completing the HUD closing form. Discouraged again by this requirement for a programmer in house, and high cost, I once more put my quest for automation on the back burner.

### Search Resumed

A year later, Garry Morrison joined my company. He shared my conviction that escrow automation was a "must," and so his first order of business was to resurrent the computer search. We knew that many underwriters had studied automation and some had acquired systems, usually tied to their main frame systems.

Again, we surveyed the field and found no computer system specifically programmed to our needs. At Chicago in 1978, a title company offered time-sharing on its computer for $1,500 a month for 25 closings, with additional charges for more deals. This was too high a cost and too restrictive as to times of use for us.

The period 1980 to 1982 was a time of disintermediation for savings and loans in my state, causing a massive shift in the traditional supply of mortgage funds. Mortgage interest rates became tied to money market rates and mortgage bankers emerged as the source of home buying capital.

Whereas the S & Ls and their attorneys had prepared their own closing paperwork, the mortgage bankers and brokers found it desirable to turn the work over to the title companies. Government requirements like RESPA Form 1, Regulation Z and note and mortgage guarantees complicated the process, as did new buyer/seller/lender arrangements for financing. We found that, where formerly the closing of a $100,000 house sale required five checks, upon disbursement, with all the new wrinkles, today's closing might require as many as 25. Title companies doing anywhere from $100,000 to $5 million of business had real incentives to automate.

Speeding up the quest, we visited computer shows wherever we found them.

"When we explained our requirements," says Garry, "their eyes glazed over—but they assured us their hardware could do the job." They stated "we can write the software," but we had no expertise in it and had no desire to be pioneers by developing custom software for the title industry. If a computer salesman tells you that they can "find someone to write the software"—RUN!!!

**"We can now comfortably handle 8,000 escrow checks a month, and we estimate that, with the pickup in the real estate market, we could easily increase that to 12,000."**

At computer shows and ALTA conferences we heard horror stories of companies that had embraced automation, at least partially, only to be discouraged and abandon it at high cost to themselves.

At the ALTA Annual Convention in Boston, in October, 1982, we met a fellow named Jeffrey Scott Ratner. He was the founder and head of a young computer company then called—you can believe it or not—Ragtronics. It was located in Greensburg, Pennsylvania.

### More Affordable Automation

Ratner told us that rapid introduction of the microcomputer with word processing capability—a high tech spinoff of the space program—had made the cost of office automation more affordable, and that his firm specialized in suppling both computer hardware and software custom-tailored for realty/title closings.

Having become quite sophisticated about computers through our years of search, trial and disappointment, we felt it was worthwhile to test his claims.

The next month we flew to Greensburg, taking along all the documents related to two complicated closings then pending in our offices. Arriving late one night, we spent the entire following day—12 hours—watching our paper information being burned onto 5¼-inch "floppy" discs.

Late that night, we returned, exhausted, to Florida convinced we had found what we had sought for years. In December, we purchased SULCUS microcomputer-word processor hardware, and software, for our company. To

**Continued on page 27**

## Gold Coast Title Compiles Time Savings

Now into its fourth month of automation at this writing, Gold Coast Title has compiled a table on time saved over prior manual operations. Some explanatory notes are in order. First, the figures listed (in minutes) are conservative, according to Gold Coast President J. Herman Dance. In the manual listing, for instance, the figures do not include the time spent when typographical errors and last-minute changes required a re-work prior to closing. Dance estimates that this occurred 42 per cent of the time prior to automation. The entry for compilation of information does not include normal telephone time, which has not varied significantly from our prior experience. Finally, the entry for RESPA forms includes, in both the manual and automated listings, the time required for calculations—a major contributor to saved time.

The table compares Gold Coast's prior manual operations with its computerized operations (figures are in minutes). This is based on a four-month experience; Dance expects that the savings will continue to mount—through increased operator familiarity; a continually-expanding base of stored, standard information; and hardware and software enhancements.

### Time Required, Typical Residential Closing

| | Minutes Per Case Manual | Minutes Throughput Automated |
|---|---|---|
| Preliminary Reports | 30 | 12 |
| RESPA Forms and/or Closing Statements | 58 | 15 |
| Documents (Average: 8) | 72 | 22 |
| Title Policy(ies) | 36 | 7 |
| Checks (Average: 12) | 24 | 4 |
| Check Register | 8 | 1 |
| Proceeds and Disbursement Sheet | 30 | 2 |
| Compilation of Information for Preparation of Closing Documents | 43 | 10 |
| **TOTALS** | **5 Hours, 1 Minute** | **1 Hour, 14 Minutes** |

# Title Systems—Equipment User Questionnaire

As a service to ALTA members, the Association Abstracter-Agent Section Land Title Systems Committee is compiling user information on different types of title industry systems and equipment. If you have user experience with the category listed below, please complete this questionnaire and return it—by November 15, 1983—to Committee Member Richard A. Johnson, Nebraska Title Company, 100 Court House Plaza, Lincoln, Nebraska 68508. Use additional sheets as necessary. Please include copies of any products/system literature with your questionnaire. An analysis, based on user questionnaires that are returned, will be published in a future issue of *Title News*.

**Category for this questionnaire: retrieval systems for storage of abstracts, title policies**

1. Is the system used primarily for retrieval of:

   Abstracts _____

   Title insurance files _____

2. Volume of items stored per month (number) _____

3. Basic features of retrieval system _____

4. Equipment being utilized _____

5. Advantages and disadvantages of system _____

6. Other comments _____

COMPANY NAME _____

YOUR NAME AND POSITION _____

LOCATION _____

# Systems-Equipment Profile . . .

## Retrieval Systems for Storage of Abstracts, Title Policies Present Challenge to Companies

By Richard A. Johnson

A big problem common to all title companies is the storage and retrieval of records and files. Whether the company is primarily involved in abstracts of title or in title insurance policies, the problem is the same: How to store the abstracts or title insurance files and still be able to retrieve these items in a fast, systematic matter.

In some areas, title companies are often asked to hold or store abstracts for individuals on a particular transaction —or they may be requested by a lender, developer or other client to warehouse all of that client's abstracts. This can result in a massive problem unless the company has a system in place for indexing and retrieving the abstracts.

Is this information kept by name of owner, lender, address, legal description of property, etc.? Is it cross-referenced? What type of receipt is given the depositor? What information is needed when a request is made for the return of the abstract? Is there equipment that can be utilized to handle this function?

These are some of the basic questions encountered in devising a system for handling the storage and retrieval of abstracts. If your company has experienced the problem of abstract storage, let us know how it is being handled.

The storage and retrieval of title insurance files is an equally massive problem. This is especially true in those areas where title insurance has only recently become the dominant form of title evidence. While the volume of title policies issued will determine to an extent the sophistication of the system, hopefully there are some basic steps in handling this problem that are applicable regardless of the volume involved.

How are the files indexed for quick retrieval? Is the information kept by policy number, insured party, legal description, etc.? What is the extent of the information needed to allow quick retrieval? Is equipment being utilized?

The retrieval of stored abstracts or title policies can be a time-consuming function. We know there are many ways this problem is being handled. Hopefully, those with a system that works well will share this information by completing the questionnaire and returning it, by November 15, 1983, to Richard A. Johnson, Nebraska Title Company, 100 Court House Plaza, Lincoln, Nebraska 68508. Results based on questionnaire returns will be analyzed in a future issue of *Title News*.

*Richard A. Johnson is a member of the ALTA Abstracters and Title Insurance Agents Section Land Title Systems Committee and is president of Nebraska Title Company, Lincoln, Nebraska.*

**PLEASE**

**Help your Errors and Omissions Committee help you—We need to know:**

**What problems you have had**
**What successes in finding E&O coverage you have had**
**Whom you are insured with—Are you happy with coverage and cost?**

**Write to Errors and Omissions Committee**
**Box 966**
**Bartlesville, Oklahoma 74005**
**Or phone 918/336–7528**

# Names In The News . . .

**Richard A. Cecchettini** has been elected executive vice president of Title Insurance Company of Minnesota. **Cecchettini** presently serves on the Executive Committee of the ALTA Title Insurance and Underwriters Section.

**LeRoy J. Schreifels** has been elected to the position of vice president and associate counsel with the company. Elected to the position of vice president with Minnesota Title are **John W. Myers**, **S. James Bevacqua**, **George A. Finney**, and **Richard C. Mohler**.

Elected to the position of assistant vice president are **Timothy E. Pfaff**, **Barbara H. Aiken**, **Daniel P. Gomsrud**, **Tari M. Pekar**, and **Charles E. Polk, Jr.**.

Other appointments at Minnesota Title are **Richard A. Wilson**, assistant vice president and agency representative for New Jersey and eastern Pennsylvania; **Jim Valenti**, western region national accounts executive, San Jose, California; **Dean R. Youngberg**, Anoka County (Minnesota) branch manager; and **William F. Faust**, manager of the Hennepin/Ramsey branch office, Minneapolis, Minnesota.

American Title Insurance Company, Miami, Florida, announces the appointments of **Chris G. Papazickos**, current senior vice president and general counsel, to the additional position of secretary; **Pearl R. Radice** to assistant vice president and director of human resources; and **Allan F. Montezon** to manager of Wisconsin state office.

**Lawrence M. White** has been appointed regional vice president of First American Title Insurance Company, overseeing operations in Hawaii.

Lawyers Title Insurance Corporation, Richmond, Virginia, announces the following elections to its board of directors: **Gordon L. Crenshaw**, chairman and chief executive officer of Universal Leaf Tobacco Company, Richmond, Virginia; **John W. Davis**, president of Republic Federal Savings and Loan Association, Altadena, California; **Dr. Thomas A. Graves, Jr.**, president of the College of William and Mary, Williamsburg, Virginia; **Joseph A. Jennings**, chairman and chief executive officer of United Virginia Bankshares and United Virginia Bank, Richmond, Virginia; **Dr. Michael H. Mescon**, chairman, department of management, Georgia State University's College of Business Administration, Atlanta, Georgia; and **Zach Toms, Jr.**, vice chairman of the board, First and Merchants Corporation, Richmond, Virginia.

**Robert J. Hartlaub** has been elected vice president and New Jersey state manager for Lawyers Title, Summit, New Jersey.

Lawyers Title also announces the appointments of **John D. Weber** as Rocky Mountain states claims counsel and **Michael D. Shaw** as Colorado state counsel, Englewood, Colorado. **Kim T. Chase** has been named manager of the company's national division office, Boston, Massachusetts; **Joseph W. Huber** has been appointed senior title attorney, Pittsburgh, Pennsylvania. Lawyers Title, Dallas, Texas, announces the


*Cecchettini*


*Schreifels*


*Bevacqua*


*Radice*


*Montezon*


*White*


*Crenshaw*


*Graves*


*Jennings*


*Mescon*


*Hartlaub*


*Weber*


*Shaw*


*Chase*


*Kling*


*Hellewell*


*Huber*

appointments of **Nancy G. Kling** to assistant counsel—claims and **P. Darlene Toerck** and **Edward D. Hellewell** to senior title attorney.

**Sharon G. Langeberg** has been promoted to senior national title service coordinator for Ticor Title Insurance Company of California, Los Angeles office.

Transamerica Title Insurance Company has appointed **Harold C. Hayes** vice president and division counsel in the eastern states agency headquarters.

**Lynn Russell** has been named branch operations manager of the Scottsdale office of Fidelity Title Agency of Maricopa, Arizona.

**John James Gaffney III** has been appointed branch manager, northeast Philadelphia, Pennsylvania, office of Industrial Valley Title Insurance Company.

**DANCE—continued from page 23**

this date, we have trained five members of our 26-person staff in use of the equipment. We can now comfortably handle 8,000 escrow checks a month, and we estimate that, with the pickup in the real estate market, we could easily increase that to 12,000.

And our greatest relief is that we no longer have to spend time on THE QUEST.

**Cheryl A. Wagner** has been named assistant secretary for Commonwealth Land Title Insurance company, Pittsburgh, Pennsylvania.

**Robin Wall** has been promoted to marketing representative of Stewart Title and Trust of Tuscon, Arizona.

Chicago Title Insurance Company announces the following appointments to assistant vice president: **James E. Johnson**, Indianapolis, Indiana; **Richard M. DiLaurenzio**, New York, New York; and **Otis Phillips**, Amarillo, Texas. Appointed to the position of associate regional counsel are **Robert L. Henn**, Philadelphia, Pennsylvania, **Michael J. Berey**, Manhattan, New York, and **Timothy J. Whitsitt**, Arlington, Virginia. **William E. Fleming** has been appointed assistant vice president office counsel, Kansas City, Missouri and **David Sawyer** regional claims counsel, Atlanta, Georgia.

Other Chicago Title appointments include **Janett Lowes**, title operations officer, Indianapolis, Indiana; **William L. McKenna**, resident vice president, Los Angeles, California; **Gary Cichon**, FHA/VA counsel, Chicago, Illinois; **Robert F. Dasher**, title officer, Chicago, Illinois; and **John H. Noblitt**, title operations officer, Charlotte, North Carolina.

**Milton Biles** has joined Metro County Title Company as vice president and manager of commercial operations, Fort Worth, Texas.

**Richard C. Smith** has been appointed major account executive for Ticor Title Insurance Company, Milwaukee, Wisconsin, office.

*Hayes*

*Russell*

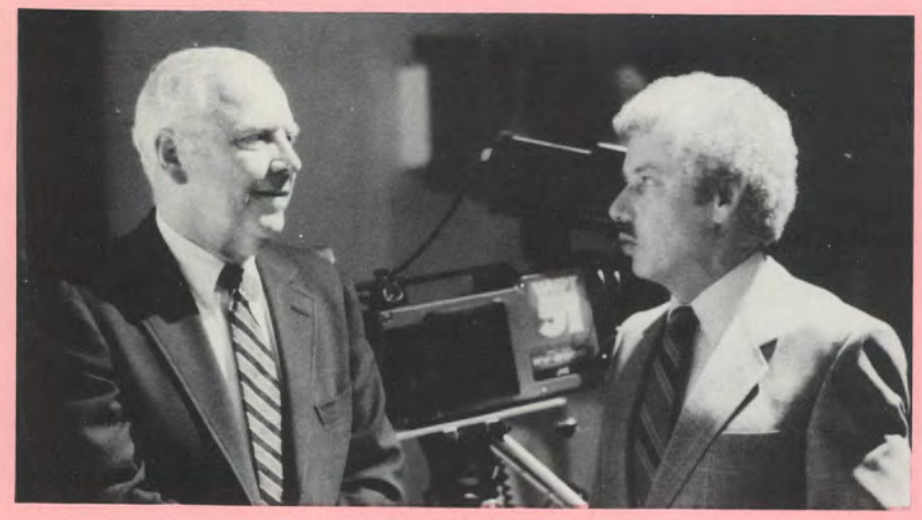
*Wagner*

*Wall*

*Phillips*

*Noblitt*

## President-Elect Kennedy Discusses Title Insurance on PBS



**ALTA President-Elect D. P. Kennedy, left, president of First American Title Insurance Company, Santa Ana, California, talks with J. Wendell Webb, producer-host for "Financial Enterprise," a 30-minute television show reaching some seven million viewers in 45 states, during a taping session in which the Association officer was interviewed on the subject of title insurance. Primary distribution of the program is through the PBS Television Network.**

# Calendar of Meetings

**August 4–7**
Idaho Land Title Association
Elkhorn Village Inn
Sun Valley, Idaho

**August 11–13**
Kansas Land Title Association
The Holidome
Topeka, Kansas

**August 11–13**
Montana Land Title Association
Ramada Inn
Bozeman, Montana

**August 18–20**
Minnesota Land Title Association
Holiday Inn
New Ulm, Minnesota

**September 9–11**
Missouri Land Title Association
Sheraton Westport Hotel
St. Louis, Missouri

**September 10–13**
Indiana Land Title Association
Sheraton-West (Airport)
Indianapolis, Indiana

**September 14–16**
Dixie Land Title Association
State of Alabama Convention Center
Gulf Shores, Alabama

**September 15–17**
North Dakota Land Title Association
Town House
Grand Forks, North Dakota

**September 21–24**
ALTA Annual Convention
Boca Raton Hotel and Club
Boca Raton, Florida

**September 28–October 1**
Washington Land Title Association
Thunderbird Motor Inn
Yakima, Washington

**October 2–5**
New York State Land Title Association
Sky Top Lodge
Sky Top, Pennsylvania

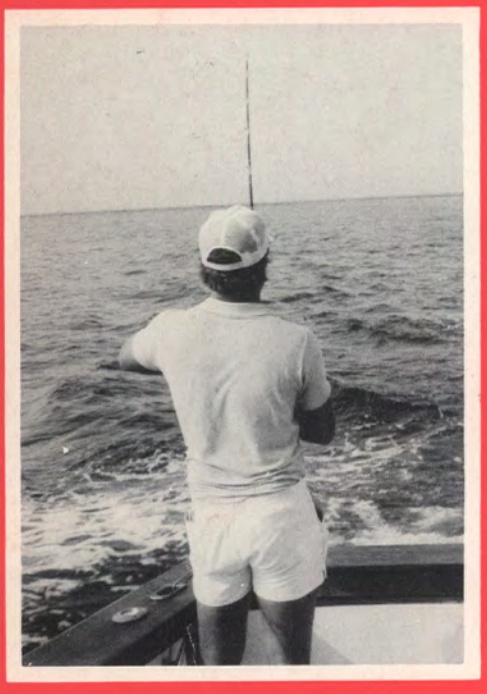
**October 6–8**
Wisconsin Land Title Association
Paper Valley Hotel and Conference Center
Appleton, Wisconsin

**October 14–16**
Palmetto Land Title Association
Hilton Head Holiday Inn
Hilton Head Island, South Carolina

**October 20–22**
Land Title Association of Arizona
Sheraton Tucson El Conquistador
Tucson, Arizona

**November 9–12**
Florida Land Title Association
Hyatt Palm Beaches
West Palm Beach, Florida

## Ocean Fishing Tournament Among Convention Attractions




Not all of the 1983 ALTA Annual Convention will be devoted to sessions, workshops, committee meetings and the like. On Friday afternoon, September 23, the agenda will consist of the traditional golf and tennis tournaments and—taking advantage of the Boca Raton Hotel and Club Florida seaside location—an ocean fishing competition. Those desiring to pick up clubs, rackets or rods and join the fun and who have not registered for a tournament may do so by completing an activities form and returning same to Association staff along with their check.