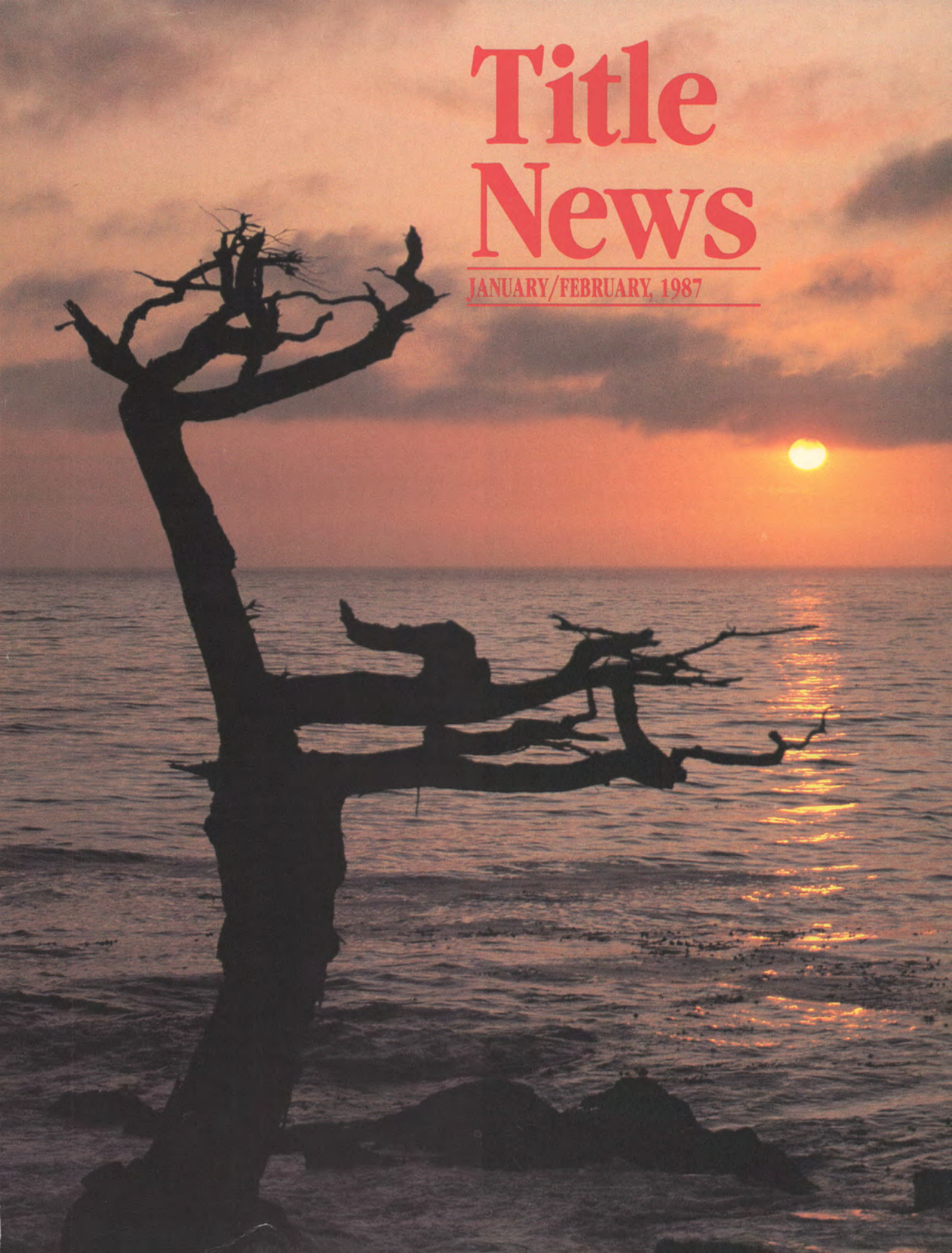
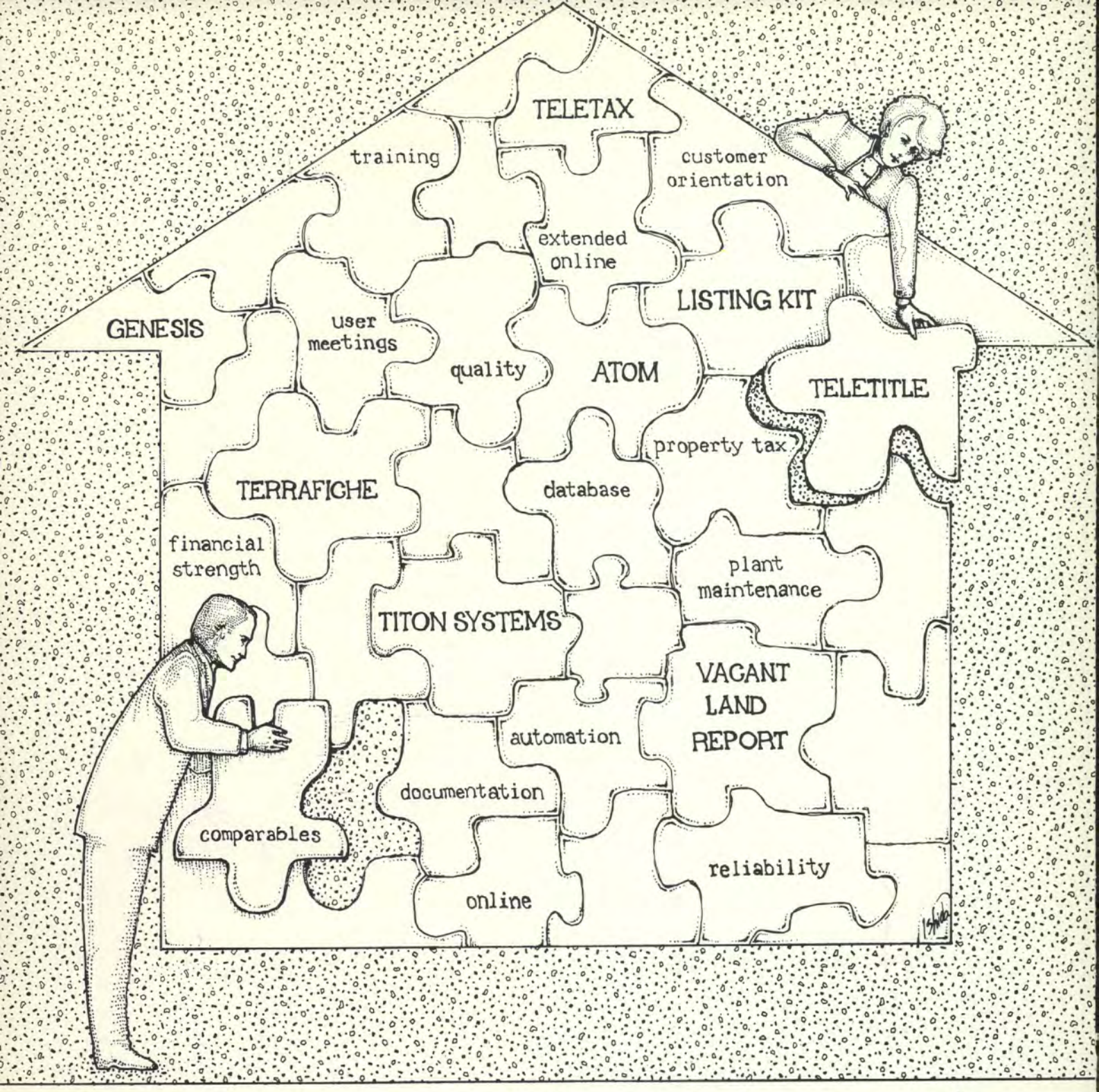


Title News

JANUARY/FEBRUARY, 1987



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Title News

Contents

Volume 65, Number 6

Front Cover: Standing as a lone sentinel, a cypress tree is etched against a Pacific sunset along the coast near Monterey, California. The 1987 California Land Title Association Convention will be held amid this scenic splendor—May 6-9 at the Hyatt Regency Monterey. (Photograph by Dave Stock)

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ISSN 0040-8190

Editor: Gary L. Garrity

Editorial Assistant:
Lisa S. Kim

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A Message from the President

Effectively dealing with the serious national challenges that confront the land title industry requires a strong and unified American Land Title Association that is financially healthy. With issues like real estate reporting and premium reserve taxation under the Tax Reform Act, the Antitrust Damages Clarification Act prompted by the Federal Trade Commission administrative action against some of our members, and errors and omissions insurance availability/affordability, ALTA must continually be able to act swiftly and decisively on behalf of our industry. Maintaining this capability, along with the impressive programs and services otherwise available to our members, has required development of ALTA as an organization of major stature, supported by adequate financing.

There is a good recent indication of the operating level we have achieved, as seen in the 1987 ALTA Budget approved by your Board of Governors during a meeting at the 1986 Annual Convention of the Association.

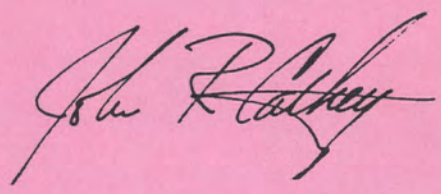
For 1987, our approved ALTA budget is just above $2 million—which includes slightly projected increases for income and expense over the approximately $2 million authorized as the 1986 Association Budget. Major items such as legal expenses, conventions, committee expense, office rental, staff salaries and benefits, travel expense, public relations, publications and contingency fund for legislative expenses are included in this total.

As a matter of interest, ALTA Conventions are budgeted on a break-even basis and do not produce income for other activities of the Association. All proceeds are used to bring our members the most attractive Conventions for the lowest possible registration rates.

The 1986 and 1987 budget figures reflect these relatively good economic times, since ALTA dues income is based on member income. As a reminder of the swings in the economy, $400,000 in 1986 was transferred by Board action from cash surplus earned in previous years to reserve assets—restoring funds spent to keep your Association viable during the severe national recession at the beginning of this decade. Your Board has established an objective of continuing to rebuild the reserve fund in the coming year to assist the industry in recessionary and emergency situations.

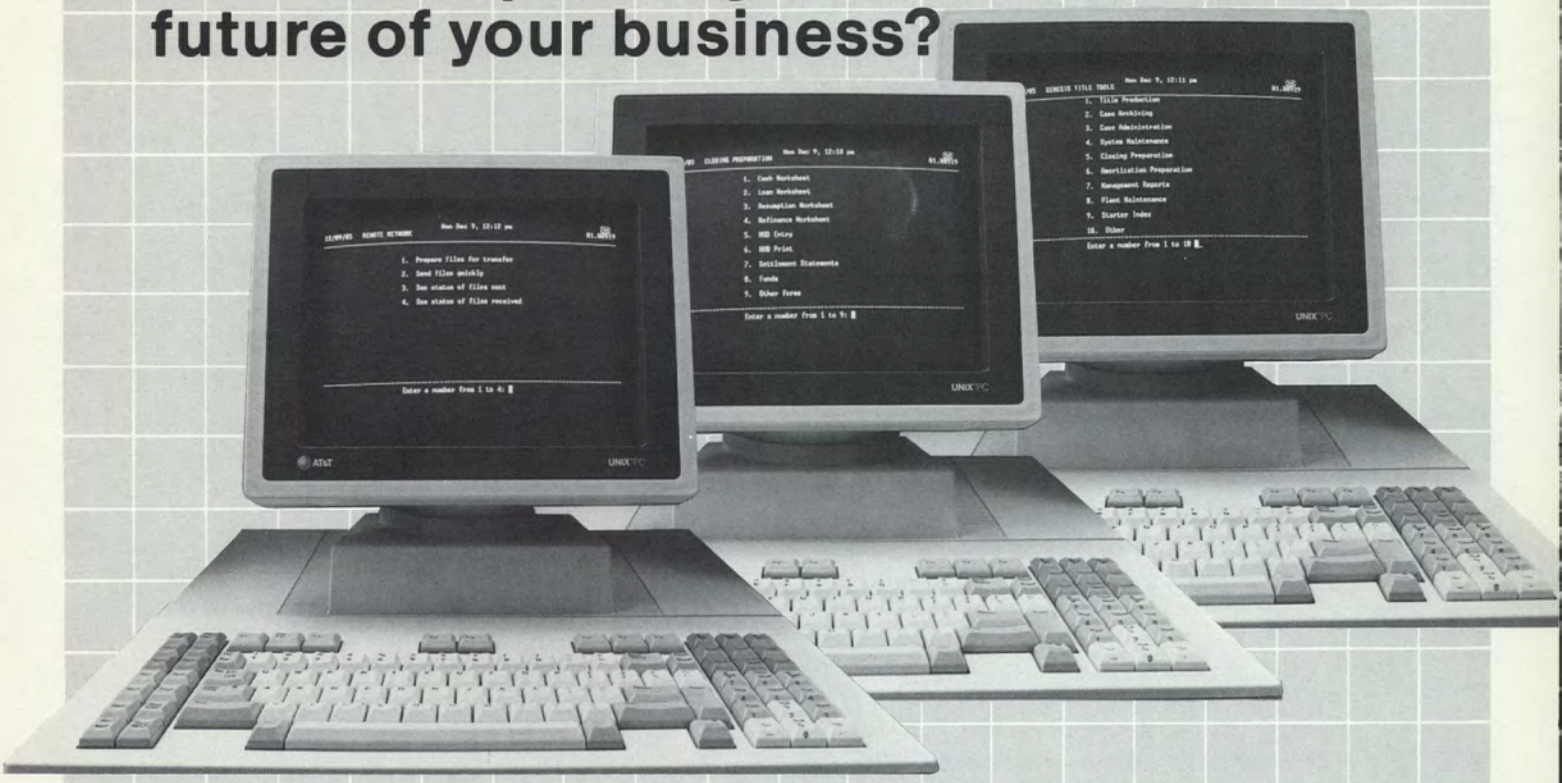
ALTA has been found to be in excellent financial condition during our annual audits by the Arthur Andersen accounting firm and, with continued skillful application of financial management by your governors and staff, this fiscal soundness will remain.

Our organizational and financial resources are impressive, and so are our needs and problems. Collectively, title underwriters, agents and abstracters throughout the nation—through their participation—have built ALTA into an Association that is second to none. Our payment of ALTA dues is truly an investment in a better future for us all.



John R. Cathey

Can a computer system affect the future of your business?



Ask an expert.

"Absolutely. If you are concerned at all about productivity, you want the latest computer technology at all times," says Joseph Buchman, Senior Vice President at Commonwealth Land Title Insurance Company.

"As you grow and requirements change, you will not want to change systems. You, therefore, need to be certain that the vendor will provide upgrades to keep pace with the latest developments. That's why we chose Genesis.

"When we were looking for a system for our 5000 agents, we were concerned with getting state-of-the-art software. We wanted the best possible performance and a realistic price. Genesis incorporates both within a UNIX® multi-user operating system. We were impressed with its quality, versatility and performance," says Buchman.

Title industry experts around the country have expressed confidence in Genesis' ability to meet their future needs. And Title Data's long-standing reputation is proof of their commitment to keeping Genesis on the leading edge for years to come. Let Genesis bring you the future, with —

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ALTA Governors: Continuing A Proud Heritage

Members of the 1986-87 ALTA Board of Governors photographed during the Association's recent Convention in Los Angeles are, beginning at left, President John R. Cathey, The Bryan County Abstract Company; President-Elect Marvin C. Bowling, Jr., Lawyers Title Insurance Corporation; Abstracters and Title Insurance Agents Section Chairman Charles O. Hon, III, The Title Guaranty & Trust Co. of Chattanooga; Title Insurance Underwriters Section Representative Parker S. Kennedy, First American Title Insurance Company; Abstracter-Agent Section Representative Cara L. Detring, The St. Francois County Abstract Company; Finance Committee Chairman Richard A. Cecchettini, Title Insurance Company of Minnesota; Treasurer David R. Porter, Transamerica Title Insurance Company; Underwriter Section Chairman Richard P. Toft, Chicago Title Insurance Company; Underwriter Section Representative Herbert Wender, Commonwealth Land Title Insurance Company; and Immediate Past President Gerald L. Ippel, Ticor Title Insurance Company.

Newly-installed ALTA President John Cathey and wife Wynona acknowledge applause as they are presented to the membership during the Association's 1986 Annual Convention Banquet in Los Angeles. At right is California Land Title Association Executive Vice President Lawrence Green, who served as master of ceremonies.

Following their election and installation during the 1986 ALTA Annual Convention, members of the Association Board of Governors met to begin consideration of the most recent challenges facing the title industry. In doing so, they continued a proud heritage of leadership dating back to the chartering of ALTA in 1907.

Underwriter Section Chairman Dick Toft, chairman and chief executive officer for Chicago Title Insurance Company, finds running a favorite form of exercise and is active in many civic endeavors. Here, he joins other volunteers working in a telephone pledge telecast for WTTW, local Public Television station.

Governors active leaders, present views on priorities

Both the Abstracter-Agent and the Underwriter sections elect three representatives to the Board. Besides major responsibility in their respective companies, all are in close touch with industry needs.

Richard P. Toft

We are within another challenging period for our industry, and our future depends upon our success in meeting the challenge.

One of our chief priorities must be managing through the business cycle, not just the upswings of that cycle. New methods must be found to achieve profitability over the cycle so that sufficient funds will be available for reinvestment and returns to those who have placed their capital at risk.

Developing and implementing adequate controls to protect ourselves and the public is also of utmost importance. Fraud has been increasing at an alarming rate, and we need to realistically and pro-actively deal with our vulnerability in this area if we are to retain the confidence of those relying upon our services.

At the same time, the industry must convert from one that is operationally oriented to one that is market driven. We need to recognize and respond to the needs of our various publics so that the industry provides products which creatively satisfy those needs.

We must also prepare for the future. Automation is an obvious requirement for success in our skill-intensive industry. We need to invest heavily in development and education in the coming years if our product is to remain cost-effective, as opposed to the offerings of other alternatives.

Investment in technology alone, however, will not assure our future success unless we have a continuing core of well-trained and motivated young title professionals. The industry must develop the next generation of title insurance company owners and managers through well planned and thorough training programs.

And, of course, we will continue to educate the public and our elected representatives regarding our business and the value of our services. Too often, we are perceived in a negative light, rather than as the providers of an invaluable service, which leaves us open to ill-advised regulation and mistrust.

The last five years have provided the title industry with some of the greatest challenges, changes and opportunities in history. The next few years will provide ever more interesting challenges with accompanying opportunities.

Charles O. Hon III

Our trade association must continue to take the lead in representing our needs as an industry. It must continue to act rather than react, and, in order to do so effectively, it must increase its membership. I feel that there is no excuse for someone involved in our business to decline membership in ALTA. Failure to join our trade association indicates an unwillingness to support our industry.

ALTA works for all in the title industry, and there are non-members who reap the benefits without paying their way. This situation has the effect of increasing the cost of membership to present members.

Another major need of our industry being addressed by ALTA is the errors and omissions insurance affordability/availability crisis. Our association has expended many thousands of dollars already, and is prepared to spend more in its effort to find acceptable and affordable coverage for its members. A solution to this problem will have a positive effect on increasing membership.

Along the lines of action versus reaction, we must be assertive as an industry. We are not a stepchild in the family of real estate transactions, and we should not think of ourselves as such, nor should we allow ourselves to be

manipulated by others. We sometimes tend to view ourselves as second-class citizens, and in doing so cannot expect others to view us or treat us differently. We are an important, integral part of the real estate community, and we must begin to act it.

Bert V. Massey, II

It is my belief that the most pressing challenges that will face the title insurance industry nationally in the immediate future relate to regulatory and legislative incursion into the operation of our business. The response to those challenges should, therefore, be the highest priority items for the American Land Title Association.

The legislative and regulatory incursions of which I speak have been and will continue to be brought about, primarily, by virtue of the fact that our customer base, regulators, and members of congress, finally have come to a realization of the vast amount of money that is handled by those in title insurance operations as a result of the closing process, a recognition by regulators of the integral part that the title insurance industry plays in the real estate conveyancing and mortgaging process, and a recognition by other industry groups participating in the real estate conveyancing and mortgaging process that their hope to avoid further regulation and legislative incursion in their activities may be achieved by foisting off responsibilities they should rightly assume upon the title industry.

Classic examples of the incursions to which I refer and the manner by which they occurred are the Federal Trade Commission alleging "price fixing" against certain title insurance underwriters during a Republican administration that is allegedly "pro business," all of which resulted in the loss of hundreds of thousands of dollars in attorneys fees and costs to the industry in general, and the affected underwriters in particular; the National Association of Realtors' lobbyists persuading the Senate of the United States that, in connection with the Tax Reform Act of 1986, the reporting of gross proceeds of sales of real property be placed as a responsibility of title insurance companies, rather than the responsibility of real estate brokers; and the efforts of the Internal Revenue Service first, and the Congress later (and more successfully), to drastically change the method by which the unearned premium reserves of title insurance underwriters are treated for tax purposes.

Brown County Abstract Company Secretary-Treasurer Bert Massey is a member of the Title Industry Political Action Committee Board of Trustees, and is the founding chairman of the Texas Land Title PAC and continues as its chairman. The Texas Land Title Association past president is a partner in the Brownwood, Texas, law firm of Massey and Shaw—and feels that life's better pursuits include making speeches and enjoying a good cigar. He is shown (seated) with City Manager Virgil Gray as he pursues another favorite endeavor—serving as the mayor of Brownwood.

In the State of Texas, where I live and do business, we operate in the most regulated climate, as to title insurance, of any state in the nation, and yet, despite this regulation, the partnership that has existed between our industry and the State Board of Insurance has been a healthy one, both for consumers, and for the title insurance industry itself.

However, at a time when the economy of the southwestern United States is probably in the worst condition since the great depression, we currently find the staff of the Texas State Board of Insurance seeking to radically change the formula by which the cost of title insurance policies is determined by the State Board of Insurance, for the purpose of, first, dramatically reducing title insurance premiums, and, second, capping permitted annual rises in title insurance premiums, by severely limiting the amount of expense items that can be made a portion of the rate base.

Rumors abound that, when the Texas Legislature convenes in January of 1987, various bills will be introduced seeking to "regulate" (translate—emasculate) the title insurance industry, either by deregulating it in Texas, or by deregulating the higher liability premiums. These bills are to have as their sole purpose, giving the large developer with a great volume of business the opportunity, to "whip down" big liability rates.

The inevitable result of the passage of such legislation would be to cause a rise in the lower liability premiums, as a profit must be made somewhere for those currently engaged in the title insurance industry to stay in business.

How can these priorities be met? It seems to me that the vehicles for doing so are already in place, but they must be strengthened, and the efforts to strengthen them and to strengthen the influence of our industry constantly emphasized. A knowledgable, intelligent governmental affairs officer, and an informed governmental affairs committee, which is active, are essential to our survival insofar as Washington is concerned.

My information is that our staff has an excellent reputation both with the bureaucracy, and with important members of the House and Senate. However, they cannot fight the battle alone. High priority must be given, therefore, to raising funds for the Title Industry Political Action Committee, so that our influence can be felt monetarily in elections, and an even higher priority must be given to securing the active political involvement of our member-

Abstracter-Agent Section Chairman Charlie Hon, president of The Title Guaranty and Trust Co. of Chattanooga, is equally at home on the golf course or behind the wheel of a boat towing water skiers that include his and wife Ann's two children. He is a past president of the Tennessee Land Title Association and the Chattanooga Land Title Association.

ship. Few other industries have an "agent" located in almost every county seat in the United States, but we seem to have a difficult time securing the active participation in local elections of these "agents."

I have no magic answer to stirring the interest of our members in their future through the political process, but constant effort to do so must be maintained.

Cara L. Detring

It seems that it is no longer enough to do good work, provide good service, keep your employees and customers happy, and in short, "take care of business" in your own little circle. You now must be acutely aware of government affairs and keep track of all that goes on in the national and state legislatures.

On top of that, what happens in other states also affects each of us, because other state activities and litigation can set precedents. It is extremely difficult for a small company to stay aware of all of these things. Even if we have the energy to absorb all the information, we don't always have ready access to all of the sources of information. ALTA has, through its ever-increasing involvement in government affairs, played an important role in protecting us all from the dangers of government regulation, de-regulation, and litigation from all angles. This role as watchdog of the industry has to have top priority in ALTA activities.

Another priority for our industry is the constant effort we must put forth in the familiarization and education of others with the extent of our services and expertise to eliminate the misunderstanding of the role our industry plays in real estate transactions. It seems it is a never-ending battle.

First American Title Insurance Company Executive Vice President Park Kennedy practiced law with a Beverly Hills, California, firm for four years prior to becoming associated with that underwriter. He is chairman of the board for the Greater Santa Ana Chamber of Commerce, enjoys golf and fishing, and—as is evident here—has been known to swing a formidable bat when a softball game is on the agenda.

Parker S. Kennedy

I think the future of our industry is unclear, but very good. Unclear because of the inevitable changes, and good because, no matter what happens, the real estate closing process will always involve title information and a guarantee of its accuracy.

In order to protect this future, we should never lose sight of the importance of people to our business. Title companies, insurers and agents alike, consist of a little furniture, a little money and a lot of people. We should train them and appreciate their knowledge and efforts.

We must use computers to help our people, but I think we've all learned that computers won't replace them. As long as we don't forget that our primary assets walk out our doors and drive home every night, we'll be o.k.

Herbert Wender

In a word, the most significant need of the title insurance industry at this time is "respect." While title insurance is a requirement in every commercial transaction and nearly every residential transaction, our industry has not yet been completely success-

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Cara L. Detring, who manages The St. Francois County Abstract Company as vice president, practices law and serves as a municipal judge, is the current chairman of the ALTA Education Committee and is a past chairman of the Association's Young Title People Committee—in addition to holding the office of Missouri Land Title Association first vice president. During leisure time, she can be found with her family near a pool or beach—or, in colder climes, skiing the best snow available.

Commonwealth Land Title Insurance Company Chairman of the Board and Chief Executive Officer Herb Wender enjoys basketball, both as spectator and participant. Here, he holds ball autographed by members of the Philadelphia 76ers pro team—which was presented to the Commonwealth Land Title aggregation as champion of the local Financial Basketball League.

Convention Golf Winners Announced

The following are the winners of the golf tournament held at the 1986 ALTA Annual Convention in Los Angeles:

First place low net: Mike Fahey, Nebraska Land Title Association, Omaha, Nebraska.

Second place low net: Mike Mann, TRW, Inc., Real Estate Information Services, Anaheim, California.

Third place low net: Mary Ann Drelicharz, Omaha.

Low gross score: Steve Bennett, Ticor Title Insurance Company, Rosemead, California.

Closest to the pin: Bill King, Title USA Insurance Corporation, Houston, Texas.

Longest drive: Steve Bennett, Ticor Title Insurance Company, Rosemead.

A TITLEPROFILE

Company: Trans-County Title Agency, Inc.

Location: Northern New Jersey

Executives: Neil & Cecile Savad

Favorites:

Book: Firestone's Biography (his) Children's Hospital (hers)

Vacation: British Virgin Isles (his) Maui (hers)

Sport: Tennis (his) Running (hers)

Automobile: BMW (his) Volkswagen Convertible (hers)

Children: Greg, 20; Amy, 19; Kim, 16

Computer System: TITLEPRO

Work Stations: 11

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Neil and Cecile Savad
Trans-County Title Agency, Inc.
New Jersey

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Expanding Horizons!

Topical updating, management development opportunities await amid the scenic splendor of fascinating Albuquerque, New Mexico

Susan E. Perry

Expanding horizons against the breathtaking scenery of New Mexico, in an atmosphere enriched by a program of management development and topical information. This theme combination provides an irresistible attraction for the 1987 ALTA Mid-Year Convention, to be held March 25-27 at the Albuquerque Hilton.

Located in New Mexico, the "Land of Enchantment," Albuquerque is a city of contrasts—blending ancient Indian ruins, quaint Spanish villages and a modern metropolitan skyline. The city's roots trace back to 1706, making it one of the nation's oldest inland settlements. Forming its historical heart is Old Town, where San Felipe de Neri Church—built in 1706—faces the Old Town Plaza, where shops, restaurants and museums are located along narrow, winding streets. There will be an opportunity to visit Old Town as part of the Convention's sparkling leisure time activity agenda.

Amid the picture postcard setting of mountains, forests and desert, the leisure time itinerary will include, for those arriving early, a historical Santa Fe Trail Turquoise Tour all day Wednesday—including stops at a ghost town, a mission that is the oldest church in the nation, the Palace of the Governors (oldest public building in the country), as well as the Museum of Fine Arts, the Plaza, and the State Capitol.

Wednesday evening will feature a western welcome party emphasizing the fascinating blend of local culture—and offering entertainment and ample cuisine that will make dinner plans for later in the evening unnecessary.

Early risers on Thursday morning will have an opportunity to join in a tethered hot air balloon ride and thus sample that popular local sport. Later that morning, New Mexico State Senator Tom Rutherford, an avid balloonist himself, will present a thematic commentary, "Up, Up and Away," during the brunch for spouses and guests.

On Thursday afternoon, the agenda will include two optional tours—one covering the city of Albuquerque and one visiting Isleta (little island) pueblo, ancient St. Augustine Catholic Church and the Indian Pueblo Cultural Center. The initially mentioned tour will cover all quadrants of the city, with visits to Old Town, downtown, the Albuquerque Country Club, University of New Mexico, Rio Grande Valley, Kirtland Air Force Base, the Albuquerque Museum of Art, History, and Science, and the Museum of Natural History. Old Town, by the way, is an excellent place to shop for Indian arts and crafts. Isleta Pueblo is one of the largest Indian pueblos in New Mexico, and the tour will include a stop at an Indian home, where Indian baked goods are made and sold; a visit with a well-known Isleta artist; and a Cultural Center experience that combines a museum, the Zuni Pueblo dancers, and a stop at an arts and crafts gallery.

Thursday evening will feature a tour on the 2.7 mile Sandia Peak Aerial Tram, Albuquerque's most popular tourist attraction, followed by dinner at the well-known Firehouse Restaurant at the base of the tramway. The aerial tram is the longest in the western hemisphere, and reaches Sandia Crest, where the altitude approaches 11,000 feet and the view is spectacular.

For the explorer, a rental car will provide access to the surrounding areas of Santa Fe, Taos, or the southeast region—where the Carlsbad Caverns are located. Special Convention rates have been negotiated with Budget Rent-A-Car. Further details are in the Convention registration information mailed to ALTA members from the Washington, D.C., office of the Association.

Management development will be emphasized during the opening day's program on Thursday, when ALTA will follow the successful format introduced at the 1986 Mid-Year in presenting a workshop, "The Complete Title Manager." Four concurrent sessions will be offered, two running the en-

The author is ALTA staff director of meetings and conferences.

tire period from 8:15 a.m. through 12:00 noon, and two that will be repeated once during this period. Development of the workshop program was through the ALTA Abstracters and Title Insurance Agents Section and ALTA Title Insurance Underwriters Section, in conjunction with the Association Education Committee. As was the case in 1986, members will select in advance the sessions in which they will participate, and admission will be by ticket.

"Management Skills in Marketing, Advertising and Public Relations" will be the theme for one of the morning-long sessions, which will be moderated by Barbara Harms, a member of the ALTA Public Relations Committee who is vice president and manager, advertising and public relations, for Chicago Title Insurance Company. Serving as panelists will be (smaller market area) Tim McFarlane, Education Committee member and vice president and manager for Idaho Title and Trust Company; (middle size market area) John Bell, Abstracter-Agent Section Executive Committee member who is executive vice president for The Security Abstract & Title Co., Inc., a Kansas title company; and (larger market area) Robert Meckfessel, vice president and Missouri state manager for First American Title Insurance Company of Mid-America.

In the other full morning slot will be "Modern Financing Techniques after the 1986 Tax Reform Act," a session moderated by ALTA President-Elect Marvin Bowling, executive vice president-law and corporate affairs, Lawyers Title Insurance Corporation. Panelists will be Eugene Ranney, manager-real estate production services, Northwestern Mutual Life Insurance Company; Robert Mallow, counsel for the New York City law firm of Dreyer and Taub; ALTA Title Insurance Forms Committee Chairman Oscar Beasley, senior vice president and senior title counsel for First American; and Forms Committee Member Russell Jordan, vice president and associate general counsel for Lawyers Title.

Rounding out the workshop agenda will be two provocative "repeat" sessions—"Effective Time Management," led by Terry DeLaPorte, and "Managing Employee Con-

(Opposite page) Albuquerque's Old Town Plaza has been the focal point of community life since 1706. (Top, right) Sandia Peak Tram, longest tramway in North America, will whisk ALTA Mid-Year Convention attendees to the top of 10,378-foot-high Sandia Peak for a spectacular view. (Lower right) Every fall, Albuquerque is the site of the International Hot Air Balloon Fiesta; a tethered hot air balloon ride is being offerred to ALTA members on hand for the March 25-27 Convention.

Guest Speaker Profiles

Brzezinski

Kiam in commercial

French

Three leading figures, whose areas of capability range from foreign affairs to international and American business, promise a lively morning when they address the ALTA Mid-Year Convention General Session in Albuquerque March 27.

Zbigniew Brzezinski, former assistant to President Carter for national security affairs, is Herbert Lehman Professor of Government at Columbia University, in addition to being senior advisor at the Georgetown University Center for Strategic and International Studies. He has written numerous books and articles, his most recent volume being *Game Plan: How to Conduct the U.S.-Soviet Contest.* In it, he states: "This book is based on a central proposition: the American-Soviet is not some temporary aberration but a historical rivalry that will long endure. This rivalry is global in scope but it has clear geopolitical priorities, and to prevail the United States must wage it on the basis of a consistent and broad strategic perspective."

A native of Warsaw, Poland, who currently is a United States citizen, his many endeavors have included serving as a member of the Policy Planning Council of the Department of State and, during the 1968 Presidential campaign, directing the foreign policy task forces for then Vice President Hubert Humphrey. He has been awarded the Presidential Medal of Freedom for his role in the normalization of U.S.-Chinese relations, and for his contributions to U.S. human rights and national security policies.

Victor Kiam, the indefatigable chairman of Remington Products, Inc., is an entrepreneur of the first order who became internationally known through his television commercials shown around the world in 15 languages (he liked the Remington shaver his wife gave him so much that "I bought the company"). He acquired Remington, a concern that had lost $30 million over the previous five years, in a leveraged buyout and subsequently led a recovery that brought him world-wide prominence.

Kiam combines a gift for salesmanship with a talent for motivating people, and strongly believes in regular communication with workers that gives them a sense of participation. He is known for shutting down the factory for 15 minutes four times a year to deliver a quarterly report to workers and answer their questions. His employees are more than casually interested in these meetings; they share in the company's profits.

He received his M.B.A. degree from Harvard Business School and subsequently joined Lever Bros. Among his achievements in the Remington turnaround: selling the company shavers to the Japanese.

Thomas French is a recipient of the Mortgage Bankers Association of America Distinguished Service Award, and previously has chaired the organization's Executive Committee, Certified Mortgage Bankers Committee, and political action committee. He also has served as vice chairman of MBA's legislative and membership committees, and is a past president of the Texas and the Fort Worth mortgage banker associations.

In addition to directing the mortgage banking activities of Bank of Boston Mortgage Banking Group, he also is responsible for the activity of its four mortgage lending subsidiaries. He received his law degree from Baylor Uni-

Continued on page 71

flict," under the leadership of David Miller, both of whom are authorities in their respective subject areas.

Headlining the Friday morning General Session agenda will be an update on ALTA activity, presented by Association President John Cathey, The Bryan County (Oklahoma) Abstract Company, and commentary by three prominent guest speakers—Zbigniew Brzezinski, senior advisor at the Georgetown University Center for Strategic and International Studies, who from 1977 to 1981 served as Assistant to President Carter for National Security Affairs; Victor Kiam, chairman of Remington Products, Inc., who became nationally known after his acquisition of that company and his leadership in its recovery—and his appearance in its television commercials; and Mortgage Bankers Association of America President Thomas French, who directs the Bank of Boston Mortgage Banking Group's operations from the headquarters of that organization in Jacksonville, Florida.

For more on the three guest speakers, please see their profiles accompanying this article; an overview of the Convention schedule also appears in this issue of *Title News.*

There are horizons to be expanded in Albuquerque—both indoors and among the scenic vistas outside. For additional information, call the ALTA Washington office at (202) 296-3671. It is a Convention experience not to be missed.

New Members

(Recruiter's name in parenthesis)

Active

Idaho

Intermountain Title Co., Inc., Orofino, (Ted Strohamier, Land Title of Nez Perce County, Orofino)

Michigan

Petroleum Abstract & Title Service, Inc., Traverse City

Minnesota

Lake Abstract Co., Inc., Detroit Lakes, (Melvin P. Soderberg, Detroit Lakes)

Nebraska

Beckner Abstracting & Title Co., Osceola, (Michael G. Fahey, American Land Title Co., Inc., Omaha)

New York

Select Abstract Corp., Brooklyn, (Shield McGowen, American Title Insurance Co., New York)

Estates Abstract Corp., Massapequa, (Helen Powell, Commonwealth Land Title Insurance Co., New York)

North Dakota

Ashley Abstract Co., Ashley, (Gerald D. Gordon, LaMoure County Abstract Co., LaMoure)

Ohio

Globe Title Agency, Cincinnati

Security Title & Guaranty Agency, Inc., Cincinnati

Pennsylvania

John M. Fedorko, Morrisville, (Ronald Froggatt, Robert Chalphin Assoc., Inc., Southampton)

Continued on page 71

Convention Calendar

(All meetings will be held at the Albuquerque Hilton)

Tuesday, March 24

12:00 noon	Affiliated Association Officer-Executive Luncheon and Seminar
1:00 p.m.	Convention Registration
All Day	Various Committee Meetings

Wednesday, March 25

Morning	Various Committee Meetings
7:30 a.m.	Convention Registration
8:00 a.m.	Automation Exhibits Open
9:00 a.m.	Abstracter-Agent Section Executive Committee Meeting
9:00 a.m.	Underwriter Section Executive Committee Meeting
9:00 a.m.	Lender Counsel Meeting
9:00 a.m.	Life Counsel Meeting
9:00 a.m.	Santa Fe Turquoise Trail Tour (Optional)
12:00 noon	Life/Lender Counsel Luncheon
12:00 noon	Past Presidents Luncheon
2:00 p.m.	Board of Governors Meeting
6:30-8:30 p.m.	Ice Breaker Reception (heavy hors d'oeuvres and entertainment will be provided)

Thursday, March 26

7:30 a.m.	Convention Registration
7:30 a.m.-9:30 a.m.	Hot Air Balloon Tether Ride for ALTA Members
8:00 a.m.	Automation Exhibits Open
8:15 a.m.—12:00 noon	Workshop Session: "Management Skills in Marketing, Advertising and Public Relations"
8:15 a.m.—12:00 noon	Workshop Session: "Modern Financing Techniques after the 1986 Tax Reform Act"
8:15 a.m.—12:00 noon	Workshop Session: "Managing Employee Conflict" (Repeated at 10:15)
8:15 a.m.—12:00 noon	Workshop Session: "Effective Time Management" (Repeated at 10:15)
9:30 a.m.	Spouses/Guests Brunch
1:00 p.m.	Albuquerque City & Museum Tour (Optional)
1:00 p.m.	Isleta Pueblo & Cultural Center (Optional)
6:00 p.m.	Sandia Park Tram & Dinner (Optional)

Friday, March 27

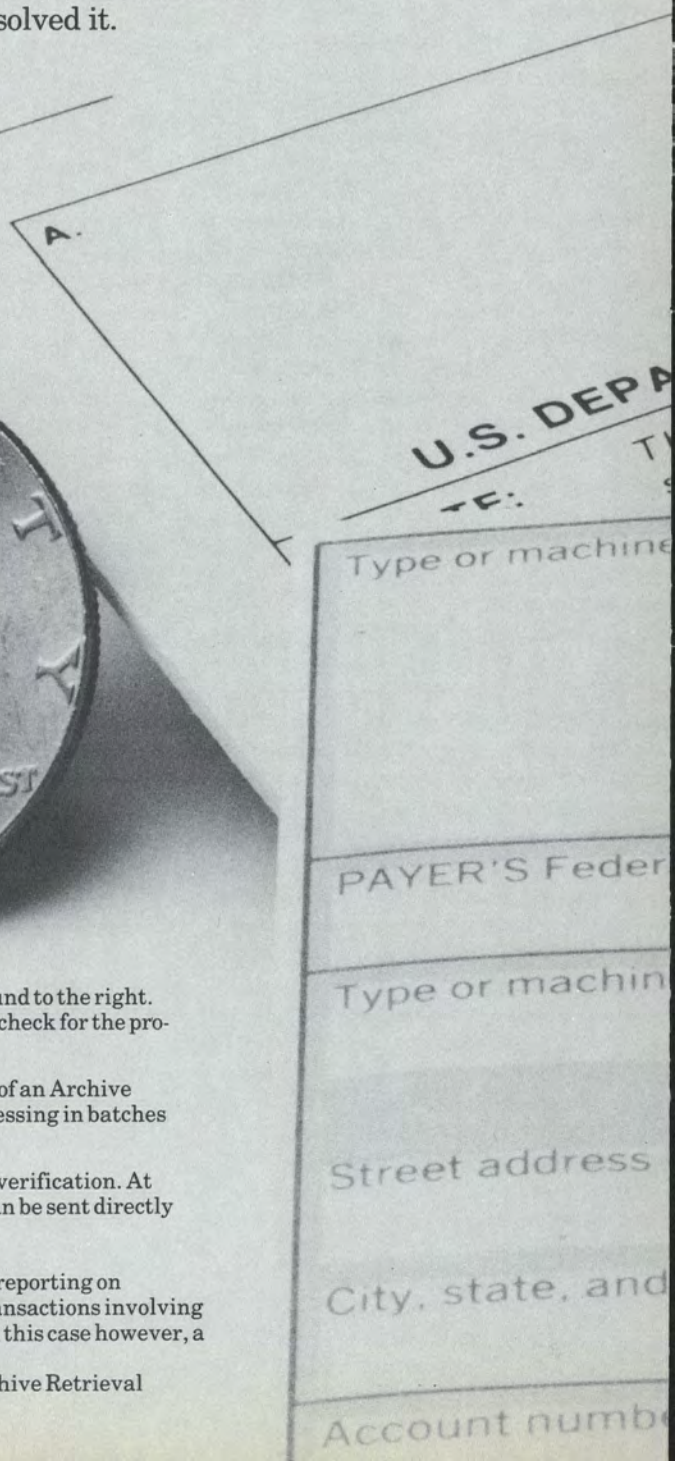
7:30 a.m.	Convention Registration
8:00 a.m.	Automation Exhibits Open
8:30 a.m.	General Session
12:00 noon	Adjournment

50¢ Is All

Magnetic Media Transaction Reporting To The IRS Has Been Made Easy.

The time has come to face the problem of reporting real estate transactions to the IRS on magnetic media. We've faced the problem, and solved it. Now, your simplest solution is to let us do it for you. 50¢ per seller is all it takes. Just join our service and never worry about it again. At the end of the reporting year, we'll send you a floppy disc containing each and every transaction that requires reporting. There's no inputting of information into a computer by you or your staff. All we ask is that you fill out one small data form at closing. Archive Retrieval System, Inc. will do the rest.

Here's a brief description of how to join up, how to handle the data form, when to mail-in information, and what to expect from us.



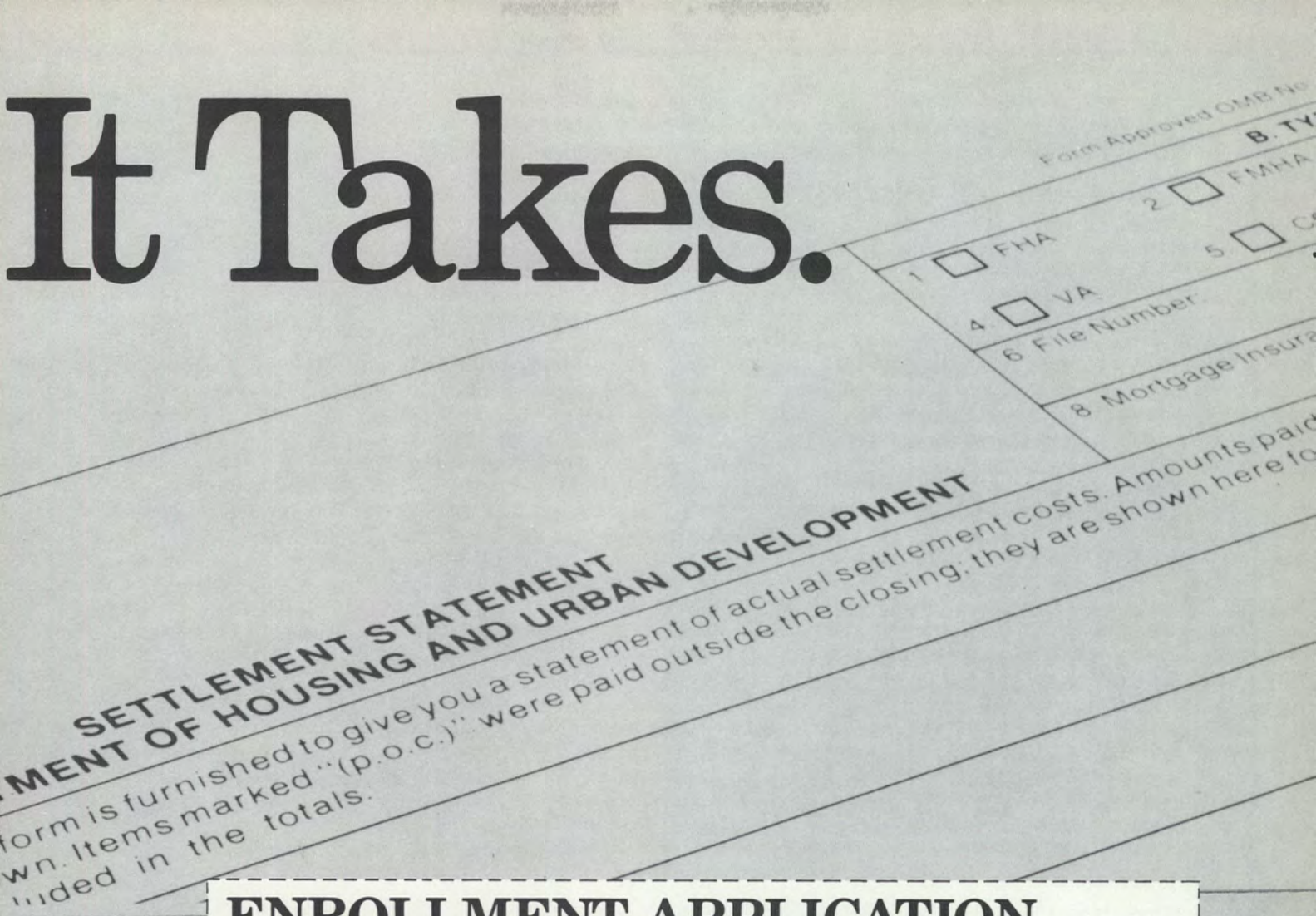
Three Easy Steps.

1. To join Archive Retrieval System, Inc., please complete the application found to the right. There is an initial processing fee of $25.00. Sign the application, enclose a check for the processing fee, and mail both to the address given on the application.
2. After your application has been processed, we will send you a master copy of an Archive Retrieval System, Inc. data form. We ask that you send them to us for processing in batches of 100, with appropriate payment.
3. We will store the information from each form and send you a hard copy for verification. At the end of the year we'll send you a floppy disc with all transactions that can be sent directly to the IRS.

Archival Retrieval System, Inc. has solved a problem for you and your staff. IRS reporting on magnetic media has been made easy, as well as inexpensive. When dealing in transactions involving hundreds of thousands, even millions of dollars . . . 50¢ seems minutely small. In this case however, a half-a-dollar can do a big job.

We hope you fill out the application which follows and become a member of Archive Retrieval System, Inc. Let us make your business life a little easier.

It Takes.



ENROLLMENT APPLICATION

Please enroll our organization in ARS's Reporting Service for IRS 1099's. Enclosed is our company check for $25.00 to cover the onetime setup fee. Our organization is:

Name _____

Address _____

City, State, Zip _____

Employer ID Number _____ Phone _____

We would like to take advantage of ARS's Reporting Service for Real Estate Closing Information. In order to participate we agree to provide ARS with the required closing information in the ARS prescribed format. Submissions will be in batches of not more than one hundred (100) items and will occur at least monthly. Failure to submit batches as soon as 100 documents are accumulated may cause delay in processing. We further understand that the enrollment is not binding on our part, but we intend to participate through 1987.

Our monthly volume is approximately: (check one or enter number)
☐ 0 - 50 ☐ 51 - 100 ☐ 101 - 150 ☐ 151 - 200 ☐ _____

A company check for $.50 (fifty cents) per item will be sent with each batch submitted for processing.
Reject items (i.e. illegible, incomplete, hand written, improper form or other condition that prevents processing) will be charged an additional $.50 per item if the number of rejects exceed 3% of the batch.
Special request reports will be available for a $50.00 set up charge plus $.10 (ten cents) per record processed.
ARS will return a processed copy of the batch control sheet and a printed list containing each processed item within two weeks of submission. Corrections are to be made to the printed list and included with the next submission. Magnetic media in the IRS format will be provided before January 31, 1988 (quarterly if volume is sufficient) and each subsequent year along with a printout of the included data and run totals balancing to submitted control sheets. The enrolled organization is responsible for validating the data and submitting the magnetic media to the IRS. ARS's only liability is to correct errors identified in the listings and provide replacement media for submission.

Enrollment Authorized by: (name) _____

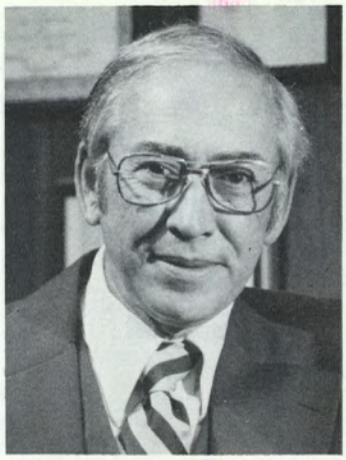
(title) _____

23705 IH 10 West, Suite 210, San Antonio, Texas 78256, (512) 698-0480

ARCHIVE
RETRIEVAL
SYSTEM, INC.

"There's hardly anything in the world that some men cannot make a little worse and sell a little cheaper, and the people who consider price only are this man's lawful prey."

John Ruskin (1819-1900)



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Kansas City Regional Seminar Set for April

Kansas City's Hilton Airport Plaza Inn will be site of the first ALTA Regional Seminar for land title owners and managers to be held in 1987. The dates are Friday afternoon, April 10, and Saturday morning, April 11.

After consultation with industry leaders in the region, members of the ALTA Education Committee have developed a concentrated program that will emphasize sharpening the skills of those with management responsibility.

Leading off on Friday will be a discussion on claims and litigation, conducted by James D. McKinney, Indianapolis, state counsel for Lawyers Title Insurance Corporation, who moderated a well-received discussion in the same subject area during the ALTA Regional Seminar held in his home city last October.

Following on Friday will be a session on employee training in the individual title office, led by ALTA Governor and Education Committee Chairman Cara L. Detring, and Association Education Committee Member Elizabeth J. Carlisle, who have been program leaders on this subject at a number of the regional events. Detring is vice president, The St. Francois County Abstract Company, Farmington, Missouri, and Carlisle is vice president—training for Ticor Title Insurance Company, Los Angeles.

On Saturday morning, the entire agenda will be devoted to a comprehensive session on legal descriptions from the management perspective. Leading the discussion will be Rob-

Continued on page 76

ALTA Title Industry Regional Seminar
Kansas City, Missouri

Friday, April 10

1:00 p.m.	*Opening Remarks*
1:15 p.m.	*Claims and Litigation* James D. McKinney
2:45 p.m.	*Break*
3:00 p.m.	*Training in* **Your** *Office* Cara L. Detring Elizabeth J. Carlisle
5:00 p.m.	*Adjourn for Cash Bar Reception*

Saturday, April 11

8:30 a.m.	*You Never Know Enough About Legal Descriptions* Robert H. Davenport
10:15 a.m.	*Break*
10:30 a.m.	*Legal Descriptions—continued*
12:15 p.m.	*Seminar Feedback*
12:30 p.m.	*Adjournment*

During the ALTA Regional Seminar held October 31 in Jantzen Beach, Oregon, left photograph, ALTA Governor and Education Committee Chairman Cara Detring, The St. Francois County Abstract Company, second from right, and Oregon Land Title Association President Kenneth Pond, Continental Land Title Company, center, talk with members of the seminar panel on bankruptcy problems, who are, from left, Thomas Stapleton, Ticor Title Insurance Company, Betty Schall, Chicago Title Insurance Company, and Michael Magnus, Oregon Title Insurance Company. In the other photograph, seminar attendees listen intently during a discussion that included sharing of experiences on employee productivity techniques.

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Written at the home buyer level to reach the widest range of public interest. Explains why safeguarding against land title problems is essential, includes a basic discussion of how title insurance works, presents concise summaries of title hazards actually experienced, and points out that ALTA members are widely respected for their expertise. $30.00 per 100 copies

The Importance of the Abstract in Your Community
Describes, in quick-read form, what an abstract is and tells about the role of abstracters in expediting real estate transactions. Points out that the skill and integrity of ALTA member abstracters represents an important asset to those who purchase and otherwise invest in real property. $17.00 per 100 copies

Buying A House of Cards?
For those needing a lively, high-impact piece of promotional literature. In quick-read text, the folder makes it clear that title hazards are a sobering reality—and emphasizes the importance of owner's title insurance for home buyers. Reminds that home ownership is a major investment that can be protected by the services of ALTA member abstracters, agents and title insurers. $14.00 per 100 copies

Send checks made payable to the Association to American Land Title Association, Suite 705, 1828 L Street, N.W., Washington, DC 20036. You will be billed later for postage.

Membership Recruiting Campaign Begins

Melvin H. John

Membership is the engine which keeps an association running.

While the American Land Title Association has an active and growing membership, there are many who are in the business of land title evidencing who are not members.

It is the responsibility of the ALTA Membership and Organization Committee to promote membership in the Association. The committee has an ongoing campaign in place to achieve this goal.

First, it calls upon every member to urge non-members to join.

Second, with the aid of members of the Recruitment and Retention Subcommittee, every member of a state association who is not a member of the ALTA will be contacted about joining.

Third, a new videotape, developed by the Public Relations Committee, on why ALTA membership is important to abstracters and title insurance agents, will be available for showing at affiliated association conventions in 1987.

Fourth, underwriters will be requested to urge their agents, who are not ALTA members, to join the Association.

Fifth, every month messages concerning the benefits of membership will be sent to affiliated associations for publication in their newsletters or magazines.

Sixth, new members and their spouses will be invited to the President's New Member Welcome Breakfast at the time of the 1987 ALTA Annual Convention.

Seventh, recruiters of new members will become members of the President's Club and be invited, together with spouses, to the President's New Member Welcome Breakfast, and be eligible to win a prize at the time of the 1987 Annual Convention.

This is my second year as chairman of the Membership and Organization Committee. Last year, a total of 175 new members were recruited. The goal in 1987 is to exceed this figure.

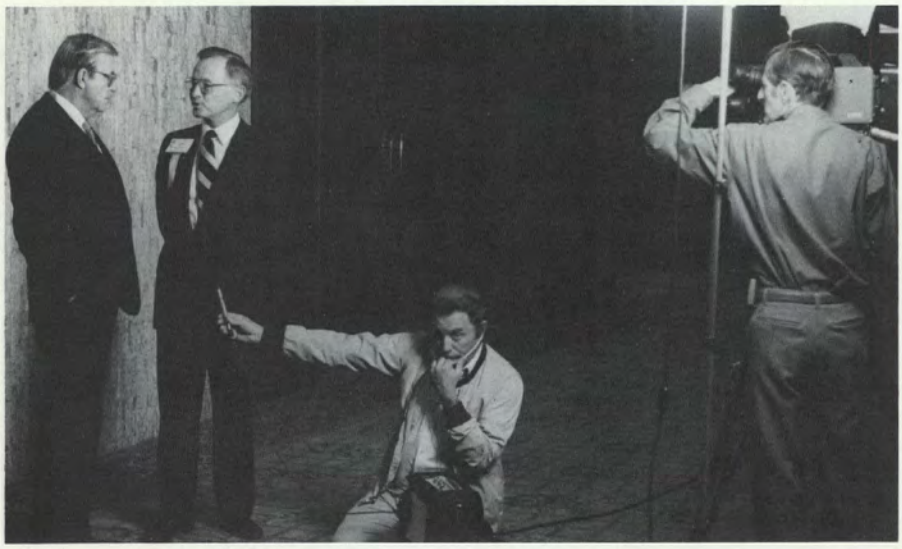
In 1986, with input from Leta D. White of Lawrence, Kansas, a member of the Recruitment and Retention Subcommittee, a new membership recruiting brochure was developed, entitled *Score A Perfect 10.* It sets forth 10 important reasons for joining ALTA. Also, the ALTA membership applications were revised and updated. Copies of these materials may be obtained by contacting William J. McAuliffe, Jr., senior vice president, American Land Title Association, 1828 L Street, N.W., Washington, DC 20036, telephone (202) 296-3671.

Continued on page 76

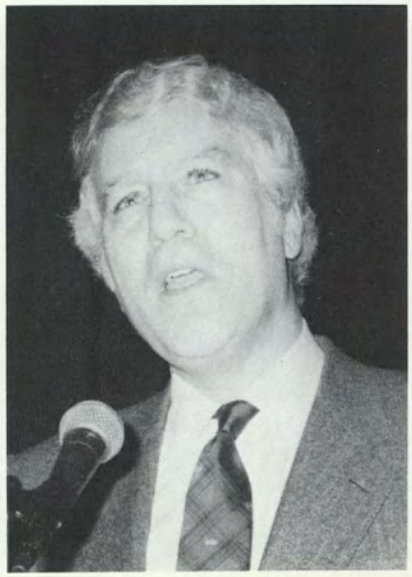
The author is serving as chairman of the ALTA Membership and Organization Committee for the second consecutive year. He is senior vice president and zone manager for Ticor Title Insurance Company of California in Dallas, Texas.

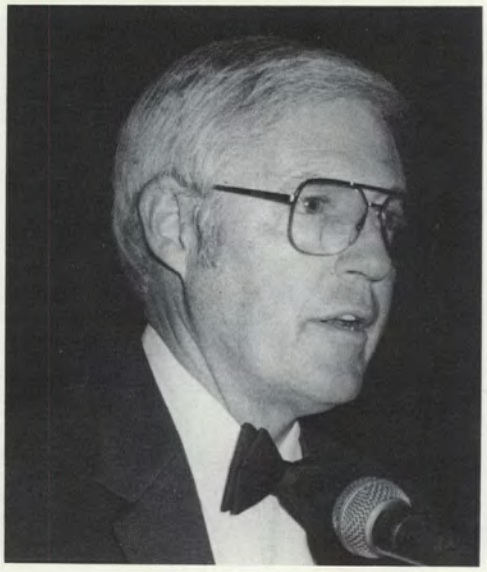
Members of the ALTA Membership and Organization Committee, shown here, are, seated, from left, Ronald W. Plassman, Three Rivers Title Company, Inc., Fort Wayne, Indiana; Joseph D. Gottwald, California Counties Title Company, South Pasadena, California; and Floyd B. "Shum" Jensen, Western States Title Company, Salt Lake City, Utah. Standing, from left, are Chairman Melvin H. John, Ticor Title Insurance Company of California, Dallas, Texas; Brian Reardon, General Abstract Corporation, Staten Island, New York; Jack Rattikin, III, Rattikin Title Company, Fort Worth, Texas; J.H. (Skip) Boos, First American Title Insurance Company, Plantation, Florida.

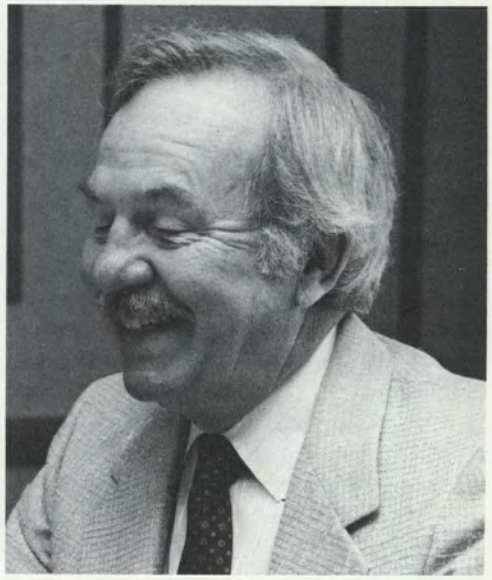
Convention Activity Includes Luminaries



Views from the 1986 ALTA Annual Convention include, top left, 1986-87 Association President John Cathey, left, being congratulated by 1985-86 President Jerry Ippel. At top, right, Title Industry Political Action Committee Chairman Roger Bell, second from left, interviews John McLaughlin, moderator of television's "McLaughlin Group," as the camera records the scene for the new ALTA membership recruiting VCR. In the center photograph, David Horowitz, nationally televised consumer activist, talks with Marietta Toft, center, and Ann Hon before addressing the Convention's spouse/guest brunch. ALTA governors who completed their terms at the Convention are at lower left; from left, they are 1985-86 Immediate Past President Jack Rattikin, Jr., Mike Currier, 1985-86 Treasurer Bill Little, and John Bell. At lower right, Lou Rukeyser, host of Public Television's "Wall Street Week," addresses a General Session.







Incoming ALTA President John Cathey acknowledges congratulations during the Convention Banquet, top, left. In the photograph at top, right, Robert Rove, Title Underwriter Counsel Committee chairman, second from right, discusses the white collar crime problem with those in attendance at the Title Insurance Underwriters Section Executive Committee meeting. Seated around the table from left are Richard Cecchettini, David Porter, ALTA General Counsel James Maher, Marvin Bowling and Richard Toft. At bottom, left, Mary Feindt, chairman of the Liaison Committee with the American Congress on Surveying and Mapping, provides the Abstracters and Title Insurance Agents Section Executive Committee with a status report on work by ALTA and ACSM to update the survey standards originally developed by the two organizations in 1962. From left are Ken Orthund, Mike Currier and Charlie Hon. At bottom, right, Directory Rules Committee Chairman Jim Mills finds a lighter moment in the proceedings despite a full agenda at the Eightieth ALTA Annual Convention, Century Plaza, Los Angeles.

Convention Commentaries, and Additional Photographs, Are Found on the Following Pages of This Issue

Seminar: Trends in Title Insurance

Marvin C. Bowling, Jr.
Raphael Cotkin
Mark T. Davenport
Oscar H. Beasley

Marvin Bowling

I am confident that we are all well aware of the so-called insurance crisis that we read about in the papers and hear about over the television, and find ourselves involved in as we deal with property and casualty companies and others who take risks as we do. However, I am sure you are also aware that title insurers are not immune from one of the elements which the insurance companies say are the main reason for that crisis and that is high litigation costs and high awards to insureds who bring actions against insurance companies and obtain treble damages through such items as bad faith, improper handling of claims, etc., etc. Title insurance companies are not immune from that and we need to be forewarned and forearmed. So the Title Insurance Underwriter Section Executive Committee thought it would be highly current and proper for us to have a discussion this morning on the dangerous aspects of that litigation. But, more importantly, what can title insurance companies do to narrow the parameters of loss? What type of steps do they need to take to see that we are not subject to that type of claim?

We are fortunate to have with us, first, two eminent counsel who are very much involved in title insurance claims and the duty of title insurance companies to handle those claims in good faith.

First, we are fortunate that we have with us Ray Cotkin, who comes to us from Los Angeles and who will talk to us about insurance under the microscope, carriers under a microscope. He is a member of the Cotkin, Collins, Kolts, and Franscell firm here in Los Angeles. He is a 1965 graduate of the University of Southern California law school, a member of the California State Bar Insurance Committee and former chair of that committee. He is one of the founders of Lawyers Mutual Insurance Company, California's attorney-owned legal malpractice carrier. He is an author of the California Auto Insurance Law Guide for 1982-85 Annual Edition and has been a lecturer for California's continuing education of the bar programs on insurance litigation, insurance bad faith litigation and insurance coverage problems. He has been a panelist for Practicing Law Institute programs on media insurance and protecting against high judgments, punitive damages and defense costs, and on insurance excess and re-insurance coverage disputes. As you can see, he is highly qualified to talk on the subject in which we are very much interested.

Then, we will hear from Mark Davenport, who is from Dallas and the law firm of Figari and Davenport. He is senior litigation partner there although he is too young, I think, to be called senior anything. He has represented a number of title insurance companies for some time and I can personally say he has been quite successful in, shall we say, avoiding the bullet that arises in the title insurance business because of some of the things Ray has talked about.

Mark earned his law degree at Southern Methodist University in 1969. He is admitted to practice before all the state and federal courts needed in his area.

He is a member of the Dallas, American and Texas bar associations, and the Dallas Association of Defense Counsel and the Texas Association of Defense Counsel.

Mark specializes in life, health, accident and title insurance litigation—as well as in general corporate litigation. He is going to talk to us on procedures for not only preventing these bad faith claims, but on what happens when one is leveled against you and how you might defend.

Raphael Cotkin

When I began, even before becoming a lawyer, I went to law school at night. During the day I worked as a law clerk for some well-known insurance attorneys in Los Angeles, Johnny Bolton and Gene Groff. The firm did a little standard auto insurance, not very much. Primarily handled specialized insurance coverage problems in the area of arson, jewelry fraud, land subsidence, that type of thing. While working with them, I can well remember, in some of the auto insurance cases that would come in occasionally, the claims man would send it in and indicate $10,000 policy limit, dead banq liability, injuries are worth hundreds of thousands of dollars, don't offer them more than $6,000 because they know they can't get any more than that. That was pretty much the standard at that time, which was in the 1960s.

My mentor, Johnny Bolton, took me to what was then one of the earliest meetings of what is now known as the Southern California Defense Counsel and I can recall, at that first session I went to, there was on the panel somebody speaking about something that was then brand new—the topic of bad faith insurance claims. It seemed like an interesting little curiosity but, at that point, our assumption was that this was an item which would come up in only the most extraordinary situation, something that would not affect day-to-day claims handling in the insurance industry and certainly wouldn't affect sophisticated claims such as the type we were ordinarily dealing with. How wrong that prediction turned out to be.

I am sure most of you now hardly see a case where the claimant or the insured isn't alleging that you, the insurance carrier, are acting in bad faith with regard to them.

From left are Raphael Cotkin, Esquire, of the firm of Cotkin, Collins, Kolts & Franscell, P.C.; 1985-86 ALTA Title Insurance Underwriters Section Chairman Marvin C. Bowling, Jr., Lawyers Title Insurance Corporation; Mark T. Davenport, Esquire, of the firm of Figari and Davenport; and, in the photograph at right, ALTA Title Insurance Forms Committee Chairman Oscar H. Beasley, First American Title Insurance Company.

Unless you have been on the planet Krypton recently, you know there has been a tremendous amount of publicity regarding the so-called insurance crisis. In the midst of this, the property and casualty insurers in particular suddenly have developed a very high, probably an undesirably high, profile in the eyes of the public and unfortunately in the eyes of legislators.

Closer Scrutiny Ahead

I think, as time goes on, you are going to see closer and closer scrutiny paid to the insurance industry by the public and by the legislature. And, I think the title insurance industry probably is going to be one of the industries that suffers from that development.

Whereas your more conventional property and casualty companies have at least benefited by way of passage of restrictive legislation dealing with claims made against carriers such as the famous Proposition 51, which was just carried in the state recently restricting substantive liability on the joint and several situations or they've gotten restrictive legislation such as that limiting damage recoveries, limiting attorneys fees in the medical malpractice field, title insurers I think are going to get the detriment from the fallout that the insurance industry has sustained. But, as far as I can see the title insurance industry is not getting any of this benefit that other property and casualty insurers are getting.

We recently went through the process of buying a home and, as wives will do, my wife insisted that I sit there and read the title insurance policy which had been ordered up for us. After resisting, I finally sat down and attempted to literally wade my way through the policy.

Over the decade since I have been practicing, I've literally read thousands of insurance policies. I feel relatively comfortable reading the Lloyds marine form, which is several hundred years old at this point. (It probably was written by Chaucer, or possibly by William the Conqueror.) I feel relatively comfortable reading re-insurance treaties issued by Munich Re in German and translated into English. But, I have to tell you that I found the title insurance policy to be almost incomprehensible as I attempted to wade my way through it.

An Unusual List

I have used that experience as a springboard into providing you with a list. I suspect if there were a list of things speakers are not supposed to do, one of them probably is—don't give your audience a list. But I think you will forgive me because I am going to give you a list which is unlike any you have heard previously. This is going to be a list telling you how to go about getting the title insurance industry into the same sort of pickle barrel that standard property and casualty carriers have fallen into with regard to bad faith and insurance code statutory violations.

If you follow this list, you too, like the Allstates, and the State Farms and the Royal Globes, will have the opportunity to sit there and hear juries announce multimillion dollar punitive damages awards against you in connection with a dispute that might involve a thousand or two thousand dollars in substantive damages.

In no particular order, let me start with the first item on the list.

In handling claims, be sure to use the claims file as an opportunity to demonstrate your sense of humor and your withering sense of sarcasm with regard to the nature of the claim being made, the quality of the plaintiff's attorney, and what you think of the insured.

Be sure to fill the claims file with items that you would be ashamed to have a jury hear in a bad faith case brought against you seeking punitive damages.

So that you don't feel I am being too vague and not specifically detailed, be sure to put into that claims file some ethnic comments or jokes. Specifically, make them ethnic comments or jokes which will be guaranteed to insult at least half the jury who will be sitting there, listening to this punitive damages case brought against you by either an insured or a claimant.

While going through the case, be sure not to contemplate the possibility that the plaintiff's attorney or the insured's attorney is setting you up eventually for a bad faith and punitive damages award.

While you are going through the process of handling the claim, be sure never to consider the fact that the insured, who has come to you for protection after the claim was filed, is the same individual whose premium dollars fund your company's surplus capital and which make payment of your paycheck in the long run.

As indicated earlier, one thing we definitely should have on this unusual list is that title companies should continue to write policies so incomprehensible that even an insurance coverage lawyer finds it impossible to understand them.

But don't worry about that. Because you will find that, when coverage disputes get tried, judges and more particularly juries, will have absolutely no difficulty comprehending the policy. It is just absolutely wondrous the way juries, which may consist of people who may have on the average an eighth grade education, have no difficulty at all understanding

these complex policies. Of course, I am sure I hardly have to tell you whose side they come down on when the foreman comes back and reads that verdict following trial.

When claims come in, be sure they are denied because of hypertechnical exclusions that defy logic and, in particular, which defy the insured's reasonable expectations when he actually purchased the policy.

Be sure not to try and put yourself in the shoes of the insured as to what he would have expected from the product which you sold to him.

In handling the case, be sure to let a case which may involve $2,500 or $5,000 and which has extremely difficult facts and a sympathetic plaintiff, wend its way through the courts, make its way to jury verdict, and then go up on appeal. I hardly have to tell you that what happens ordinarily in creating precedent is that bad facts make bad law from the standpoint of the insurance industry.

Attention from Plaintiffs Bar

If you follow the items I have just ticked off, I think, eventually, you will manage to bring the title insurance industry into the focus of the plaintiffs bar, which I think—fortunately for you so far—really doesn't appreciate the possibilities that exist on behalf of plaintiffs attorneys in pursuing title insurers. For those of you who are from outside California, the entire area of bad faith has become so lucrative in California that we not only have the specialized plaintiffs bodily injury attorneys who exist all over the country. But, in fact, we have managed to create a specialized plaintiffs bad faith bar, consisting of attorneys who at this point will handle nothing other than bad faith claims against insurance companies.

They will turn aside what would seem like otherwise lucrative bodily injury claims, because they find these claims proceeding against insurance companies to be even more lucrative for them. In that regard, one of the more prominent plaintiffs attorneys locally who specializes in bad faith claims, pointed out one time that even though insurance companies accuse him of setting them up for bad faith claims, in actuality he doesn't set them up; he can't set them up, only the insurance company can set itself up for a bad faith claim.

Over the decades since I have been connected with the insurance industry, it has been fascinating to watch the development on the other side of the fence in the plaintiffs bar. When I began, primarily plaintiffs attorneys specialized in routine garden variety bodily injury claims, normally stemming from slip and falls or auto accidents. Then you could see the snowball effect begin as they recognized medical malpractice as being a lucrative field to pursue, they began to develop expertise, began to develop a body of experts, began to conduct their seminars, and after that the life of the physician was never the same. We have seen that same thing happen with regard to product liability claims, particularly after the famous Pinto case out here in the 70s, which unfortunately my office at that time was defending and which I will tell you now is a classic example of a case which never should have been permitted to go to the jury.

Recently, hitting even closer to home, in California, one of the surety bond companies permitted a case involving horrendous facts both to go to jury verdict and then to go up on appeal. Until that happened, surety companies stuck to the party line that surety bonds are not true insurance, and surety companies therefore are not subjected to the same strictures and penalties that garden variety insurance companies are subject to out here.

Somebody let that case wend its way through the system, and we now have on the books in California, a case which makes it very clear that, no matter what the surety companies believe, they are deemed to be subject to all of the requirements that other insurers are deemed to suffer from. I make mention of that because it has been my perception that many claims representatives for title carriers seem to have a feeling that they really are not quite the same as other insurers. It might be called a "title *insurance* company" but, in reality, it bears more of a relationship to real estate than it does to the world of insurance and, therefore, they should not be subjected to the same type of problems that property and casualty insurers are subject to by way of punitive damages awards and insurance code violations. Unfortunately, in this modern day world, that is not where the law is.

Going on with my infamous list, even when you do decide to provide relatively expansive coverage, don't bother to spell that out in the policy if it would mean having to reprint the policy and incur the attendant expense. For example, with regard to coverage that you intend to provide for certain types of easements, even though the policy may not expressly provide the coverage, since you know internally that you intend to provide the coverage, go on the assumption that your claims people, in fact, will understand what the company policy is and will always carry it out.

By way of analogy, in the disability income field, the standard policies normally have a restrictive coverage with regard to when it is that an individual insured under the policy is deemed to be totally disabled. Approximately 40 years ago the California Supreme Court in the well-known Erreca decision, in essence said we don't care what the policy says, if an individual is disabled to the extent that he cannot carry out an occupation for which he is suited based on his education, station in life, and that sort of thing, then he is deemed totally disabled and he is entitled to coverage under the policy.

For whatever reasons disability carriers writing in California, on the whole, never brought themselves to make that change in the policy. They continue to have the same restrictive definition that they had 40 years ago. In connection with my activities on the California State Bar Insurance Committee, dealing with the sponsored program we have, we constantly lobbied with the company to change their policies to fit that definition.

The response we get is, "Look, we do provide that coverage. We tell our people we provide the coverage but we write on a national basis and it would be a pain in the neck to make a distinction for California. Our claims people understand what the story is and therefore we don't feel it is necessary." On numerous occasions, not with regard to that company, but to other disability carriers, claims people unfortunately, read the policy literally, turn down disability income claims on the basis that someone who has been a brain surgeon even if they can't continue to function as a brain surgeon, can go find some sort of occupation, possibly selling newspapers on a corner, and therefore they are not covered by the policy. If you do intend to provide coverage, why don't you just expressly so state to avoid this type of trap that disability carriers have fallen into.

One impression I have gotten in reading title cases is that they seem to frequently involve disputes over extremely hypertechnical coverage provisions. As mentioned earlier, provisions which frequently will defy the reasonable expectations of the insured or at least what the courts believe the insured's reasonable expectations were and then these disputes over relatively limited amounts of money are then fought to the death.

One of the cases in California which I suspect most of you are familiar with, a case called *Jarchow vs. Transamerica Title*, decided in 1975, is almost a primer for insureds and plaintiffs attorneys on how to go about suing title insurance companies. The decision dramatically expanded the responsibility of title carriers and did the same actually for insurance companies of all sorts.

It is my impression, for example, that the *Jarchow* case was the first case in California that announced that failure of a carrier to provide a defense was not just a breach of contract with the limited type of recovery a plaintiff can get in a breach of contract case; it was a tort, a tortious breach of contract, therefore opening up a Pandora's box as to endless consequential damages, and punitive damages for the insureds.

In any event, if you look at the *Jarchow* case, in which the court was much more concerned with the lofty principles that involved it

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Workshop: Automation In the Local Title Office

John D. Haviland
Clyde H. Wilson, Jr.
Dennis R. Johnson
Amy Bertorelli
William R. Blincoe
Hughes Butterworth, Jr.

Shown from left are ALTA Land Title Systems Committee Chairman John D. Haviland, South Ridge Abstract & Title Company; Association Abstracters and Title Insurance Agents Section Chairman Charles O. Hon, the Title Guaranty & Trust Co. of Chattanooga; and Clyde H. Wilson, Jr., Esquire, of the firm of Wilson & Jaffer, P.A., who is chairman of the Computer Law Committee of The Florida Bar.

John Haviland

There is no reason today for anybody not to be automated. If your system can't pay itself back within at least a year or two, it doesn't exist. They all do that now. There is no cost factor, so I hope that if you are thinking about becoming automated, you will do so because the stronger each agent is, the stronger we all are.

Clyde Wilson

In buying systems, there are, of course, a lot of nonlegal considerations. But I'm going to address some of the legal considerations.

Before I get into that, I would like to give you a little bit of history on how contracting evolved in the computer field. By "computer," I don't just mean the box. I mean the system. I'll talk about the software license, the maintenance contract, the service contract, and so forth. I'm using it in a broader sense of the word.

Computers really exploded on the American scene about 10 years ago. They have been in existence since the mid 1940s, when they built that huge U.S. government computer that I think was a 4-K and covered the whole building. Nonetheless, in about the last 10

Panelists seen from left are Land Title Systems Committee Consultant Dennis R. Johnson, CWP Software; Committee Member Amy Bertorelli, Ticor Title Insurance Company; Committee Member (1985-86) Hughes Butterworth, Jr., Lawyers Title of El Paso, Inc.; and William R. Blincoe, Chicago Title and Trust Company.

years, computers have invaded almost every office. The forms available for contracting in conjunction with computers were all generated by the in-house legal departments of your major vendors. In other words, your IBMs, your NCRs, Honeywells, and so forth, put lawyers to work and they generated the forms. Basically, the lawyers out in the field were not generally involved with computer contracts or software contracts, and most of them were not particularly interested in getting involved. Most lawyers tend to shy away from technical subjects anyway. Most of them have liberal arts background degrees, not engineering or technical degrees. Furthermore, the law and lawyers tend to react slowly, while the high tech industry has moved very rapidly. This resulted in the development of a set of contract forms that were extremely vendor oriented.

Incidentally, before I start beating upon the vendors, let me tell you that I represent more vendors than I do purchasers. So if I seem anti-vendor, it's just that my role here is to help the purchaser of a computer system. Also, I should say that not all vendors employ the tactics in contracting and negotiations that I'll describe, but most do.

Anyway, the vendors developed a series of these vendor-oriented contract forms. If you go to most legal form books and look up computer contracts, you will find forms very favorable to the interests of the vendor, and not designed to protect the interests of the purchaser. This is generally not true in other legal areas. For example, most of you in the title industry know that I could go into any real estate broker's office or almost any law office in the United States and obtain a form for a real estate sale contract that would be fair to the interests of both the buyer and the seller. It provides the seller the protections he needs in the transaction, and it has a number of things in there to protect the buyer, such as a provision to assure the buyer that he will get good title.

The typical contract in the computer field doesn't protect the buyer. This is generally true of the vendor forms being used to sell computer systems to the title industry. I know this, because some of these vendors were kind enough to supply me with copies of their forms. Their forms are typical of the software-hardware contract forms you see, whether you are dealing with accountants, data processing people, or whoever you're dealing with as the subject profession.

The only other type of contracts commonly used to sell software or services, other than vendor lawyer drafted forms, are those that I refer to as "clip and paste contracts." These are contracts created by business people who try to take little bits and pieces of other contract forms and create their own. There are some really bad clip and paste contract forms in use today.

Let's analyze the typical computer system sale contract from the point of view of why the purchaser came to the table and why the vendor came to the table.

We'll take the buyer's needs or wants first. Let's review his "want list" that motivated him to come to the table to purchase the system. When he buys a system for his local title office, or for whatever reason he's buying a system, the first thing he wants is one that's going to meet his own business needs and operate well. Now, is that the typical vendor's contract? No. Nowhere to be found in the typical form contract.

This brings up the number one difference in the point of view between the purchaser and the vendor in the computer system field. The clever vendor wants to sell things, objects, while the clever purchaser should want to purchase function. In other words, he should be "function minded" and the vendor should be "item minded." Almost all contracts tell you the items that you will get. You will get the computer, you will get the printer, you will get the software diskettes, and so forth. They do not properly describe the function you will get. The salesman told you all about the efficient functioning of this system to solve your business problems. But his statements are specifically disclaimed by the contract.

Function Should Be Included

Let's use an analogy of buying an automobile. You go to buy an automobile. The salesman says, "Okay, here's what you're getting. You're getting four wheels, you're getting your radio antenna, you're getting a roof, you're getting a windshield, windshield wipers," etc. But these are only *items*, and if the purchaser were clever (analogizing this to the computer field), he would say, "No, no, no. I am not interested in how many wheels it has. That's not what I'm after. I'm concerned with *function*. I want zero to 60 in seven seconds. I want a car that I can cruise 120 an hour all day long and it won't overheat. I want a car that, when I get tired of my Chevrolet engine because I don't think it's quite good enough for my business any more, I can pull it out and drop in a Ferrari engine and it will match perfectly with the transmission."

In other words, in the computer field, the vendor contract form speaks in terms of items, while the clever vendor should be interested in contracting in terms of function. So, when you are getting ready to deal with your vendor, particularly your software vendor, think in terms of function and try to start getting function into your contract and not a list of things. You don't care about the things, you care about your business needs and what it's going to do to meet those business needs.

Now I'll return to discussing the specific list of wants that motivate a buyer to come to the table and whether these are addressed by the vendor forms.

The next item on the purchaser's want list is to be sure that the system will run reasonably fast. The technical buzz words are "response times" or "run times." You want good response times and good run times. Is that in the contract? No.

You want prompt delivery of your system. The salesman says it will be here on November 1. Is that in the contract? No.

You want prompt maintenance for your system after purchase, and you want competent service people available to you. Is that in the contract? No. That's what the salesman told you, but there is nothing in the contract about it. Yes, you were offered a maintenance contract, but it doesn't discuss the turnaround time on service calls, nor the training level of service personnel.

You want performance features of the software, such as that it will handle peak loads, that it can be adaptable to change with the changing of government forms. You know the government loves to change forms, such as the HUD forms. Also, from state-to-state, the forms differ. You want software that can be changed to fit the forms and procedures in use in your state. Is that in the contract? No.

You want the best price. You don't want to buy a system and find out six months later that your competitor down the street bought it for 25 per cent less, because he was a better negotiator. That's what we call the "Most Favored Nations" clause, and they are never in the vendor's contract forms. It is a good idea to put one in if the salesman says you are getting the best price available. Fine. Put it in the contract. And then if you find out six months later that you didn't get the best price, he must rebate the difference to you.

You want good trade-ins. You want your system to be upgradeable. The salesman assured you of this, but the contract is silent.

You also want the computer to work with existing equipment, peripherals, if you have any. Sometimes you have existing equipment in your office or existing software, and you want to make sure this system, this existing software or hardware, is compatible with what you are getting. The salesman said it was compatible, but that isn't put in the contract.

You want to be sure you get the proper configuration. You also want to make sure that you have the proper operating environment. You know if you are getting a large machine, it requires certain air conditioning and a certain power source, and you want to make sure that responsibility is put on the vendor to determine whether your existing environment is acceptable or what specific changes are needed. He is the expert, not you. He knows about computers, you know about title insurance. And he should take on that responsibility. But, you know what the typical vendor's contract does; it puts that responsibility on you! In fact, it even puts the responsibility on you to warrant that you have examined the

system and that it meets your business needs. You make that decision under the contract, not him. And, actually, that should be on him, in all fairness.

You want backup machines available. You want spare parts available. You want . . . I could keep going, Are these in the contract? None of these are in the contract.

Let's look at why the vendor comes to the table.

What does the vendor want? Well, he wants to *get paid.* Is that in the contract? *You better believe it!* And it's got all kinds of teeth built in as to what happens if you don't pay or you don't pay on time. He has *absolute deadlines* for payment, not just "target dates." You've got to pay. You've got to pay on time.

The second thing he wants to do is to avoid risk of *his* own nonperformance, such as if the machines don't work right, the software doesn't work right, or it turns out they cannot alter the software to the way you prorate taxes on a closing statement in Missouri. The vendor designed the software for California, and now he learns that, in Missouri, you prorate your taxes differently, or you have sales taxes that are different from what's in California or some other state, and, after you buy the system, he cannot seem to change the software to meet that. Generally speaking, if it isn't in the contract, then it's not in the deal. Of course, the salesman told you that they could alter the software, but the contract, again, is silent.

Balance Up Front

There's a clause in almost every contract that says you agree you have not relied on any representations except those in the contract. And that clause is very difficult to get around. Now, I won't tell you that it is impossible. One of the things I do a fair amount of is traveling around and lecturing to lawyers on what to do when the purchaser who has suffered a real nightmare comes into their office with his computer system, but has a typical vendor contract that gives him no rights. There are clever ways to try to squeak around the contract, but it's sort of like treating cancer, rather than preventing cancer. It is not a sure thing. It is expensive. And there is no good reason to subject yourself to that agony if you can prevent it. You are better off to try to avoid it up front with a balanced contract.

Those in small title office type environments who go down to Computerland to buy an IBM-PC that are not going to have any ability to negotiate a contract. But you are unlikely to have serious problems with the PC itself and, if you do, it can be easily replaced. Problems are more likely to occur in a system that's bundled together—hardware, software, peripherals, or buying the software alone. Generally, in bundled or software purchases, you have the ability to negotiate. And that is where most of your problems are going to come from.

Many vendors have developed strategies for avoiding contract negotiations. The large vendors actually train their salesmen in how to avoid contract negotiations.

The typical way that it works with a corporation, for example, is that the salesman comes in the door, talks to the data processing manager or some other management-level individual, and tells him about the wonderful features and functions of this system. He does a demonstration. He gives the manager some slick brochures. Other rival salesmen also call on the same person, or deal with him by mail, and they make their pitch. And then the dp manager goes to his boss and says, "I think we should go with the XYZ Company. I've investigated them, and they're the ones to use."

Then that recommendation goes on to senior management, the board of directors, or whoever has the final decision-making authority. They give final approval, and the money is allocated. A lot of times, the DP manager then orders the hardware.

The salesman says, "Let's go ahead and order the hardware while we're working on the rest of the stuff, while we're studying your needs, how we have to change the software."

So, at this point, the delivery dates are set, the money is allocated, and the dp manager has told his boss which company they should use, and it's all set.

Now, the salesman says, "Oh, we've got some forms to fill out. Here's the order form and here's the contract form." It is treated as a mere after-the-deal-is-made formality. It's always brought up at the end of the deal. Well, at that point in time, of course, it's a little bit late to negotiate, particularly if the company is counting on getting the system next month.

If you, as a buyer, object to anything in the contract, the vendor might assure that the contract was done by their lawyers, and it is perfectly legal. And that's true. It is perfectly legal. That's the problem with it!

They will also assure you that it's been signed by many other customers, all across the country, if they are a national company. And that's also very true. It probably has been.

They will stress that the deal is virtually complete and it is too late to negotiate. "If you want to bring your lawyer in, then we are going to have to drop the November 1 delivery date, and I have three other customers I'm going to have to put ahead of you. Maybe I can give you a February 1 delivery date but, if you want to get your lawyer involved, go ahead."

If the buyer continues to insist on seeing his lawyer, there is another strategy, which is let to him call his local probate lawyer who probably doesn't know anything about it anyway. The salesman and buyer visit the buyer's lawyer together in a 15-minute office appointment, and the salesman immediately says, "Mr. Jones here wants to make sure that this contract form is legally valid. I'm sure you'll agree that our New York legal department has done a fine job in drafting this form. It's perfectly legal. It's been signed by hundreds of customers," etc., etc. Then he says, "Now, isn't it true that this is a valid legal form?" And the lawyer says, "Yes, it's a valid legal form." That's about as far as it goes, and then, with a sense of comfort, it's signed.

Another thing. If you're dealing with larger companies, sometimes they will actually tell you that their computer won't accept any other order form except the printed form containing the contract. That is just not true.

What happens when things go wrong? You're six months down the line and you find out, lo and behold, there's no way to change this system now to meet the new forms that came out of the federal government, or your state passed some sort of a new change in the way you prorate taxes in your closing. Or it's buggy software. It's giving you real problems. What happens? You call your salesman. Maybe he's no longer there. But, anyway, you get some guy on the phone, and the first thing he'll tell you is, "I'm sorry, Mr. Jones, but I don't see that in the contract, and you said you wouldn't rely on anything that isn't in the contract. We tell all our salesmen not to promise that so, if he did, he was totally unauthorized. However, we'll do what we can for you. We'll in fact come in and try to do whatever we can." The ultimate vendor coup is to come in and say, "You know what you need? You need an upgrade. You need an extra box. You need our new software system and, for a certain price, we will give you a trade-in," and so forth.

I happen to drive a Jaguar, which means I'm very friendly with my mechanic because, if you have a Jaguar, about every week you go back to see him again. I was wondering when I'd hear that ploy, and I heard it last week. I took my Jaguar to my mechanic and, since it's an '84, he said, "Well, actually, it's getting a little old. Why don't you buy an '86? You know that's the upgrade you need." That is the same ploy used by vendors of computer systems.

The vendor may also argue that any problems are your fault. "You're the one who determined that this would meet your business needs, not us. You picked the environment. You picked the air conditioning system. You picked the electric lines (if they say you have electrical problems)." A lot of times they'll say you have electrical problems when you don't. Meaning lightning storms in the area, so forth, that cause surges that cause problems. The same problems could be caused by software. Bugs in the software. They only appear periodically. The vendor will also say, "You ran the acceptance test. You accepted it. You

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ALTA Judiciary Committee Report: Part II

Marketable Title

Coastal Petroleum Company v. American Cyanamid Company and Board of Trustees of The Internal Improvement Trust Fund of The State of Florida, 492 So. 2d 339 Fl (1986)

Three questions were involved in this case.

1. Do swamp and overflow patents issued by the trustees include sovereign lands below the ordinary high water mark of navigable rivers?
2. Does the doctrine of legal estoppel or estoppel by deed apply to the 1883 patents?
3. Does the Florida Marketable Record Title Act operate to divest the trustees of title to sovereign lands below the ordinary high water mark of navigable rivers?

The court answered all the issues in the negative, asserting the Congress had no intent or power to convey state sovereignty lands beneath navigable waters by acts or patents conveying non-navigable swamp or overflow lands.

The court further held the doctrine of legal estoppel or estoppel by deed did not apply to swamp and overflow patents and that the legislature did not intend to make the Marketable Record Title Act applicable to state sovereignty lands.

* * *

In this action by a seller for specific performance or for damages because of defendant's inability to close, the contract for the conveyance of good and marketable title "except for utility easements and except none." One of the parcels was subject to a railroad switch easement.

The court rendered judgment to the defendant purchaser. The railroad easement rendered title unmarketable. Even with the grantee's knowledge of a railroad easement, his right to object to the unmarketability of title was not defeated. His knowledge of the easement prior to the date set for closing did not constitute a waiver. (*Tanners Realty Corporation v. Ruggerio,* 111 AD2d 974) 490 NYS2d 73

Mechanics' Liens

Specialty Concrete Construction, Plaintiff, vs. Seafirst Mortgage Corp., Defendant. 708 P 2d 1245. Wy. (1985)

Contractor filed mechanics lien against fee owner and perfected same by action in district court. Contractor failed to notify Seafirst, as mortgagee, or enter same in civil action within 180 day statutory period from date of lien filing. Specialty secured judgment against owner and attempted to sell free and clear of Seafirst mortgage. Prior to date of attempted sale, Specialty was advised by title company on behalf of Seafirst that sale could not be made free of Seafirst mortgage. Specialty then entered Seafirst in civil action and moved for summary judgment for priority over Seafirst's mortgage. The summary judgment was granted. Seafirst appealed. Supreme Court reversed, holding that failure to join a mortgage interest holder in a lien foreclosure action is not fatal to such action, but that if not joined within 180 day statutory period, the mortgage interest holder's interest is not affected by such action.

This Wyoming decision concurs with prior decisions in other states holding that mortgage interest holders, whether prior or subsequent to the mechanic's liens are proper parties in actions to foreclose or enforce such mechanic's liens against such mortgage interests.

Seafirst Mortgage Corporation v. Specialty Concrete Construction, 708 P. 2d 1246, Wy (1986)

Specialty improved property in Campbell County, Wyoming, completing the work on October 10, 1983. In November, 1983, Seafirst became a successor to a mortgage dated November 30, 1983. Specialty filed a mechanic's and materialmen's lien on January 31, 1984 and commenced suit on July 11, 1984 but failed to name or make Seafirst a party defendant.

Can Specialty foreclose its mechanic's lien free and clear of Seafirst's mortgage?

The general rule is that failure to join mortgage interest holder in a mechanics' lien foreclosure action is not fatal to such action but the mortgagee's interest is not affected by the suit. The failure to join such parties leaves their rights acquired prior to commencement of the foreclosure suit unaffected by the proceedings.

C & C Tile and Carpet Company, Inc. (et al) v. Anchor Concrete Company (et al), 697 P.2d 175, 56 Okla B.A.J. 470 (Okla App. 1985)

Owners contracted with Shamrock Enterprises, Inc. to reconstruct their residence which had been partially destroyed by fire. Shamrock obtained materials and services from various subcontractors and completed all repairs. Owners paid Shamrock in full and Shamrock thereafter filed for bankruptcy without paying the subcontractors. The materialmen each filed liens in a timely manner. One materialman, C & C Tile and Carpet Company, Inc., filed suit to foreclose its lien, naming other lienors as defendants. The trial court sustained owners' motion for summary judgment on the basis that the materialmen had failed to give notice to the property owner that unpaid charges for labor or materials

Report Published in Installments

The accompanying cases and others published in additional issues of *Title News* constitute the most recent report of the ALTA Judiciary Committee. In addition to Chairman Ray E. Sweat, the following served as members of the committee during preparation of this compilation.

Samuel R. Gillman; Nicholas J. Lazos, Esquire; Bernard M. Rifkin; Michael J. Fromhold; Hugh D. Reams, Jr.; R. N. "Bob" Merritt; Gerard K. Knorr; James K. Weston; Donald P. Waddick; Abraham Resisa; Jerrel L. Guerino; John S. Thornton, Jr.; William M. Heard, Jr.; Robert J. Whisman; Frank P. Willey; E.A. Bowen, Jr.; Charles E. Riggs; Turalu Murdock; Steven H. Winkler; J. H. Boos.

Ted W. Morris, Jr.; Michael Pietsch; Robert C. Mitchell; James Weston; Jack C. Daw; E. W. Adams; Roy H. Worthington; Charles I. Tucker; Louis G. Shusan; Daniel Murray, Esquire; Timothy J. Whitsitt; Gary F. Casaly; Theodore C. Caris; D. P. Waddick; Bobby L. Covington; James W. Hicklin; Don Al Asay; Richard A. Johnson; Mark W. Vaughn; Louis C. Meyer, Jr.

P. C. Templeton; Harold A. Kleinfeld; Joseph Ritter; John H. MacMaster; Dale W. Griffin; Dale L. Astle; Michael G. Magnus; Philip M. Champagne; Carl E. Wallace, Jr.; Ernest G. Carlsen; Phil B. Gardner; Guy C. Jackson, III; Michael J. Jensen; Mark Schittina; Hugh D. Reams, Jr.; James E. Tompkins; Eugene J. Ouchie; Roy P. Hill, Jr.

could result in liens being filed against the property pursuant to 42 O.S. 1981 §142.1.

The issue on appeal was whether the statutory notice is a prerequisite to enforcement of a mechanic and materialmen's lien upon owner-occupied residential property. The materialmen argued that the notice provision was not applicable due to the fact the property was not "presently occupied as a dwelling by an owner" by virtue of the fact the owners had vacated the property during the repair period. The appellate court considered the legislative intent of the statute and concluded that the temporary vacation of the premises by the owners to facilitate repairs did not defeat the property's status as "presently occupied." The court noted that the owners are entitled to the benefits and protections of the statute. The court affirmed the trial court, holding the materialmen's liens were not founded upon notice and therefore were not enforceable.

Mortgage—Due on Sale

Santa Clara Savings and Loan Association vs. Pereira, 211 Cal. Rptr. 54 (1985)

This is another in a long line of California due-on-sale cases.

In August of 1979, Joseph and Kay Orlando refinanced their home with Santa Clara Savings and Loan Association for $105,000, secured by a first deed of trust. In December of 1979, the Orlandos sold their home to the Pereiras for $168,500, "subject to" the first deed of trust. Santa Clara on three occasions sent the Pereira's credit information forms to be filled and returned in order for Santa Clara to determine their creditworthiness leading to a potential assumption of the debt. The Pereiras refused to provide any information. Santa Clara then brought this action for declaratory relief, claiming that it had a right to accelerate payment for failure of the Pereiras to provide adequate evidence of creditworthiness.

Under *Wellenkamp*, the lender is allowed to accelerate if it can show an increased risk of default. In this case, the Pereiras had every opportunity to provide the relevant information and refused to do so. When a buyer refuses, as here, the court held that it is reasonable for a lender to conclude that there exists an increased risk of default, and to accelerate the obligation.

Mortgages

Sweatt vs. The Forcelosure Co., Inc., 212 Cal. Rptr. 350, 1985

The case involves the interpretation of Civil Code §2924C regarding trustee's or attorney's fees. The statute, effective January 1, 1982, in pertinent part reads as follows:

> ". . . the trustor . . . at any time within three months of the recording of the notice of default under such deed of trust or mortgage, if the power of sale is therein to be exercised, or otherwise at any time prior to entry of the decree of foreclosure, may pay to the beneficiary or mortgagee or their successors in interest, respectively, the entire amount then due under the terms of such deed of trust or mortgage and the obligation secured thereby (including costs and expenses actually incurred in enforcing the terms of such obligation, deed of trust or mortgage, and trustee's or attorney's fees not exceeding one hundred fifty dollars ($150) in case of a mortgage or a deed of trust or one half of 1 per cent of the entire unpaid principal sum secured, whichever is greater) other than such portion of principal as would not then be due had no default occurred, and thereby cure the default theretofore existing . . . "

At the time of the default in question, there was $2,800.98 due under the secured promissory note executed by respondent Sweatt. The total unpaid principal sum due on the note was $52,556.54 at the time foreclosure was initiated. The trustee maintained that it was entitled to a fee of $262.78 which was ½ of 1 percent of the principal sum of $52,556.54. Trustor maintained that the statute only entitled the trustee to $150.00 since it was only entitled to $150.00 or ½ of 1 percent of amount in default.

While the appellate court upheld the trial court's award of $150.00 in trustee fees, it interpreted the statute as to allow trustee's or attorney's fees based upon the statute—set percentage of the *unpaid principal sum* secured with a floor of $150.00.

Lange v. Wyoming National Bank of Casper 706 P. 2d 659, Wy (1986)

Lange, on March 13, 1980, entered into a contract to sell certain properties to Fireside Partners in the city of Casper. Several warranty deeds covering these properties were placed in escrow with Wyoming National Bank of Casper, to be released to Fireside as installment payments were made. Fireside made all payments up to July 1, 1982. When that payment became delinquent, Lange gave notice of the default and asserted that the contract would terminate unless the July payment of $290,000 was paid in full within 30 days. One Coffman, managing partner of Fireside, a title insurance agent doing business as Rocky Mountain Title Insurance Agency, arranged a mortgage for $1,481,000 from Wyoming National Bank of Casper, obtained the deed to be delivered on July 1, substituted an enlarged description covering all the property occupied by the Fireside Lounge, which was mortgaged to Wyoming National Bank of Casper to secure the loan.

Fireside Partners failed to make further payments and on April 21, 1983, the sellers, Lange, filed a complaint asking the court to quiet title in them and declare the loan obtained by Coffman null and void.

At issue was validity of mortgage.

A deed purloined or stolen from the grantor or possession of which was unlawfully obtained from the grantor without the grantor's knowledge, consent or acquiescence is no more effectual to pass title to the supposed grantee than if it were a total forgery and is therefore void. A mortgage based on a void deed is also void. Mortgagee's rights depend upon the mortgagor's right. If the mortgagor's rights terminate so does the mortgagee's.

The court ordered Lange to return the $290,000 to the mortgagee bank. This elicited a dissent by Judge Rooney, who contended that the creditors should not be required at the creditors' peril to inquire into the source of money used by the debtor to pay obligation owed to the creditors.

* * *

In this mortgage foreclosure action, the mortgage note provided that upon default plaintiff had the right to demand immediate payment of all the principal "and any interest owing." The mortgage note provided that in the event of default plaintiff has the right "to demand payment of the entire amount I owe you with interest up to the day you receive payment" and further, that the terms of the mortgage and mortgage note are binding until all obligations thereunder are satisfied.

The court held that the clear import of the instruments, which must be read together, was that the contract interest rate of 15¾% per annum (and not the legal rate in CPLR 5004) was to apply after default and until the interest has been paid, or until the contract was merged in a judgment. *(Citibank N.A. v. Liebowitz, 487 NYS 2d 368)*

Sheehan vs. Aniello, 19 Mass. App. Ct. 621 (1985)

Specifically, the Sheehans, buyers of three parcels of land assumed an existing first mortgage in 1974. The Aniellos, sellers of the property, took back a second mortgage on all three parcels. This mortgage contained a clause stating that "the mortgagees herein agree that upon the recording of the discharge of the first mortgage. . . . parcel one of this mortgage will be discharged." In 1981, the Aniellos commenced foreclosure proceedings on the second mortgage. In 1982, when the first mortgage went into default, a foreclosure sale was planned. A few days prior to the sale of the premises, the first mortgage was paid off and a discharge was promptly recorded. The Sheehans tried to prohibit the sale of parcel one under the second mortgage based on the provision regarding the discharge of the first mortgage. A lower court issued an injunction prohibiting the sale of parcel one based on *Stewart vs. Bass River Savings Bank* 3 Mass.App.Ct. 574 (1975).

The issue in the *Sheehan* case was whether or not a provision calling for a partial release of the mortgage was enforceable even though the mortgage had been in default.

A key issue before the court was whether this case was governed by the *Stewart* case, and the court ruled that it was not. In that case, Bass River Savings Bank had agreed to release a parcel of industrial land from Stewart's mortgage once the local planning board approved subdivision plans. After the plans were approved, the mortgagor defaulted and the bank attempted to foreclose both parcels. The court prohibited the foreclosure of the industrial land saying that

> the [mortgagor] had done all that the agreement required him to do in order to obtain the release. The fact that the . . . [mortgagor] subsequently defaulted in his obligations did not justify the bank's retention of land which was not bargained for as permanent security for those obligations.

The mortgagor went into default after the planning board had approved the plans, and the court ruled the partial release should be granted.

Circumstances surrounding the agreements to provide releases differ in the *Stewart* case and this case. In the *Stewart* case, the mortgagor had fulfilled all requirements in order to obtain the release before he defaulted on the mortgage. The court, therefore, ruled the bank must issue a partial release. In the *Sheehan* case, the mortgagor defaulted prior to fulfilling his obligations in order to obtain the release. Since the second mortgage had been in default at the time the first mortgage was discharged, the partial release remains in ques-

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How to Lobby Effectively

Richard P. Toft
Howard S. Liebengood
Gary G. Hymel
Bert V. Massey, II

Richard Toft

Lobbying is a major responsibility for members of the land title industry at both the federal and the state levels. Without this legislative communication, chances for achieving the objectives of our industry in Washington—and in state capitals—would be remote.

Through ALTA and through state title associations, we have an opportunity to reach legislators with a collective voice that results in more effective communication than what might be accomplished by relatively few individuals acting alone. Yet, the all-important basis for successful lobbying is contact between constituent title men and women, and their federal and state legislators and staff.

Since lobbying is a skill that becomes more critical for all of us as the title industry continues to face difficult an challenging legislative issues, it is appropriate and timely to have commentary on the subject from three experienced and successful practitioners of the art. Each is eminently qualified to present his views on what makes a good lobbyist and good government relations, and what should be avoided.

Howard Liebengood is vice president and a founding member of Gold and Liebengood, Inc., a Washington, D.C., government relations firm that has represented our industry in the issue centering on the Federal Trade Commission challenge to state insurance regulatory authority. He received his law degree from Vanderbilt University and is a veteran Capitol Hill staff member, having served as assistant minority counsel for the Senate Select Committee on Watergate, as a member of the first minority staff for the Senate Select Committee on Intelligence, and later as sergeant at arms and doorkeeper for the Senate. He also has worked as a consultant to then Senator Howard Baker of Tennessee.

Gary G. Hymel is executive vice president and director of government affairs for Gray and Company, another Washington, D.C., government relations firm that has represented our industry in the FTC issue. Previously, he served as House Speaker Tip O'Neill's administrative assistant for eight yeas and his responsibilities included the Speaker's appointments, legislative scheduling and media liaison. His House staff positions of major responsibility date back to 1965, and include serving as administrative assistant to the Majority Whip, and later Majority Leader, Representative Hale Boggs of Louisiana. Earlier, he was a political reporter for the *New Orleans States Item.*

Bert V. Massey, II, is secretary-treasurer of The Brown County Abstract Co., Inc., Brownwood, Texas, and is a partner in the firm of Massey and Shaw, which engages in a general real estate and business law practice. He is the mayor of Brownwood, and his career includes serving as an ALTA governor, as a Title Industry Political Action Committee trustee, and as president of the Texas Land Title Association.

Howard Liebengood

Let's examine what a lobbyist is not, and what my concept of a lobbyist is. I get disgusted with some of my colleagues who apologize for being lobbyists. They hold themselves out to be government relations consultants, public relations consultants, lawyers with an interest in federal government, when in fact they are lobbyists. I take great pride in what I do, and what I do is lobby.

A lobbyist is not the Hollywood image of a sleazy guy going up and slipping an envelope in Willy Starke's pocket in *All the King's Men,* and he's not what is too often I think, more the common media conception of a lobbyist—some highly placed insider, who is able to succeed because of his access to the revolving door.

Instead, I think a lobbyist is like several other professions. A lobbyist is like an intelligence professional, in that he analyzes intelligence information; he disseminates it. He's like an architect, in that he develops creative strategies for his client, and builds firm, lasting relationships with the constituents. He's like a lawyer, in that he must recognize his client's interests in some depth; he must research their problems; he must develop arguments; and he must close on those arguments with a "jury" that he knows, in my case, the members and staff of the United States Congress. And he's also like a doctor, able to draw upon specialized knowledge to prescribe remedies for his clients' ills and hopefully cure those ills. Sometimes it's painlessly; oftentimes not.

I think that, if we didn't have lobbyists, we'd have to create them, because they are a vital link, an information conduit in our democratic process, and I'm proud to count myself among their numbers.

On how to be an effective lobbyist, I'd like to just tick off some quick thoughts. There are, I think, a series of characteristics and tools—some are subjective and some objective—that distinguish the good lobbyist from the bad, and I might mention them briefly.

One is experience. With experience, a lobbyist has access; he has developed a reputation for integrity and credibility which will stand his client in good stead.

With regard to access, I caution that it not be overstated. I think too many clients retain lobbyists because they know somebody. But, everyone in this profession knows somebody. And it's not just being able to open doors that matters, it's being able to close them. And, while access is important, it's just one aspect of the lobbying profession.

Experience also provides the lobbyist with an understanding of the process. Now, I think this cannot be overstated. They say that politics is the art of the possible. Well, the lobbyist, drawing on his experience, is able to tell his client what is possible and what is not. Sometimes that falls short of the client's expectations but, believe me, it saves the clients a lot of energy and money, by not spinning his wheels.

It's important to know who the players are; it's important to know when to make the play, as timing is often the key to success in a process which is mysteriously defined. Congress makes laws in strange ways . . . and mysteri-

ous ways. I remember standing on the floor of the Senate one night with my mouth agape, and Senator Jim Pearson of Kansas came up to me and said, "Liebengood, you don't know what is going on here, do you?" I said, "No." And he said, "Well let me tell you something, you're never going to find out." And he was right.

I felt insulted until he told me that he'd been there 18 years, and he still didn't know. There is no orderly process, and I think sometimes clients approach lobbyists with the mistaken conception that there is. In other words, it is not going to happen in Step A, B, C, D. More often, there's a Step A and a Step D, and there's no B and C. And the only way, I think, to deal effectively in that environment is through experience.

You also must understand members and their staff. The member of Congress has a tremendously short attention span. You have very little time to make your point. Too often I think clients who have a lot to say, and who have been waiting months to say it, find themselves losing their member in the first three or four minutes as his eyes glaze over, first with indifference, and then with contempt—so, it's important to understand the nature of the member. And that, too, comes with experience.

Skills. Obviously, a lobbyist needs to have good communication skills, in that he is the key to communicating between both client and member. He also must have good creative skills, in that he's going to be crafting a remedy within a process that he both knows and understands.

There are also a range of personal characteristics that are important. He must be persuasive. Obviously, that's what the job is all about. He must be competitive and willing to get into the trenches. He must be patient, as this mysterious process often works terribly slowly. And he must be confident, but not overconfident. Like the gunfighter said, "No matter how fast you are, there's always going to be someone faster."

You must be objective and take nothing for granted, including your friendships, because there are always competing tugs and pulls. And I'd like to stress the fact that you should never burn your bridges, because you never win an issue forever and you never lose an issue forever. And I think it's important that you maintain good relations, preferably in a bipartisan way, and live to fight another day. As my old boss, Howard Baker, used to say, "A day is a lifetime in politics." And it truly is. And I think it's important that you keep that perspective as you go about this business.

And, finally, I'd like to say that the thing that makes a lobbyist the most successful is having a good client. A client brings with him important tools: political action, honoraria, a reputation for industry and integrity, and an import to his community and to his country.

From left are 1985-86 ALTA Government Affairs Committee Chairman Richard P. Toft, Chicago Title Insurance Company; Association Government Affairs Committee Member Bert V. Massey, II, The Brown County Abstract Co., Inc.; Gary G. Hymel, Gray and Company; and Howard S. Liebengood, Gold and Liebengood, Inc.

And I'd like to thank the Ticor Title Insurance Company for allowing me to represent them, and for acquainting me with ALTA—in my work with Robin Keeney and Jim Maher, and Mike Goodin's other people in Washington, I've come to know your industry and, through Erich Everbach and Bud Morrow and Jerry Ippel, the Ticor Company, and I say that you are the type of client that makes folks like me look awfully good, and I appreciate that.

Gary Hymel

I would like to endorse everything Howard said and try to build on some of the things. I'll try to be more specific . . . practical.

Let me just try to add to some of the points that Howard made. Certainly, when you start to lobby, you have to have an exhaustive knowledge of your subject. Now, quite frankly, we weren't all experts in title insurance when we started out representing you folks. But, we have learned. We have talked to your lawyers and your members, and have learned the issue. We figure we are smart enough to do that before we go in to see members. Then you rehearse your arguments before you go in to see them. You carefully word it, you are efficient with your words, you don't waste words. It's important to know the people you're going in to see. It's probably the key—knowing what makes each member tick. And, quite frankly, we think that's what Howard and I bring to you. We know those members of Congress, and we know what they respond to. So we are able to advise you to say the right things when you go in to see them.

You should know your member's politics. You know his neighbors, and you know what's important to him. You know the district. Tip O'Neill says all politics is local. And, believe me, that's true. And that's why we rely on you to soften them up so we can go in and make the final pitch. It's also very important, if the member says I agree with you, to get out of there. The minute he says okay, then you thank him and leave. I've seen that happen so many times with people lobbying Speaker O'Neill. He'll say okay, the person will keep talking, and he'll say, "Hey look, now you're going to talk yourself out of it, now you ought to get out of here." He practically throws them out.

It's important, too, when you lobby, to have your position developed on a piece of paper, and leave that paper behind after you see the person. Because members of Congress have a lot of things on their minds and on their schedules, and if you expect to have some follow-up, you have to leave them a piece of paper. They will put it in a file so it will pop up at the right time.

It's also important that, when you see a member of Congress, that a staff person be present. Bob Gray tells the story of lobbying a certain Senator. He spent 20 minutes outlining his position. The Senator said, "Well, Okay, Bob, by the way, would you go talk to my staff person and lay it out for him?" Bob says that I realized then that I'd been talking to the wrong person, which is true. So, it's very important not to just leave it with the member. They have too many things on their mind and, if a staff member isn't there, you make sure that you follow up with a staff member. And then after you see him, you follow up with a letter. Thank him for hearing you out, and express your wish that they support you when the time comes, and that you will remind them when it comes up for a vote.

Lindy Boggs, who was the wife of Hale Boggs, and has been a Congresswoman now for 13 years, used to tell Hale, "Always say 'please' and always say 'thank you'." Well, those basic prerequisites of courtesy and etiquette still apply in a very human institution like the U.S. Congress. The members appreciate it. They like to be thanked. If you can get them to co-sponsor this bill we're working on for you, it's important that you thank them, because, they remember. Not many people thank them, to tell you the truth. People think

they own a Congressman because they voted for him. But members are still human beings, and respond to courtesies.

I think that, when you develop a position and you are making the points that you want to, you find what I call the "fairness factor" in an issue. Certainly you have one in the issue that we have before you. If you can enunciate that to them, tell them you are being treated unfairly, that you follow the law in good faith about joining rating bureaus, but now, you're penalized for that very thing. You tell them that, and you hook them, because most of the members of Congress are really there to right wrongs. I mean, they are public servants. They like to find a place where people are being treated unfairly so they can change it. That's what underlies their public service. And if you can tweak them on that point, which is a strong point that we make whenever we go in to speak to them, you've gone a long way.

If you can show additionally that your bill is in the public interest, of course you'll also go a long way. The Congress is not going to do anything that it perceives is against the public interest—public, meaning people, and certainly you represent a lot of people. So, use that as a point. It's very important if you go in to see a member if he's predisposed to your point of view in some kind of way.

Now, how do you get them predisposed? Well, I learned today from one of your Oklahoma members that a new member coming to Congress next term is the son-in-law of a member of the American Land Title Association. That is predisposition, if I ever heard it. When we go to see that member next year to ask him to co-sponsor your bill, we know we are going to have a smooth path in there. Maybe you were a classmate of a member of Congress. Maybe your wife was, of his wife or your kids with his kids. Anywhere that there is a connection, that helps, because members are called upon to make decisions and to co-sponsor things that they have no idea what it is, but they do it because they trust the person who's asking them. And if they trust you because you were a classmate in college, or the wife, or the kids, you're most of the way there. If you can make a good argument and persuade them on the facts, then you've got them. So maybe you're in business in some way with a member, or know him through business, or know him through contributions, through their campaign or support for their campaign; it all helps.

I used to run trips for congressmen, and know a lot of members who had to rely on us for just the details of a trip. My job was scheduling legislation for the floor, where your word is everything. I was using the Speaker's power to do that, but your word was everything. So, if there is some element of trust that you can build on, then you are a long way toward being there.

I have to keep current. So do you. Members change—(I added up, by the way)—of 115 co-sponsors, 12 are not returning to the House next year. I hope they will move on to the Senate, where it will be easier to get them as a Senate co-sponsor. As a matter of fact, one of them is running in Louisiana today. But, we have to keep current. And we have to keep current on the rules, because the rules do change. You know the fellow who said, "Well I finally figured the game out, but they changed the rules on me." Well, that does happen. They adopt rules each Congress. Most of them don't change, but some of them do. And, certainly, the members change. And it's important that we keep up with the new members. Now, we do that through building on the staff people that we already know. When we call an office and find there's a new staff person, we say, "Would you tell them that we're friends and that I'm okay."

We go to fund raisers. And I might say that the business of raising money and supporting members is real important. What you do, is find people who support and agree with you, and then you support them all you can. There's an awful lot of cost to running a political campaign. Television gets most of the money, but it's there, and these members have fund raisers. We go to them. Robin goes to them, and we hope that you'll help out the PAC and keep it so we can keep going. The members don't necessarily equate co-sponsorship with whether you've contributed, but it's nice to be able to go to those parties and talk about your issue. But, to get into the party, there's a price. So we appreciate what you've done on that score and urge you to redouble your efforts, and I think we can succeed in the next Congress.

Bert Massey

My role is to represent the point of view of the rank amateur, who probably has accomplished very little in terms of lobbying, but at least continues to try from time to time. I think there is a difference insofar as lobbying at a state level is concerned from lobbying at a Washington level if you're not a professional, only in the sense that at the state level you have a better opportunity to be closer to the member of the legislature—be it the House or the Senate—with whom you intend to deal.

Even in a community of 20,000, such as where I live, the community can be the population center in the legislative district that our member represents. And, incidentally, it doesn't hurt anything, in that case, at my home, that he happens to own an interest in a title plant, and secondly, lives in a neighboring community that is too small to control the election.

And, we were fortunate enough to support him early-on because of our commonality of interests, and as a result of that he is most kind to listen when we call and talk to him. He's been opposed in our community twice, and we've gone against the trend to back the opponent, and that's been excellent insofar as giving us access to his office is concerned.

The same is true of our senator. He's always very kind to listen. He will call and talk to us personally, and take the time to do that. We happen to have as the state senator in my community the fellow who is the great believer in "play your cards so close to the vest that nobody can even reach them, much less see what they are going to say." Now, he's very kind, will be glad to listen, and when you get through it, he says, "Thank you for calling. I appreciate the information . . . goodbye." And you'll know how he votes when the matter comes up on the floor.

I think to be effective in lobbying, as a member of this organization or any other, in the sense of trying to persuade your elected official to vote for something that you want him to vote for or against something you are opposed to, requires you to have some bonafides when you contact him. If you have not participated in any political campaign since Grover Cleveland's election, and if you're known around town as a fellow who feels it is a slur on his family's honor if he's required to buy coffee, much less donate to a campaign, and if you never participated in your community—you never did anything but take your living out of it and go home—it is highly unlikely that anybody you are going to contact, be it a legislator or a state senator, a congressman, or a United States Senator, is going to pay much attention to you to start with. They are interested in people needs, I think, at least based on my contact with them. They are more interested, however, in the needs of people who are interested in their needs, which is that they want to be re-elected the next time they are up. And, the fact that you may have donated $100 to somebody's campaign, or you are known as one who has a great many contacts or is respected in the community, or at least is a hard worker, certainly doesn't hurt anything.

I love to tell the story that, by being mayor of Brownwood, if you have, in Los Angeles, $2.50, you can get coffee anywhere in town. But I have found that, when I call somebody's office in state government or in national government in the bureaucracy whom I don't know, I think it is ludicrous for me to pick up the phone and call and . . . you never get straight through. I have to leave a message for them to call back and, if I ask them to call Burt Massey in Brownwood, Texas, they are usually very polite and say, "Thank you, now that was that number . . . and that's Brownsville?" But, usually, if I say—and I hate doing this—"This is Bert Massey, I'm the mayor of Brownwood, Texas, would you mind having

him call me back?," the answer is usually, "Yes, Mayor, what was that number?" I don't understand that, but it seems to work.

I think that if you are active on a civic level, it's important; if you are active on a political level in your community, it's important; even if you don't back the winner. And, when that happens, people remember it. It's important on a state level, as well as on a national level, to get acquainted with the member's staff. Particularly in Washington; they don't have time as a congressman or a senator to know all the details that you are talking to them about. I doubt very seriously that our congressman from Texas, or from my district, or either one of our senators, was aware that there was a reporting problem or a tax problem in the tax bill for the title industry. So somebody on their staff had to be educated, so they could be educated, so they could understand when you fellows came to see them.

I couldn't echo more what Gary and Howard have said about don't waste time, even on a staff level. The last time ALTA brought several of us to Washington to go to our officials' offices, I went to see the legislative assistant for Senator Phil Graham, who happens to be a lawyer from El Paso, Texas, who happens to be acquainted with my friend, Hughes Butterworth, who is the world's leading title agent in El Paso. I was able to mention Hughes' name and we discussed his various foibles and problems, and laughed and chuckled about it for about one minute. But that gave me the entree to go through what I was interested in, and about five minutes later the fellow lookup up at the clock and said, "You've been here five minutes, you've told me everything you wanted to tell me, I appreciate your coming, that's an effective way to talk to me, adios." And I left. And he followed up. And I got an answer, and we didn't spend 15 minutes laughing and scratching about the weather. And I think it's important to avoid that.

I think it is very important to make contacts and keep them, not only on a state level, but on a national level. I can tell very briefly a couple of war stories and I'll quit.

It so happens that, while I was in college, I was with a group that was active in campus politics. Most of us probably deserve to be just finishing a term at the state prison at Huntsville now, but few of us have. And it so happens that, today, the fellow who is the executive assistant to the governor of the State of Texas worked his way up through the University of Texas on a staff level. He's an old fraternity brother of mine . . . we were at each other's weddings . . . we kept up our friendship over the years . . . and it so happens I went by his house one evening and took my family. As my little boy was riding on his shoulders—looking down shocked at the top of his head—there was hair there . . . my son's never seen that on the top of my head . . . Cliff happened to tell me that, within a week, he would be named executive assistant to the governor of the State of Texas.

Well, it may not mean anything to some but I think it's pretty good stuff, to be able to call the governor's office and be able to get through to the executive assistant. Now, that doesn't mean he's going to do anything for me that he wouldn't do for anybody else. But, at least I've got an ear in that office when I have a concern—both on a municipal level and on an industry level.

The fellow who's our congressman, I did not back when he first ran for office. I backed his opponent. His opponent ran third in a field of three but it was a fairly close third. We kept up our acquaintance with his opponent and also supported the man who was ultimately elected to congress, Marvin Leith, who we, in Brownwood at least, have high hopes may be the next chairman of the House Armed Services Committee. Congressman Leith has been very receptive to that support in his runoff election and in subsequent elections and is, I think, a good friend. That gives me the opportunity to visit with him.

That opponent, having run third, we did not turn to and say, "You loser. We wasted $500 of our money on you. Never bother to darken our door again." Instead, we've been friends all these many years and, today, he's the chairman of the State Board of Insurances for the State of Texas, which regulates the rates of title insurance in our state as well as promulgates all the forms. Again, that doesn't mean he's going to do anything for me he wouldn't do for anybody else, but he does remember that we were with him when the soup was thin, and so he doesn't get too mad when we show up about every six months and announce, "The soup's thin, the soup's thin, I need to see you."

I think those kinds of things really are the key to at least having access. Then, I think you have to be knowledgeable when you go to talk. For me to have gone around on behalf of ALTA and talked about the taxing of reserves, would have been like sending my little boy to talk about nuclear proliferation. He probably knows more about that than I do at two and one-half. But I know something about the fact that I was not really happy about sending a lot paper to Washington showing the net on a sale by a seller.

* * *

So, I think you have to know what you're talking about when you go. My impression is that the members get plenty of mail—from cranks and from people who have a philosophical bent and say, "Don't bother me with the facts, I've made up my mind."

And lastly, you're not always going to get your way, and don't go away mad because nobody appointed you to be in charge.

Open Discussion

TOFT: Now it's time for open discussion, and I would like to lead off. Throughout 1986, there appeared to be two Washington issues that focused considerable attention on the practice of lobbying. One was the matter of Michael Deaver, former White House staff member, and his alleged use of influence while working as a lobbyist. The other was the sheer number of lobbyists who descended on Capitol Hill as a response to the Tax Reform Act. Gary, did the so-called "Deaver affair" make it more difficult for you to function in Washington?

HYMEL: Well, I don't think there's any doubt about it. It made it more difficult for us all, particularly in the area of representing foreign countries. What appeared to be moving right out of the White House one day and then representing all of these foreign governments the next, has greatly been played up in the press, and it has made it more difficult for us. I don't even know Mike Deaver, and I don't know the details of any of his involvement. But just in general, this power we have of access, that we know people on the Hill, it's a very fleeting power, because if we misuse it or abuse it, we lose it. We have to prove ourselves every day up there, that we are trustworthy, and not going to ask anybody to do something they probably shouldn't be doing in the first place. We just supply them with the information. Do you want to add anything to that Howard?

LIEBENGOOD: Well, I just want to say that I think that Deaver matter is unique. Mike Deaver . . . whatever the facts are surrounding the Deaver case . . . is not your average lobbyist. He is someone who went from a position of high power and great access into the lobbying/government relations business. He's not someone who is typical of the Washington lobbyist. The Washington lobbyist that Gary and I know and work with on a day-to-day basis has nothing close to the access that a Mike Deaver had. Yet, they are able to function successfully and competently and have a happy and substantial clientele. The idea of a revolving door fix just isn't what lobbying is all about. A lobbyist doesn't fix anything. A lobbyist nudges . . . sort of a sophisticated nudge . . . and a very complicated process. And the concept of the all-encompassing, influential influence peddler is just a misnomer.

HYMEL: I was very surprised at the access that we could obtain during the tax bill, even during late June and July. It really did not seem to be as crowded as the press represented it to be. Do you have any reflections on that?

LIEBENGOOD: Well, you know, all politics is local. And, if you have a local problem and you're a member, particularly in the House,

where they run every two years, he had better keep that door open. Because, if he finds himself not listening to his people, he's soon going to find himself right back with them. They know that.

HYMEL: Because Dick mentioned the tax bill and access, I think something that's worth knowing is the fact that you heard of the halls of Congress being jammed with lobbyists on the tax bill. In fact, from time to time they were when the committee was meeting. But I don't know of any bill where not only do lobbyists have so little access to members, but members had so little access to the chairman. This bill was written by Chairman Rostenkowski and Chairman Packwood, and their own conference committee had almost no access to them. So the history of this tax reform bill is a history of access in reverse, I would suggest.

HYMEL: The founding fathers set it up so they would be tied closely to the people and have to go home and campaign. They saw that as a good thing—to keep them represented. So look at it this way, incumbents have a tremendous advantage having a two-year term. You know, some fellow walks into the barbershop and they say, "Why don't you run for Congress?" And he says, "Heck no. You've got to be nuts to run for Congress. You only get a two-year term." And the incumbent says, "Yeah, that's right." You know, it does discourage the opposition because it's so precarious. So the guys who are in aren't going to change the rules to make it easier for the challengers. That's just a practical fact of politics. President Johnson sent up a four-year proposal one time and didn't even get a hearing. It was a non-starter. Another big problem they would have, suppose you have a four-year term for members of Congress and suppose he had served two of the four years and still had two to go, and then a Senate seat was up at that time? He could run for the Senate, without having to resign from the Congress, which you have to do now. The Senate will never change that one, believe me. A member of Congress has to, as soon as he is sworn in, start thinking about re-election. Once again, our founding fathers thought that was good, because it keeps them closer to the people. And, believe me, it works.

LIEBENGOOD: I think it's a good idea. I just don't think it will happen. I think what you'll see first, rather than seeing the length of terms extended in Congress, I think you are more likely to see the number of terms capped, particularly in the Senate. There are some pronounced advocates for limiting the number of terms that a Senator might hold, and I think you are more likely to see that happen before you see the length of the congressional term extended.

HYMEL: Well, I don't agree with that, to tell you the truth. Certainly, you know, the precedent we have, of course, is the President. And, right now, a lot of people wished they didn't have that rule, right? I really don't think they will tinker with any of that. The down side is so great, and it affects the incumbents so much, you aren't going to change the rules to made it easier for the challengers.

HYMEL: The system used to be that members were able to take cash. The District of Columbia had a non-disclosure law, so every member of Congress had a D.C. Committee where you put all this cash and didn't have to report where it came from. It was fraught with abuse. So the reform came, and they said, "Well we can't limit how much people take, but let's at least have full disclosure." And they created this PAC . . . Political Action Committee . . . to allow members of organizations and corporations to contribute to a Political Action Committee, and the big rule was that the members of the corporation or the board couldn't direct where that money went. The members of the board were a separate group to decide that. And we had full disclosure. You had to say where every penny came from, it would be printed in a big book and the press would be able to use it. And it has helped. It hasn't stemmed the flow of political money. It costs an awful lot to run a campaign today. I don't see any change coming. And I think there's no lessening of your necessity to participate in that process.

HYMEL: Well, the important thing to remember is that the Political Action Committee is what we have. And you can fuss about it and you can say, well, you know, we tried to correct an abuse and now we have spawned new abuses in their own right and whatever, and be critical . . . I would suggest that those who refrain from taking PAC money are either extraordinarily secure or sure to enjoy a very short tenure in the Congress. Because it is absolutely essential. "Political action," someone said, "is the mother's milk of politics." And it is true. No matter what form it takes, whether it is political action committees, or whether you go back to private contributions, there is no substitute for involvement in that part of this political process. There just isn't. And I think that your organization has recognized that. Roger has a good sense of that. I know John Cathey has a good sense of that.

John, whom I know, is also a pretty good lobbyist in his own right—I know that from having talked to David Boren, senator from Oklahoma.

I think that both political action and grassroots activity, which you both do quite well, cannot be overstressed when you look at your needs in the future. I also believe that ALTA is embarked on an honoraria program, or is considering that, and I highly recommend that. Because that, too, is a very useful tool. And these people will appreciate your support.

The political action committee is a way to show that support, and they particularly appreciate it when you don't need something. Being there and being their friend when you are not asking for something is all the more important so, you know, your issues are going to come and go, but I think your participation in political action should be a constant and hopefully a growing element of your organization.

HYMEL: The House twice passed a federal financing of congressional campaigns, as we have for the President. And the Senate killed it both times. And I don't see the Senate ever enacting it, because the incumbent has a tremendous advantage over the challenger. I also would like to add to what Howard mentioned about your grassroots support in addition to PAC money. The fact that when the Association asks you to write your members, or visit them, it is tremendously helpful to us! When we go in to see a member, and we walk in the door and a staff person hands a file folder to the member and it has your letters in it, and he opens that file folder and says, "Oh yeah, I know about your issue because my local people wrote." How comforting that is to us! We've gone a long way already in convincing that member. So I urge you that, when you are asked to, respond and let those members know that you care.

MASSEY: In my very limited political sphere, the radio stations and newspapers believe that it is the next greatest sin to adultery to take a position in the political arena, so you don't have to be concerned about it. When the TV people interview me, I usually look like I just crawled out from under the culvert, on the TV screen, so, really, if I were announcing my preference for motherhood, apple pie, or fresh whole milk, it probably would look like the Communist Manifesto. I think the greatest example I've heard of the effect of the media is the speech that Lou Rukeyser gave the other day. It's awfully tough. These fellows sure know a lot more about it than I do.

But, it's awfully tough to overcome that, even if the guy you are visiting with is your childhood friend. It's just, in the face of that kind of pressure, if the media is really on them and really spotlighting them on a particular issue, that applies to local politics on up. I know that, when I get an article in my little hometown newspaper that's just the least bit critical of what the city council happens to be doing . . . and I assume this goes all the way to the White House—well, not the White House, but at least the United States Senate—the initial reaction is, "Ooooh, I wish they hadn't discussed that until I had this out of the way."

LIEBENGOOD: Well, I would like to say that it is tough, but . . . this isn't a commercial . . . we've made a living out of it. Our company has lobbying, as well as public relations. In public relations, we hire ex-newspeople. The head of our public relations unit is Frank Mankiewicz, who is the former chief of Na-

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AMERICAN LAND TITLE ASSOCIATION

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is indicated that as to the actual substantive damages that were awarded to the insured following the trial, the amount was $170 on top of which you then had attorneys' fees which were of course necessitated by the litigation, on top of which you had $200,000 essentially by way of punishment, although I believe in that case it was in the form of emotional distress for the claimants.

The decision itself is so long that I suspect my Xerox bill in making copies of it will probably amount to the same $170 which were being sought in way of damages. With regard to that case, some claims people decided that there was something sufficiently important so as to make it into a Holy Crusade and the result is something which undoubtedly has cost title insurers and all insurers, tens of millions or possibly hundreds of millions of dollars since that time.

With that background, I think then what we should add to our unusual list is that, within the claims department at title carriers, be sure to always reward and promote the most hard-nosed "to hell with the insured" claims people that you have.

Also, be sure to allow those people to make rejections of coverage claims—to deny coverage—without being screened by people higher than them because there is always the possibility that people higher than them may have more of an overview and a broader view of what is involved. I guess another corollary to that is, be sure to use defense counsel who mirror that same mentality. Defense counsel who never seem to see a legitimate claim when it is first sent over to you for defense, take a "millions for defense, not a penny for tribute" attitude, and surprisingly always seem to find on the courthouse steps after having incurred extensive defense fees, that something new has turned up and in fact the case should be settled.

In fact, from management's standpoint, I guess another thing we should add to the list is always downgrade the claims department. Make them the lowest people on the totem pole because, after all, these are the people who simply give away money. Unlike the marketing people or the sales people, they are not bringing money in the door. You can even improve on that by deliberately understaffing and underpaying those people so that, even if you have a zealous, dedicated claims person, the crush of work is such that it is physically impossible to get claims paid on a timely basis. If that sounds extreme, I can tell you that I have represented insurance carriers who were exasperating by way of lack of claims personnel. Ultimately it became extremely clear that understaffing the claims department was a deliberate strategy on their part.

Another corollary to that, if time gets tough, be sure to contract the claims department, and hire in their place more marketing and sales people since, again, the claims people are obviously the lowest people on the totem pole.

When you treat your claims people that way, you can be guaranteed some day, somewhere, in an insurance bad faith case, you are going to find some of those ex-employee claims people, getting on the stand and testifying with regard to the pattern and practice that you have carried out if in fact this was your M.O.

Claims People Need Tools

Let me briefly mention a case that I tangentically touched upon. Several years ago, a friend of mine who is a plaintiffs lawyer and does a lot of insurance bad faith work, called and asked me to serve as an expert witness in a case. The facts he described to me were these.

He was proceeding with a claim against a fairly prominent local auto insurance carrier, and he had ascertained that the reason they had been so stingy in dealing with what otherwise seemed as if it were a fairly cut and dried claim, was that they actually had an expressed pattern of discriminating against black claimants represented by Jewish lawyers.

Well, I heard this and my first reaction was, "Ah! Come on. You are making this up."

For reasons unrelated to the case, I didn't participate in it as an expert and promptly forgot about it until several years later I flipped on the TV, and I was looking at the news and, for some reason, this case was in part televised and there was my friend putting on his case against this insurance company and he paraded to the stand a group of ex-employee claims people from that company, who testified to just that pattern by the company. People who got up and said, "Absolutely, we were instructed, if it were a black claimant with a Jewish lawyer, don't pay him a dime."

I am sure none of you have situations that extreme, but, the moral of the story is, if claims people are not given the tools with which to do what they have to do in dealing with claims and doing on behalf of your insureds what they should, then ultimately they may turn out to be a secret weapon for plaintiffs attorneys pursuing you in coverage actions.

I mentioned earlier my impression that one thing that was happening was that title companies seemed to take unduly hard-lined positions in cases that didn't involve that much money, and let them wend their way through the system and end up as precedent which comes back to haunt you.

Let me tell you about a sequence which definitely will affect the title insurance industry. I am going to describe some of the details, but let me provide the background which began in cases other than title insurance cases.

Billion-Dollar Case

In California, we presently have what we know of as the *CUMIS* Doctrine, based upon a case of that name which I will get to a little later on in my address. Before *CUMIS*, however, we had *Executive Aviation*, a 1971 decision. Let me tell you about *Executive Aviation.*

In that case, the carrier involved provided coverage to a company that provided aviation services. In the course of piloting a plane, one of their employees apparently lost control of the plane and crashed, death resulted, and in came the wrongful death claim against the insured. Some of the issues in the substantive case, as to which I will not go into gory detail, however, were:

Number one: Was the pilot who had let the plane get out of control, properly licensed to function as a common carrier and in fact was this flight one that involved common carriage? If it did involve common carriage, then, as I am sure most of you know, common carriers are held to a higher standard of care than the ordinary standard and if, in fact, it was common carriage, then this pilot was not properly licensed. That's on the substantive side.

Number two: On the coverage side of that case, the carrier involved had a policy which excluded as to common carriage and also would have excluded if, in fact, this pilot, not properly licensed, was flying in common carriage. The insurance carrier spotted the problem and immediately began attempting to protect its coverage interests, and hired lawyer X to represent its coverage interests and attempt to undermine the coverage interests of the insured company. Shortly thereafter, in came, as anticipated, the bodily injury claim against the insured and, at that point, the insurance carrier proceeded to turn over defense of the insured to that very same lawyer, who was representing the insurance company in suing the insured to undermine coverage. Honest. I am not making this up.

The company recognized that its interests and the insured interests were diametrically opposed. What the insured wanted to do in resisting the wrongful death claim was fight off the claim that the insured was engaged in common carriage. On the other hand, though, from the insurance company's standpoint, they wanted to demonstrate there was common carriage because that would get them out from underneath any coverage at all based on their exclusion as to common carriage.

Sometimes, these things sneak up on you. But this carrier recognized the problem it had. During the inevitable subsequent case against the carrier, people went through their claims file and there was a note from the claims adjuster to the claims manager indicating that "we find ourselves in a paradoxical situation because what we (the insurance carrier) want to demonstrate by way of common carriage, is

something that subverts our very own insured's interest."

Not only did the insurance company recognize something very peculiar was taking place but so did the insured. The insured detected the fact that the attorney who had been hired to defend him in the substantive case, was that very same attorney who was suing him in the declaratory relief action on behalf of the carrier. At which point the insured requested that he be entitled to have defense counsel of his own choosing in the death case.

Apparently, somebody at the insurance carrier's office felt the carrier's right to control the defense and designate defense counsel was either one the original Ten Commandments, or at the very least was a new Eleventh Commandment and wouldn't budge. The insured nonetheless went ahead, retained counsel of the insured's choosing and proceeded to pay out of his own pocket because the carrier refused to pay those bills.

The case eventually was resolved as far as the death claims are concerned, but the coverage action went on and ultimately, although it still strikes me as incredible, the insurance company let this both go to trial and go up on appeal and to become an appellant precedent which established that, if you have a conflict of interest between the insurance carrier and the insured, then the normal right of the insurance carrier to control the defense had to give way and the insurance carrier had to permit the insured to designate counsel of the insured's choosing and to pay for that attorney's fees.

I would estimate, literally, that the effect of the *Executive Aviation* decision when it finishes unfolding, not only here but throughout the country, will probably cost the insurance industry literally billions of dollars.

I would let you guess as to how much was actually involved in that claim by the insured against the carrier for his fees. It was a grand total of $2,325. That's what the insurance company was fighting over and that's what brought about what I am convinced is a multi-billion dollar added expense for the insurance industry.

For some reason, the *Executive Aviation* decision didn't seem to catch the attention of people who could make us of it here, they being primarily insureds personal counsel. The outside general counsel who give business advice to insureds, who would be in a position to step in and defend if you had a conflict between the insured and the carrier and do so at the carrier's expense.

CUMIS Case: The Other Shoe

Unfortunately for the insurance industry, they permitted the second shoe to drop as of 1984. In *San Diego Navy Federal Union vs. CUMIS Insurance Society*, once again you had a situation in which the insurance carrier dispatched a reservation of rights to its insured, which was, as its name indicates, a credit union, and designated counsel of the carrier's choosing to protect the insured. As the case progressed, apparently it was a fairly complicated wrongful termination suit brought against the Credit Union by one of the Credit Union's terminated ex-employee.

The credit union decided that it wanted counsel of its own choosing to step in, made that request, and CUMIS, which I believe is an acronym for Credit Union Mutual Insurance Society or something to that effect, CUMIS denied that request and refused to pay the bill submitted by the insured's designated counsel. Once again, the carrier let the problem begin to wend its way through the system. The case was tried in San Diego.

Because we follow coverage matters very closely, we were aware of it even at the trial level although, in California, our trial court decisions are not published decisions, they are not precedent. (It is different from the federal system.) And we were aware that the case had been tried and the trial judge wrote an absolutely scathing, lengthy, fairly scholarly opinion, dramatically expanding the obligation of insurance carriers to permit the use of the insured's chosen defense counsel and in fact made this an ethical obligation for the carrier, and of the defense attorneys designated by the insurance carrier—both of them had a responsibility for telling the insured what his rights were and all but inviting him to go out and get separate counsel at the carrier's expense.

Why in the world this insurance company didn't at that point just lick its wounds, make payment, close the file and go on to the next one is something that I'll just never understand. Instead, it prosecuted the case through appeal. Down came the appellant decision. As they should have anticipated, the court reaffirmed exactly what the trial judge had said, indicated that, in essence, under any circumstances where the carrier dispatches a reservation of rights to the insured, you then have a conflict of interest between the insured's interests and the carrier's interests and the insured must be advised that he can get counsel of his own choosing, that that counsel will control the defense—not the carrier's counsel—and, in addition, the defense attorney selected by the carrier has exactly that same obligation. The case was widely publicized this time. Efforts were made by the insurance bar to get it turned around at the supreme court level. No luck whatsoever. And that's now the law in California.

It is a horrendous example of the insurance industry shooting itself in the foot, and it is now something the industry is going to have to come to grips with. I think there is still a high degree of denying reality on the part of carriers, and I have seen it specifically with regard to title carriers.

Since *CUMIS* came down in California, we have had a case called *McGee* which, under some circumstances, does limit the obligation and some title carriers seem to feel that the *McGee* limitations are nirvana and will insulate them from this Bolshevik idea of the insured selecting the insured's own designated counsel. But, I submit to you that, in actuality, *McGee* is only a very limited exception. It is an exception to the rule only where the coverage issues have no relation to the substantive facts in the underlying damages case and, other than the law in California now, I think, what will eventually be the majority rule in the country, is that, if you have a Reservation of Rights, the carrier is going to have to tell the insured about the right to independent counsel, and is going to have to start paying independent counsel.

Ground Rules Suggested

For those from states other than California, who have not yet experienced this delightful way of handling files, I can tell you that it is a whole new ball game. Once you have a *CUMIS* situation, at that point the insured takes over control of defense. The carrier is on the outside looking in. Has a devil of a time finding out exactly what it is that is taking place in the substantive case. Finds bills coming in from this new defense counsel, this interloper, which are two, three, five, ten times greater than would be anticipated from the defense counsel that carriers normally utilize, and there really isn't a whole lot that you can do about it. However, let me suggest some ground rules. For example, with regard to this interloper defense attorney, how may cases has he had? How many cases like this has he taken to jury trial? You have to be very specific about that. This is something we learned to our sad experience in several cases, where attorneys got in, the carrier was paying them and it turned out they really didn't have the foggiest idea as to the substantive nature or the background of the type of case they were defending. Which, I might add, did not in any way deter them from sending in some very impressive fees for payment by the carrier.

Establish with that attorney that, in fact, either he is going to handle this case alone or he is going to handle it himself with an associate. Find out how it is going to be staffed. Again, that is one way in which this can completely get away from you. You may find that, under these circumstances, you are being taken advantage of and the defense firm brought in by the insured for no good reason suddenly has five or six people working around the clock on what you consider to be a fairly garden variety title insurance claim.

We had one case in which it turned out the individual the insured designated as counsel basically was a criminal defense attorney. Seemed like a completely bright, pleasant chap but had no knowledge whatsoever as far as substantive civil defense work. As a result, he then had to associate with him yet another

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firm and we suddenly found that, at all times, he and the associate counsel were showing up at every deposition, every motion, and the meter was running at twice the rate it should have.

So, establish exactly how the case is going to be staffed, how they are going to be handled. Set up lines of communication. Again, this is not your guy. This is not one of your panel or approved defense counsel. For one thing, you will find that the way in which many attorneys report to their clients, even attorneys reporting to fairly substantial corporations, is extremely skimpy compared to the manner in which carriers usually systematically require reporting from their approved counsel.

Lay out the ground rules as to how frequently you expect to get information from them. You'll have to tread carefully. Keep in mind the context is that there is a conflict of interest between you and the insured. So this attorney whom the insured has brought in will be able to skirt some of the issues as far as reporting goes, where his reports to you could serve to undermine his client, your insured's coverage rights in the case.

Work out those ground rules, though, because one thing you may run into is this designated attorney may take advantage of that situation so as to adopt a position that "I can't report to you at all, because there is this conflict and, if I am reporting to you, then the information that I pass along to you, Mr. Carrier, is going to subvert the insured's coverage rights." So, set up your reporting requirements and you are really going to have to monitor it.

Set up your fee schedule. Unlike the attorneys you use, this individual hasn't previously obtained approved fee rates with you. How much is he going to charge? How much does he charge for the various support personnel? You are going to have to get down to all sorts of nitty gritty details, which ordinarily are not at all necessary when you are dealing with those counsel that you are familiar with.

Going back to my theme of the industry unnecessarily shooting itself in the foot, we recently in California had what I also think is going to be a landmark decision, known as *White vs. Western Title Insurance.* At least, from my vantage point, you once again have very nominal amounts of money involved and, at least as the decision was written by the Supreme Court, it looks as if the title carrier is taking an extremely hypertechnical approach, as far as what it viewed its obligations to the insured to be.

If anybody is here from Western Title, I am sure they may feel they have the inside story and that there actually were legitimate grounds for the defense. All I can tell you is that, based on the decision itself, which came down at the very end of 1985, it does not look as if this was a case worthy of being made a vendetta by the title insurance company. The amounts involved in the case wringing wet, don't appear to be more than $10,000 $15,000, something of that magnitude.

The carrier resisted the claim made by the insured, as to whom it turned out there was an easement running across its property and the holder of the easement attempted to assert its rights, whereby the insured then turned to Western under its title policy. That became the start of a long, sad story, which culminated with a trial in which not only was Western hit for substantive damages, but also for what I'll deem blood money over and above the substantive damages to reward the insured for what the court felt Western Title had put the insured through.

Once again, the title carrier managed to make horrendous law for the entire insurance industry in California. Because the court didn't appreciate the way in which the title carrier negotiated with its insured throughout the case, i.e., the court felt the title carrier had been nickel and diming the insured, the court established for the first time in California, the concept that even though normally settlement negotiations are absolutely inadmissible, cannot be put into evidence in your normal garden variety lawsuit, in a bad faith claim against an insurance carrier, henceforth insureds will be able to show what went on during negotiations.

Just think about that for a second. Just think about what that does to you on the day-to-day handling of just about any claim which becomes contested between you and the insured. You are going to end up in front of a jury, trying to explain your litigation strategy, your claims handling strategy, why it was that at one point you offered the insured $3,000 which is what was offered the insured by Western early in the case, why it was that you then offered the insured $5,000. Why did you change? What changes took place in between? Why did you go up? If it was worth $5,000 a little later on, why didn't you offer that to the insured initially?

Much of the time, there is a completely legitimate reason for increasing offers as the case progresses. There are all sorts of developments that take place. But keep in mind where this is getting resolved. This is getting resolved in front of a jury, which ordinarily has an animus toward the insurance industry, and harkening back to the very first thing I was saying early on, I think you are going to find even more of an animus to the insurance industry given what is happening to premiums, given the propaganda blitz which the plaintiffs bar has leveled against the insurance industry by way of retaliation for what the plaintiffs bar regards as propaganda by the carriers to restrict plaintiffs' rights.

You are going to be litigating in front of a jury the contents of your claim file, and the contents of offers and demands, that you made with the insured. It is always going to be looked at through 20-20 hindsight and, of course, the cases that the plaintiffs are going to take to a jury are going to be those in which you are going to have trouble explaining or justifying what took place, and I think you can see the tremendous explosiveness that is now involved in this entire process.

Again, getting back to what I indicated earlier in my address, although the damage has been done, and in this regard, Pandora's box has been opened, at the very least start to pay very close attention to what goes into your claim file. It is going to be fair game. As you put something in a claim file, think about how that would sound if that entry in the claim file was being read to a juror. Because that is going to be the ultimate acid test as to how you are going to be viewed.

As a result of *White vs. Western Title,* I think we are going to see a totally different ball game as far as the way in which you are able to negotiate with insureds and you are going to have your process of negotiations coming back to haunt you in front of a jury.

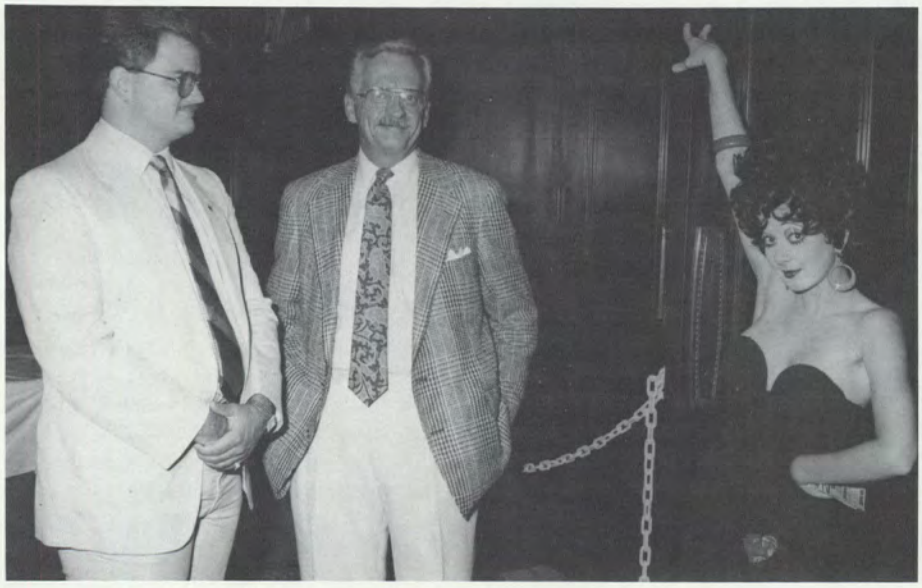
White also made another dramatic change in our law. You would think that even if 20-20 hindsight could be applied to the way in which you negotiated with your insured before suit was brought, at least after suit was brought, the curtain rings down, you are clearly adversaries at that point, and at least at that juncture, no longer could the insured put in front of the jury the type of demands and offers that you are making to the plaintiff in the way in which you conduct yourself.

Wrong! *White vs. Western* holds that the insurance carrier is a fiduciary, which is a horrendous burden to carry around in this litigation and that fudiciary duty doesn't stop just because the insured has hauled off and sued you. It gets almost metaphysical as to exactly how one can remain in a fudiciary relationship with someone else who is suing them for all they are worth, but nonetheless, that is the ground rule.

So, as that lawsuit continues, even though you are dealing at arm's length with the insured, he is going to be able to demonstrate in front of a jury the way in which you treated him even after the lawsuit got filed. Assumedly, the activities of your attorney in dealing with the insured and insured's counsel are going to be fair game when that bad faith case gets tried.

The only potential remedy I can offer is to be awfully careful as to the way in which you conduct negotiations. Again, I think you are going to have to excise sarcasm from your approach. And, I am really not being critical by that comment. You see a lot of bizarre claims coming at you. Nonetheless, you are going to have to be cleaner than clean in the way you handle these cases both before and after suit is filed.

Having taken you to that point, since I cer-



tainly don't want to leave you with a funereal state of mind, let me point out that, if it weren't for all these interesting problems that we have going, there wouldn't really be any need for our services, and we would all be out selling computer software systems, or something like that. So look up! Times are going to get even more exciting than they have been for the last few decades.

Mark Davenport

I want to try to bring to you a perspective from the trial lawyer's viewpoint. What I do is basically I am down in the trenches, trying these cases for companies on a regular week-in, week-out basis, and I want to present that perspective. I understand my audience is composed in part of underwriters, part attorneys and part businessmen in this area so I am going to try to direct my comments, perhaps not so much to the scholastic or academic area, but more or less to the day-to-day matters that hopefully will be of help to you.

The first thing I think it is important that you understand is that there is a real life crisis out there. It is a real problem. It is something that you had better become aware of and learn how to confront, or it is going to threaten not only your bottom line, it is going to threaten the basic industry.

I find in dealing with some companies, that they have not yet become aware of how serious this problem is. It is like it is going to happen to somebody else. It is going to happen to the property companies or it is going to happen to the life companies. But it is going to happen to the title insurance industry. It is happening to the title insurance industry and it is time that the title insurance industry woke up and learned how to handle these claims and start taking some preventive measures which will, hopefully, if not solve, it will at least prevent massive jury awards.

I was flying to New York the other day and picked up a *USA Today* and it was talking about the delegates to the White House from the Small Businessmen of America and their number one priority that they had selected for President Reagan and Congress to address was to reform civil liability laws, create standards for product, professional and commercial liability and to insure that insurance is available and reasonably priced.

Now, small businessmen and businessmen are people who also buy title insurance. And insurance now has become a major item of business. So far the industry is still providing title insurance and related services at affordable, fixed prices but, in light of the growing trends, it is going to be more and more difficult to maintain those economics unless some changes are made.

Extra-Contractual Liability

You've got to understand, I want to try and separate in your minds, what extra-contractual liability is. How it affects you and how you need to change your thinking in the manner in which you and your outside counsel approach claims handling, approach underwriting, and approach your dealings with your outside counsel, once the matter goes into a lawsuit.

Most of the cases that have developed in this area have come initially from California. Texas has first, as a matter of fact, rejected the implied covenant of good faith and fair dealing in one of the earlier Texas Supreme Court cases. It is now under attack and the Supreme Court has clustered today in Texas a number of cases that may well change the law.

But your plaintiffs bar is very, very organized. They are much better organized than the defense bar. And if you don't think that you are swimming and you are surrounded by sharks, you better look again. There are handouts being passed out and speeches being given on a regular basis in Texas and other states throughout the bar, articles such as this one: "Setting Up the Insurance Carrier: The Plaintiff's Perspective."

Now that is an article that is being circulated to lawyers who may not know anything about insurance, and it is not an article that says, "We want to have a fair adjudication of facts, this is the way you protect your clients' rights." It is called, Setting Up the Insurance Carrier! Part of the article starts out and this is passed out throughout the state. This article has been written primarily from the plaintiff's strategic perspective. "Armed"—like the analogy to war—"armed with the understanding of the applicable rules of law governing the carrier's activities, the policy justifications for those rules and the legally operating facts, plaintiff's counsel is prepared to investigate, plead, and develop his or her case with a view toward setting up the insurance carrier."

Now, I am sure you are familiar and your lawyers are familiar with the traditional contract claim and the traditional defense under a policy. I have prepared and I believe it has been circulated before you, an outline which to some extent repeats and lists some of the comments Ray Cotkin listed, but is intended to help you follow briefly what I am going to say and try to separate in your minds exactly what the problem is. I know that people, especially the executives in this area, do not separate in their mind exactly what is bad faith. I mean, what are punitive damages coming at us? How does it all fit? How does the puzzle fit together? Why is it happening?

Let me just first approach it from the contract viewpoint. You know what the contract claims are. You've handled them for years. Most people, and unfortunately many defense lawyers, still gear their efforts toward defending a contract case. And you are familiar with general concepts that are set forth on page 3 of the outline, where you get the case in and you determine is the claim covered? Do we have a duty to defend the claim in third party suits? Do we need to do reservation of rights and all the problems incumbent on that now with the CUMIS decision, as Mr. Cotkin so ably discussed. What are our effects if we wrongfully refuse to defend? And so forth and so on.

And you say now, you know, that is how we have always historically operated and we have a contract and we understand what a contract is and we know that if event A happens, event B follows, and we know that we set our premiums on these contingencies and, you know, we are really not commercial abstracters. Title insurance was never intended to create commercial abstract liability. We are familiar with the cases that used to say that when you conduct your title search, you are doing that for your own benefit in assessing what type of risk you are willing to undertake, that it is not supposed to be a representation to your insured and so forth.

And you seemed to think, or the title insurance industry seems to think, as did many other insurance companies in other fields of insurance, that you could rely on your policy. And, because of that you had some type of predictability. You could say, "Okay, I have an exclusion. I don't have to pay this claim. I can defend this exclusion. I can this, and this, and this, and I can now actuarially set my premium that I am going to charge for this policy based on predictable risk."

All right. Well, times have changed because enterprising lawyers now have created the concept of extra-contractual liability. And, for those of you who are still in the old world and those of you who are still gearing your thinking and your lawyers on your staff are gearing their thinking toward defending a contract suit, you are missing the boat. Because now it is like you need to know you are in a fight. It is like the two people who were in a fight and one of them had a razor and he swung at the other one and the other guy says, "Ah ha! You missed." And the other one says, "Oh, yeah? Just try to turn your head!"

You better realize that you may be cut and bleeding in a claim now before you ever know that you are in a fight. And the way this works is through the creation of tort claims as opposed to contract claims. The general types of tort claims are extra-contractual claims listed in the Outline. Those, and the one I am going to talk about, we are mostly concerned about today, is the breach of the implied covenant of good faith and fair dealings.

But there are other outside claims that are asserted against title companies now. You find gross negligence. You find negligent misrepresentation coming up in primarily an underwriting context. You find that, when your company underwrites, when you do your title

report, when you issue the commitment, when you close, you are exposing yourself to claims of negligence. That is, you missed an outstanding interest.

Negligent misrepresentation. Your attorneys became aware of outstanding interests that were not disclosed and negligent misrepresentation simply means that you were engaging in an action in which you had a pecuniary gain. You should have realized that your insured would have relied on you to disclose these matters and, in not disclosing matters or perhaps misdisclosing or misrepresenting matters, even innocently, you were negligent and that can create liability.

You have fraud. You have intentional and negligent infliction of emotional distress. You have statutory deceptive trade practices, which you all are familiar with. You have statutory insurance code violations, which are very popular in Texas now. And then you have the Racketeer-Influenced and Corrupt Organizations Act which we are now seeing in some limited contingencies in cases.

Now, let's talk about what these are and I want to first talk about this implied covenant of good faith and fair dealing. Now what is it? The theory is, it is set forth on page 8, "the insurer owes to its insureds an implied duty of good faith and fair dealing that it will do nothing to deprive the insured of the benefits of the policy."

Underwriting and Claims

Now, that's very high sounding. That's very heady stuff to a jury—that you have to act in good faith and fair dealing and so forth. Now, where that comes in, in the title industry primarily now, is in claims handling. And I want to separate in your mind two aspects of litigation—litigation that we get in the first part, the underwriting process, tort claims, and litigation that we get in the second part, which is the handling of claims.

Now, as a practical matter, we have, let me give you an example, in Texas, a statute under code 2121 of the Insurance Code. It prohibits false, deceptive, misleading acts in the business of insurance, just as the consumer protection statutes prohibit false, misleading and deceptive acts in the business of trade or commerce. And, what that does, is create a mode that you can recover damages from mental anguish, or actual damages, and you can recover treble damages, or three times your actual damages, if the conduct of the insurer was committed, what they call, knowingly. It relaxes many of the fraud concepts. It makes the proof easier. It makes jury submission easier. And it is very, very troublesome as I am going to show you.

But, you say, why do these lawyers now, why are they coming at us with extra-contractual claims? Well, you don't have to be Einstein to figure that one out. If you will look at page 9, there are some of the obvious reasons and they are common sense reasons. Number one, a title insurance policy, when you issue it, is set at a fixed amount. It is a different breed of cat than your casualty policies, or your disability policies, so forth. You are setting the amount of your liability, the cap of your liability, as of the date that you issue the policy, and you are basing that risk on matters that you searched up through the date you issued the policy.

Well, if you have held your land for many years, sometimes the amount of that policy won't compensate you for the inflated value of your land. And, it won't compensate you in some events for matters or damages that you suffer after you have a title failure, or you have an outstanding interest, or you have a high power gas line underneath your mobile home development. So, when you assert these extra-contractual claims, you open up the door for all damages that proximately flow from a result of the tort. So you avoid that. You avoid contractual defenses.

Whether there is an exclusion or whether there is a non-coverage issue, that's not really the issue. I know California courts have gone with the reasonable expectations theory. Texas and many other states still have historically gone on the deal, you have your contract, the contract says this, if you can interpret it, and even though an ambiguity is construed against the insurer and so forth, nevertheless if it says that . . . you know, you kind of cut a deal going in, and this is what the rights of the parties are. You can avoid that. Because, for example, when you go to the jury on a tort claim, or you go to the jury . . . in Texas we have what you call a special issue practice in state court, and that means you submit an issue to the jury, and you don't say who wins or who loses. You submit a controlling issue of fact.

And, instead of submitting an issue such as "Do you find from a preponderance of the evidence that the gas line easement was in existence as of such and such a date," which then would trigger a contract defense, you say, "Do you find from a preponderance of the evidence that the insurance company committed false, misleading and deceptive practices in the manner in which it denied this claim?" And you have a jury out there that says, "Well, here's the plaintiff, here's the insurance company. You bet they did."

So it is much easier jury submission. You have bigger damages. You have the ability in asserting these kinds of tort claims to leverage the insurance company because now you say, "Boys, I am sorry about this $10,000 contract claim you have, but not only are we going to sue you for actual damages, we are going to sue you for punitive damages." And punitive damages, the sky is the limit. "And we are going to throw it in front of the jury, how much you earned last year and we are going to throw in how much actual damages we had and we are going to let the jury look at all the mental anguish my poor man suffered because he couldn't build his mobile home."

And, in talking to you now, the pendulum has swung. Now, when the insurance industry, maybe back in the '60s or something, there were some bad apples, maybe some companies didn't act in good faith, all right. And maybe that is what brought this about.

But, let me tell you. I represent many, many companies. I represent over 50 or so life insurance companies. I represent six or seven title insurance companies. And, I work behind the scenes with these lawyers who are in court, they are inside counsel. I work behind the scene with the lawyers who are handling these claims, and I see for the most part today, people who are intelligent in this industry. These are lawyers for the most part I am dealing with. They are inside counsel. They are not a claims adjuster that you might find in a casualty company. But these lawyers are busting their rear to do the right thing. They are working hard. They are making intelligent decisions. They are meeting. They are trying to do the right thing. They are acting in good faith. They are doing everything they can to adjust this claim correctly and fairly and pay it when it is closed.

And then I have seen those people taken on cross examination, and I see them in the deposition and watch the plaintiff's lawyer, who is abrasive, who is gruff, whose modus operandi is to cut and slash and burn. I see some of these people after it is over, and they have done absolutely nothing wrong. They are abused, they are hammered on, and I see some of them at the end of the day and they say, you know, I don't want to do this anymore. I see them in tears. And they haven't done anything but try to act in good faith.

Now, what the advent of these torts is doing to the industry is a stick, and a gun to your head. And say, "You are going to pay me and if you go defend your contact right in court, we are going to go up and we are going to get us a big decision." And, indeed, some of the cases that we are looking at now were fairly small monetary claims on hindsight, but the companies thought that they had a right to go into court and get a finding and adjudication that the contract exclusion was right without being exposed to punitive damages.

Changing Leverage

So the leverage has changed. It is a tremendous leverage thing now. And, like Mr. Cotkin said earlier, it is that so many companies now . . . you know, you say maybe we just ought to pay this claim because it is under $50,000 and even though I really don't think it is covered and look at the ramifications if we don't pay it. We are going to go up and we are going to get some jury that is going to tag us good.

Well, it shouldn't be that way. You ought to have the right, if you are going to operate

under a contract, you ought to have rights under the contract too. You ought to have the right to know in a commercial context that, under a contract, that if you do this and you charge a premium on this that this is the way that it will follow. I mean it is the whole concept of the rate structure. It is the whole concept of the deal. It is just a matter of common sense.

I am a contract man, I guess I am indoctrinated with it because I have been selling it to juries for the last 15 years. But, it seems to me, I'll play by the rules, but I want the rules set when I go in for the fight. I don't want to have a contract that says this and when the time comes, five years later, 10 years later, and the person who isn't covered under the contract, I don't think he ought to have a right to change those rules. I don't think he ought to have a right to say the contract says whatever I think it ought to say under the heady feeling it is good faith, it is fair dealing and I reasonably expect you should do this. It can't work that way.

And, you are seeing now these bizarre results that are going across the United States. It started a lot in the western states and is moving east. And so that's one of the reasons we are having a problem now. That's one of the reasons that litigation costs in your claims department are shooting through the ceiling. Because these people are fighting, and fighting and fighting to try and keep the finger in the dam.

Now, the other thing, you have plaintiffs' lawyers who have a virtual gold mine. They now can take a small claim on a title policy and, I am restricting my comments to the title industry, they can take a small claim, and they may knock the ball over the fence. They can take a $5 or $10,000 claim and say bad faith, bad faith, bad faith. And, the next thing you know, they've got you over a barrel.

So that's where it is coming from. They can try these cases and they can throw everything from the net worth of your company to the claims you have denied, the number of lawsuits you have been involved in, and basically completely obscure the issue that should be the subject of the case. So the disadvantages—there are disadvantages—now are this thing will come back: the pendulum always swings. Historically, it will swing up way too far one way and swing back, and so forth. But, eventually, some of these decisions will probably come to haunt the plaintiffs' lawyers.

The White case . . . and those of you who haven't read White vs. Western Title, I encourage you for some light reading some evening to read this 20-page opinion. It was handed down by the California Supreme Court on December 31, 1985. And I don't want to dwell on that opinion because it is long and complicated. But I will say some of the findings are rather interesting. One of the holdings of the court in California, again, was that the implied duty of good faith and fair dealing continues after the lawsuit is filed because the court reasons the contract of insurance doesn't terminate with the litigation, why should the duty of good faith, and fair dealing.

The ramifications of this are ominous—the court admitted to the jury certain settlement offers, though not all of them. It didn't let in one of the offers by the company. It could have had a major impact on the jury. But, once you become an adversary and you are defending the case, and your lawyers go out and take depositions, or he submits interrogatories, or you try to have a settlement negotiation, the plaintiff's lawyer is going to get up in the later case—they bifurcate them—that means they cut them in two.

They will try the contract claim first. You defend that. Then they sue you again and they have another jury to try this tort case. And, in the tort case then they dump in front of the jury, well, look what your lawyer did. He took ten depositions. How much did that cost? He submitted all these interrogatories. Things that the whole adversary system contemplates and you try and settle it. Well, you only offered us $10,000. Well, how come you all had $20,000 in reserve on this claim? How come you only offered us 50 per cent of your reserve? And all this comes into the jury.

As the court says, there were several opinions, concurring and dissenting opinions, as Justice Lucas said—I just want to give you a flavor of what you are dealing with and what your outside lawyers are dealing with. He says an insurer who refuses to pay its insureds on a disputed claim, is now not only at risk that its refusal will subject it to damages for breach of the covenant of good faith and fair dealing, but must also be conscious that any aspect of its conduct during litigation of the original claim of coverage may be used as significant evidence in an ensuing breach of good faith action. An insurer's unsuccessful attempts to settle during the course of initial litigation may now be presented to a second jury along with other aspects of defense.

Confronted with such evidence and unfamiliar with the vagaries of litigation, the jury will, I submit, in all likelihood regard any settlement attempts as prejudgment admission to liability and standard defense tactics as indications of the lack of good faith.

And, then, another one I think you will enjoy, is Judge Kus, who notes this in his concurring and dissenting opinion: "The problem is not so much the theory of bad faith, as its application. It seems to me that attorneys who handle policy claims against insurance companies are no longer interested in collecting on those claims but spend their wits and energies trying to maneuver the insurers into committing acts which the insureds can later trot out as evidence of bad faith."

Now, when the plaintiff does that and the plaintiff's lawyer does that, I submit to you, who is acting in bad faith? The covenant of good faith and fair dealing, if that is to be the law, and we are to imply this day-to-day standard on contracts, runs both ways. It runs both ways. And that is something I am going to point out to you when I conclude my remarks with a case example—that you need to keep aware of it. It is time to take the gun away from our heads. It is time to quit walking around like an ostrich with your head in the sand. It is time to fight back and it is time to fight back with your lawyers. It is time to fight back in the legislature. It is time to get the contract back where it needs to be. If you are going to stay in business and you are going to keep making money, there's nothing wrong with making a profit, there's nothing wrong with not going bankrupt—and it's not going to keep happening. You are going to have to start taking some affirmative action to do it.

Now, let's talk about, now that we have explored it a little bit, what it is, what the problem is. Let's first look at, just very briefly—how we identify it in our business. How do we stop ourselves from getting us in a position of being held up? Now, part of your problem is going to be not so much your big offices where your claims attorneys are in there handling claims every day, because they are usually up. All you have to do is go through one of these cases and you are up. But it is in your smaller areas, where you may have your underwriting counsel also handling some of your claims, who may not be attuned to this, who may drop the ball and subject you to a big hit. So you need to do an educational process.

Examination and Claims

The identification of problems, I've set forth in my Outline, and I have identified them really in two areas: the first area is title examination and then the second area is claims.

Insofar as what you do to avoid them, let me approach these same listings.

I want you to briefly follow me through some of the preventive methods.

Now, let's just briefly talk about underwriting because we don't get as much in that area. You are generally safer in the underwriting area.

The name of the game in tort liability in underwriting is to create abstracter liability. Now, for example, the White case in citing some prior precedent basically imposed abstracter liability on title insurance companies and refused to apply a definition that appears in your insurance code which defines abstract of title and would purport to say from the legislature, as I understand California law, and I will defer to my competent and worthy counsel on it. But it would seem to say that the title insurance company, in issuing a title commitment or a title report, is not purporting to give an absolute abstracter report to an insured, which would then create liability if you don't disclose something. I mean, are you supposed

to go back to the patent? Are you supposed to disclose everything from the patent? I mean from the patent forward. So, the way you do it in underwriting, I presume you go to the legislature. I presume that you could clarify disclaimer language in your policies. It needs to be stated where you can read it better. And, I think it is fairly clear that you can't put on your policy that you can't sue us for anything in the world, or we will never be liable for anything in the world. That wouldn't be enforceable. Nevertheless, you could have language put in your policy that would be very, very helpful if you are trying this case to a jury that would clarify it.

Now, preventive methods . . . the other thing is this, when you are closing a transaction, and your people are in there underwriting it and you are issuing the commitment, you are issuing the policy, be careful what you say. Don't make loose statements in there like there are no problems with your title or, "No! This would never happen." Or, whatever, because you would be surprised if that case goes in the slammer and, when it comes back up, you are going to be surprised as to the clarity with which that insured will remember that, not a statement, it was a representation. It was one that I relied on. It was one that gave me great comfort. It was one that, if it had not been made, I would not have even closed this transaction. Be careful what you say.

Now, let's go to claims. This is where you really get it hung. This is where it really hurts. And this is where, as Mr. Cotkin was saying earlier, this is where you rip your jeans before you even know you are in a fight.

I have listed through a combined source of articles and, incidentally, for those of you who are interested in the academic development of good faith and some of the substantive law dealing with it and its application to your industry, I have reprinted at the end of this article, an article by Mr. John Holsack.

Anyway, let's go to claims. When it is said, "don't put anything in that claim file that you aren't proud of," let me tell you how serious that is.

Get your claim department organized. Get the people who are handling these claims, shake them up. Get your diary systems, put them in place. Get your files, get a procedure in place in your offices for opening these claims.

When the claim comes in, get your reports from your agent. If you need a survey, get your survey. Get your documents of record. Get it assembled and do a claim report. Common sense. Look at it. Analyze your case. Do what we do in our office when lawsuits come in, do a suit report. Well, what you are doing is a mini-suit report and your claims attorney should go ahead and get a game plan on handling this claim from the time that claim hits the door. And then you set in a procedure for corresponding with your insured. Keep them notified. So many suits come about and they get lawyers, it is because you didn't ever tell them. They call you and you never call them back.

Implement your diary system. Now, when you are looking at your claim, I want you to think like this. Every document that is generated in the claim file, I want you to visualize it blown up into a five foot by four foot posterboard exhibit, placed on an easel in front of the jury, and by your side, with the plaintiff's lawyer, with a large red marker questioning you from the witness stand. Just like your shadow will be projected on your exhibit and you have 12 jurors sitting five feet from you looking at you and looking at this huge exhibit. It will seem many, many times larger than life in front of you. And if you have put something in that document that you cannot explain, or that you are not proud of, I assure you that you will have a very long hour to spend on the witness stand and you can take small statements out of context, if it is not true, if it is not objective, if it is not fair, and if you aren't proud of it, then don't write it.

Aggressive Legal Action

Let me point out another problem we are seeing in the industry. Not only this industry, the life industry. You turn your case over to a lawyer, okay? And then you forget about it. I'm the inside counsel. I've got me a stud lawyer out here, he's going to take the ball and run with it. You may have a problem with the lawyer you've got. What you have to do is get that lawyer to play ball just like you want your claims lawyer to. You want him to try the case and these lawsuits don't get any better with age and if you get lawyers who say we are going to roll this into a dark hole and we are the defense and we are going to stonewall it, we still have the money, don't we? Let's not press it. You better look real hard at him because I think in today's litigation climate, today's battleground, you want a lawyer who is going to aggressively go after that case. You want to put that plaintiff's lawyer to work. You want to get early depositions. You want to set the facts in concrete. You want to get it to trial. You want to make that plaintiff's lawyer, who is working it on a contingency, earn his pay.

Now, coming back. A trial lawyer, if you were to compare us to doctors, is like the surgeon. By the time the patient gets to us, he has the disease, or he has the problem. We didn't have any planning to keep him well. Now he is on the operating table. A lot of times we get him, he's fibrillating or he may be getting ready to die. Now, he is either going to die or he is going to get well, but he has to go through the operation. And, when you have a claim and you get a lawsuit, you have the problem. It is not going to get well by just looking at it. And, if it is complicated and it is thorny, you might as well make the decision and go ahead and get it done.

How many times has your lawyer avoided the problem? How many times after you got your lawyer, you write him, you say, "My God! I've written this guy four time and he hasn't written me back. Can I at least get a call? I get his bills every month. You would think he could give me a letter on what's happening on the case." What about this tort claim? You know this guy is suing us for $50 million, and he says, "Don't worry about it."

And, all of a sudden, magically, we get down to the court house and that defense lawyer says, "You know, I was up this weekend working on the case. We've got us a little problem. Maybe we better talk to that lawyer about settling." And by then you have spent your money. Your plaintiff's lawyer, much as he didn't want to, you finally forced him to get his case ready, and he is starting to feel his oats now.

So the numbers just progressively enlarge. The point is this, get a lawyer that is willing to have some energy to go out and work your case. Don't be afraid to talk to him. Don't be intimidated by him. If he won't talk to you, I don't care if he is with the biggest firm in the world, or the smallest firm in the world, if he won't talk to you and won't communicate with you, and he won't go for you and work with you, then don't be afraid, because that is going to cost you a lot of money if he is not handling your litigation and it is not progressing.

Now, I don't think in looking at this thing, the manuals that we are seeing are being subjected to discovery; I am going to point out to you how that happens. You need to have them updated and corrected. The discovery of claims files. Now what happens? The plaintiffs' bar is very organized. You will get a form complaint. I get them now. I can read them. I can just feel them by osmosis without turning the first page. I can tell you verbatim every statement that is in them.

Three weeks ago I got in three suits, all three suits within three days, in federal court in Houston. All three suits utilized the identical format. Even the causes of action were identically worded in the same chronological order. It is real easy to answer them, but that is what's happening. And name of the game is that, as soon as you file your answer, bam! You are hit with a stack of interrogatories like this: "State every claim you have denied in the last 50 years. Would you please identify each lawsuit you have been involved with and state the following: name of lawyer, type of case, where it is filed. Please state every complaint that has ever been filed against you by any regulatory agency. Please list all responses you made to all such complaints. Please identify every document generated in connection with this claim."

And then you get hit with a request for production. We want to see the entire claims file. Then you are hit 31 days later with no-

tices of deposition. They want to take all your claims people. A good plaintiffs' lawyer can get a title insurance company or any other insurance company that is not ready for this fight, and they have them some slow moving defense lawyer.

You've been out to the fair and seen those bears that go back and forth and you shoot them with a gun with a light . . . they'd be going back and forth, everybody screaming and hollering . . . and you are in a state of chaos, and the insurance company says get rid of this guy! Settle with him. That's what they want you to do. So, get your procedure in line, deal with that problem, because, if it hasn't happened to you, it is going to happen. You can just count on it.

One of the ways we defense lawyers are defusing these things is we are bifurcating. And when I say bifurcating, I mean they sue you in contract and sue you in tort. So you say, Judge, we want to try the contract case first. We don't want to take discovery, all these claims manuals, because, if we win the case, then this tort claim is out the window. Most of the judges, especially a lot of the federal judges in Texas, are clamping down on these abuses. They are saying, no, we aren't going to turn this into a zoo. We are going to try this contract case.

Now, what we are also doing, is, if you try your contract case, rather than have a separate jury come back six months later, you are much better off having the same jury come back. In other words, they answer your jury charge on the first part of your case, then get them back in. Okay, Judge, we lost. Gee, I am sorry, we tried our best but we lost. Now bring them back in and let's see the same jury listen to our tort suit.

Now that is pretty good because the jury will come back in and they will see how close it was. They will have seen all of the facts that you developed in support of your contract defense and maybe they had trouble with it. Maybe they felt bad about holding it against you, and so maybe they will equalize it out. But, most of the time, if you try a good contract case, and you have a decent contract defense, this same jury is not going to be as prone to penalize you as a jury that is impaneled a year later and they are given only these instructions: Ladies and gentlemen, the court has found that the defendant title insurance company was negligent. That they wrongfully denied a claim and now we are going to listen to some testimony on damages. So they don't have any background. That's a bifurcation.

Let me close with a horror story.

Those of you who think I am kidding about the things I have been talking about, let me close with a brief story on "This could happen to you." Those of you who think that the title insurance companies are immune from that silver bullet that is dodging by your head now and you don't even hear it, I want you to listen to this scenario.

A title insurance company I represent insured a parcel down on an island off the southern end of Texas. The island was purchased back in the '70s by a couple of developers. The agent that wrote the title policy, followed customary routine underwriting standards. Back in 1900 (we went all the way back to the Republic of Texas in this particular case), a person of questionable ethics by the name of X filed a subdivision plat out on this island. It was just an office plat and he got some old boy to draw it up and he goes down to the county and he records this subdivision plat. Plat is filed. He then goes all over the United States selling these lots on this plat. You know, $1.00, $5.00 and so forth, but you could never have located it. There was no place of beginning. This is going to be the title defect that I want to tell you about.

So, he finally sells all the property to some people and it trickles up through the years and there are some people out here, maybe 150 people, that had these deeds from the subdivision. But nobody ever heard from them. Nobody ever tried to enforce them. They were a joke. They failed because they didn't comply with the statute of frauds and so forth.

Well, our title guy looked at all this stuff. He said, "Well, these people wouldn't ever have any claim because at best, even if they had a claim, they would be barred by adverse possession. Plus the county struck this thing off the tax rolls 20 years ago. So we are going to issue the title policy and we will not except to that subdivision."

Fine. Okay. Talked about. The guys who bought it borrowed the money and they leveraged everything. They borrowed 100 per cent of this price. Bought the property and they were going to keep it a couple of years, flip it, make a million dollars. Make a lot of money.

Well, the agent told them; they said when they closed, "What about this subdivision plat?" And the agent allegedly said, "It is no problem." No problem meaning it will not be an exception to our title policy. They closed.

Well, these guys had a deal wired with the State of Texas, their contracts up there, that they were going to cut a deal on the public beaches. You all know when you try to develop land on an island like this, you have to have an agreement with the state on what are public beaches, what's wetlands, what's lowlands, what are the easements, and so forth. They had a deal cut.

But, when the state went to effectuate that deal, through a so-called friendly suit, the attorney general who handled it got to looking at this old subdivision plat and he said, "You know, I don't know what the law is. It is pretty complicated. I think we ought to add all the grantees as parties to this suit and get a trespass to try title suit to adjudicate that they don't have any interest."

Well, did you ever try to get a quitclaim deed from somebody? It can't be done. So this meant that the guys who were going to flip this stuff couldn't even pay the interest on their note, and were going to be stuck with a little bit longer lawsuit.

So, what happened? Well, you know the scenario. They couldn't pay their note. The bank foreclosed. They went to bankruptcy. They suffered rack and ruin. They became alcoholics. They got divorces. They were prominent people. You know. You name it. A lawsuit is filed. Lawsuit is pending a long time. The company's lawyer who handled this the first time approached it primarily from a contract defense viewpoint and blitzed them. I mean just machine gunned them. But there were tort claims included.

Now we took the lawsuit over in midstream and tried it for three, long, hot, grueling weeks down on the south coast of Texas. And you talk about problems. When this gentleman says that our policy reads kind of complicated, we disqualified five jurors from this south Texas border town on the grounds they couldn't speak enough English to know what a real estate contract was. They didn't have any concept what a real estate contract was, couldn't even understand it.

So we had this jury and we had three weeks of this, and these people abandoned their contract claims and sued us on three theories. They are as follows.

Number one—your agent told us that this subdivision was "no problem." And it sure was a problem and it just cost us, it was a big problem. Whatever that means.

Number two—your agent did not disclose there were quitclaims in the chain of title. Anyone knows a quitclaim ruins your ability to market the property. Now the Texas policy doesn't ensure marketability. And said because of those quitclaims, we couldn't sell the property and they displayed or tried to display manuals which discussed quitclaim deeds, and all your manuals probably said the same things. A quitclaim deed is only a chance of title and so forth and so on.

The third claim was that we had refused to defend the suit by the State of Texas (even though the matter was clearly excluded). The case was tried.

Talk about good faith and fair dealing. I tried every way in the world I could to settle that case. The damage claim that was asked was actual damages of $30 million, and they were requesting for that to be trebled to $90 million. That was the damage claim that went to this jury. It was a predominantly minority jury; $90 million and they weren't even suing on the contract of title insurance. You talk about a real fight, it was a real fight. It's fun looking back. I'll tell you now I won the case, but looking back it wasn't any fun going through. It wasn't any fun at all.

In this case, I told you earlier, we countersued the plaintiffs. We figured we may

go down, but we are not going down without a fight. We sued them for our attorneys fees under this Texas insurance code statute. They said that we acted in bad faith. We said, no, you brought this to harass us. To hold the gun to our head. We are not knuckling. We want all of our attorneys fees back. This jury—one poor lady—I guess she learned every way you can to sleep in a jury seat.

But we had the contracts blown up and the real estate contracts, and we were trying to explain what marketability was and the contract was, and the exhibits were everywhere—huge exhibits.

But the plaintiffs cried. Grown men crying. They cried up there and said this was rack and ruin and it was just horrible. That jury saw through it. That jury, and we tried it on a law and order theme, realized that these people had a contract. They are not suing on the contract. I displayed it very openly to that jury in saying, why would you sue for $90 million if you weren't trying to stick us up? That jury came back and they—unanimously in answering 40 some odd issues—blew the plaintiffs away. Answered every single issue against the plaintiffs. Gave them zero damages.

Then the jury went on in the last three issues, found that the suit was brought in bad faith for the purpose of harassment against an insurance company, and awarded the title insurance company and its agent $450,000 in attorneys fees that were accrued over seven years. That judgment has now been abstracted and we are seeking collection against the plaintiffs.

So, there is some good news out there and, if you want to avoid seeing guys like me, you can avoid it by using some common sense, by opening your eyes, and by practicing some preventive medicine.

But I will leave with this comment, and it is that you are in a fight now. You are in a war now and you are not going to get away from this thing by ducking your heads and running from it. You haven't done anything wrong. And there are ways that you need to aggressively fight the problem. Don't be afraid of a fight. You know, it is kind of like the short, fat kid. He didn't want to fight but if you stick him in a corner, and you corner him where he's got to fight, well, he's a pretty mean guy to come out with. It is time that we started attacking this problem, recognizing it, dealing with it preventively and hopefully getting some relief in the legislature.

Marvin C. Bowling, Jr.

In addition to having good counsel to represent us in suits, it is also important that our title insurance contract be clear, concise, and comprehensive so that contractual claims can be handled on a proper basis and don't result in extra-contractual claims.

Because of the language in our policy, which could be improved, and because of the types of cases that have just been discussed, the ALTA Board of Governors asked the Title Insurance Forms Committee to review all of the policy forms that are promulgated by the American land Title Association, and consider as necessary the adoption of newly-worded forms.

The committee has been meeting over the past three years, and has worked diligently to accomplish this change. They have sent out to you drafts of proposed forms of title insurance policies, which we believe meet these challenges for clear and concise language and which will provide for us the type of coverage and defenses we need.

The chairman of that Committee is Oscar Beasley. As you know, Oscar has worked long and hard on the Forms Committee, and he is now going to report to you the changes in those forms.

Oscar Beasley

The committee was assigned the task of improving language, clarifying and changing the language where necessary, so that the policy itself would more represent what was involved, both from the customer's use from the company's and the court's understanding of the coverages. There are some basic changes in the policy.

There have been at least three drafts sent out to the membership. There have been three or four other drafts given to other groups. We have tried to keep people very much aware of what has been going on, the circumstances surrounding the changes and the ideas that were being presented. We were given comments at various times in the past years. Each comment that came in was taken by the committee. First, they were reviewed by a subcommittee, since the group was broken down into subcommittees to handle the various areas like the insuring clauses, the schedules, the exclusions and the conditions and stipulations.

Once those comments were reviewed by the individual subcommittees, each comment was then taken back to the full Committee and, in a full meeting, was again reviewed. Every comment was given a full hearing on two different occasions, and in some instances they would be given a hearing on additional occasions at a later time. We appreciate very much the comments which we received. The comments have in many respects been reflected in language that has been used in the policy. Some of the coverages have been adjusted to go with some of the comments.

Additionally, we have had meetings with many of the representatives of the lender and the life counsel and discussed proposals with them. We have had five separate meetings with Fannie Mae, and some of Fannie Mae's representatives have appeared at other times with us. We have been over coverages with each of these people and, recently, we met again with some lender representatives. We again went over some of the objections which they seemed to have to the policy and again adjusted in some areas as they suggested. Most of the suggestions were discrepancies in the understanding of the language which we used when compared to the 1970 policy or as compared to what someone read, which seemed to say something different than it did. We have tried to accommodate everyone we can, insofar as these changes are concerned. We have still been advised that some people don't like it. I have had some people say you are giving too much, and then I have had the next crowd come in and say you are not giving enough. Maybe, if that's the situation, we have compromised ourselves pretty well in the middle.

Provisions Reviewed

Let's go through some of the provisions. One of the major actions of the committee was to place various types of coverages where the coverages belong. Take the exclusions that had previously appeared within the insuring clauses, and move them to the exclusions areas, rather than have exclusions in one part where they fit with the coverage and exclusions in another part where they didn't fit with exactly the same coverage. We have tried to adjust those coverages and exclusions. Consequently, in the proposed policy, the actual insuring clauses include merely insuring clauses and do not include any of the former exclusions which appeared on the first page. As an example, the exclusion for usury or consumer credit protection has been taken from the face sheet, the insuring clauses, and has been placed in the exclusions.

If you go to the mechanics lien clause, what has been done is to give the affirmative statement concerning mechanics' liens and then add the exclusion which previously appeared in the insuring clause. Otherwise, there are very few changes in the insuring clauses.

However, there is a substantial change in the way the policy is set up. The opening paragraph of the insuring clauses formerly contained a provision for the payment of attorney fees. This created confusion and caused ambiguity. The attorney's fee clause has now been moved to the end of the insuring clauses.

The exclusions from coverage have to be compared as they are here with the exclusions that were amended and put in the policy in 1984. The former exclusions in the 1970 policy were amended in 1984.

As you will recall, prior to 1984, we had excluded from coverage not only eminent do-

main but also the exercise of police power. Environmental matters were and are considered as police power. As a matter of fact, there is a decision in Massachusetts that holds the exercise of environmental control is a police power activity. The policy has always excluded police power activity. The 1984 exclusion stated that, if there was notice of an exercise of record, we would show it.

We have not changed the exclusions in two ways. In 1984 and the way the exclusion was drafted, we put in a special definition of public records which had applicability only to the policy power and use provision of paragraph number one of the exclusions.

In 1986, we have removed that definition. Put in a new definition of public records in the policy, and the way this exclusive is now drafted, title companies, would show those matters, which involved either the lien on the property for environmental or other matters, excluded in exclusion 1, or for a notice of an exercise of police power concerning an environmental or use matter that appear in the public records

"Public records" has now been tightly defined and limited to the constructive notice of matters set forth in accord with the recording statutes under state law. Previously, the policy definition was a more open definition and, although we always thought it meant the records established in accordance with the recording statues, there were courts who have misread our intentions and given another definition, which (included records) like the *Federal Register*, or those of the Bureau of Land Management. We feel that this interpretation is not possible now.

In addition in the exclusions in paragraph 3, we have reworded 3(b) to add some clarity to it. And, have also gone a little bit further in 3(e) by requiring that, even in a lenders policy, there must be a value paid in order for there to be coverage under the policy. The remaining exclusion, number 4, is the previous doing business law exclusion, but it now applies not only to the original insured but to any other insured who is an insured claimant under the policy.

Paragraph number 5 is the former usury paragraph and paragraph number 6 is the former exclusion from mechanics' lien coverage that appeared in the insuring clauses.

One of the things that this accomplishes is to eliminate those incidents that have occurred where a mechanics' lien has been filed 10 years after the loan has been insured. It has absolutely nothing to do with the original insurance, even though it was a construction loan that was insured, it was not done by reason of any funds that came from the original loan and therefore was a post-policy event. Being a post-policy event, there should have been no coverage. All companies have over the years been requested to defend the priority of the loan, even though there is a post-policy event. This language will terminate that obligation, or supposed-to-have-been obligation, to defend.

The basic change in Schedule A is the use of the word "title to the estate," since the title to the estate is what is being insured in the policy.

Schedule B has a change in it. It is a change only for clarity. It removes an ambiguity and is in the heading of Schedule B. The heading paragraph, lead-in paragraph, now indicates not only do we not insure against the items in Schedule B, we also do not insure costs or attorney fees for defending items listed in Schedule B. It would seem clear that, if you didn't have any payment obligation for loss and damage, you should not have had a payment obligation for defense. Unfortunately, all insureds don't seem to understand that.

The remainder of Schedule B has basically stayed the same.

Conditions—Stipulations Changed

The Conditions and Stipulations are substantially change. The first change is in paragraph 1(a), and that change is a change in the definition of insured and requires that, for an insured claimant to have a right to coverage under the policy, they must have acquired the loan through assignment by not having knowledge of the existence of a defect.

One of the problems that we have faced in the past is that, if you had a fraudulent lender, for example, a lender who knew there was an equitable lien of some sort in existence and they ignored its existence and then loaned money on a mortgage, they do not have priority over the equitable lien. The old policy would have covered any transferee (assignee), even though they knew of the existence of fraud, although the original insured would not have been covered. This definition has been, we believe, tightened down and we do not believe it creates a major problem for any lender.

One of the problems that does arise and the lenders have raised as a question, is what the word "knowledge" means. Well, we have defined knowledge a little differently. The word known is added to the word, knowledge, because there are several places in the policy that the word known appears and both are defined to mean actual knowledge, not constructive knowledge. Matters in constructive knowledge are those things a person would automatically have by reason of the recording acts, or notice which may be imputed to insured by reason of public records.

So, the public records definition removes any problem of actual knowledge. Also, we have added the old definition, "By reason of public records as defined in this policy or other records which impart constructive notice of matters affecting the land." One of our main theories in doing this is not to be bound by what is in the *Federal Register* as constructive notice.

One of the problems the lenders and life counsel had was that they didn't want to be bound by actual notice if they hadn't known them. If they had known them, then they are bound by the actual notice, but just because something exists in a 12-million page government document does not mean that everybody in the world knows about it.

Another change is in paragraph F. This is the redefined public records definition. "Records established under state statutes at date of policy for the purpose of imparting constructive notice of matters relating to real property, to purchasers for value without knowledge." Virtually all types of recording statutes, at least three out of the four and the fourth one is not used that often, require that there be some element of bona fide purchaser or bona fide mortgagee involved.

Constructive notice under the policy therefore is tied to those recording statutes that require a bona fide statute, where any coverage or exclusion tied to a constructive notice, as an example, toxic waste, and evidence of a lien or violation is recorded in the public records as defined, then the company would have to show it in Schedule B as an item. If it happens as unfortunately many situations occur, and there is no recording except in the hip pocket of some bureaucrat hiding in the back room of an environmental office, we are not required to go and look to see what his hip pocket carries. However, we are required, if we find a recording in the public records as defined, to report it. That doesn't mean we are giving coverage, it means we are showing that there is a matter of public record, which it is our business to show.

Another change is in 1(g). Our original revised definition of marketability concerned matters insured in the insuring clauses. Because of our discussions with lender and life counsel, the definition was changed as we now have it. The definition pertains to an alleged or apparent defect with affects the title so that buyer or mortgagee will not have to perform. We think the definition is good, and will prevent some of the past problems.

In Conditions and Stipulations, you will find many changes. The changes in continuance of insurance are minimal, although there is a different definition in the amount of insurance in 2 c.

This section has nothing to do with actual payment, but in the section which discusses the amount of insurance under the lenders policy for the lender after they acquire title. There has been a common phrase used in the industry for many years, an unfortunate common phrase because it is not true, that at the time of a foreclosure a lender obtains an owner's title policy, automatically. By this, I mean that some of our own people feel, when the lender forecloses, the coverages given them are owners coverages. Many lenders blindly

believe that, the moment they foreclose, they now have an owners policy. They do not have an owners policy. What they have is a lenders policy which is similar to owners coverages. And, the issue that must be determined is what is the amount of insurance after foreclosure.

In 2C, which incidentally is a re-write in some sense of the old A and B, we have listed the elements for determination and we have added for the lenders benefit that the top limit is the amount stated in the policy. However, if it is less than the original full insured because the loan has been reduced below, the principal indebtedness, which obviously includes the interest thereon, expenses of foreclosure, amounts advanced pursuant to insured mortgage and a new item which was not there before has been added—reasonable amounts expended to prevent deterioration of improvements. The lenders feel that that amount is an additional amount which should be insured because their mortgages provide that it becomes a part of the principal indebtedness.

There have been some substantial reworkings of the next paragraph—3, 4, and 5. One of the things that we have done, is to tighten up our ability to (1) obtain notice (2) properly defend the case, and (3) to select the counsel to defend the case. We have also clarified the duties of cooperation between the insurance company and the insured.

Additionally, paragraph 5 is a requirement that, prior to our obligation to pay, the lenders must provide us with a proof of loss which contains facts of claim and a determination of the amount of claim and the basis for the amount. This had been partially required in the old policy but now it is set out with more clarity.

Timing Clarification

We had some questions from lenders concerning the timing involved for recording claims. They felt language did not say what we thought it said, so we accepted changes clarifying that paragraph 5, and the proof required thereunder, follows the giving of notice in 3 and the actions in 4, as soon, therefore, as the lender has the knowledge of the facts, they must give them to us.

That would not prevent us from defending the action where notice is given under paragraph 3.

Paragraph 6 gives us rights which we are more properly stated to settle with third parties and thereby eliminate the claim. The language in paragraphs, 6 and 7, gives us the right with reasonable diligence to clear the title. Reasonable diligence provides us time to clear up the claim, and yet not permit us to sit back for 10 years and say, Mr. Lender, we are thinking about it. The companies still will have to operate with reasonable diligence to accomplish clearing of the defect.

Paragraph 8 talks about the things that used to be talked in some of the paragraphs concerning ability to perform, reasonable diligence to perform, our ability to take it to a final determination or appeal, and at the end of page 8, we have added some additional matters that used to be in 8(b) concerning liability and permitting the amounts expended to prevent deterioration to be included.

The reduction of insurance, in paragraph 9, has been changed to a certain extent.

There have been some ideas expressed over the years that the policy is actually two separate policies. One policy was for the purpose of indemnity for loss or damage for title matters, and the other was for defense. The courts have not been kind in the interpretation of the defined coverage and have found that the obligation to defend is greater than the obligation to indemnify.

The policy has now been amended to say what we have always thought it meant. That is, that if a full payment has been made on the policy, that is, the amount of insurance purchased has been fully paid, in accordance with the terms of the policy, you have no obligation to indemnify because there is nothing left to pay under a policy. The obligation to defend no longer exists and it has been generally believed through the industry that, once the policy was fully paid—that is, every possible amount of loss or damage that could be paid under the amount of the insurance has been paid, the policy no longer provides for default. Consequently, you will find that this has now been set forth.

The liability and noncumulative provisions have not been greatly changed. Payment of loss has not been changed.

Subrogation Changes

The subrogation paragraphs have been changed in two or three ways. The changes made are both for clarity and substance in part. As an example, suppose that a bonding company, rather than pay off the mechanics' liens as the bonding company is required to do by its contract, buys the loan from the lender, and then requires the title company to pay off the lien.

The policy is now designed so that other insurers, like the bonding company who buys the loan, will not be an insured under the policy, and that the title policy is on an equal parity with any other insurance that might be available.

We have again the right to terminate our coverage when the loan has been paid, and we also have the right to all of the collateral taken by the lender, all of the guarantees given, that is any the lender had to guarantee or pay his loan, belong to the title company. The collateral would not come to the title company in the transaction where the lender still had a portion of his debt unpaid at the time the policy has paid off. The company would not then have the right to any of the subrogation until such time as the lender was able to collect its full debt.

This might happen where there is a cross-collateral mortgage, where you have two mortgages collateralled together or you have two sets of collateral. This is not a new provision, it is only a clarity provision.

Possibly the most controversial issue that has arisen in the new policy is paragraph 13.

Throughout the years, the industry has had many bad court decisions. Those decisions have arisen for several reasons. One reason has been the court's interpretation of the title policy. A second reason is the slowness with which the courts operate. A court in Los Angeles County may take as long as three years to bring a case to trial.

Those costs for attorneys fees expended by the companies in relationship to the amount paid for loss or damage by the companies is somewhere between 35 and 45 per cent of total claims costs. A substantial amount of the costs for attorney fees are caused by third parties who sue the insured, and a substantial portion arises from the insured suing the insurance company.

Arbitration Clause Included

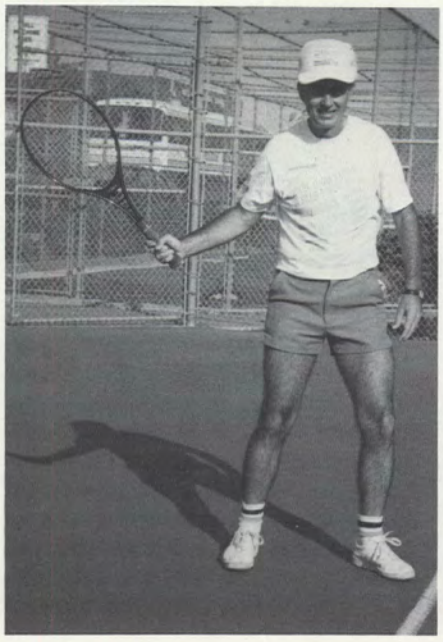
Many of the companies in the last three or four years have begun to use arbitration as a tool of settlement. Arbitration is an assistance in settling claims because arbitration can occur far more rapidly. The Forms Committee, in drafting this policy, has at the request of many companies, included an arbitration clause. The clause calls for a binding arbitration, but only becomes effective in the event, and only in the event, that it is requested by the insured or company. Please understand that the arbitration, as it has been established in the policy, is with and under the control of the American Arbitration Association. The American Arbitration Association has offices throughout the country and each of these offices has the ability to handle and arbitrate matters.

The rules for arbitration are called the "Title Insurance Arbitration Rules," and are available to anyone who wants copies. These rules were adopted from the triple A's commercial arbitration rules, but have been amended and changed for title insurance arbitration.

When the rules are adopted, then the American Arbitration Association takes over all arbitration matters. The ALTA will no longer have any rights in the arbitration. Any company, any lender, or other group can request that be made to the panel of arbitrators by the American Arbitration Association.

All arbitrators must provide biographical statements concerning themselves. They will be reviewed by the AAA before they go on the panel. The arbitration is not a title company arbitration. It's an American Arbitration Association's arbitration.


AMERICAN LAND TITLE ASSOCIATION




Happy
Birthday

When arbitration is requested, a list of arbitrators will be sent to each side. The list will have on it names of people on the panel, along with their biographies. The parties to the arbitration may select anyone of that group, rate the group or deny all that group. If they select one out of that group, it goes back to the triple A. The triple A compares it with the selection made by the other side; if they are the same, then that is the arbitrator. If not, the AAA will send out a second list. If no selection is made, then the AAA will appoint an arbitrator.

The arbitration will proceed forward not unlike a court trial, except that there will be limitations on time. There will not be a limitation on discovery, but the discovery will be governed by the rules and in accordance with the Arbitration determination.

Once the judgment is entered by the arbitrators, it is the final judgment. It is not appealable except for the caprice or improper action of the arbitrator, or for jurisdictional matters.

We have heard many criticisms of arbitration, including the problem that you do not have a legally trained lawyer-judge handling the arbitration hearing, and you do not have the ability to have a jury.

I am also told one of the problems is the arbitrators seem to try to arbitrate matters and maybe give each side a little bit and perhaps not do exactly what should be done. Somehow, that rings awfully true for many judges who have been handling cases, and it certainly is the same problem with juries.

Will this work? Certainly. It will work. Will it be better? Only time will tell. Will it be cheaper? At least from a cost standpoint, probably yes. If arbitration is requested, costs must be paid by both parties to the arbitration.

There is authority, if it is not inconsistent with the law, to award attorney fees and other costs. All matters arising out of the transaction can be arbitrated. The paragraph reads: "arbitral matters include, but are not limited to, any controversy or claim between the company and the insured arising out of or relating to this policy, any service of the company in connection with this issuance of the, or a breach of the policy provisions, or other obligation." This would include, without question, matters of bad faith, coverage issues and other problems arising out of the transaction.

We feel that arbitration is a valid provision to have in the policy and that it is worthy of a try. Only when one of the parties requests arbitration will it be used.

The Owners Policy

Let's look now for a moment at the owners policy. As I have mentioned, five different policies are being redrafted. The owners policy parrots the lenders policy in those areas where owners coverage and lenders coverage do not differ. On the first page, insuring clauses, there is no difference in the first four clauses and the indemnity coverage is separated from the defense coverage.

In the exclusions from coverage, there are exclusions ordinarily found in the owners policy which differ from the lenders policy. Otherwise, the exclusions are the same. The change in Schedule A again is the word title. Schedule B has the same provision involved in it concerning attorney fees.

A major change in the Conditions and Stipulations is the change in the definition of knowledge, public records and unmarketability previously discussed.

The actual change of substance in the owners policy, which differs from the lenders policy, will be found in paragraph 7(B).

This clause is an 80 per cent co-insurance clause, very similar to the co-insurance clause in the New York policy. We feel one of the requirements for this policy to be in New York would be that this co-insurance clause be included but we also feel that, in today's market, this co-insurance clause is very important to the policies. It only applies in the two situations which are the most grievous.

One is for an insured who asks for insurance coverage in an amount which does not equal the value of the property. It is not at all uncommon for an insured to ask for, as an example, $1 million coverage knowing that property is worth $10 million. This type of transaction would cause a problem since all losses are up to the face amount of the policy.

Unless you are specifically willing to give that kind of coverage, that is insure for less than full value, the co-insurance clause would come into effect. The result would be, if it is a $10 million piece of property, he only obtains $1 million in coverage, that a loss would be paid one tenth by the company and nine tenths by the insured. If they obtained full value coverage, or 80 per cent of value coverage, co-insurance would not be applicable.

The other situation that occurs so frequently, is where an owner pays a million dollars for the property, obtain a million dollar policy and then makes improvements for $15 million. The value of the property is substantially higher than the amount of the policy. The same co-insurance would be applicable in this situation.

Where improvements are made on the property, additional title insurance must be obtained. These are the only two situations where the co-insurance clause would be effected.

The owners policy includes the arbitration provision, same as in the lenders policy.

The other policies—the construction loan, the lenders leasehold, and the owners leasehold policy—track the changes we have discussed, with the exception that there are valuation provisions from the former leasehold policies incorporated. In the construction loan policy, there is no coverage for mechanics' liens or subsequent advances unless there is an endorsement given.

The Title Insurance Arbitration Rules of the American Arbitration Association are the rules that we have discussed, and govern the way the arbitration will work. The rules also limit the arbitrator action to those rights and duties within the title policy. The arbitration must be based upon these rules and nothing else. The arbitration can't go outside the jurisdiction for law. As an example, if the policy is issued on property in California, they can't run out to New Mexico and pick the New Mexico law because they like it better. It has to be decided by California law.

I won't take time to go through these rules, except to say that the rules as you see them are completed. The only thing not included is the schedule of fees and that is a matter that is still being discussed. The actual arbitration, like a court, has additional fees that would be required to be paid.

From my standpoint, I personally think the Association owes a tremendous debt of gratitude to the members of the Forms Committee, who have worked so long and so diligently on these forms.

The committee has not only researched the law throughout the country, but also has brought into this policy the expertise of the companies and the individuals involved.

In addition to that, I would like to extend an added thanks to Bob Rayburn, Bob Haines, Bob Rove, and to Chris Papazickos, who did the tremendous job of setting up and working out the arbitration rules by working out the arbitration rules by working with the American Arbitration Association. They have done a superb job and they should be commended in particular. The Forms Committee for policy revision included three people from the California Land Title Association and three people from the New York State Land Title Association; each of these associations have separate policies of their own. They were brought in to try and help coordinate among the Associations and to assist us in the work on these policies.

It is hoped that we will have one type of ALTA policy in use for the entire country.

Southern Title Begins Operations in Colorado

Southern Title Guaranty Co., Inc., Austin, Texas, has expanded into Colorado through alliance with two title companies in Denver, according to an announcement from the organization.

The new Denver division consists of two locally-owned abstract companies, Security Title Guaranty Company and Title America, who are now licensed title agents and representatives for Southern Title Guaranty, it was reported by Dave Ginger, executive vice president-marketing for the Texas underwriter company.

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signed off under the contract."

The vendor may tell you that you chose incompatible equipment to go with the software. You say, "Well, the salesman said it was okay." The vendor's reply? "Well, he wasn't authorized to say that."

"Your staff is incompetent." That's one of their favorites. "Your people don't know what they are doing." Well, Mr. Vendor, you trained them. However, you, the buyer, should have stated in the contract that the vendor trained them and is responsible.

If you have the source code, he may accuse you of having tampered with the code.

What things can go wrong? I've already mentioned the buggy software. You also can have a system that simply runs too slow. It's too small to fit your needs. It doesn't expand as your business expands. It might lack mandatory features I mentioned before. You can have incompetent or untrained people who can't keep the system going. You can have vendors who do not wish to continue to maintain and develop the product. You have to make sure, when you are dealing with a software vendor, that he is going to stay in that business for a while. In other words, you don't want to deal with a vendor who's been doing real estate closing software and now has gone into accounting software or into inventory control software, and that's the future of his company. He's selling off his leftover real estate software and devoting his attention to the new field.

A year from now, when the new forms come out of the federal government, or the new tax pro-ration laws come down from your state legislator and you call him, he's no longer going to have the programmer on his staff who wrote in Cobol and who worked on that system for NCR Computers. He's going to have on his staff the guy who writes accounting software in Basic and is working on IBM-PCs, or whatever. He isn't going to want to continue to develop the real estate closing software product as changes come along. And you don't want a software product that they won't continue to develop.

What can happen to your business if you have software problems and hardware problems? Well, you of course can have data that can't be relied on. You can have customer payments that get lost.

I defended a vendor who sold a system up in Montana. The vendor had sold software to a chain of credit unions and collection agencies, and the problems were in the collection agencies' software. It had caused notices to go out to people for money due when they did not owe money. It caused notices to go out to people for a debt of $50, who really owed $900. And then, when they paid the $50, the computer would credit them in full and send them a notice that they had paid in full. Of course, if the agency found out six months later that the computer made a mistake, its chances of going back and getting the other $850 were nil. The software vendor was sued for a large amount. Fortunately, we got the vendor out of that situation very, very cheaply. But it can cause enormous havoc in a business like that.

I defended one where a police department had a system that was creating problems in checking for stolen vehicles. The policeman would stop someone on the highway and want to find out whether or not the car was stolen. Because of compatibility problems between the police department's computer system and the FBI's computer system, they had trouble with response time, getting the message back as to whether or not the car was stolen. Meanwhile, they have someone stopped out on the highway. We dealt with that one.

We dealt with a lot of others in other environments, but you can also have the same kind of problems in the title industry. You can lose customers. You can lose employees.

Employees who are trying to remedy severe computer problems soon get fed up. It creates a real morale problem in your own office if you have a bad situation. You can be out your system costs, your maintenance costs, your site preparation costs, your acceptance test costs, your personnel training costs, your lost management time, your financing costs, your computer supplies costs. You can be out a lot of expense.

Positive Suggestions

So far, I've told you all the bad things. I told you what can go wrong and how the contracts are bad and so forth but, what about the positive side? What about the plus side? What can you do about it?

What can you do about it when the salesman comes in the door? Well, start by getting the contract form on the table. He's going to give you the slick brochures, and you say, "Oh, by the way, Mr. Smith, will you please also leave a copy of your contract form? Because I'm comparing contract forms from the various vendors at the same time I'm comparing features and functions of their systems." In other words, you want to get in there before vendor selection is made, before any commitment is made, either psychological or otherwise. You want to start comparing contract forms.

Now I'm not going to say for the moment that this is the most important consideration. Obviously, you're going to need to look at the software and the reputation of the vendor, the financial strength of the vendor, and all these other considerations. But legal considerations are definitely considerations. So you want to get that form on the table in the very beginning, and you will find that is the time when they are most pliable to deal with, because they know they haven't closed the sale yet.

Hopefully, you want to talk to an attorney who has some familiarity with this area, if in fact you are going to be investing a considerable amount of money in this, or if this system will be important to your business. You may or may not want to hire someone as a consultant, who knows a lot about software as it relates to the title industry, if you are in fact buying closing software for your local title office. There again, I realize you have to weigh the fee that you might have to incur against the cost of the software and the system and the importance of the system to you.

There are also other tactics that can be considered. You may want to find out when the salesman's quarter ends and when he really needs to make sales. Turn the time ploy around on him by negotiating just before the end of the quarter, when he's trying to make a sales quota.

Avoid gentlemen's agreements. Avoid side agreements. Avoid letters of intent in the early stages of negotiations, anything that creates even a psychological commitment to a single vendor. Negotiate all of your contracts at once. If he has a maintenance contract, a services contract, a hardware contract, and you're dealing with a single vendor, say, "I want to review all of those. Let's look at all of them. Let's sit down and talk about all of them at once."

After you've gotten all the slick brochures and narrowed it down to two or three vendors, you're going to start talking contract with them, so you want to make priority assignments or your "want list" and develop some backup positions. Usually, you tell the vendor, as your starting position, "I want you to get rid of all these limitations on your liability," and he says, "No way!" That's where you start. You say, "Okay, now, what I want to talk about is . . . ," and you have backup positions. Actually, many times you can do a lot with backup positions.

You want to come to the table, as I said earlier, talking results and not things. You want to specifically address response times. Address up-time percentages. In other words, "I want to know how much time out of a month this software will be available to me. I want certain guarantees that I'm going to have a certain amount of what they call 'up' time available to me. I want you sir, to do a survey of my needs and put them in writing, and I want you, sir, to guarantee that this machine will meet my needs, and I want that in the contract."

An interesting ploy I've used in the past is, at that point in time, pull out those slick brochures, and where it says that these systems will meet your individual need and all that, you ask, "Now, that's true, isn't it? I mean, that isn't a lie, it's true what you put in your brochure."

He tells you it's true, and you say, "Good, let's put it in the contract," or, "Let's attach

that brochure to the contract and just call it an exhibit and say it's part of the contract, part of what you promised me." That's also a ploy. And it is very difficult for them to turn around and say, "Well, it is true, but you know I can't say it in the contract." And, of course, you want to get it as specific as possible. If you can, you want to tie it into a list of what your wants are.

You want to talk about run times. You want to talk about volumes. You want to talk about changes in the software to meet changing laws and all the things we've dealt with before. You want him to take the responsibility basically that the machine will meet your needs in your environment, with your air conditioning, your peripherals, your other software. You want him to take on those liabilities or those guarantees and not have them back on you.

Another thing that's very important is the acceptance test. The acceptance test most vendors devise would be similar, again, to using the buying-a-car analogy, to approaching a used car salesman and saying, "Okay, I want to buy this car, but I want to test it first," and the salesman says fine, and he sticks the key in, he turns it, it starts, he turns the key off, and says, "There, now give me your money." You'd say, "Now, wait a minute. I don't think that's a sufficient test yet. I don't know whether this car will go over 30 miles an hour, whether it will overheat if I drive it 35 miles an hour for 30 minutes straight, or whether the windshield wipers work, or the horn works, etc. etc. I want to drive it, to put it through its paces. I want to drive it like I would normally drive, do everything with it that I normally do with an automobile, to at least try to get a better fix on whether or not this car is going to meet my needs."

By analogy, you want to do the same thing with a computer system. You want to have a well designed acceptance test.

By the way, I talked with several title industry vendors to get more specific information on the industry and how vendors are relating to the industry. I'm not from the title industry but, being a lawyer, I close real estate deals, like most lawyers, so I know a bit about the industry. Basically, I wanted to know more about the title industry as related to the software. One of the vendors provided acceptance test suggestions for a buyer. He suggested that you test real estate closing software by taking the most complex mortgage closing you can find, put in every variable you can think of, and run it through. Then run it through again and again, add and subtract all of the variables, and make sure it will meet your needs. Do all the prorations and everything the way you do them in your state. Identify anything that it cannot do and contract for changes. Make sure it will meet peak loads. In other words, it may add two and two and come up with four, but will it do that when you are running through a volume?

More Warranties

You want to push for warranties in the contract, some of which I've already mentioned. Here are some more you might want to consider getting in there.

You want a warranty that the product, equipment and systems shall be fit for the particular purpose for which they are to be used.

You want a warranty that the product, equipment and systems shall be free of defects in material and workmanship.

You want a warranty that the product, equipment and systems shall be in good operating condition.

You want a warranty as to the compatibility of components and their interchangeability; that you can interchange components for those that are here.

You want a warranty as to the completeness and suitability of the configuration you're using or plan to use.

You want a warranty that the product, equipment and systems shall meet or exceed certain functional specifications. Now that's one they'll usually give you, of course. But those specifications are low standards.

You want a warranty as to upgrades for conversions, that the product may be upgraded or converted to another product.

You want a warranty as to proprietary rights, property rights and distribution rights. They do normally have that in the form before you start negotiating but, if it isn't there, it should be.

You want a warranty that the software releases and engineering changes will not degrade performance in the future. In other words, you may have a software system today that works well, but it may be poorly designed. We have something in the software field called "spaghetti code," and I learned to program computers back when that's how it was taught. You wrote software like you might write a novel, where you start at the beginning and write it all the way through to the end, and if you pull a character out of chapter 11, all of a sudden you have got to go over and change chapter 2, because the character is there too. You have to go to chapter 15 and change that chapter. You had that character all the way through the novel.

Today, they write software like a book of short stories, where it's broken up into single, individual units. They can interact with each other but it's modularized, as they call it. A well designed software system should be modularized, which means that, if you want to change something, you can pull out this piece, change it, test it separately, and slide that piece back in again.

It is, again by analogy, a book of short stories. If I write a book of short stories and decide I really don't like story number 8, I can pull it out, change it, stick it back in, and I haven't affected any of the other short stories. Whereas, with a novel, if I don't like chapter 8 and I change it, I may have to change a lot of other things.

The problem with spaghetti code is that it may work fine today but, when you need to change it in the future, suddenly you go through all the birthing pains you had when you originally wrote the software, and you can go through development problems. You can go through buggy problems. You can go through all kinds of problems that are created by the necessary changes downfield. So you want a warranty that that won't happen as you do these changes.

You want a warranty that the software is a current release level, meaning the vendor's latest version.

If you are buying used equipment, you want a warranty that the hardware has all the latest engineering changes installed.

There is a warranty as to your environmental conditions. It meets the site specifications. Again, there is the "Most Favored Nations" warranty. I can go on with others, but those are the main ones.

Let me provide a couple of other suggestions in dealing particularly with the small vendor.

Try to make sure your vendor is going to be in this business for a while. As I told you, this is very important, particularly in the software field. We all know IBM is going to be here next month, next year. But, how about your software vendor, is he going to be in this business and with good competent people in a year? Well, one way you can do it, of course, is deal with a big vendor that you think is financially strong and so forth, but the small vendor may say he gives better personal service, and that type of thing. So, what do you do when you are dealing with a small vendor and you are afraid he might go bankrupt, or might go out of business, or is going to drop over with a heart attack, and he's the only one who knows this code? Well, one thing you can try to do is get your hands on the source code. Now, the vendor is probably going to say no to that.

Probably a lot of people don't know what source code versus object code is. Source code, is you looked at it, would look like a series of mathematical computations. It's a combination of letters, numbers, and little signs like parentheses. It looks vaguely like algebra. Source code is what a programmer writes and understands. It's what a human can understand. If the programmer wants to go in and change something, he can read it. It's like a foreign language to those who don't program but, to him, it's intelligible.

Then the machine takes that and converts it over to what we call object code, and that's a little bunch of ones and zeroes that go all the way across the page. Humans can't read that. Machines can, but humans can't, and that is in fact what you get when you go down to Radio

Shack or someplace else and buy a diskette. They don't give you a diskette with their source code on it because, if they did, you could take it home, put it on your machine, call up a list command and list out their source code. Once you have it, you could give it to your buddy or keep changing it yourself, or you might even start selling it illegally. So they don't want you to have it. They want you to have the object code only, and that's what is on the disk. That's what you can't change, because programmers can't read it.

So, when you get a diskette, probably all you are going to have is the object code. You may want to tell the small vendor, "Look, I know you're a good vendor, but let's face facts. You're small and I'm not sure whether you are going to be in this business a year from now, or two years from now, when I need to make changes to this system. So, how about giving me the source code?"

He'll probably say, "No way," and he has a legitimate point there. But, some of them will give it to you. If they will give it to you, let them. Stick it in your safe and you have an extra copy of it. But most of them will say no, and that's a reasonable position. That's not just a bad position on their part.

So, your backup position is to tell him you want what we call a "source code escrow." Tell him you want to escrow his source code with some neutral party and, if he's a good vendor, he may have already established a source code escrow because someone may have already told him about it. But, if someone hasn't, someone should. It's a good sales tool. Because he can go to the next business and say, "I may drop over from a heart attack next week or something, and you won't have my source code and you can't bring in another programmer to work on the program. But, don't worry about it, because I have established an escrow with the First National Bank of Toledo, or wherever, and they have access to it. If I die, they immediately give you a copy. If I go out of business, they give you a copy."

We have source code escrow contracts. There are some standard forms around, and they are quite a good idea when you are dealing with a small vendor.

User Suggestions

Some of the suggestions that were made by the systems vendors in the title industry are from the user's point of view. One of them, and I think it's a very good suggestion, is that you make sure the person who wrote the software is not only knowledgeable in the software industry, but also in the title industry. In other words, you have to have somebody coming into that shop of yours who talks your language, and can see your problems, who knows what you are dealing with, and not just somebody who may be a great software guru who knows all about software languages and all that, but doesn't know anything about the title business. I think that's a very valid suggestion. That carries over to any other field, not just the title field.

One of the vendors pointed out, and I think this is also a very good suggestion, that you want to make sure you are going to have local maintenance on your hardware. That is a very significant thing. You need someone close to your town. If you buy a brand X computer, it may be a bargain but, how are you going to get it worked on? Sometimes it's better to buy your hardware separately from a local vendor, where you can go back for your support or go back if you have problems. You don't want to get caught with a brand X in an area where there's no maintenance available to you.

Another suggestion was made by a person very knowledgeable in the title industry and software as it relates to the title industry. It was an excellent suggestion. When the vendor goes into a title office, he usually meets with a manager, but there are some office procedures and peculiarities that aren't necessarily known by the title office manager. The manager should bring in the real estate closer. He should bring in all the people in their area who will have anything to do with the system and let all of them go over what the system does, as is, and what changes might be necessary to adapt it to a particular operation of a particular business.

Having said all these nasty things about vendor contract forms and their tactics, I don't want to leave you with the impression that I consider those vendors selling to the title industry a bunch of charlatans. They are getting their best deal using their lawyers. As I said, I represent more vendors than purchasers, so I can't be too hard on them. But I do think that, when they come to the table, you need to protect yourself in the legal document because, remember, for the most part, *if it isn't in the contract, it isn't in the deal!*

Dennis Johnson

Sometimes the words you hear are not really the words that are being spoken. They mean something else to whoever is speaking than to whoever is listening. That's very important when you are talking about computers and, in negotiating contracts, when you are talking about picking a system or whatever. The word, "escrow," for example, means an entirely different thing in California than it does in Michigan.

With words that we use every day, we know the meaning of them so well that we don't understand that other people attach different meanings to them. So, communicating between the vendor and the purchaser is sometimes very difficult, especially if one side or the other is not fully familiar with the terminology of the title business as used in that particular area.

Now we are going to discuss building a system and how these things all come together. Remember, when we are going through this and when you are looking at systems, you can only do three things with a computer system. Whether it costs $200 or $2 million or takes up a whole room or sits on a table, you can still only do those three things.

Number one, you can somehow put information into it. That is called input. The input phase. You get information into that computer.

Secondly, you can cause the computer somehow to act upon that or process that information, change it around, whether it is moving a sentence from the top of the page to the bottom of the page, or adding two and two, pro-rating a tax, whatever that process is, that is what is called data processing. Data processing is not a wild, mysterious thing. It is simply doing little things like adding two and two. That is all data really processing comes down to. A lot of it, but that is what each step really comes down to. That is data processing.

The third thing you can do is get information back out from the system. That's where you are printing your HUD form or printing a warranty deed, or are looking at the screen because you requested the computer to give you some information and now it is displayed on the screen and you can read it. That's the output phase.

Those are the only things you can do with any computer—input, process and output.

Most computer systems today are designed to be easy to use. This is called being user friendly. Being user friendly means you don't have to be a computer expert to know how to use them. The program should be designed so that it speaks relatively plain English and so that you can respond to it also in plain English.

First of all, let's take a look at how information can be put into a computer. In other words, the input phase. The normal method of inputting information, when you are using a system and running a program, is by using the keyboard. And this is a keyboard right here. It looks very much like the keyboard on a manual typewriter. It has all the letter keys and the number keys. You have some special computer keys that might be used by some of the software. That is the normal way of putting information in the computer when you are running it. You can also read it in electronically from a disk but this is normally what you would be using.

When you enter information into a computer using the keyboard, rather than having it come out immediately on a piece of paper, as it does, for example, on the typewriter, it will normally appear on a screen, just like your TV screen that you watch the 6 o'clock news on at home. Now this is called a monitor. They used to call it a CRT or a cathode ray tube, but

everybody started understanding that a cathode ray tube is really nothing more than a television set, so they changed the name to a monitor, so that you won't object to paying $600 for it, instead of $150. Really, there are some differences. The monitor's resolution is better than the normal TV. But you can in fact take a normal TV set, the color set in your living room or the black and white in the den, and hook it onto a computer and you can have the results displayed on your TV set just exactly in the same way that they come up on the monitor.

A slide that I use shows the user trying to get information out of the computer and that is how you do it. Put $10,000 in a small paper bag and ransom that information back out.

Once you have the information inside the computer, then you need somehow to cause the computer to process it. This calls for what is known as the CPU, the central processing unit. That's what acts on the computer. That's what keeps your information in memory. That's what causes all the calculations and processing to take place.

If you would picture a gigantic bulletin board, that is a magnetic bulletin board. You turn it on with a switch and it energizes the magnet, and think of the information, your data, as little pieces of magnetic paper. You can place those little pieces of magnetic paper anywhere you want on that magnetic bulletin board. You can rearrange them. Move them around from top to bottom. Whatever you want to do with those pieces of paper.

Now picture that screen filled from top to bottom, side to side, with about 500,000 pieces of little bits of magnetic paper. Then you turn off the power. What is going to happen to those pieces of magnetic paper? They are all going to fall off, right? That is exactly what happens to the information you have in your computer when you turn the computer off. It all just disappears. Now, obviously, it is inconvenient every time you turn your computer on to have to enter 500,000 bits of information every day before you get started in business for the day. So the computer industry spared no expense whatsoever in developing what's called a disk drive so that you can permanently store that information and the computer just reads it back in every day. It doesn't stay in memory but it is there on the disk.

Then there is the little floppy diskette. They call them floppies because they are in fact floppy. It looks square but inside the square is a round piece of plastic very similar to a 45 rpm record and this goes in and it spins around and the equivalent of the record player needle comes down and reads the information off the disk, or if you are sending information out to it, it records onto that disk.

The hard disk is inside a computer. It looks very much the same as the floppy, except that it is in fact rigid and spins a whole lot faster. The floppy disk will go roughly 300 rpm and the hard drive disk will go about 3,000 rpm. Because it goes 10 times faster, it operates 10 times faster when you put information into it or take information out of it. It also can store a tremendously larger amount of information. On a floppy diskette, you can have about 360,000 characters of information. On a certain hard disk, there are 10 million bytes of information but you can get them the same size, something that would fit into a shoe box, with 20 or 30 or even 40 million characters of storage capacity. That's how you store your information and keep your records on line—so you can bring that information back whenever you need to have it.

Now we have discussed at least the hardware that is necessary and provided some explanation of how a computer system works, a single work station, of how you put information into a computer by using the keyboard. And we have seen how you can cause, with our big magnetic bulletin board, processing and rearranging of that information in any form that you want to have. That does the processing, that is the central processing unit.

And, for the output, which is the category left to cover of the three—input, processing and output—you have several choices. You can output on the screen, as we said before. You can display information on that little TV monitor as it were.

Now that is very useful from time to time, if you just want to look at something and then look at something else and you don't need to wait for a printer to crank it out. But it does have some disadvantages. If you were to be in a closing and you display your warranty deed on the monitor and you ask your sellers to sign it, it is a little inconvenient. First of all, the screen gets all full of ink and that is hard to clean off, and, secondly, even if they do sign it, and you take it over to the county clerk to record it, it won't fit in their time stamp machines! So you have to have something other than that computer monitor in order to record your warranty deeds.

The most logical way of doing that, then, is to somehow get that deed onto a piece of paper and for that process you use a printer. There are several types of printers. First, there is what is called an impact printer. There are two types of impact printers. One is called a daisy wheel printer. It is set up very similarly to an IBM Selectric except the Selectric has the ball and the daisy wheel just has a little wheel with the letters on the pins and it spins around—who knows how it comes up with the right letters going at that speed but it usually does. And you can create your warranty deed by using a daisy wheel printer.

The other type of impact printer is called a matrix printer. A matrix printer has a little cartridge full of needles and the needles are punched in patterns by the computer to make the characters, the letters, the numbers, or whatever. They use a different combination of needles for each character that you are going to produce on the paper.

The matrix printer is much faster than the daisy wheel printer. A daisy wheel printer, which gives you true letter quality, true typewriter IBM Selectric kind of quality print, can print about 40 to 50 characters per second. Some of the newer ones will go up to 60 or 70 or so characters per second. If you use the traditional computation of five letters in each word to figure out how many words a minute you can type kind of a thing, the daisy wheel printers will come up to probably 500 or 600 words per minute. Which is a whole bunch faster than you can type by hand, but by computer standards is very slow compared to a matrix printer. Instead of 50 or 60 characters per second, a matrix printer will go maybe 250 to 300, 500 or even 600 characters per second on a piece of paper. That means you can do a lot of printing very, very quickly.

There are two other types of printers. One is an ink jet printer, which you don't see too many of. But they have some very special applications. Multicolors that you can use. I have seen reproductions of paintings, like the Mona Lisa or landscapes, or whatever, done on an ink jet printer, and it is a phenomenal recreation of the original. You can do amazing things with it.

But the disadvantage of ink jet printers is, obviously, that you have little jets there that squirt ink onto the piece of paper and you can have some reliability and service problems from time to time keeping those things clean and operating in the right mode.

The other type of non-impact printer, which is now starting to become very popular, is called the laser printer. A laser printer looks just like a desk top copying machine. In fact, internally, it is very similar in many ways to a desk top copier. It does not strike the paper with each character, it causes a photographic image to be placed on the paper, not by way of film and camera, but by way of the same methodology that is used in a desk top copier. These are extremely fast printers. Even the slower ones will do 8 or 10 pages of text per minute.

When you are printing on either an ink jet or a laser printer, if you are used to hearing a typewriter or hearing a matrix printer whine back and forth, it is eerie, because they are totally silent. You are sending all these documents to be printed and it looks like a copy machine and they just come out and it is totally silent. So they have the advantage of being silent. They have the disadvantage that, if you are producing checks, for example, and you need a true carbon copy, you can't do it, because there is no impact there to go through the carbon paper.

We have just described the whole of a small one-station computer system. The keyboard for the input. The monitor for both input to see what is going in, and output, the printers

and the processors.

What does a system like that cost? Hardware costs are extremely low now, compared to what they were just a very few years ago. When the micro, what is called a micro computer, like the IBM-PC, came out, you would have to pay $5,000 or $6,000 for a computer system, an XT with a 10 million byte storage.

You can now buy what is called an IBM-PC clone; it is a lookalike, they are compatible. This is the brand X. You have to be careful which one you get and that you are going to be able to get service on it. But you can buy them with a 20 million byte hard disk system for less than $1,000. You can around Houston, and I am assuming the prices are relatively the same elsewhere.

Printers—daisy wheel printers—used to cost $5,000, $6,000. Now you can buy them for $1,000 or less. In some cases, considerably less. Matrix printers used to be $3,500; now you can buy those for $200. So the cost of the hardware is very, very inexpensive. Almost to the point where, if you cut it in half again, you still are not going to save enough money to make it worth waiting a week to make your purchase. It has reached the point where another 50 per cent cut in prices isn't that important any more.

Service is a very important aspect to consider when you are putting together your system. If you are dependent upon a computer (and after you get one, you will be) and it goes down, you will be essentially out of business until it is repaired. To go back to doing closing statements, or title commitments or final policies, or warranty deeds, or anything else, by hand, after you are used to having a computer crank those things out for you automatically, is psychologically almost impossible to do.

A system like this should give you a throughput time to process a closing and produce the closing statements, warranty deeds, title commitments or final policy, note, deed of trust, or mortgage, whichever you use, disbursement sheet and checks or something of that sort, an affidavit or two. In other words, five or 10 completely printed documents or fill-in-the-blank form printed documents, a full-blown FHA or VA mortgage or conventional mortgage, total processing time, inputting the information, calculating the file, printing all your documents, really should not take more than 15 or 20 minutes, assuming that you have the information lined up before you start entering and do not have to break to make phone calls to get this information.

On a cash transaction, which is obviously requiring fewer inputs and fewer documents to be printed, you should have a total throughput time of 10 minutes or less. Now, if you compare that with the time that it has taken you to do those types of transactions by hand, you will see that there is a very substantial difference.

If you have a computer system, you no longer have to have an expert closer processing these transactions for you. And your closing people, your knowledgeable, highly-paid people, can spend their time where it should be spent, in dealing with the customers and getting the information and putting the things together. You can have less highly skilled people doing the processing and getting your information out.

That is it on the single work station system. All the component parts. Amy is going to tell you how, if you have one of these stations, you can share the information that you have put in that one, with other stations or branch offices.

Amy Bertorelli

It has been an interesting year, both in the world of automation and certainly in the world of real estate. During this past summer, most of you experienced the impact of a very busy real estate market, including a lot of refinancing and a huge inventory of open orders.

Those of you who had computers during this time period, no doubt found it much easier to keep up with the increase in volume for the very reasons that Dennis stated. But if you had only single stand-alone workstations such as Dennis described, you probably ran into some problems you didn't expect, or plan for. If I am right, here are some of the problems you might have experienced:

(1) You ran out of disk space because you had that large open inventory of orders and you had to move some of your orders on to diskettes, which wasn't exactly what you had in mind when you bought that hard disk.

(2) Perhaps it became difficult to manage and control all those orders and you had to come up with some imaginative, manual way of doing it. Again, not exactly what you had in mind when you bought that computer.

(3) And, another thing was you probably had to figure out some way to keep track of which orders were open on which machine, if you have more than one machine in your operation, so that when you closed the order you didn't have to re-enter it on another machine. I know some people actually color coded their machines with their order files.

So these are a few of the problems we noted this past summer and there probably were others.

Dennis just described what we refer to as a single-user computer system, that is, a keyboard, a monitor, a systems unit which is the central processing unit, and a printer for output. We took advantage of these single, stand-alone stations a couple of years ago and we recommended replacing your typewriters with these machines. We call this a single user station because only one person can access the disk and process the data at one time. This type of system, with the proper software, as Dennis mentioned, can successfully increase productivity in our business by over 50 per cent. So, placing a few of these workstations in an office to produce preliminary title reports, commitments, policies, and to close escrows, produce documents and disburse checks for settlement makes a lot of sense.

Over the past few years, we have seen the results of such installations and they are very impressive. And yet, when we have a really big year, as we are currently having, you begin to feel the need for a better way to automate, a way to share the resources you have. If there was only a way to share all the files and order data among all the users in your office. What you are now looking for is a way to hook up or link all those stand-alone computers to each other.

This sharing the information concept is especially important if you want to produce consolidated management reports or answer an inquiry about a particular order. Of course, each computer system has the ability to copy data to a diskette and, thereby, one can move files from one machine to another and consolidate information this way. But, often, this approach creates more paper work and presents more problems than it solves. If a lot of that kind of copying goes on in your office, and if proper care is not taken, you end up with a lot of redundant data existing on multiple computers and you've wasted a lot of disk space. So this makes the job of managing your computer resources even a little harder.

Since the whole purpose of purchasing this equipment and software in the first place was to increase productivity, reduce expense, provide a tool to help better manage your operation, it stands to reason we want to build a systems environment that contributes to these goals, not one that presents more problems.

So, how do we accomplish this? How can we make the change from multiple, single, stand-alone workstations to a shared resource environment? What are the options for sharing data? First, let me say I am not going to present an exhaustive list of alternatives. There are multi-user options which include minicomputers or super microcomputer worlds, which are emerging very quickly. But this is not what we are talking about here. Rather we are discussing taking a PC or a number of PCs and building upon them.

We spent a lot of money in the past couple of years, those of us who purchased these so-called personal computer systems, and we don't want to see that investment go down the drain and replace it with something else.

So there are two parts to consider: the hardware and the software. When purchasing the software, you must obtain the vendor's guarantee that their software can work in a defined, multi-user environment. The vendor

should define to you just what that environment of hardware and software consists of and you should install it accordingly. This differs from vendor to vendor so that is all I can say about it without being vendor-specific.

On the hardware side, it is easy to install a simple local area network (LAN)—a simple, two-station LAN.

First, we add another computer to the configuration. We hook these two together. One of these computers will become a file server on the LAN. The file server is the network manager. It will keep some information about every workstation on the LAN in its own disk storage. Generally speaking, we pick a more powerful computer for the network manager, or file server—such as an IBM-PC-AT, which is a faster machine than an XT, and it has a lot more disk space. This is because the file server has to have additional information on its disk to know what is going on with all the other computers on the LAN. It will have control of either all or a large portion of the disk space on the network. To do this, we must add a network card to each workstation.

The network card is inserted into a slot in one of the computers. All the computers on the LAN must have one. It is inserted into an open slot in the computer and then screws are used to secure it in place.

Next, we must cable the computers together. There are many types of cabling available. An example is a shielded twisted pair, and we can place these two computers up to 2,000 feet apart in an office with this cable. After this, we load the networking software, then the application software, and we are ready to process.

If this seems deceptively easy, it is—that is, it's relatively easy to link the computers together. However, once we have linked our computers together, everyone on the network can have access to all the data on the network.

This presents potential issues of both security and data management. Security systems, e.g., password control, can be built into the software. But the bigger issue is network administration.

To successfully install and run a local area network, you should have someone on your staff who understands the network and the application software which will run on it—and who can troubleshoot when problems occur. Someone must be sure the data is backed up, purged or libraried appropriately on a regular basis. Someone must be able to diagnose problems with the network and take intelligent action when necessary. This person is called a network administrator and should be chosen very carefully. The asset your network represents is enormous, and care must be taken in protecting it and making sure it works correctly.

There are many articles being published about network administration. I suggest you read up on the issues before taking the plunge. Ideally, you should review someone else's network system and talk to them about their experiences, the ups and the downs. This will help you plan better when you decide to install yours.

Once you have your network, if you have more than one office location, you may want to consider setting up some kind of communication from one branch to another, computer to computer. This certainly can be taken care of through the installation of modems, which allow easy telephone communication from one PC to another on a dial-up basis.

Bill Blincoe now is going to talk to you about systems support.

William Blincoe

To put the concept of support into perspective, I would like you to think, if you will, that it is the last day of the month, you are back in your office. It is about 10 minutes until 2. The people who are here for your 2 o'clock closing are in the lobby. Of course, you normally get your file for the loan package from a lender about two days before the closing, but it has been slow lately and the package just came in the door.

Today's modest task is to finish this closing and do two more for our biggest customer. At this point, we have something of a problem. This may seem like an exaggeration to you and to a certain degree it is. It is not necessarily going to happen that you will develop problems on the last day of the month, but automation is like any other endeavor of man. Sooner or later, something is eventually going to go wrong. If the fellow named Murphy is correct, it is going to go wrong at the worst possible time for you.

So, what have I done at this point? I've convinced you that you don't want to automate, correct? It is really not my purpose for being here. Automation can be a tremendous improvement for your business. It can help with the productivity of your staff. It can help you eliminate errors. It can simplify your life. It can improve your business climate. So, the purpose is not to talk against automation. My purpose is rather to talk about what you can do to simplify the process, once you have made the decision to automate, and to set particular conditions so that when you need support you get it and get it quickly.

We tend to operate under the misconception that support is a vendor problem. We send the vendor a check for some maintenance every month and, in return, we expect, first of all, that nothing will ever go wrong. In the unhappy event that something does go wrong, we expect the vendor to fix it as quickly as humanly possible. A matter of moments might be acceptable; anything more, certainly, will not be!

Unfortunately, it doesn't work like that. Support is not necessarily all your vendor's concern. Support is a partnership. You are affected by it. You participate in it, just the same as your vendor does.

After all, who really has the most at stake if something goes wrong? The vendor or you, with a roomful of people waiting for a closing to take place? At the risk of stating the obvious, the time to plan for your support operation is not at the point where your system goes to the great beyond! The time to plan for support is when you are planning to install a system in the first place. What we should be doing now that our system has decided to stop on us is not planning our support procedure but, rather, exercising the support vehicle that we want to use.

There are two support processes that we need to deal with—the hardware support and the software support. What we do next is going to be determined, in large part, by whether we think the problem we have is hardware or software related. It is virtually impossible to fix a software problem by throwing a new piece of hardware at it. By the same token, it is difficult to fix a hardware problem by loading in a new program. So we need to determine where our problem lies.

Before we get into the specifics of precisely what to do, let's examine the one critical support tool you do for yourself, which helps you regardless of where the problem might be. That is backups. I cannot stress enough the importance of the backups' role in a good support procedure. In the event that something does go wrong, the backup sees to it that your down-time is minimal and your recovery complete.

Backups tend to be time consuming. They tend to be annoying. You tend to need to do them at the times you least want to do them. For instance, when you would rather be going home, you end up having to do the backups instead. But, there is no substitute for a good backup. If you don't have the backup information, you run the risk of being in serious difficulty.

The location of your backup information is critical. I have a friend who told me he was very proud of the fact that he took a backup every night. He knew exactly where it was kept. He took it home with him. He kept in on the refrigerator, attached to the refrigerator by a kitchen magnet! Fortunately, he never had to use those diskettes before he found out what the danger in doing that was.

The backup should be somewhere away from the machine. It is nice to have it nearby so that, if something does go wrong, you can quickly load the backup in. But there are situations where you have to be sure that your backup copy is protected in a safe environment. If something serious were to happen, like the ceiling falls on your machinery, it is

probably going to take your backup along with the machine, if the backup is right there next to the machine. Therefore, you need to give some thought as to where you are going to keep it.

Okay. We have our backups. We have our system broken. Now, what are we going to do? Let's assume for the sake of argument that the problem we have had is hardware related. We are going to have to work on the hardware.

We are at the stage where a hardware support environment needs to be defined. Hopefully, that was established when we bought our system. For instance, if one has bought a system that is manufactured some place that one has never heard of and no one in our city has ever heard of either, we risk the strong possibility of having to wait for some period of time while our machine is repaired. So, if you are looking at hardware, it is wise to pick a standard vendor. Someone that other people in your town are familiar with. By the same token, you can do a lot to help yourself in this regard.

If you are considering automation of a number of functions in your office and each one is going to require a piece of hardware, there are several ways that you can proceed. You can use what Amy described as a local network and tie all of the different pieces of the machinery together. But, maybe the ideal software doesn't all run on one kind of machinery, or on one machine. If you are looking at compatible equipment, even though the software may be incompatible, you can provide self-backup for yourself. For instance, the system that you keep to do the closing documents might run on a piece of hardware. If you are looking for a general ledger system to do your accounting, and it runs on a similar piece of hardware, then, obviously, if one of those pieces of hardware goes down, you can use the other to back the system up, so you are not necessarily completely out of the water.

When you decide to automate, one of the decisions that you need to make is how much time you can afford to be out of service. This will affect a lot of things—how often should you back your system up. If you can afford to be down for a couple of days, while you recover the last six months' worth of information by keying it back in, then you only need to back your system up every six months. If you can't afford that time out, you need to back it up more frequently. If you can't afford any down time, you need redundancy in hardware.

For instance, let's suppose that you are talking about hardware to support a patient system, a diagnostic system for a hospital. If you are the person who is hooked up to that equipment, you don't ever want to hear the words, "I'm sorry. The computer is down." You want them to have as much redundant backup as they possibly can have—rooms full of spare computers! On the other hand, if it is a function that is not critical and you tolerate the downtime, that degree of expense isn't necessary. You need to ask yourself, "How long can I afford to be out of service?" That question informs your hardware selection decision and your backup frequency.

The other aspect of support we need to concern ourselves with is software support. This is an area where your participation is absolutely critical. Systems are very complex, and are written for a lot of different users, so they have quite a bit of function. The title business is not exactly the same in California as it is in Michigan. The systems have been created to provide that type of flexibility to allow that difference in process and style.

One of the biggest things that you can do to minimize your dependence on your vendor for support is to be as familiar with the systems that you have as you possibly can. The vendor coming in to train you will attempt to show you in three days time what they have spent three man years trying to create. Obviously, there is more function in the system than can easily be absorbed in that period of time. If you take the time to learn the other functions of the system after the vendor leaves, keep strengthening the training, keep familiarizing yourself and continue to test the limits of the system, then a lot of the support issues need never occur. Rather than relying on the vendor to tell you specifically how to do something, you can become self-sufficient in that regard.

Often, we find people will be exercising the system and something will not work quite according to plan, or not quite according to their expectations. So, whoever is using the system will attempt to do whatever they were trying a bit differently, and again it might not quite work perfectly so they try something else. Sooner or later, as you try and circumvent the things the system is trying to tell you, you will find yourself in a serious situation.

For example, the system stops running. Now what are you going to do? As you watch this type of thing take place, you may tell your support provider how you came to be in the position if you have noted information to give them. How did you get from where you were—which was everything running along perfectly—to where you are now—which is nothing running at all? What steps were followed? Better than that, you may keep for that provider of support services the messages that the system gave you. The information, the pieces of paper, etc. . . . whatever you have gathered can assist the support provider in re-creating the situation. If will greatly minimize the amount of time you will be out of service.

It is difficult to re-create situations. It is especially difficult when the situation has occurred over a period of time.

Another important thing to keep in mind when you need support is assigning priorities to the degree of severity of the problem. In this way, you can help yourself with your vendor. If you are calling because you have a single work station that is not working any more, and you have people in your lobby that you need to do closings for, you have a more severe problem than the person who is on the other line calling from another location, who would like a heading moved over 5 spaces on a report.

If you can assign priorities to the degree of the problem, the vendor knows how to allocate resources to take care of that problem for you.

Along with that thought, if you accumulate several separate but relatively simple problems and turn them in at the same time, you will help the vendor concentrate his resources. A lot of times, we will experience a problem with a system and we'll think, "Well, I must have done something wrong." It is common to feel that way because the systems can be a little bit intimidating. But those are the types of things that are important to know and keep track of, so that, in the future, you can turn them in and get them taken care of.

Having taken care of our hardware and our software problems, we need to evaluate what types of support offerings the different vendors have for us as we are selecting our software. There are a couple of things to keep in mind. Is the vendor who is providing your system dedicated to the future development of that system? A lot of support issues are solved in later releases of software. So you can find improvements simply by going forward with the new development that the vendor is providing.

Are the hardware service procedures in place to take care of your hardware? What are you going to have to do to get a broken piece of hardware fixed. Where do you send it or does somebody come and fix it for you on site? What is the vendor's method of assigning priorities in the problems as they come up? How do they evaluate which ones are truly critical problems and which ones they have a little bit of time to take care of. How does the vendor follow up on service calls? Do calls go in to the Great Divide, never to be heard from again? Or, does someone get back to you on a periodic basis and let you know how your particular problem is being taken care of.

The final thought that I would like to share, is that this is a process that takes time and money. Support is something that you cannot ignore. It is possible not to do backups. But, at what risk? The amount of time and money that you put into a support plan for your operation will greatly affect how long or how inconvenient an outage is for you, how severe a problem is and how quickly you get back on your feet. After all, what are you balancing that cost against? You are balancing that against the cost of being in business!


BIG BEAR
TITLE PACKA
THE FIREBREATHERS

Hughes Butterworth

Shut your eyes and think of Space Odyssey, 2001, Buck Rogers and his ray gun, Star Trek, Orwell's book, *1984*. These were dreams of the future. They told in stories much of which has already come true, a lot of which is coming true today.

Shall we look into the crystal ball and see what the future might have in store for us. Let's see, there is electronic mail, data networking, laser optics, optic disks, laser printers, video conferencing, networking and interfacing, artificial intelligence, information resource management, there is a never-ending image of things to come, some of which is now upon us.

First, let me say, especially to those carrying management responsibility, that we must learn to prepare for what is coming, for the office of today will be totally different in a very few years, compared to what we know today, and it is all because of this thing called the computer. Some in our business can recall the offices of yesteryear, when the abstracters and clerks wore green visors to reflect the light. Today, we use green screens to soften the light on the CRTs. I wonder what we will be looking back upon in another few years, when we think of today's offices and tomorrow's.

Computers certainly have helped clerical workers increase their productivity. But workers tend to view the savings as their own rather than the company's. They continue to do about the same quantity of work, using the time saved to do things on their job to bring personal pleasure. This will again change dramatically when the new offices of tomorrow come into view.

Let's move forward to what's upon us. The world of computers started with word processing, which is still being developed today with vendors adding spelling checkers, which probably is a return to the emphasis on the user's productivity via the integrated features.

Sharing information and resources is what networking is all about. Information is reshaping American business and its people in the drive for productivity and effectiveness. Although economic storms have calmed somewhat, the information tide will impact many companies. This information revolution is impacting people, enterprise, corporate culture and entire industries.

Consider that computers have been around for three decades and information has existed since Moses descended from the mountain with the Ten Commandments carved in stone. We wonder why all this commotion. If we have been dealing with computers and information for that long, why this great revelation?

It is in the accessibility of the staggering amounts of information. And it is necessary, therefore, to examine the effects of information revolving on people and business.

Computer networks are now dominating the data communications field in the local network levels. There is a clear need on the part of the user, the manager, to understand what networks have to offer and how they perform their magic. Data networks are here and management must learn how to use them.

Let me show you just a little of what is already here.

Electronic mail. Many businesses that bought personal computers in the heydays of 1984 ended up stuffing them in the back of closets in frustration and disillusionment during 1985. Now, in 1986, those in a number of these same businesses are cautiously beginning to dust them off for use in the new world of telecommunications.

Telecommunications has become the new buzzword. Many are very intimidated by the very same. Once telecommunications simply meant talking on the telephone, but the widespread use of computers is fundamentally expanding the meaning of the term. It now includes a variety of electronic methods used by businesses of every size to send and receive information.

Federal Express has what they call a "Zap Mailer." You can transmit a facsimile either terminal to terminal, or to the Federal Express office, with live documents with guaranteed delivery if you don't go machine to machine within two hours. The overnight delivery I will guarantee you soon will disappear.

Another is an answering machine where a person has a private telephone number which allows you to call and leave up to a five-minute message, and a beep will advise the person of a particular message. This same form of system is also available in most computers. However, it is not voice activated and the message must be typed for now.

But the laser and laser optic video conferencing soon will be changing all of this. Ma Bell is already installing the network throughout their system, which will be working in early 1990. Data base is the newest way to control your data. It has been with us for a few years, but, with the optic revolution, data base will certainly give way to other methods in the very near future.

The dominant information management issue today is integration of information technologies into some form of a synchronized partnership. Developments in micro computers and micro networking are pacing the linkage among mainframe computers, office systems, and the end user. The developing that links products will be as dramatic as the development of the micro chip. High tech shows one index of future developments indicate a trend towards integrated micros into a local area network—LANS. And linking LANS to mainframes. LANS, local area networks, you call this word a buzzword. But remember buzzwords become reality in the near future. What this is really saying to you is the office systems and computers are being linked together for the users benefit.

Laser printers—the very name evokes images of Star Wars technology. Or at least Buck Rogers and his ray guns. Leading the PC printer world of technology, these machines have caused at least as much excitement as the latest PCs themselves. Simply the availability of high tech printing at affordable price is enough to generate much of this excitement. High price laser beam printers have been around for several years, but they have figured largely in the more expensive mainframe in many computer areas. Last year Hewlett Packard announced its $3,600 laser jet printer, leading the way to the low cost laser printers for the PC world. Here are from Xerox, IBM and others, different types of laser printers.

Non-impact printers have overtaken impact machines as the printer of choice among low-end users, also gaining ground in the data center as well. Whether or not the speed and versatility offered by laser printers can overcome the reliability of the older impact machines remains to be seen.

Optical disks and laser optics—in recent years significant achievements have been made in producing smaller, more powerful personal computers. Now the computer world has poised for another revolution, this being in computer memory capabilities. The breakthrough is here. Optical disks finally are making their debut for use with computers. The consumer is already aware of audio disks or laser video disks; now with the application to the 12-inch disk, the impact in terms of office efficiency and instant access to information is expected to be enormous.

Optical disks let you store 1,000 books where floppies hold just 100 pages. You can see what is coming down with these optics.

For a relatively long time in the computer industry, it was understood that the fundamental units of data were numbers, alphabetical characters, and a few special symbols. Stalwarts maintained this position even when graphic characters and pictures were introduced, labeling them as information objects rather than real data. Such rigid interpretations, however, are changing as the ever-evolving technology forces us to regard digitized pictures, voices, and so on, as units of data. Similarly in many respects to numbers or alphabetical characters, images and document processing is upon us. Not only has image processing arrived, its continual development and widespread use will be one of the milestones in the evolution of computer technology.

Image processing will ultimately rank

equally with word processing. But, regardless of the expected benefits of this rapidly progressing technology, as promoted by the advocates, there is a real need for industry professionals to exercise caution. D.P. managers must be certain and certainly stay abreast of new advances in hardware and software technology, but should never lose sight of their ultimate responsibility for the real world performance. You have seen some and hear of a few more.

Artificial intelligence. A.I. Another buzzword. What is artificial intelligence? Artificial intelligence software handles processing with a relationship that is more sophisticated than data or text processing. A.I. software has the ability to learn, improve its performance, make judgments, and respond to inquiries as a human would. Artificial intelligence systems can make choices and respond to human communication. Frightening! A machine that is like the human brain.

The *Wall Street Journal* has the following, and I quote:

"Computers take on a new role as experts in financial affairs. Once computers were just big calculators. Over the years, they have become storehouses of information as well. Now they are making the leap to giving advice. Financial expert systems are starting to do such tasks as guide individual's investments, warn manufacturers about foreign competition, and reject bad insurance risks. Expert systems, also known as knowledge-based systems, differ from common data processing systems. They can store and manipulate knowledge in rules of thumb as well as data. They can reason by drawing reference from knowledge. They can help a human formulate problems. For example, by making sure that novices ask the same questions experts do and they can train users by explaining how they reach their conclusions.

"This has been hot stuff in the academic community for 25 years, artificial intelligence. But it has been slow in being applied elsewhere. In the past five years, a few corporations have started using the expert systems in some engineering and manufacturing jobs. In the financial area, people aren't as advanced yet. But there is a whole lot more going on, says _____, director of the Artificial Intelligence Center at Arthur D. Little, Inc."

You have been exposed to but a few of the hundreds of items that I can report to you at this time. I have taken only some of the highlights. I imagine some of the small items not reported on will come forth much sooner than some of what has been mentioned. You and I must become better managers to keep up with this emerging technology of tomorrow.

May I share with you the following thoughts:

First, managers do not cost justify expenditures for computer systems. Most managers hide behind the buzzword of better efficiency.

And, last, how many managers will be rewarded for rejecting an expenditure for a system, conversely, when a system does not achieve an economic payback? How many managers will be held accountable?

LOBBYING—continued from page 36

tional Public Radio and, before that, was press secretary to Bobby Kennedy. Before that, he wrote a column with Tom Braden. We have newspaper people, and we think we can handle . . . now, not all the time, but there's a great area there because of our contacts and the people who work for us . . . and we keep up with those contacts in the press as well as on the Hill. So we think we can advise people on how to handle them. We put them through media training, for instance, to tell them how to handle the press and what to say. So, I think there's a big area where you can help a person who is more prone to put his foot in his mouth too.

MASSEY: Well, I think it is an absolutely powerful dimension. Members do react to it. They react to it as we say, "inside the Beltway," when it's in the *Washington Times* and the *Washington Post* at one level. They react to it at another level when they go home and find out the impact that media has had on their local constituents. And there's no underestimating the force that media has on politics and on issues.

LIEBENGOOD: I think it's important that you provide ALTA headquarters or the ALTA government relations shop, in Washington, with the content of your correspondence, and we can follow up with that member and with his staff to find out what his problems are. There are some members that, if they say goodbye, I guess I just leave them alone. Others, I'd come back at them again and say that you've not lost your interest in this issue, that you still think it's an important issue to you, and that you think it's going to be revisited. In fact, it is.

I am confident that the legislation that we have been pressing in the Congress this past year will be addressed early-on next year, and I think you will have a hearing on your legislation in the House of Representatives and a hearing in the Senate. You're going to have a new chairman of the Senate Judiciary Committee, which I think will bode well for you, and I am very confident there is going to be progress on this.

So, I wouldn't just tuck that in the other drawer. I would see that it gets plugged into the system so that it can be followed up on by the ALTA staff to urge that member revisit the issue, because it's not today's issue, it's tomorrow's issue.

HYMEL: As soon as this Congress goes out, that's what I'm going to be doing, taking people to lunch on the Hill, without asking them to do anything. Now, later on, when it's business, sometimes it's better to go into the office when it's strictly business. But we spend a lot of time in that entertainment section. We've got season tickets to Bullets basketball and Caps hockey, and I'll be calling up there and offering them, without asking them to do anything. Congress is a very human institution, and people respond to kindnesses. Sometimes it's better to separate the two, but that's the way I do it.

MASSEY: You entertain—lunches, dinners, drinks, whatever—to build and maintain relationships with these people, to make friends—to make friends when you're not asking for something. You get down to business with regard to the order in the office and, I think timing is important there. Knowing when this issue is relevant to that member and when it's not are critical in finding out what you want the member to do. Is it time to cosponsor? Go into the office and ask him. Is it time to push the bill in committee? I'd go into the office to ask him. But the hours that you've spent with that member or his staff in entertainment lay a foundation for you to be well received, at least in making a request.

MASSEY: That's why it is so important to have the feedback from the ALTA member to the ALTA Government Relations people to those of us who are helping them lobby. Because, in each congressman's or senator's office there's going to be a staff person assigned to this issue—assigned to this bill. And, that's the person we need to follow up with in the first instance. Whether it's fine for you to do that, and it's fine for us to do it, the important thing is that there be a good exchange of intelligence information as to where that member is at a given time.

IVT Sponsors Seminar For Attorneys, Paralegals

A "Title Insurance Seminar" was sponsored by Industrial Valley Title Insurance Company in Philadelphia for attorneys and paralegals from the Philadelphia center city area.

Topics covered included: settlement agenda preparation, resolution of settlement requirements, special problems, settlement procedures, title company concerns, sample commitments, policies, policy endorsements, title underwriting and claims.

Guest speakers included Stanley A. Uhr of Pechner, Dorfman, Wolffe, Rounick & Cabot; and John J. O'Driscoll, senior vice president, and Keith C. Weller, associate counsel, both with Industrial Valley.

JUDICIARY REPORT—continued from page 31

tion before the court.

The court ruled that the borrower cannot seek to enforce the provision calling for a partial release when there was a breach of mortgage at the same time. In this case, according to the court there had been a

> clear, long, continuing and serious default on both mortgages by . . . Sheehan, [and] the provision inserted in the second mortgage for a release of parcel one from that mortgage could not be given specific enforcement . . . to deprive Aniello of all remaining security for the second mortgage by a last minute payment of the first mortgage.

White v. Delta Foundation, Inc. et al, 481 So.2d 329 Miss (1985)

On June 14, 1977, Roger and Joyce Y. White executed a deed of trust to John Nichols, trustee for Delta Foundation, Inc., a nonprofit corporation with principal offices in Washington, but domiciled in this state, to secure a principal debt of $5,000, evidenced by a promissory note payable in monthly installments of $115.15 each, beginning July 15, 1977. The deed of trust covered a house and lot in Madison County.

The Whites defaulted and Delta Foundation foreclosed. Before instituting foreclosure proceedings the following substituted trustee appointment was filed and recorded on the land deed records of Madison County:

> APPOINTMENT OF
> SUBSTITUTE TRUSTEE
>
> UNDER AND BY VIRTUE OF the authority vested in the undersigned mortgagee, DELTA FOUNDATION, INC. OF GREENVILLE, MISSISSIPPI, by that certain deed of trust hereinafter listed, the aforesaid mortgagee, acting by and through its duly authorized officer, KEITH EARLY, General Counsel, does hereby nominate and appoint WILLIAM A. MURRAIN as substitute trustee in the hereinafter listed deed of trust, with full power to act in the place and stead of the original trustee therein named, to-wit:
>
> "Deed of trust from Roger White et ux Joyce Y. White to John Nichols, trustee for Delta Foundation, Inc., dated December 22, 1977 and recorded in Book 470 at page 564."
>
> The above listed deed of trust is on file and of record in the office of the Chancery Clerk of Madison County at Canton, Mississippi.

There was a foreclosure and a substitute trustee's deed executed by William A. Murrain to one Michael Espy of Jackson.

The Whites employed counsel, efforts were made to "redeem" the property, and claims were made that the first foreclosure was fatally defective. Apparently, Delta Foundation agreed, because another foreclosure proceeding was begun by another substituted trustee, but later abandoned, and Delta Foundation chose to stand on the first foreclosure.

The Whites filed their bill of complaint in the Chancery Court of Madison County challenging the validity of the foreclosure, asserting inter alia, the substitute of trustee was fatally defective.

The final paragraph of the appointment of substituted trustee states, it is "State Mutual Federal Savings & Loan Association" making the substitution. The instrument, however, proports to be executed by Delta Foundation. The signature is ambiguous as it is headed "Delta Foundation," with a signature "Keith Early," who does not designate whether he signs as agent or in his own individual capacity. The acknowledgement which follows is a personal acknowledgement, not a corporate acknowledgement, nor as agent and attorney for the corporation. The notarization contains no final paragraph or date.

The acknowledgement in this case should have stated that Early signed and delivered the document for and on behalf of Delta Foundation, *and as its act and deed*, after first being duly authorized by the corporation to do so. Early simply acknowledged he signed it as an individual. This document was patently defective. While the general form of Miss. Code Ann. §89-3-7 (1972) may be followed, any official acknowledgement for public record of a corporate document should in some manner make it clear that it is the corporation executing the instrument by and through an authorized officer, officers, or agent.

The court held that the bill of complaint with the attached exhibits states a valid cause of action. Upon remand, by proper proceedings the chancellor was directed to see that all parties are protected, and a valid foreclosure consummated if one is authorized.

U.S. Cold Storage vs. Great Western Savings & Loan 212 Cal. Rptr. 232 (1985)

Plaintiff, United States Cold Storage of California sold a refrigerated warehouse to the Sapp family. The sale price was $3,600,000. Sapps paid $400,000 in cash and borrowed the remaining $3,200,000 from Great Western Savings & Loan evidenced by a purchase money note for $2,250,000 secured by a first trust deed and two purchase money promissory notes in favor of plaintiff in the sums of $600,000 and $350,000, secured by second and third deeds of trust.

On June 10, 1977, Great Western noticed a default. At that time plaintiff attempted to assume Great Western's note and deed of trust. Great Western refused based on the due-on-sale clause contained in its loan agreement with the Sapps.

On October 20, 1977, the day before the scheduled sale, a shell corporation for the Sapp family initiated Chapter 11 bankruptcy proceedings.

On October 21, 1977, Great Western's trustee postponed the scheduled sale to November 4, 1977. On November 4, trustee again postponed to December 2, 1977. On December 2, trustee again postponed the sale to January 4, 1978. On January 4, trustee again postponed a fourth and final time to March 21, 1978. Due to the bankruptcy, March 21 was the first available date on which a sale was permitted. All postponements were read by trustee to an empty room. No additional notice of sale was given.

Trial granted Great Western motion for nonsuit. Appellate Court held that:

(1) Case of *Arnolds Management Corp. vs. Eischen* (1984) 158 Cal. App. 3d 575 held that junior lienor may not challenge foreclosure sale on the basis of procedural irregularities unless lienor had first tendered full amount due on the senior obligation;

(2) Great Western fulfilled all statutory notice requirements when they publicly declared new time and place of sale when postponement took place:

(3) Postponements of sale to dates on which sale could not occur because of automatic stay under bankruptcy laws were not unlawful; and

(4) There was no implied subordination agreement between junior lienor and senior leinors.

Mortgages

Lange, Plaintiff, vs. Wyoming National Bank, Rocky Mountain Title Insurance Agency, et al., 706 P. 2d. 659. Wy. (1985)

Grantors of contract for deed brought action to quiet title and to secure damages against title companies.

This action involves a case of fraud involving Mr. Coffman, as purchaser under the contract, owner of Rocky Mountain Title Insurance Agency, and as the mortgagor under a mortgage to Wyoming National Bank, and Mr. Lange as seller under contract for deed. Coffman fraudulently obtained a deed from the escrow agent, altered the deed to expand the legal description, apparently forged an affidavit of lien release, issued a title insurance commitment and submitted same to bank, upon receipt of which bank made a mortgage to Coffman; $290,000.00 of the mortgage proceeds were paid to Lange (contract seller). The district court reformed the mortgage to reflect the correct legal description. The supreme court reversed and held that the mortgage was void due to the invalid deed, so could not be reformed. In so much as Lange had benefitted from the mortgage, they were to return the $290,000 to the bank, and property was set over to Lange. Action against the agent's title insurer was dismissed, default judgments held against Coffman who had declared bankruptcy and Rocky Mountain Title, which was insolvent.

Mischell v. Austin, 374 N.W. 2d 599 N.D. (1985)

Austin et al gave a mortgage on their North Dakota real estate to Metropolitan Federal Savings and Loan. On the same date, the mortgagors gave a second mortgage to Mischels, and in conjunction therewith, also gave Mischels a promissory note.

The mortgagors defaulted on both mortgages, and the first lien holder foreclosed. The second mortgage holder did not redeem the first mortgage, but instead sued directly on their promissory note. The trial court awarded the Mischels judgment and the mortgagors appealed to the North Dakota Supreme Court.

Can a mortgagee sue in North Dakota on a promissory note issued in conjunction with a mortgage, and seek a deficiency judgment against the mortgagor?

No. North Dakota Century Code Section 32-19.1-07 covers deficiency judgments for mortgages. The law is applicable to first mortgages and subsequent mortgages. Even though the mortgage and the note are separate and independent obligations from the debt, the legislature enacted an anti-deficiency statute which prevents the mortgagee from suing directly on the note. Therefore, the trial court's ruling was reversed.

Badger State Argi—Credit & Realty Inc. v. Lubahn et al 122 Wis 2d 718 (1985) Court of Appeals

At issue: 1) Whether a mortgage containing

a dragnet clause for antecedent debts was enforceable

2) Whether a person named in a testamentary trustee's deed had a right of possession to the parcel she occupied; whether this "claim or interest" violated a statute which precludes suspension of the power of alienation beyond the statutory period and whether this interest takes priority over the mortgagee's interest.

The mortgage in question covered three parcels of land and was given as security for several notes. The mortgagors originally acquired title to two parcels but subsequently obtained a third parcel which had formerly been occupied by the grantor. This third parcel had been conveyed to the mortgagors subject to the right of possession granted to the grantor's daughter described according to the deed in the probate court file relating to the estate of the grantor.

To secure payment of the notes and in consideration of the reduction of certain milk assignments, the mortgagors executed the mortgage which then covered the three parcels. The mortgage listed the amount secured as $239,000.00 and stated on its face it had been given "to further secure present indebtedness." Plaintiff then acquired the notes and mortgage by assignment from the mortgagee. A cooperative subsequently obtained a $46,000.00 judgment against the mortgagors which became a lien against all three parcels.

The court of appeals agreed with the trial court findings that:

1) The $239,000.00 mortgage was enforceable and that the $46,000.00 lien was subsequent, subordinate and junior to the lien of the plaintiff (the assignee of the notes and mortgage).

2) The occupant of the third parcel had a "right to possession" which could not be defeated by the then pending foreclosure sale because (a) the reservation to her in the trustee's deed was permitted by Sec. 700.16(1)(a) Stats., because it did not suspend the power of alienation for a period in excess of a life in being plus 30 years and (b) the language in the deed, although not creating a life estate, did create a property interest in favor of the occupant which could not be foreclosed upon. Her interest was of record at the time the mortgage was originally executed and when the mortgage was assigned to the plaintiff.

3) Although dragnet clauses are generally looked upon with disfavor, the clause here involved met the requirements for enforceability. The underlying debt was identified and the mortgage was based on adequate consideration in that the indebtedness was supported by a series of notes and the reduction of a certain milk assignment at the time the mortgage was given.

* * *

In this mortgage foreclosure action the court construed the intent from the instruments that the contract rate of interest was to be paid until the principal was fully paid. The defendant contended that the legal rate of 9 per cent set forth in CPLR 5004 should govern.

It is well settled that when a contract provides for interest to be paid at a specified rate until the principal is paid, the contract rate of interest, rather than the legal rate set forth in CPLR 5004, governs until payment of the principal or until the contract is merged in a judgement (see e.g., *O'Brien v. Young*, 95 NY 428; *Schwall v. Bergstol*, 97 AD2d 540; *Astoria Fed. Sav. & Loan Assn. v. Rambalakos*, 49 AD2d 715; *Stull v. Joseph Feld, Inc.*, 34 AD2d 655).

The court sustained the plaintiffs' contract rate of 15¾ per cent until judgment *Citibank v. Liebowitz* 110 AD2d 615 (1985).

First National Bank & Trust Company of Ardmore v. Donald J. Worthley, Sr. (et al), 56 Okla B.A.J. 2626 Okla App. (1985)

First National Bank & Trust Company of Ardmore (plaintiff) filed foreclosure on two construction mortgages. The initial loan had been made to mortgagor, El-Jay Construction Co., a partnership (defendant) for construction of an apartment building. No construction had been initiated at the time the first mortgage was recorded. Subsequently, during construction, a second loan was made to defendant by plaintiff, secured by a mortgage. Several mechanic liens were timely filed on the property by suppliers. The trial court, in the foreclosure action, determined that certain mechanic liens had priority over the mortgages. The issue on appeal concerned the priority of the mortgage liens in relation to the mechanic lienors. The plaintiff argued, in reference to the first mortgage, that the bank was obligated to make all advances under the mortgage and therefore, achieved priority over any mechanic liens. The

trial court applied the test regarding obligatory advances outlined in *Liberty National Bank and Trust Company v. Kaibab Industries*, 591 P.2d 692 Okla. (1979), to-wit: Could the bank have been compelled by the courts to make advances on the loan? The appellate court concurred with the trial court's conclusion that defendant could not have forced the bank to make the advances. The court noted that the promissory note provided no conditions which would automatically trigger advancements by plaintiff and no other written instrument set out conditions which would make advances obligatory. As a result, due to the absence of a general contract, the court determined that relative priorities between the first mortgage lien and the mechanic lienors would be determined by the date of each advancement in relation to the date materials and services are first provided.

The plaintiff further argued that the trial court erred in granting co-equal priority and priority over the second mortgage, except as to those lienholders who provided services prior to the filing of the second mortgage. Plaintiff relied upon *American-First Title and Trust Co. v. Ewing (et al)*, 403 P.2d 488 Okla. (1965) which held that in cases without a general contractor, priority is established by the date when material or services are first provided. The appellate court distinguished this case from *Ewing* in that this case involved two loans and the plaintiff knew that some materialmen were not being paid when the second loan was made. As a result, the court refused to grant exclusive priority over mechanic lienors as to any portion of the second mortgage. The court stated plaintiff needed the completed building to secure the loan and therefore it would be unfair to grant plaintiff priority over those who did the necessary work to accomplish completion.

Based on the above, the court of appeals affirmed the trial court's findings.

* * *

This was a motion by a co-obligor on a mortgage to reopen or vacate the default and set aside a foreclosure sale of the property to plaintiff, the mortgagee. The motion was granted. Although plaintiff performed the mailing and delivery requirements for service on defendant Conway under CPLR 308(2), it did not complete service by filing until the default judgment had already been taken. Until service was complete, defendant Conway's time to appear or answer did not begin to run (see, CPLR 320[a]; 3012[c]); thus, she was not in default at the time the default judgment was taken and the judgment is a nullity (see, *Marazita v. Nelbach*, 91 AD2d 604; *Reporter Co. v. Tomicki*, 60 AD2d 947).

The court further exercised its discretion and vacated the default against the coobligor upon whom the service had been completed. (*R.L.C. Investors Inc. v. Zabaski*, 109 AD2d 1053) (1985).

Aetna Casualty & Surety Company v. Valdosta Federal Savings & Loan Association, 175 Ga App. 614, 333 S.E. 2d 849 (1985)

On April 1, 1981, Valdosta Federal made a loan to Dahl secured by deed to secure debt, recorded April 3, 1981. The security deed contained a due-on-sale clause which provided for an assumption under conditions acceptable to the lender including an adjustment of the interest rate. On August 3, 1981, Aetna recorded a judgment against Klein. On February 1, 1982, Dahl conveyed the property securing the Valdosta Federal security deed to Klein. At this time, an assumption agreement was executed releasing Dahl from the obligation and raising the interest rate. Valdosta Federal did not have actual knowledge of the judgment against Klein. Simultaneously, with the conveyance Klein executed a purchase money security deed to Dahl, subject to the Valdosta Federal loan deed. Subsequently Klein defaulted. Dahl transferred his security deed of February 1, 1982 to Valdosta Federal and Valdosta Federal commenced foreclosure proceedings. Aetna brought suit seeking a determination of priority. The trial court held that the liens should be ranked according to date with the oldest having priority.

Did the February, 1982, assumption agreement constitute a novation causing Valdosta Federal's April 1, 1981 deed to secure debt to lose priority over Aetna's judgment?

No. The assumption merely constituted a modification of the terms of the original note. The cancellation of the old deed and execution of a new one between the same parties may have the effect of a novation but a modification agreement will not where the original security deed is not cancelled. Therefore, the Valdosta Federal deed did not lose its priority status.

Also at issue: Did the Aetna judgment of August, 1981, have priority over the February, 1982, purchase money security deed?

No. A purchase money security deed has

priority over liens against the purchaser when executed as part of the same transaction in which purchaser acquires title.

* * *

The court denied plaintiff mortgagee's motion for a deficiency judgment. The deed on the foreclosure sale was delivered on 2/18/83. It was not until 6/27/83 that plaintiff moved for confirmation of the sale and for leave to enter a deficiency judgment pursuant to RPAPL 1371.

The 90-day period on which to move for a deficiency judgment commences when the deed is delivered to the mortgagee (15 Carmody-Wait 2d, NY Prac, §92:404, p 354). The courts have uniformly treated the 90-day period contained in RPAPL 1371 (subd 2) as a provision in the nature of a statute of limitation (*Procco v. Kennedy*, 88 AD2d, affd 58 NY2d 804).

Plaintiff urged this court to hold that defendants should be estopped from asserting the 90-day limitation as a bar to the entry of a deficiency judgment. Nowhere did plaintiff allege any misconduct or misrepresentation by defendants in support of its quest for this equitable relief, and therefore, it may not be granted. *Amsterdam Savings Bank v. Amsterdam Pharmaceutical Development Corp.*, 106 AD2d 797 (1985).

* * *

In this action to foreclose a mortgage on a commercial parcel and on a collateral mortgage on residential premises both pledged as security for a loan of $500,000, defendants defaulted on plaintiffs motion for summary judgment.

Thereafter, defendant moved for an order staying the sale of the residential parcel on several grounds rendering the sale unconscionable. The motion was denied. The defendants' claim that the mortgage on parcel No. 2 was unconscionable should have been raised in opposition to the motion for a judgment of foreclosure and sale. As the appellate division, third department, stated in *Gray v. Bankers Trust Co.* (82 AD2d 168, 170-171): "A judgment of foreclosure and sale entered against a defendant is final as to all questions at issue between the parties, and all matters of defense which were or might have been litigated in the foreclosure action are concluded." *Money Store of New York, Inc. v. Doner Holding Corp.* 112 AD2d 284 (1985).

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WENDER—continued from page 10

ful in convincing its customers—the real estate professionals—that title insurers assume *genuine* risks, pay *real* losses and are worthy of protection against economic instability.

It is essential that our customers, legislators, regulators and the general public gain a greater awareness of the value of our services and the potentially devastating effect of the failure to maintain our economic health. As an integral part of any increased efforts to inform and educate, we must place a greater emphasis on differentiating the title insurance industry from other types of insurers, particularly with regard to the extremely important and expensive area of loss prevention.

PROFILES—continued from page 14

versity and practiced law before joining the pioneer mortgage banking firm of J. E. Foster & Son, Inc., in Fort Worth, an organization he later served as president.

Before becoming associated with Bank of Boston, he also was executive vice president of real estate for First American National Bank in Nashville, Tennessee.

NEW MEMBERS—continued from page 14

Tennessee
Southeast Title of Tennessee, Nashville, (Buddy Adams, Jr., First American Title Insurance Co. of Mid-America, Memphis)

Associate

Massachusetts
James C. Hession, Danvers
Edward P. McPartlin, Boston (John A. Long, Esq., Boston)

New Hampshire
Daniel J. Scanlon, Londonderry

New York
Peter Moesel, Esq., New York (Jerome Calica, Esq., New York)
Keith C. Osber, Esq., Binghamton

JUDICIARY REPORT—continued from page 69

Municipal Property

Department of Transportation v. City of Atlanta, 255 Ga 124, 335 S.E. 2d 114 (1985)

The City of Atlanta transferred land traversing four city parks to the Department of Transportation for use as proposed limited access highway. The deed contained several restrictions and a possibility of reverter to be triggered by any violation thereof. The Department of Transportation sought to condemn the possibility of reverter and any other interest the city might have retained in the portions of the parks deeded to them. The trial court dismissed the condemnation, voided the land transfer and issued a permanent injunction against further construction.

Did the city have the authority to convey public parklands?

The land involved was expressly dedicated to the city for use as parkland and the city accepted the dedication. The parks have not been abandoned by the public. State law prohibits the sale, exchange or other disposition by a municipality of parks, playgrounds and other like property which has been dedicated to public use and not subsequently abandoned. Therefore, without further legislation or referendum, the city could not legally alienate the land in question and the transfer was an ultra vires act and properly enjoined.

Also at issue: Did the Department of Transportation have the authority to condemn land in current public use owned by a municipal corporation?

The provisions of the Georgia Constitution relating to the power of eminent domain and the statutory delegation of such authority speak to private property. The term "private property" does not include property owned by a governmental agency. The Department of Transportation may, as an agency of the state, exercise such eminent domain powers as have been authorized by the general assembly, the power to condemn municipal property has not been given to them by the legislature.

Options

This action was brought to recover damages for breach of contract and fraud. Plaintiff had entered into an option agreement with defendant S for the sale of real property which was assignable. S assigned the option to R. Corp., a close corporation under his control. R. Corp. exercised the option but later defaulted by refusing to go to contract.

Ordinarily, option agreements create only unilateral obligations upon the seller to hold a sale offer open for the duration of the option. The obligations of the parties are transformed into a bilateral contract of sale only upon the exercise of the option (see, e.g., *Benedict v. Pincus*, 191 NY 377).

As a general rule, where the option is assignable, the assignment is made prior to the exercise of the option and the assignee validly exercises the option, the obligations under the bilateral contract thereby created are binding only upon the assignee of the option.

In this action plaintiff sought to pierce the corporate veil. The appellate court denied summary judgment and sent the case back to try the issues. The determinative factor is whether S disregarded the corporate existence of R. Corp. and used the corporation for the transaction of his personal rather than corporate business. *Toroy Realty Corp. v. Ronka Realty Corp.*, App. Div. 2nd Dept. 493 NYS 2d 800.

Edgar v. Hunt, 706 P.2d 120 Mont (1985)

In 1964, the Hunts were granted an option to repurchase land for $7,000 from the Edgars. In 1984, the Edgars brought a quiet title action to invalidate the option contending: (1) there was no consideration for the repurchase option and (2) the repurchase option was a condition restraining alienation and thereby void under 70-1-405 MCA.

The court held that the $1.00 paid was adequate consideration and that the restraint was not void as it was freely entered into by mutual consent as a normal incident of an equal bargaining relationship. Further, when viewed in light of the entire transaction, the option was not repugnant to the interest created.

* * *

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* * *

Plaintiff tenant entered into a lease of residential premises and has been continuously in possession. The unrecorded lease provided plaintiff with an option to purchase the subject premises on certain terms and conditions which typed option was duly exercised. The printed form paragraph "tenth" of the lease provided that the lease was subordinate to any and all mortgages existing and/or subsequently placed upon the premises.

Plaintiff, inter alia, asked for a judgment declaring that a subsequently recorded mortgage as it affected the subject premises was null and void. Judgment was granted plaintiff. Where a tenant is in open, visible and continuous possession under a lease for a term of three years, one taking a subsequent mortgage upon the premises is charged with notice of the prior lease, although it is not recorded, and is not an incumbrancer in good faith within the meaning of RPL §291. *Vitale v. Pinto,* Bianchi, 500 NYS 2d 283 (1985)

Quiet Title

Noble v. National Mines Corp., 774 F2d, 44 Ky

Burden of proving title to disputed property rested upon individual who brought suit to quiet title to land, so that if he was unable to demonstrate valid title to property, any defect in chain of title of corporation which also claimed land were irrelevant.

Evidence concerning actual possession of remote mountain land, ownership of which was disputed was highly relevant in action to quiet title, so that on remand, record should be reopened to allow proof of that issue.

Partnerships

Smith & Hitt Construction Company, Inc., v. Charlie Fowler, et al, No. 54,603 (1985)

Marion T. Smith entered into a partnership with Charles Harry Fowler ("Charlie Fowler"), Dr. Robert E. Wiggins, Sr., and Robert E. Wiggins, Jr., in August, 1979, forming a general recording and production business known as J.D.M. Productions and Delta Sound Stuidio.

In July, 1981, when the People's Bank of Indianola threatened to foreclose on a deed of trust which Smith had executed as security for a loan by the partnership, Smith's corporation, Smith & Hitt, purchased the note in order to prevent foreclosure. However, the bank retained the deed of trust when it sold the partnership note to Smith. Smith subsequently sued his other partners for the balance on the loan. The partners contended that the collateral on the loan was impaired because the bank had not assigned the deed of trust to Smith & Hitt as security for the partnership loan. The supreme court finds that the collateral has not been impaired, since the deed of trust is still in full force and effect and may be foreclosed at the proper time.

Additionally, the court notes that even though the partnership has been dissolved because of Fowler's bankruptcy, the partnership is not terminated, but continues until the partnership affairs have been wound up. The court holds that the affairs of the partnership must be wound up before final disposition of the suit on the partnership note is made. The court reverses and remands to the Chancery Court of Sunflower County so that the affairs of the partnership may be wound up.

Reversed and remanded.

Records

Badger v. Benfield 78 N.C. App 427 (1986)

Plaintiffs purchased a condominium in the spring of 1983. Prior to obtaining a warranty deed from the developer, plaintiffs being attorneys personally conducted a title search. The search revealed various liens but not including a deed of trust to Republic Bank. The plaintiffs' deed was recorded May 5, 1983. Plaintiffs were made aware of the Republic deed of trust and had a second title search performed revealing on the index the Republic deed of trust dated August 5, 1982. A trip to

the office of the register of deeds confirmed the Republic deed of trust had been indexed on May 10, 1983. Plaintiffs had negotiated a settlement with Republic. Plaintiffs claimed loss because of the tardy indexing of the Republic deed of trust. Trial court dismissed for failure of plaintiff to state a claim upon which relief could be granted.

Was the late indexing by the register of deeds proximate cause of plaintiffs' loss?

The trial court was affirmed by the court of appeals. Priority as between the plaintiffs' deed and the Republic deed of trust was established based on the timing and order of their registration. Registration is not deemed complete until the instrument has been properly indexed. Since the Republic deed of trust was indexed only after the plaintiffs' deed was properly registered, the plaintiff had no obligation to Republic for their deed held priority over the bank's deed of trust. Defendant's failure to properly index the deed of trust was not the proximate cause of plaintiffs' injury.

Haner v. Bruce, 145 Vt. 694 (1985)

In March, 1979, plaintiff obtained a writ of attachment against defendant, Bruce, and filed it with the St. Albans City Clerk, who recorded and indexed it in an "attachment book." The clerk, however, did not index the attachment in the general index of land records, as required by 24 V.S.A. section 1161. A recorded land contract gave Bruce the right to purchase certain real estate in St. Albans.

In May, 1979, Bruce purchased the property and conveyed it one day later to defendants Fosgate. In early 1982, Plaintiff obtained a final judgment against Bruce and filed it with the city clerk.

The trial court recognized the defendants as bona fide purchasers without notice of the misindexed attachment and dismissed plaintiff's claim.

At issue: Whether a misindexed real estate attachment is valid against a subsequent bona fide purchaser who had no actual notice of the attachment.

Judgment reversed and remanded. In the absence of statutory provisions, an index is not an essential part of the record. The filer of an instrument does not bear the risk that the filing officer will not properly perform his or her duties and as between the parties, the filer shall not be held more blameworthy than the title searcher who is in a position to protect himself by simply asking the recording clerk about the peculiarities of the records and recording procedures.

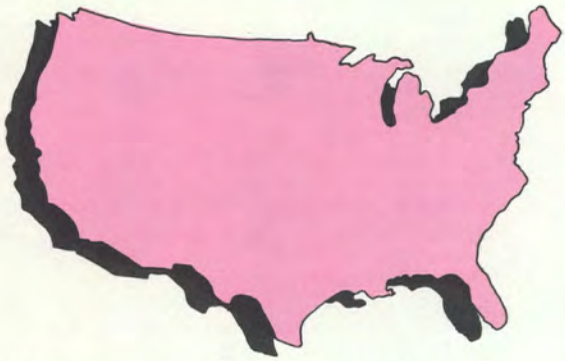
Reporter's comment: Important to note that the city clerk was not a defendant and, thus, the responsibility of the recording clerk was never raised as an issue.

* * *

The owner of property fraudulently obtained a satisfaction of mortgage. The satisfaction was not recorded, but at a closing of a sale of the property, it was exhibited to the representative of the title company, who marked the lien off the company's exception list. About an hour after the closing, but before the deed to the purchaser and the satisfaction piece were filed, the mortgagee filed a notice of pendency. The mortgagee brought an action to set aside the mortgage satisfaction, and the purchaser appealed from a judgment of supreme court which canceled the satisfaction and declared the mortgage a valid lien. The appellate division affirmed, holding: "When, as here, a notice of pendency is filed, a purchaser is charged with constructive notice of litigation if he fails to record the deed prior to the filing of the notice of pendency." Dissenting, Justice Rubin wrote: "The filing of a notice of pendency under the circumstances of this case does not preclude the application of the equitable rule that where one of two innocent parties must suffer from the perpetration of a fraudulent act, the party who enabled the act to be done must suffer the loss." (*Goldstein v. Gold*, 483 NYS 2d 375.)

Rule Against Perpetuities

The bylaws of a condominium gave its board the perpetual right to buy any unit on the same terms as a proposed outside purchaser. The court rejected a contention by buyers against whom the right was exercised that it violated the rule against perpetuities. It held that although an option to buy property is subject to the rule, the option here "does not present a significant restraint on the power of the property owner to convey a fee interest," nor, since the option was vested in the board, would problems arise in identifying the option holder. "[A] technical violation of the rule against perpetuities should not operate to void an otherwise reasonable restraint," the court concluded in denying plaintiffs' motion for an injunction against the condominium's sale. *Anderson v. 50 East 72nd Street Condominium,* Superior NY County 491 NYS 2d 189.



Around the Nation

McCook Abstracter Nebraska President

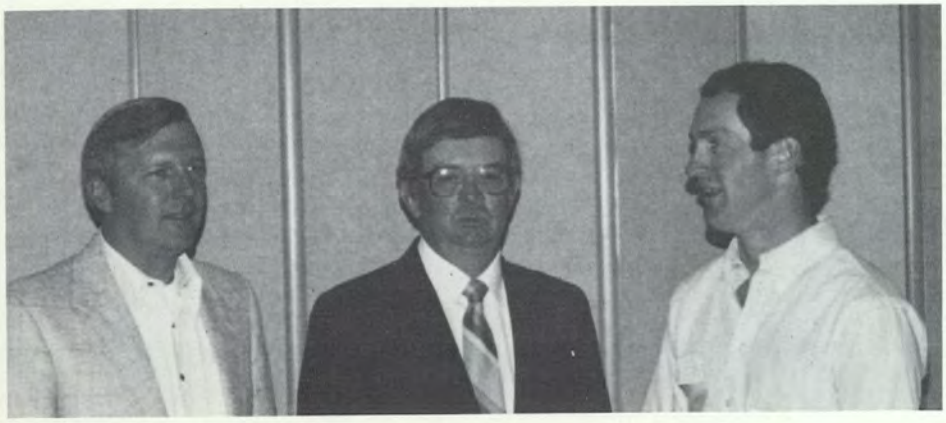
ALTA President-Elect Marvin C. Bowling, Jr., Lawyers Title Insurance Corporation, was a featured speaker at the Nebraska Land Title Association annual convention.

NLTA announced amendment of its bylaws to offer affiliate membership to any person registered as an abstracter or title insurance agent in any state other than Nebraska, as well as any licensed real estate broker, registered land surveyor, attorney, or any person engaged in a business or profession relating to abstracting or title insurance who are not eligible for active membership.

A special, first time, "Title Person of the Year" honor was presented to Jim Lehr of Hamilton & Johnson, Inc. The association plans to continue with this award, which is the responsibility of the NLTA board of directors.

John F. Hanson, McCook Abstract Company, was elected NLTA president. Margaret Schneider, First Securities Corporation in Aurora, was elected vice president, and newly-elected members of the board of directors, each for three terms, are Patty Jacobs, Seward Title Company, Inc., and Jeffrey D. Bell, Bell Abstract & Title Company. Immediate past president is Michael G. Fahey, American Land Title Company, Inc.

David Grove of Auburn, Nebraska is the recipient of the 1986 NLTA scholarship award. He attends Kearney State College, and is majoring in accounting. The scholarship award recipient is chosen by the scholarship committee, and is a senior in high school who is a child of an abstracter or title person.



Newly-elected officers of the North Dakota Land Title Association are, from left, Vice President Rodney Lindstrom, President Thomas Ward and Secretary-Treasurer Gabe Hermes.

North Dakotans Elect Thomas Ward President

Thomas Ward, Hettinger County Abstracters, was elected president of the North Dakota Land Title Association at the 1986 annual convention of that organization. Elected vice president is Rodney Lindstrom, Surety Title Company, and re-elected as secretary-treasurer is Gabriel Hermes, Richland County Abstract Company. C. Walton Elliott, Security Abstract Company, is immediate past president.

Guest speakers at the convention included ALTA Senior Vice President William J. McAuliffe, Jr., Norm Evilsizer, Title Insurance Company of Minnesota; John Stewart of the Brady, Martz accounting firm; and Darin Langseth of Midwest Federal Savings Bank.

Hon Featured Speaker At Washington Meeting

ALTA Abstracters and Title Insurance Agents Section Chairman, Charles Hon, The Title Guaranty & Trust Co. of Chattanooga, was a featured speaker at the annual convention of the Washington Land Title Association.

Hon reported on the status of the Federal Trade Commission administrative complaint against six title insurers and related federal legislative efforts of ALTA, the tax reform bill and its impact on the title industry, ALTA efforts to secure affordable and continually available errors and omissions insurance for its members, the new Internal Revenue Service requirement for reporting the seller's

gross proceeds from all real estate sales, and activity of the Title Industry Political Action Committee.

Other speakers included State Insurance Commissioner Dick Marquardt, Jerry Guerino, senior vice president, Transamerica Title Insurance Company, who discussed high liability underwriting in "hostile takeovers;" and Warren Kennedy, Commonwealth Land Title Insurance Company, who reported the activities of the Washington Limited Practice Board.

Gary Kidd, Transamerica Title Insurance Company, was elected WLTA president and Gene Geist, Land Title Company of Jefferson County, was elected vice president. Vern Arnold remains executive secretary. Immediate past president is John Tagge, Chicago Title Insurance Company.

Wisconsin Association Now 80 Years Old

The Wisconsin Land Title Association recently celebrated its 80th anniversary during the 1986 annual convention of the organization.

Featured speakers included ALTA President-Elect Marvin Bowling, Lawyers Title In-

TIPAC Supports Successful Oklahoma Candidate

ALTA President John R. Cathey, right, The Bryan County Abstract Company, presents a contribution from the Title Industry Political Action Committee to Jim Unhofe, successful Republican candidate for the Congressional first district house seat in Oklahoma. He received 56 per cent of the vote during the November election. President Cathey is the TIPAC state trustee from Oklahoma.

ALTA Senior Vice President William J. McAuliffe, Jr., at dias, installs newly-elected officers during the D.C. Land Title Association convention banquet. From left are President J. Bruce Davis, Second Vice President Richard L. Sugarman, Treasurer David M. Hall, and Third Vice President Mary Naccash.

D.C. Land Title Association Past President J. Frank Mowery, Columbia Real Estate Insurance Company, presents Ann M. Bridges, First American Title Insurance Company, with a silver tray in appreciation for her years of service to that organization.

surance Corporation, who provided an update on "ALTA Membership and Involvement," including a report on the Federal Trade Commission administrative complaint against title insurers and related federal legislative efforts by ALTA, and Eugene Ranney, Northwestern Mutual Life Insurance Company, spoke on the origination of real estate investments and various forms of financing used in major transactions.

Also providing commentary on the program as speakers were WLTA lobbyist Peter Christiansen of Cooke & Franke, Milwaukee, who gave an update on results of the November elections; Paul Gergen, president of Kenosha Savings and Loan Association, who spoke on the "Lending Economy in Wisconsin," predicted the next three years as good ones for the savings and loan industry; and Paul Mangiaracina, Ticor Title Insurance Company, Chicago, who reported on activities the Illinois Land Title Association in exploring development of its own errors and omissions insurance program.

Dick Oliver, Smith Abstract & Title, Inc., is the newly-elected WLTA president. President-elect is Chuck Schiereck, Chicago Title Insurance Company. Re-elected as directors are Jim Duffy, Ashland Land Title Co.; Steve Evans, Outagamie Abstract & Title Co., Inc.; and Mike Skoglind, Schmitt Abstract & Title Co., Inc. Newly-elected directors are Mark Ciborowski, Wisconsin Title Service Co., Inc., and Al Dixon, Rusk County Abstract Co. Carrie Hoyer, Wisconsin Title Service Co., was re-elected secretary-treasurer. Roger Manley, Walworth Title Security Co., is immediate past president.

D.C. Title Association Honors Ann Bridges

Ann M. Bridges, First American Title Insurance Company, was honored at the Washington, D.C., Land Title Association banquet with a silver tray and a bouquet of roses for her years of devoted service to that organization.

ALTA Senior Vice President William J. McAuliffe, Jr., installed the newly-elected officers, who are: president, J. Bruce Davis, Lerch, Early, Roseman & Frankel; first vice president, Bernard F. Goldberg, Lawyers Title Insurance Corporation; second vice president, Richard L. Sugarman, City Title & Escrow Company, Inc.; third vice president, Mary Naccash, Titlemark Services, Inc.; secretary, Darlene E.P. Clark, Columbia Real Estate Title Insurance Company; treasurer, David M. Hall, Chicago Title Insurance Company; assistant secretary, Ielaine Belton, Columbia Real Estate Title Insurance Company; and, assistant treasurer, Susan B. Poff, Chicago Title Insurance Company.

Guynes Heads New Plano Title Operation

Plano Title Company has announced the opening of its newest office in Plano, Texas.

Kay Guynes is senior vice president of the new operation. Christa Buchanan is escrow secretary and Jana Kettlehut is the receptionist and bookkeeper.

FLTA Honors Robinson

James W. Robinson has been designated an Honorary Life Member by the Florida Land Title Association during the annual convention of that organization. He serves as a consultant to Miami-based American Title Insurance Company, and, before his retirement, worked in the title industry from 1935 to 1983. Earlier, he was elected an ALTA Honorary Member and FLTA's "Titleman of the Year."

Names in the News

Everbach

Pahl

Uhlman

Keith

Lanier

Wilkie

tant counsel-claims, Dallas, Texas; **Theodore N. Denslow**, assistant controller, Richmond, Virginia; **Dana R. Ward**, risk administrator, Richmond.

Insured Titles, Inc., has announced the promotion of **John L. Felder**, to vice president and national agency counsel, Overland Park, Kansas.

Commonwealth Land Title Insurance Company has announced the following promotions: **Jean Archambault**, vice president, Fort Lauderdale, Florida; **Nancy K. Hunsinger**, assistant vice president, Philadelphia, Pennsylvania; **Suzanne P. MacGregor**, assistant vice president, Fairfax, Virginia; **Ernest O. Winn**, assistant vice president, Sarasota, Florida; **Raymond T. Woznicki**, assistant vice president, Norristown, Pennsylvania; **Charles W. Kiehl, Jr.**, assistant title officer, Lancaster, Pennsylvania; **Eugenia P. Leskie**, closing officer, Drexel Hill, Pennsylvania; **Rita Ann Ambrosine**, assistant records officer, Philadelphia.

The following appointments are announced by Fidelity National Title Insurance Company; **Gene Snook**, vice president and county manager, Los Angeles, California; **Kristen Reid**, branch manager, San Mateo, California; **Willy Lambright**, sales representative, Santa Ana, California.

Denslow

Ward

Felder

Hunsinger

Hull

Heil

Ticor Title Insurance Company, Los Angeles, California, announces the promotion of **Erich E. Everbach**, to executive vice president, secretary and general counsel; **Kurt G. Pahl**, to senior vice president and treasurer; and **John W. Uhlman**, to senior vice president and controller.

The following have been elected to these respective positions at Lawyers Title Insurance Corporation: **Charles W. Keith**, vice president and Pennsylvania state manager, Pittsburgh, Pennsylvania; **Charles S. Lanier**, vice president, Albuquerque, New Mexico; **John B. Wilkie**, vice president and continues as chairman of the board and president of Lawyers Title of Arizona, Tucson, Arizona; **Deborah L. Goodman**, manager, Atlanta, Georgia; **Frederick R. Persaud**, branch manager, Miami, Florida; **Eric W. Smith**, branch manager, Winter Haven, Florida; **Lloyd R. Miley**, manager, Tampa, Florida; **Janet A. Dinihanian**, manager, Bridgeport, Connecticut; **John T. Updegraff, Jr.**, assis-

Goodman

Persaud

Dinihanian

Updegraff

The following elections are announced by Mid-South Title Insurance Corporation, Memphis, Tennessee: **Lois J. Hodge**, senior vice president; **Robert Schneider**, underwriting and escrow counsel. Mid-South Title has also announced the following additions: **Barbara Brown**, staff attorney, commercial and national referral business; and **Michael S. Champlin**, staff attorney, residential area.

James W. Hull has been named southwest district manager and vice president, Altamonte Springs, Florida, for American Title Insurance Company.

Industrial Valley Title Insurance Company has announced these appointments: **James G. Heil** to account executive, Radnor, Pennsylvania; **Geoffrey McGraw**, corporate systems analyst, Haddonfield, New Jersey.

Chicago Title Insurance Company has announced the appointment of **Annette I. Kelley**, to account executive, Philadelphia. Chi-

cago Title has also announced the following promotions: **James Barrett**, vice president, sales, Cleveland, Ohio; **Albert P. DeChristie**, assistant vice president and branch manager, Cherry Hill, New Jersey; **Carmen Wright**, manager, Dallas, Texas.

Kevin Barber has joined American Realty Title Assurance Company as sales and marketing representative, Columbus, Ohio.

Western Title Insurance Company has named **Richard D. Nott** manager, Oakland, California.

KANSAS CITY—continued from page 19

ert H. Davenport, Carmel, Indiana, land descriptions consultant who is retired vice president and Indiana training director for Ticor Title and a former secretary of the Indiana Land Title Association.

Registration for the seminar is $70 for ALTA members and $110 for non-members, which does not include meal or lodging expense. Registration checks made payable to the Association may be sent to ALTA Vice President-Public Affairs Gary L. Garrity in the organization's office, Suite 705, 1828 L Street, N.W., Washington, DC 20036 (telephone 202-296-3671).

ALTA has reserved a block of sleeping rooms ($63 single, $75 double) at the Hilton Airport Plaza for the nights of Thursday and Friday, April 9 and 10. Reservations may be confirmed and extended if desired by calling the hotel at 816-891-8900 and identifying as part of the ALTA group. The hotel will release all rooms not confirmed by March 26, 1987.

Besides Detring and Carlisle, membership of the Education Committee also includes Myron C. Ely, president, East Tennessee Title Insurance Agency, Inc., Knoxville; Barbra Gould, president, Ford County Title Company, Inc., Dodge City, Kansas; Timothy J. McFarlane, vice president and manager, Idaho Title & Trust Company, Idaho Falls; Peter C. Norden, vice president and state manager, First American Title Insurance Company, Boston; and P.C. Templeton, president, First Amercian Title Insurance Company of New Mexico, Albuquerque.

American Realty Title Opens New Office

American Realty Title Assurance Company has announced the opening of a new office in Gahanna, Ohio.

This is a full service title agency that provides title insurance, in-house counsel, closing services, and courier service to the real estate market in central Ohio.

Carolyn Welsh is manager of the operation.

Strickler Named Head Of New Fidelity Office

Fidelity National Title Insurance Company has opened a new escrow office in Santa Rosa, California.

Diane Stricker has been appointed manager of the branch. Susan Peterson is acting escrow officer.

MEMBERSHIP—continued from page 21

ALTA membership is very important to title insurance underwriters, abstracters, and title insurance agents, as is evident from the following recent Association activities.

In 1986, after three years of work by the Association's Title Insurance Forms Committee, the following new title insurance forms were approved, effective June 1, 1987: ALTA Loan, Owners, Leasehold Loan, Leasehold Owners, and Construction Loan. In addition, the following endorsements of the Association were revised: 1, 2, 3, 3.1, 4, 5, 6, 6.1, 6.2, and 7.

Government relations continues to be a vital part of the Association. Through the efforts of the Government Affairs Committee and Director of Government Relations Robin E. Keeney, ALTA maintains close ties with Congress on issues of interest to the title industry, distributes grassroots campaign packages among ALTA members encouraging individuals to communicate their views to their legislators in Congress, and has increased the visibility of the title insurance industry among those in Washington whose decisions affect the future of the industry.

This legislative activity is aided immeasurably by the Title Industry Political Action Committee (TIPAC). This organization allows members of the title industry the opportunity to financially support the election campaigns of members of Congress whose views are compatible with those of the title industry. By contributing to TIPAC, a member can add his or her voice to those of others, to send a united message to our lawmakers in Washington in order to help them better understand the position of the title industry.

In the past year, the Association has had legislative success with respect to matters in the Tax Reform Act of 1986 and its impact on the title industry, namely the provisions relating to the taxing of unearned premium reserves of underwriters and the reporting of real estate transactions to the IRS. The Association also has been involved in the following issues: the Antitrust Damages Clarification Act, Superfund, Bank Bribery Deregulation, McCarran-Ferguson Act, Risk Retention Act and many others.

The ALTA Errors and Omissions Committee is studying the feasibility of ALTA creating or sponsoring a company that will offer errors and omissions insurance to members of the Association.

The value of ALTA membership is evident. It is now up to all of us who are members to make a conscious effort to inform non-members of the importance of membership. For further information, I can be reached at Ticor Title Insurance Company of California, Suite 2500, 350 N. St. Paul, Dallas, Texas 75201, telephone (214) 651-7400.

The Bite of COBRA

Joan C. Szabo

Employers are wary of the bite of company health plan requirements in COBRA—the Consolidated Omnibus Budget Reconciliation Act of 1985, which was signed into law April 7.

"COBRA is one of the most dangerous intrusions on small business—I view it with considerable alarm," says Jerry Bartos, owner and president of Bartos, Inc., a small Dallas-based manufacturer of ventilation systems. That is because the law "makes a business person responsible for someone who is no longer in his or her employ," Bartos says.

Under COBRA, businesses with more than 20 employees that offer health insurance must continue coverage at group rates for up to 18 months for employees who retire, quit, switch from full-time to part-time status or are laid off. Those insured must pay the full cost of their insurance plus a 2 percent surcharge to cover administrative expenses.

Companies are required to continue coverage for three years, at the 102 percent rate, for an employee's spouse and dependents if the employee dies or becomes entitled to Medicare. The requirement also applies in event of a legal separation or divorce. On top of that, an employer must offer to provide the same three years' continued coverage to a dependent who reaches the maximum age for dependent coverage.

Continued coverage must be the same as that offered to "similarly situated" beneficiaries—individuals still employed by the company. Those eligible have at least 60 days to decide if they want it.

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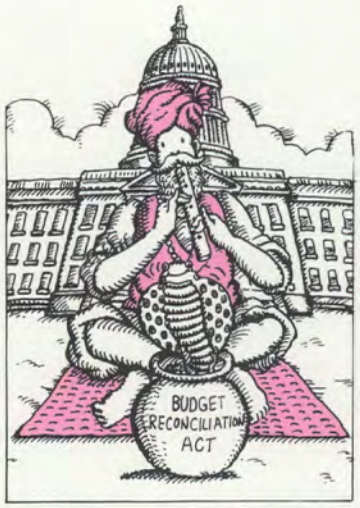
COBRA takes a deep gouge out of employers who fail to meet its requirements. The penalty is loss of a company's entire tax deduction for contributions made to all health plans.

Employee benefit consultants say the complexity of COBRA's health coverage provision has sparked a rash of questions from employers. "We have been flooded with inquiries on how to comply," says Peter Panken, a senior member of Parker, Chapin, Flattau & Klimpl, a New York and Washington law firm with a large practice representing management in labor relations.

Dennis M. Corry, manager of benefit plans for the Quaker Oats Company, says that "COBRA is ill-defined, lacking both clarification and guidelines."

Many companies view the law's paperwork requirements as an administrative nightmare. Under COBRA, employers must give written notice to each eligible employee and spouse of their right to continued health coverage. Written notice is also required when an employee or beneficiary becomes eligible for the continued coverage. The Labor Department has a model notice to help firms comply with the notification requirements.



Eucalyptus Tree Studio

Another major worry for employers is COBRA's potential cost. In addition to their expenses in processing the program, there is a possibility of higher health benefit premiums. Regulations are needed to explain how the cost of health insurance should be calculated, says Hewitt Associates, an employee benefit consulting firm in Lincolnshire, Ill.

"The 102 percent rate that companies are permitted to charge is not likely to cover the actual claim costs of people who decide to take coverage," says Peter J. Hutchings, who advises companies on their health benefits for Kwasha Lipton, an employee benefit consulting firm in Fort Lee, N.J. "The 102 percent is based on the average employee, but people who decide to continue coverage are more likely to anticipate needing medical care."

Quaker Oats' Corry says he "would not be surprised if the true cost of coverage is more than five times the premiums paid."

Employers may react to the possibility of higher rates by finding additional ways to trim health care expenses, such as asking employees to pick up more of the cost of insurance, experts say. Another cost-cutting step may include instituting a waiting period before health coverage kicks in for new employees, says consultant Linda Havlin of Hewitt Associates.

Dallas manufacturer Bartos says he has decided to drop all dependent coverage because of COBRA.

Though business views the law with trepidation, no one knows for sure how much COBRA will be used. "It remains to be seen how many people will take advantage of extended health benefits," Hutchings says. "In many cases, employees leaving one company will pick up coverage from their next employer or spouse's employer, which will almost always be less expensive for the former employee."

Meanwhile, companies are awaiting clarifying regulations from the Labor Department and the Internal Revenue Service to provide more guidance on COBRA. Until those rules are issued, employers are required to show good faith in complying with the law.

As they gear up to live with COBRA, a number of business people fear it is a harbinger of more federal regulation in the employee benefits area. One much-discussed bill in Congress that worries them would require most employers to offer up to 18 weeks of unpaid parental leave.

Another bill would require continued health coverage for former employees and their families for up to four months. More costly than COBRA, this proposal would require an employer to pay the same portion of the premiums paid before termination.

Many companies, says Hewitt's Havlin, see COBRA "as the beginning of a whole new wave of federally enacted social policies instituted by government though the employer."

Calendar of Meetings

March 25-27
ALTA Mid-Year Convention
Albuquerque Hilton Inn
Albuquerque, New Mexico

April 9-12
Palmetto Land Title Association
Myrtle Beach Hilton
Myrtle Beach, South Carolina

April 26-28
Eastern Title Insurance Executives
The Hotel Hershey
Hershey, Pennsylvania

April 30-May 2
Arkansas Land Title Association
Riverfront Hilton
North Little Rock, Arkansas

May 3-5
Iowa Land Title Association
The Lodge
Okoboji, Iowa

May 6-9
California Land Title Association
Hyatt Regency Monterey
Monterey, California

May 7-9
New Mexico Land Title Association
The Inn
Farmington, New Mexico

May 7-10
Oklahoma Land Title Association
Excelsior Hotel
Tulsa, Oklahoma

May 21-23
Virginia Land Title Association
Kingsmill on the James
Williamsburg, Virginia

June 4-7
Texas Land Title Association
Hyatt Regency Hotel
San Antonio, Texas

June 7-9
Pennsylvania Land Title Association
Seven Springs Mountain Resort
Champion, Pennsylvania

June 11-12
Southwest Title Insurance Executives
The Broadmoor
Colorado Springs, Colorado

June 11-12
South Dakota Land Title Association
Game Lodge, Custer State Park
Custer, South Dakota

June 11-14
Colorado Land Title Association
Keystone Lodge
Keystone, Colorado

June 18-21
Illinois Land Title Association
Pheasant Run Resort
St. Charles, Illinois

June 21-23
New Jersey Land Title Association
Concord Resort Hotel
Kiamesha Lake, New York

June 25-27
Oregon Land Title Association
Rippling River Resort
Welches, Oregon

June 25-28
New England Land Title Association
Smuggler's Notch Inn
Vermont

July 16-18
Michigan Land Title Association
Grand Hotel
Mackinac Island, Michigan

August 6-9
Idaho Land Title Association
Sun Valley Resort
Sun Valley, Idaho

August 6-9
North Carolina Land Title Association
Shell Island Resort
Wrightsville Beach, North Carolina

August 6-8
Montana Land Title Association (joint)
Wyoming Land Title Association
The Outlaw Inn
Kalispell, Montana

August 13-15
Minnesota Land Title Association
Holiday Inn
Bemidji, Minnesota

August 27-30
Kansas Land Title Association
Marriott Hotel
Overland Park, Kansas

September 10-13
Missouri Land Title Association
Kansas City Marriott
Kansas City, Missouri

September 13-15
Ohio Land Title Association
Quail Hollow Resort
Painesville, Ohio

September 13-16
New York Land Title Association
The Equinox
Manchester Village, Vermont

September 16-17
Wisconsin Land Title Association
The Landmark
Door County, Wisconsin

September 17-19
North Dakota Land Title Association
Ramada Inn
Williston, North Dakota

September 23-26
Dixie Land Title Association
Royal Orleans Hotel
New Orleans, Louisiana

September 26-29
Indiana Land Title Association
Holiday Inn at Union Station
Indianapolis, Indiana

September 30-October 2
Nebraska Land Title Association
Ramada Inn
Kearney, Nebraska

October 18-21
ALTA Annual Convention
Westin Hotel
Seattle, Washington

October 18-21
Washington Land Title Association
Westin Hotel
Seattle, Washington

November 12-14
Arizona Land Title Association
Doubletree Inn
Scottsdale, Arizona

November 18-21
Florida Land Title Association
Orlando, Florida

December 2
Louisiana Land Title Association
Westin Canal Place
New Orleans, Louisiana

1988

March 11-13
ALTA Mid-Year Convention
The Westin La Paloma
Tucson, Arizona

October 16-19
ALTA Annual Convention
Toronto Hilton Harbour Castle
Toronto, Canada

1989

April 5-7
ALTA Mid-Year Convention
The Mayflower-A Stouffer Hotel
Washington, D.C.

October 15-18
ALTA Annual Convention
Hyatt Regency Embarcadero Center
San Francisco, California

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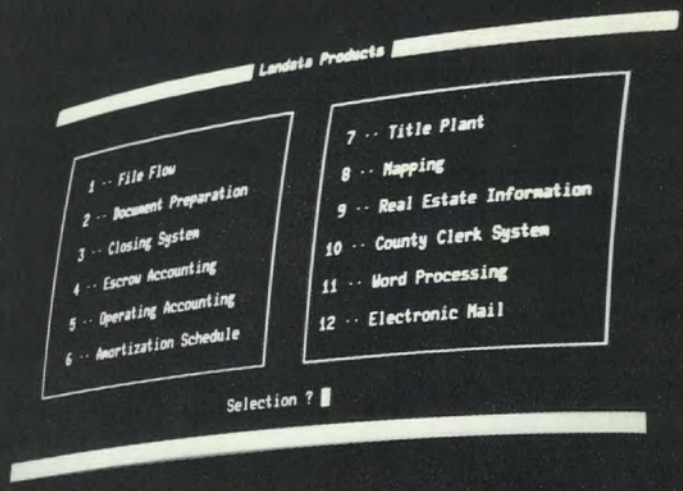

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(713) 871-9222
(800) 551-3220

DENVER
LANDATA SALES OFFICE
7400 East Caley Avenue
Englewood, Colorado 80111
(303) 741-5540

HOUSTON
LANDATA, INC. OF HOUSTON
9720 Beechnut
Houston, Texas 77036
(713) 271-0241

LOS ANGELES
LANDATA, INC. OF LOS ANGELES
412 West Broadway, Suite 211
Glendale, California 91204
(818) 244-8100

PALM BEACH
LANDATA, INC. OF W. PALM BEACH
2001 Broadway
Riviera Beach, Florida 33404
(305) 863-8001

PORTLAND
LANDATA, INC. OF PORTLAND
200 SW Market, Suite 110
Portland, Oregon 97201
(503) 226-7169

SAN ANTONIO
LANDATA, INC. OF SAN ANTONIO
5409 Jackwood Drive
San Antonio, Texas 78238
(512) 680-4060

TAMPA
LANDATA, INC. OF TAMPA
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