

TITLE *News*

MAY • JUNE 1989

What you should know about
creditors' rights and bankruptcy



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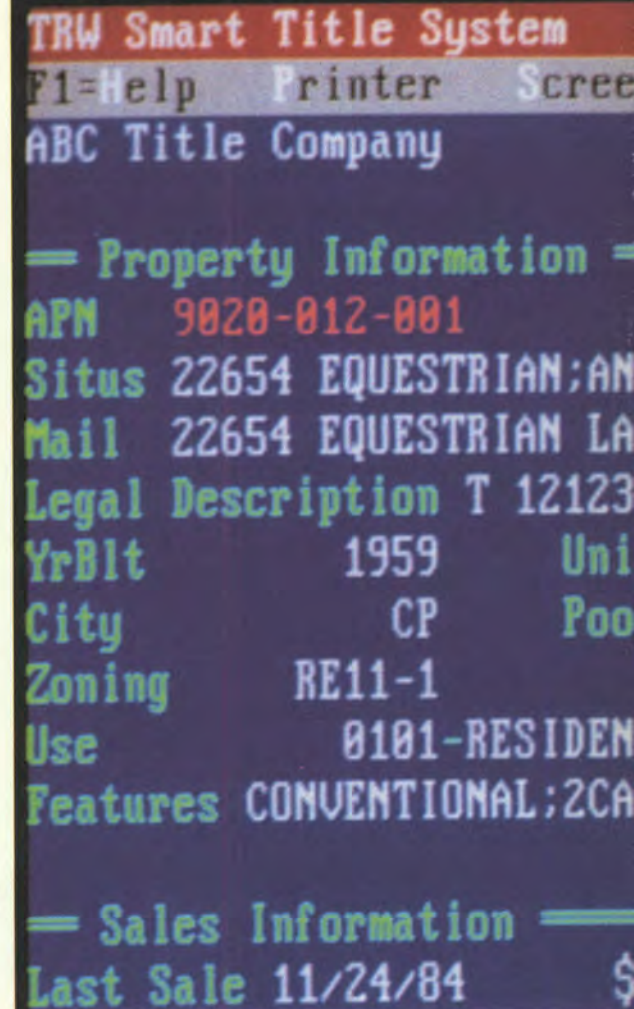
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Cover Illustration:

Everyone wants a piece from the title insurance representative (seated), but can he make his closing as the final hour approaches? See story on page 4. Cover illustration by Chris Fauver. Mr. Fauver is a long-time Washingtonian whose diversified work has appeared in numerous Association publications. An illustrator and artist, Mr. Fauver's paintings are widely known throughout the Washington Metropolitan area.

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To some, he's known as Robert Novak's opposition; as the outspoken "liberal" on the **Capitol Gang**. Others know him as a syndicated **Washington Post** columnist, or for his appearances on a variety of news shows. Whatever the tag, he's the witty, affable, and thoroughly Irish, Mark Shields. In this interview, Shields (TIPAC luncheon speaker at the 1989 Mid-Year Convention), shares some *very* candid thoughts and impressions about Washington and politics.

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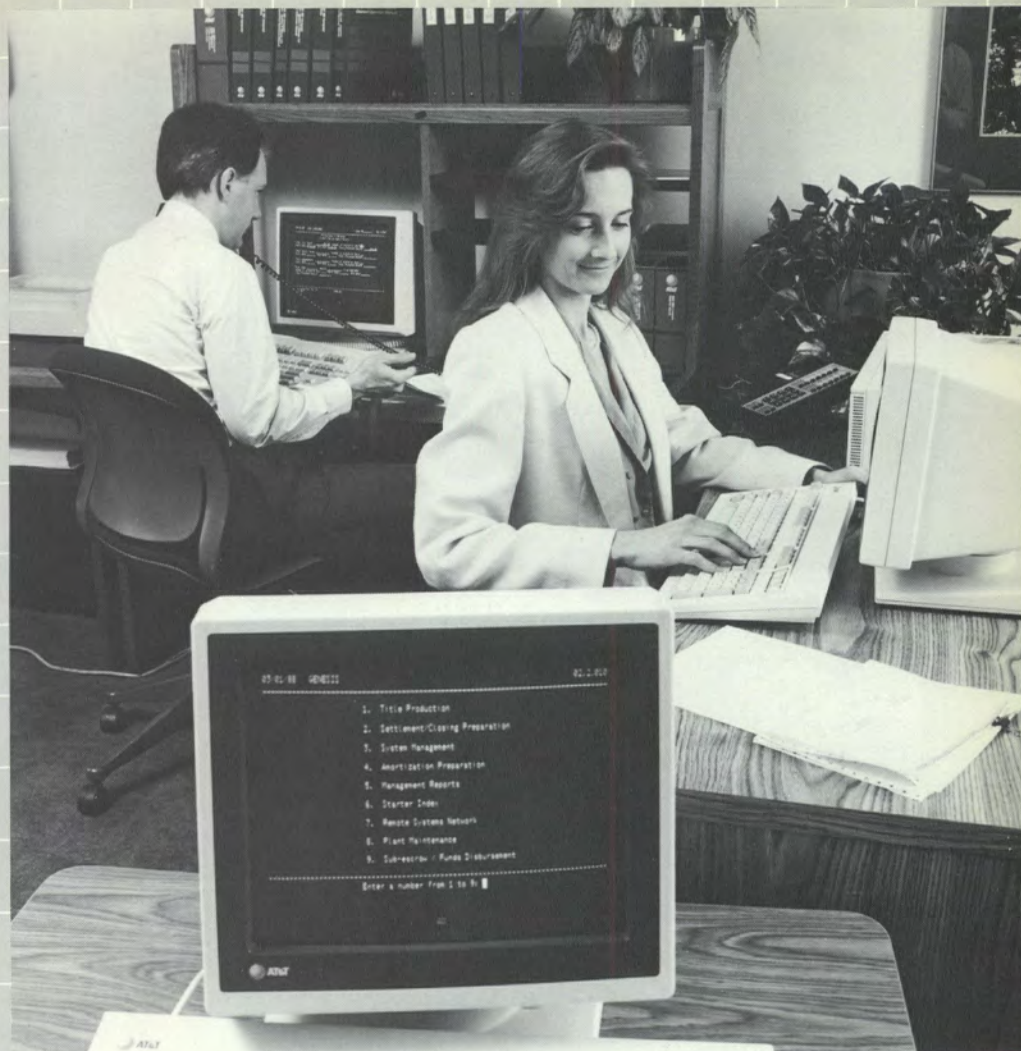
A trip down memory land—from the formation to the present events of the Land Title Institute. Written by the "Grande Dame" of the Institute itself, the article presents a first-hand view of the trials and tribulations of one of ALTA's great success stories.

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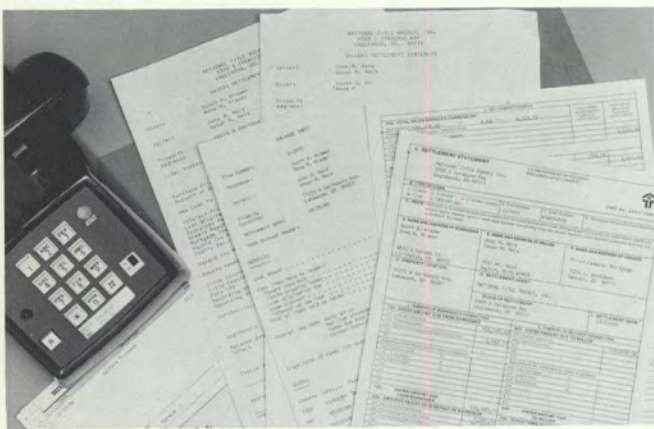
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Message From The Underwriters Chairman



Many of us in the title industry have expressed concern over the direction our profession has been headed. Adverse claims experience can be traced to human error, accepting risks never before insured, caving in to customer demands or just plain dishonesty.

The deterioration of standards in our business is not a recent phenomenon. It started many years ago when underwriters, eager to expand nationally, spread the industry's limited technical talent too thin, devoted their resources to their expansion effort, and simultaneously scrapped internal training programs. This evolution was followed by a proliferation of new agency operations in those areas of the country where agents were predominant with the same result—far too few competent people to go around. Like

sharks on a feeding frenzy, others rushed to get into this business which they saw as having excellent short-term profit potential. They came in without objection and without regard to their ability or financial strength. As a result, claims increased, but they appeared at the time to be manageable. Not recognizing the real causes of the problem, adverse claims experience in a given year was rationalized away with comments like "this was just a bad year" or "it was our turn to get hit."

The era of controlled business entities then created a new and disturbing problem for our industry. Much has been said about the pros and cons of controlled business with the focus generally on these issues: the influence exerted by the ownership, the quality of work produced, pricing, free choice, conflicts of interest and whether or not banks should be in the title business. These are all important issues which members of our Association have devoted considerable time, energy and resources to address. These issues, however, are secondary to the real problem: how controlled business entities have impacted our willingness to make long-term investments in our business—which are critical, if we intend to reestablish the standards of excellence required in the title industry.

Many of us, agents and underwriters alike, may be unwilling to make these investments as long as it is possible for controlled business entities (who in all probability, are our best customers) to erode our business almost overnight. Simply put, there is little incentive to reinvest capital in the business absent a level playing field.

Unfortunately, I do not anticipate near term changes in our business. A radical change in our regulatory environment is not likely to occur, nor is controlled business in one form or another likely to go away, nor will competitive practices likely lead to better underwriting standards, nor are the moral and ethical values of the country likely to improve. What we must do is face the realization that our business is changing. It is moving away from risk avoidance and more towards risk assumption. That is reality—like it or not.

WHAT CAN WE DO IN ACCEPTING THIS REALITY? The actions we must take are evident.

—STRENGTHEN LOSS RESERVES—Claims are not going to go away, in fact they may get worse before they get better. This applies to escrow claims and title claims; the tail being much longer than many of us are willing to accept.

—REDUCE OPERATING COST—To accomplish this end without affecting quality is easy to say but hard to do. We have to become more efficient.

—BEEF UP TECHNICAL TRAINING BUDGETS—Absent improvement in the quality of our product, our industry may be doomed.

—HIGHER STANDARDS—We must establish and maintain higher standards of performance, both ethical and technical, in all areas of our business.

Certainly, the need to insure land titles will continue, but this does not mean our traditional methods of operating are guaranteed a place in the process. Survival of any industry depends on its ability to adapt to change. Exactly how our products will be produced, serviced and delivered in the future is unclear, but it is evident that there will be changes. If we continue to swim with the sharks who have contributed to the deterioration of our industry standards—the reality will be to accept their radical visions of how title insurance services will be provided in the future.

Dick Cecchetti

Creditors' And Debtors' Rights And Title Insurance



by James M. Pedowitz

The following is reprinted with permission from the New York Law Journal.

We are living in a time period in which the law of creditors' rights is undergoing radical changes. Today, it could more appropriately be called the law of debtors' rights. This is particularly so with respect to the characterization by the bankruptcy courts and others of various types of transfers as preferential or even fraudulent under the Bankruptcy Code and under state insolvency laws. Recent decisions such as *Durrett v. Washington National Insurance Co.*, 621 F.2d 201 (5th Cir. 1980) (hereafter "Durrett"), and others have stigmatized previously acceptable transactions, such as a regularly conducted mortgage foreclosure sale, as fraudulent under either or both of the United States Bankruptcy Code and various state fraudulent conveyance acts. These changes are having a significant impact on title insurers.

The phenomenal development of the leveraged buy-out ("L.B.O.") as a method of buying and selling a business has spawned a host of creditors' and debtors' rights issues. In addition, various other transactions such as options to purchase, whether contained in a lease or as a separate agreement, transfers among related corporations, or between a partnership and its partners, and even lease terminations are some examples of transactions that have been attacked as a violation of creditors' or debtors' rights in recent years.

An article in *The Business Lawyer*, Vol. 43, May 1988, at page 807, "Avoidance of Lease Terminations as Fraudulent Transfers," examines recent case law in which voluntary terminations of leases have been set aside as fraudulent transfers under section 548 of the Bankruptcy Code. This is another example of a creditors' rights related risk that has been given very little attention up until now.

In *Matter of Compton Corp.*, 831 F.2d 586 (5th Cir. 1987), the beneficiary of a letter of credit issued by a bank at the request of its customer who owed an antecedent unsecured debt, and who drew down the amount of the letter of credit, was held to have received an indirect preference payment under the Bankruptcy Code which it was forced to turn back to its debtors' bankruptcy trustee. The creditor was also denied any claim against the bank that issued the letter of credit.

This surge of new case law emanating from new and increasing activity in the law of bankruptcy and insolvency is prompting a review within the title industry of its underwriting practices and its title insurance policy forms. Many experienced title people believe that title insurance is not geared to protect against the full impact of federal bankruptcy and state insolvency laws. It is frequently a hidden risk, and not always of the type that title insurance is expected to cover.

Title insurance, little known in large parts of the country before World War II, is a business phenomenon of the past four decades, having grown in leaps and bounds as real estate has flourished and real estate interests have skyrocketed in value. It is an industry that has demonstrated remarkable flexibility in matching its product with the proliferation of new types of interests with new and increased coverages. The simple fee mortgage or lease transaction of the '50s has developed into co-ops, condos, cond-ops, time shares, homeowner associations, sale-leasebacks, lease-leasebacks, a secondary market for mortgages, mortgages in various exotic shapes and forms with all kinds of variables, positive and negative amortizations, shared appreciation, securitization of residential and commercial mortgages, partnerships, limited partnerships, master limited partnerships; as well as foreign investment in various forms and entities, et cetera, et cetera. Title insurance in many cases has been a catalyst that helped this growth along as the industry devised policy forms and endorsements to furnish various forms of assurance to investors and lenders of the validity, effectiveness, and enforceability of the new transactions and of their documentation.

Along with this growth came the mistaken impression by some people that title insurance had no limits. Some mistakenly believed that title insurance could replace the need for separate competent legal advice. They were and are wrong! Some mistakenly believed that title insurance could assume various new casualty risks, such as insurance against past, present or future damage to the environment. They were and are wrong! Others mistakenly believed that title insurance could be expanded into the equivalent of credit insurance and guarantee the completion of new construction projects, or the re-payment of mortgages. They, too, were and are wrong!

Numerous cases have long established that title insurance is a form of indemnity insurance. It indemnifies the insured against loss as to several specific title-related coverages, less the specified Exclusions from Coverage, together with the costs and expenses of defending the interest of the insured, all in accordance with the conditions set forth in the policy. The coverages are mostly traditional ones dealing with title defects, liens and other encumbrances. Additional coverages relating to the title or the insured mortgage are added by endorsements and affirmative insurance. The 1987 American Land Title Association (ALTA) title insurance policies in Section 7 of the Conditions and Stipulations clearly state:

"This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred. . . ."

Most states define the nature and extent of title insurance by

their own statutory definition of title insurance. Often, it is in very broad terms, as in Indiana, where Ind. Code Ann. Sec. 27-7-3-2(a) defines title insurance as "a contract of insurance against loss or damage on account of encumbrances or defects in the title to real estate."

The New York Insurance Law defines title insurance in Sec. 46(18) as:

"meaning insuring the owners of real property and chattels real and other persons lawfully interested therein against loss by reason of defective titles and encumbrances thereon and insuring the correctness of searches for all instruments, liens or charges affecting the title to such property, including the power to procure and furnish information relative thereto, and such other incidental powers as are specifically granted in this chapter."

The Florida Bar Continuing Legal Education Committee publication, "Real Property Title Examination And Insurance In Florida," Second Edition, 1988, describes the nature of title insurance at Section 4.3, in part as follows:

"A title insurance policy differs from other forms of insurance in many respects. The primary function of most other forms of insurance is risk assumption, which is accomplished by a pooling of risk arising after the date of the policy. The primary function of title insurance is to eliminate risk and prevent losses caused by defects in title arising out of events that occurred before the date of the policy. In other words, the primary function of a title insurer is to take affirmative steps to minimize the risk that the insured will suffer a loss or become subject to any adverse claim, and to safeguard the ownership of property or an interest in it."

To achieve this risk elimination feature before issuing a title insurance policy, a title insurer performs or has performed for it an extensive search of the land and tax records to determine the status of the title to the real property, including all outstanding interest, liens and encumbrances. Only after these records have been examined and the title to the property properly analyzed is a title insurance policy issued. Only a single premium is paid and there are no additional periodic payments as in other forms of insurance.

The risks inherent in insuring against loss by reason of the adverse assertion of rights under bankruptcy and insolvency laws can only be minimized or eliminated by at least a careful and knowledgeable determination of real estate values, and a sufficiently detailed analysis of the complete financial condition of the transferor or borrower (not the insured party), to make certain that he, she, they or it, is not now insolvent, nor likely to become so as a result of the transaction to be insured.

Several states specifically prohibit title insurance companies from engaging in other lines of insurance. Prohibitions on guaranteeing the payment of mortgages are also common. Since title insurance is unique in many respects and different from other forms of insurance, particularly in that it can continue for as long as the insured owns the insured interest, many state insurance regulators feel that the assets of the title insurer should be protected against inappropriate risks. Risks based upon the accuracy of property valuation, the adequacy of consideration and a determination of solvency should probably be left to others than the title insurers.

Long experience has taught most insurers that it is imprudent to write an insurance policy of any type without certain exclusions from coverage. Title insurance companies are no exception to this rule. The 1987 ALTA policies preface their exclusions with the words:

"The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:"

The foregoing language is clear and unequivocal. It is intended to inform the insured that the Company will have no responsibility with respect to the excluded matters. As the old Lindy's waiter would say, "This is not my table."

Among the ALTA exclusions are:

"3. Defects, liens, encumbrances, adverse claims, or other matters

(a) created, suffered, assumed or agreed to by the insured claimant"; (Loan and Owner)

(b) not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy; (Loan and Owner)

(b) not known to the Company, not recorded in the public records at Date of Policy but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy; (Loan and Owner)

* * * * *

(d) attaching or created subsequent to Date of Policy (except to the extent that this policy insures the priority of the lien of the insured mortgage over any statutory lien for services, labor or material); or (Loan)

(d) attaching or created subsequent to Date of Policy; or (Owner)

(e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the insured mortgage. (Loan)

(e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the estate or interest insured by this policy. (Owner)"

continued on page 28

The author is a professor of Law at St. John's University School of Law in Jamaica, New York and special counsel to the firm of Rosenman & Colin of New York City. Professor Pedowitz served for many years as chairman of the Law Committees of the New York State Land Title Association and of the former New York Board of Title Underwriters.

He is a graduate of New York University, Washington Square College with a B.A. degree, and received his J.D. degree from the New York University School of Law where he also taught as an adjunct professor of Law for over 10 years.

Professor Pedowitz has written and lectured extensively on title insurance and various other real property subjects for the Practising Law Institute, American Bar Association, New York State Bar Association, and New York County Lawyers' Association. He was also associated with the Title Guarantee Company (Ticor Title) and Pioneer National Title Insurance Company (also Ticor Title) for over 43 years. Professor Pedowitz is an Associate member of the American Land Title Association.

Environmental Liens And Title Insurance

by Bob Bozarth

This article is the conclusion of a two-part discussion, the first section of which appeared in the March/April issue of *Title News*.

Article courtesy of *Lawyers Title News*.

Economics and Environmental Risks

The Nature of Title Insurance

No other line of insurance is like title insurance. Title insurance is an evidence producing-loss prevention line of insurance structured on a *risk elimination concept*. Most of the title insurance premium pays for the title search and examination required for the policy.

If title companies had perfect information and correctly interpreted it, they would rarely be called on for indemnification. On the other hand, to acquire the information they do have and use it intelligently is an expensive process. The title insurance premiums are composed of a very small risk element and, proportionately, a very large expense element. This also is true of boiler and machinery insurance and elevator liability insurance but with a significant difference. Title insurance protects against past conditions; ordinarily nothing that happens to the title after transfer is covered. Boiler and machinery and elevator liability insurance cover current and future events. They require payment, therefore, of future premiums while title insurance does not. Once a premium is paid, title insurance continues to indemnify for title defects of the past for as long as title stays in the same hands.¹

Title insurance contrasts with virtually all other insurance products which insure upon the more familiar concept of *assumption of risks* spread among a body of policyholders. They insure on a casualty basis by forming risk pools designed by actuarial predictions of loss rates which must be adjusted periodically (usually annually or semiannually) to reflect recent loss experience. Casualty insurers control their losses with a short term on policies coupled with a reevaluation of the risk at the end of each term. They attempt to predict the losses that should occur within the risk pool for the next term and set their premiums accordingly. A heavy percentage of casualty insurance premiums must be reserved for losses. Title insurers control losses with their title searches and examinations.

There is a "risk premium" in title insurance. The companies keep careful records of premiums, losses, and expenses and report this in their annual statements—their "Form 9s." . . . It follows that the better they perform the title search and related work, the lower their losses [*sic*]. Title insurance loss ratios should be low, certainly less than from 6 to 10 percent, or it can be concluded that the title searches are being carelessly completed.²

The characteristics of title insurance which distinguish it from other insurance lines are:

- a. A one-time premium;
- b. Low premium rates;
- c. Proportionately low loss, but high expense to premium ratios;
- d. An examination of title to identify risk of loss;
- e. Insuring the current status of the title instead of unforeseen future events;
- f. No deductibles; and
- g. A policy term coextensive with the interests insured.

The risk that an environmental lien has been recorded in the land records is insured under both the 1984 revision of the 1970 American Land Title Association (ALTA) policy form (as an exception to Section 1 of the Exclusions from Coverage relating to the police powers or environmental protection) and the 1987 ALTA policy forms under subsection (d) to Section 1 of the Exclusions from Coverage. This risk is appropriate for title insurance because a title examiner can determine whether or not a lien is recorded by checking the land title records. However, the *risk that a lien may be recorded in the future* is a casualty risk because a loss cannot be predicted from the land title records at the date of policy. It is not appropriate for title insurance.

The title examination allows a title insurer to control its loss experience just as the policy liability duration of a year or less, with adjustments based on intensive actuarial analysis of risk, allows the casualty insurer to control its loss experience. For title insurers to survive they must eliminate risks through their title searches, just as casualty insurers must limit the duration of their policies to survive. When a title insurer, with its potentially infinite policy term, ventures into the area of casualty risks, it loses its mechanism for controlling its loss experience. Combined with the loss potential of environmental risks, the inability to control loss experience exceeds a title insurer's ability to bear the risk.

The Financial Structure of the Title Industry

Title companies' financial structure is unique in the insurance industry. Because title insurers do not assume risks of unforeseen future events, their loss expense is less and their operating expense is greater than those of other lines. The following tables constructed by the Research Committee of the American Land Title Association make these comparisons:

By adding the two title insurance averages it becomes obvious that industry operating margins are very thin or negative depending upon the real estate cycle.

Because of this financial structure, title companies are being more circumspect about the risks they are willing to undertake. A decision to assume "casualty" risks would entail a complete restructuring of the industry's loss reserves and implementing premium renewals, neither of which is realistic.

The Title Insurance Policy and Its Environmental Exclusions

The American Land Title Association (ALTA) title insurance policies revised 10/17/70 contained no express exclusion for environmental matters, but did exclude from the coverage of the policy ". . . governmental rights of police power unless notice of the exercise of such rights appears in the public records at the date of policy." Since environmental protection falls under a government's police powers, this exclusion protected title insurers from any hidden liens for reimbursement of cleanup expenses.

In *Chicago Title Insurance Company v. Kumar*, 24 Mass. App. Ct. 53, 506 N.E.2d 154 (1987), Chicago Title sought a declaratory ruling that the discovery of a hazardous waste spill and notice under MGLA Chapter 21E from the Massachusetts Department of Environmental Quality Engineering directing Kumar to clean up the spill did not render the title unmarketable. Chicago Title had issued simultaneous owner's and loan policies to Kumar and his lender in 1985, with superlien coverage being extended in the loan policy, but not the owner's policy.

The Massachusetts Land Court ruled that the possibility of a future lien



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LOSSES AND LOSS ADJUSTMENT EXPENSES AS A PERCENTAGE OF THE OPERATING DOLLAR FOR VARIOUS LINES OF INSURANCE

| <u>Year</u> | <u>Title Insurance</u> | <u>Boiler & Machinery</u> | <u>Surety</u> | <u>Property & Casualty (Stock)</u> |
|----------------|------------------------|-------------------------------|---------------|--|
| 1981 | 8.1 | 33.2 | 34.1 | 75.5 |
| 1982 | 8.4 | 38.6 | 37.4 | 78.6 |
| 1983 | 6.3 | 40.5 | 39.9 | 81.0 |
| 1984 | 7.9 | 53.8 | 49.9 | 88.8 |
| 1985 | 7.7 | 41.5 | 77.7 | 88.8 |
| 1986 | 8.8 | 38.7 | 71.6 | 80.3 |
| 1987 | 8.1 | 32.7 | 66.1 | 76.2 |
| Average | 7.9% | 39.9% | 53.8% | 81.3% |

OPERATING EXPENSES AS A PERCENTAGE OF THE OPERATING DOLLAR FOR VARIOUS LINES OF INSURANCE

| <u>Year</u> | <u>Title Insurance</u> | <u>Boiler & Machinery</u> | <u>Surety</u> | <u>Property & Casualty (Stock)</u> |
|----------------|------------------------|-------------------------------|---------------|--|
| 1981 | 100.5 | 58.6 | 51.6 | 29.4 |
| 1982 | 101.3 | 62.1 | 51.7 | 30.1 |
| 1983 | 89.6 | 63.3 | 47.7 | 30.8 |
| 1984 | 91.2 | 64.5 | 45.6 | 30.1 |
| 1985 | 91.3 | 48.4 | 34.2 | 27.7 |
| 1986 | 87.0 | 48.2 | 45.5 | 26.6 |
| 1987 | 91.6 | 48.2 | 49.9 | 27.1 |
| Average | 93.2% | 56.2% | 46.6% | 28.8% |

under MGLA Chapter 21E did not create a defect lien or encumbrance or unmarketable title under the 1970 ALTA policy. The court held that the title policy only provided coverage against defects in existence at the time the policy was written, rather than liens which might arise in the future.

As a result of the dramatic impact of environmental issues in the 1980s, the 1970 ALTA policies were revised effective 10/17/84 to expressly exclude environmental matters with the following revision of Item 1 of the Exclusions from Coverage:

The following matters are expressly excluded from the coverage of the policy:

1. (a) Governmental police power.

(b) *Any law, ordinance or governmental regulation relating to environmental protection.* (Emphasis added).

(d) The effect of any violation of the matters excluded under [(a) or (b) above], unless notice of a defect, lien or encumbrance resulting from a violation has been recorded at Date of Policy in those records in which under state statutes deeds, mortgages, lis pendens, liens or other title encumbrances must be recorded in order to impart constructive notice to purchasers of the land for value and without limitation, such records shall not be construed to include records in any of the offices of federal, state or local environmental protection, . . . health or public safety authorities.

The 1984 revision was merely a clarification to emphasize that title insurance policies do not insure against environmental matters and to refine the definition of "public records." This revision of the 1970 policies was also a stopgap measure because the 1987 policy forms had entered the conceptual and drafting stages before the 1984 revision was published.

The 1987 ALTA title insurance policies and their 10/21/87 revision (which dealt only with the "Liability Noncumulative" section of the Conditions and Stipulations) continued the direction of the 1984 revision of the 1970 policies. However, the definition of "public records" has been moved from the Exclusions from Coverage to the list of definitions in the Conditions and Stipulations. The environmental exclusion in the 1987 ALTA policies reads:

The following matters are expressly excluded from the coverage of

this policy and the Company will not pay loss or damages, costs, attorneys' fees or expenses which arise by reason of:

1. (a) Any law, ordinance or governmental regulation . . . restricting, regulating, prohibiting or related to . . . (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at the Date of Policy.

The definition of "public records" contained in the first paragraph of the Conditions and Stipulations has also been influenced by the concern about environmental liens and the CERCLA lien recording provisions of 42 U.S.C. § 9607 (1)(3) introduced by SARA:

1. Definition of Terms.

(f) "public records:" 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 and without knowledge. With respect to Section 1(a)(iv) of the Exclusions from Coverage, "public records" shall also include environmental protection liens filed in the records of the clerk of the United States district court for the district in which the land is located.

No ALTA policy form in use today includes coverage against environmental liens which might be filed in the future. The only risk that the title insurance policy covers is the risk that an environmental lien was filed in the land records at the Date of Policy, and the title insurer missed the notice of lien or failed to take exception to it in Schedule B of the policy.

Title insurers are also conscious of environmental risks in affirmative coverages, especially those found in loan policies which give insurance coverage of the priority of the lien of an insured mortgage or deed of trust on advances or interest provisions. It is becoming increasingly difficult for title insurers to reinsure policies containing endorsements with revolving line of credit or future advance, shared appreciation, option or interest rate exchange coverages if the endorsements do not have environmental exclusions.

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The Property/Casualty Experience

It appears that the title insurance industry is trailing the property/casualty industry in its awareness of the danger of environmental risks. Prior to 1973 the Comprehensive General Liability policy insured its policyholder against the happening of an "occurrence" which "... embrace[d] not only the usual accident, but also exposure to conditions which may continue for some unmeasured time."³

The CGL policy was amended in 1973 to include a pollution exclusion. The 1973 CGL pollution exclusion also contained a proviso that the exclusion did not apply if a discharge of pollution was "sudden and accidental." Since 1973 this pollution exclusion has been the subject of volumes of litigation. Some courts have interpreted the exclusion together with its proviso as "... simply a restatement of the definition of 'occurrence'—that is, that the [CGL] policy will cover claims where the injury was 'neither expected nor intended.'"⁴

Although most courts have given the CGL pollution exclusion clause the

ment from the proposed "Comprehensive" endorsement to the "Restrictions, Encroachments, Minerals" endorsement.

Coverages of environmental risks are little understood outside the insurance industry. Misunderstanding is probably due, at least in part, to a desire for insurance against all environmental expenses. No insurer has ever offered insurance which would protect the policyholder from the expense of an environmental cleanup. The coverage under the CGL policies was designed to cover, at most, liability of the policyholder to others for personal injury or property damage resulting from a sudden spill of toxic or hazardous material, e.g. an accident involving a tank truck. Of course, CGL policies now contain an exclusion intended to eliminate all environmental risks.

Environmental Impairment Liability (EIL) insurance is the only coverage against environmental risks available today, and it is strictly limited in its scope. EIL coverage indemnifies the insured against loss for "bodily injury" or "property damage" caused by the "... discharge, dispersal, release or escape of smoke, soot fumes, acids, alkalis, toxic chemicals,

COVERAGE COMPARISON

| | <u>Cigna</u> | <u>Typical Coverage</u> |
|------------|-------------------------|--|
| Amount | \$6,000,000 | \$6,000,000 |
| Deductible | \$500,000 | None |
| Insured | Owner | Lender (Potential Owner) |
| Term | 1 Year (claims made) | Period of Insured's Interest (Potentially Indefinite) |

PREMIUM COMPARISON

| | <u>Cigna</u> | <u>Typical Premium</u> |
|-----------------|-----------------|------------------------|
| Premium | \$300,000 | \$11,875* |
| Effective Rate | \$50 per \$1000 | \$1.98 per \$1000 |
| Premium Reserve | \$195,000 | \$751.50 |

*Typical General title insurance rate. Rates vary depending on location and company.

COMPARATIVE SIZE IN 1984

| | <u>Cigna</u> | <u>Title Industry</u> |
|---------|---------------|-----------------------|
| Assets | \$39 Billion | \$2.3 Billion |
| Surplus | \$4.9 Billion | \$1 Billion |

broad interpretation that the *Broadwell Realty* court found in its survey, some courts have recently focused on the word "sudden" to require an instantaneous or precipitous event to trigger coverage.⁵ Even with this change in the interpretation of the CGL policy favoring the property/casualty carriers, the policy form was again amended in 1986 to eliminate any pollution coverage and to change the name of the policy to the "Commercial General Liability" policy because claimants were arguing that the term "comprehensive" implied coverage for all liabilities. It was the onslaught of environmental claims which compelled the property/casualty industry to structure its policy language to remove any doubt that environmental risks were covered.

The ALTA tightened the environmental exclusion in its 1984 revision to the 1970 policies, and further refined the exclusion in the 1987 policy forms. It also followed the lead of property and casualty carriers in October 1988, when it changed the name of the new ALTA Form 9 Endorse-

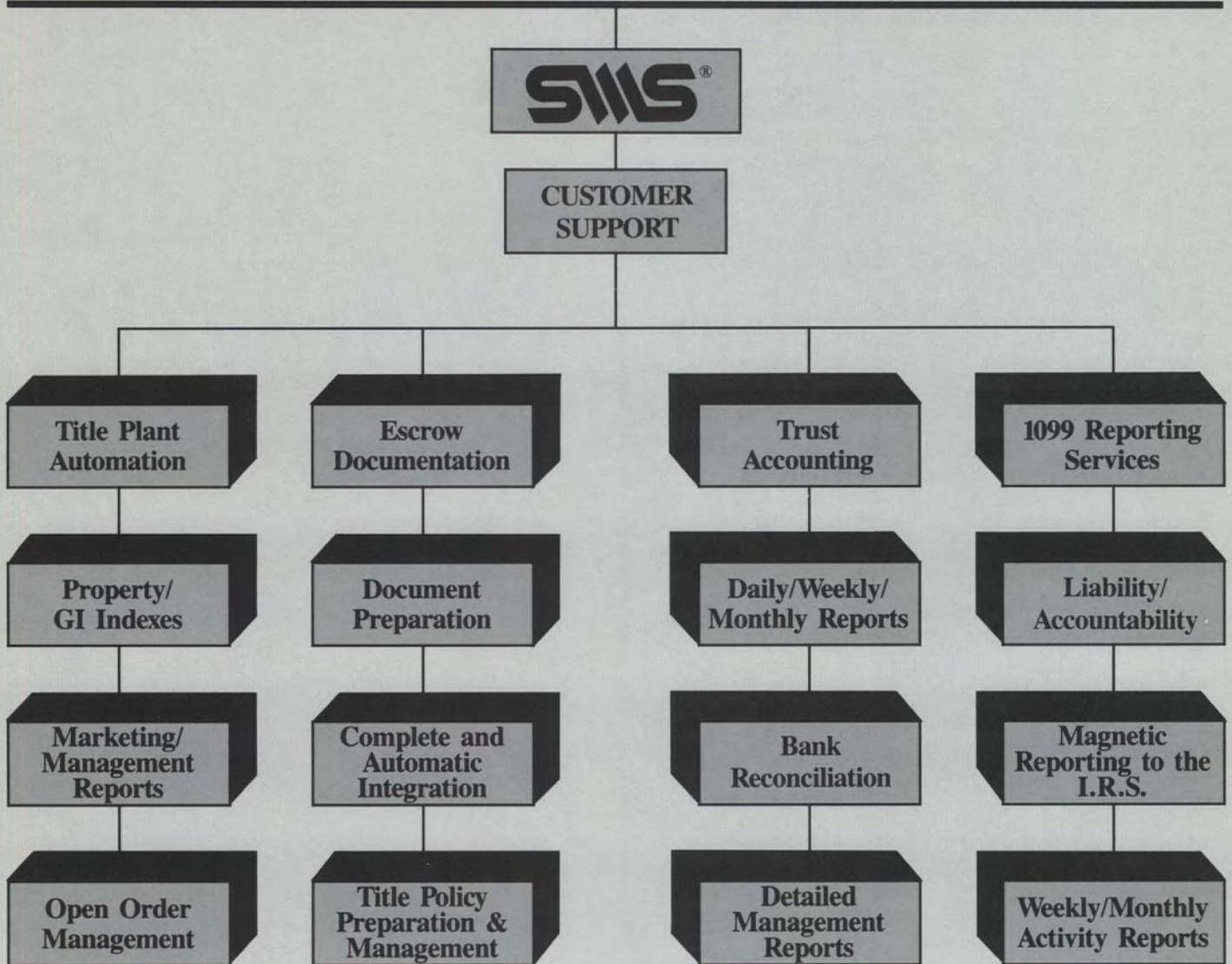
ments or gases, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any watercourse or body of water . . ."⁶ The exclusions in the policy exclude losses arising from bodily injury to employees or contractors of the insured and from cleanup costs for the site insured, even if the cleanup is undertaken to mitigate covered bodily injury or property damage.

An EIL policy only covers policyholder liability to third parties who suffer losses as a result of the pollution conditions, for example, the claimants against Union Carbide at Bhopal, India, for personal injury and the homeowners in Love Canal Subdivision near Buffalo, New York for property damage. It is of no help at all in covering expenses for a cleanup of hazardous or toxic material on the property of the policyholder. The policies have a one-year claims-made term, so the insurer has protection

continued on page 36



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 Phoenix, AZ 85029
 (602) 866-0909

SEATTLE
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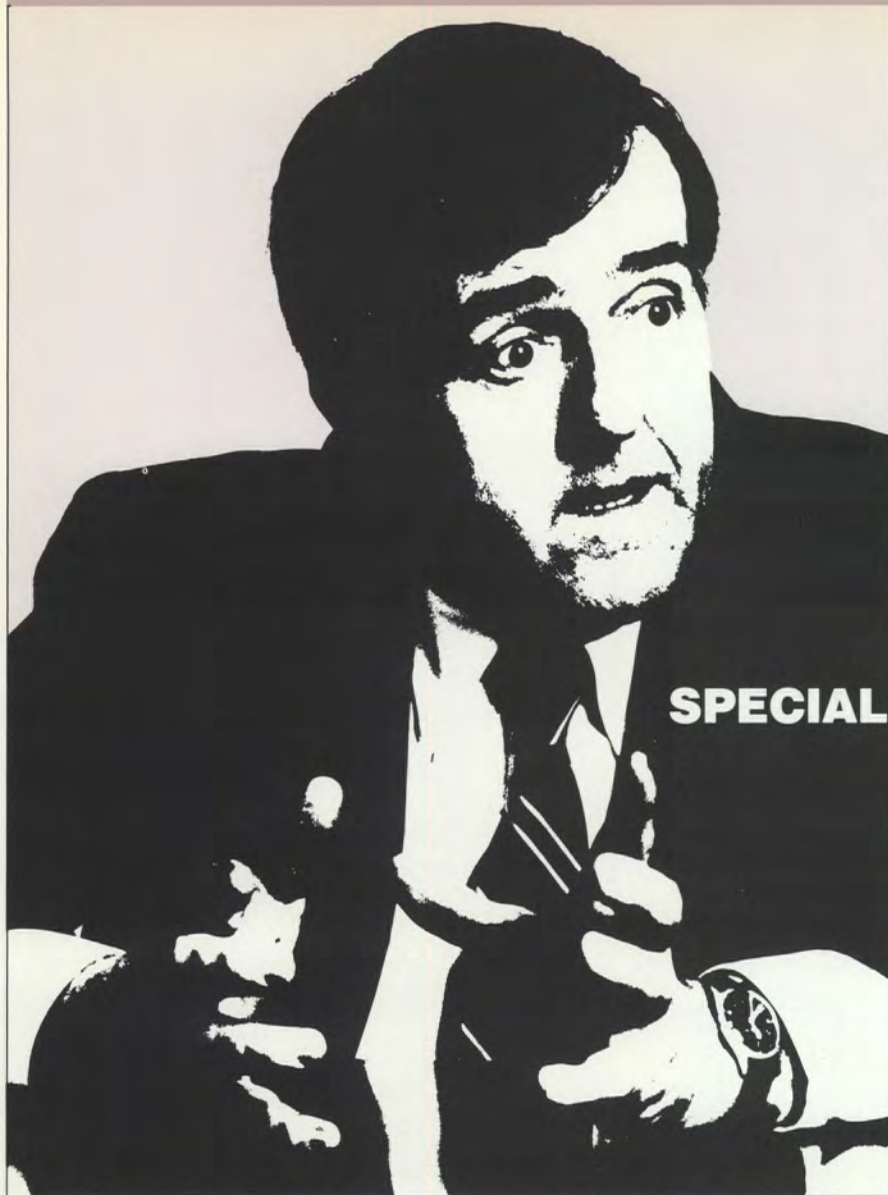
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 (619) 546-2877

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 Portland, OR 97232
 (503) 234-8816

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 (408) 946-5610

SACRAMENTO
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 Fair Oaks, CA 95628
 (916) 961-4633

COSTA MESA
 (Computer Center)
 3160 Airway Avenue
 Costa Mesa, CA 92626
 (714) 549-5700



MARK SHIELDS

SPECIAL INTERVIEW

by Adina Conn

information to audiences with great insight and wit. Shields has an uncanny way of creating some "mystic convergence" amongst groups of **all** political persuasions—managing to jest with all and offend none. He is the likeable and affable Irishman—the master of the lost art of storytelling, the Robert Benchley of the Beltway.

You have worked in every medium—print journalism, TV, teaching and lecturing. In which of those areas do you feel most comfortable?

There's nothing that compares with the immediate reaction and response of speaking to a group—you have the groans and the moans, the laughs and the applause. So that medium is undoubtedly the most immediate and most enjoyable.

Someone once said of writing, "I love being a writer, but the negative side to it is the writing itself." And that's true—writing is agony, and it's painful. There is, however, the illusion of permanence—even though we all know in our heart of hearts that three days later your printed piece is lining the bird cage, or wrapped securely around a late and great fish.

Television is terrific in its scope—you have potential for reaching more people with whatever you have to say. There's immediacy there, but you don't get any reaction.

Teaching has its strengths—it remains a very special and treasured experience. I still

“ *The most welcome compliment I can receive after speaking is for someone to come up and say, 'You made me laugh, but you made me think.' That's the highest praise one can receive—to have a shelf life longer than an opened bottle of Pepsi.*

Washington, D.C.—the nation's capitol, often referred to as the Disneyland of the East, and as a town 10 miles wide surrounded by reality. This is a city of those who work **too** hard and tend to take themselves a bit **too** seriously. In this "serious" city, filled with the "serious-minded," there is one unlike the rest of the pack, a "Beltway original." He is Mark Shields—political commentator and analyst, and journalist extraordinaire.

To some, he's the outspoken "liberal" (or as he'd probably say, "There's that 'L' word again"), who butts heads with the archconservative Robert Novak on the weekly TV show, **Capitol Gang**. Others know him as a **Washington Post** syndicated columnist, as a regular on **MacNeil/Lehrer**, and frequent guest on **Nightline**, the **Today Show**, and **Good Morning America**.

In a profession peopled with those possessed with overgrown egos, Shields is a humorous individual who clearly refuses to take himself too seriously. He disseminates

enjoy going to campuses and talking to kids about politics—which is not only enjoyable and fun, but is critically important.

How did a political journalist like yourself get into teaching?

Originally, I started teaching when I got out of the service, because I came from a family of teachers. At that time, teaching was not only an honored profession, but was considered to be terribly worthwhile. I taught as a fellow at Harvard for two semesters, which I enjoyed tremendously.

I also taught at Wharton before I became a “born-again virgin,” commentator and journalist. I was a campaign manager and the Wharton school conducted a series of courses in management in the nonprofit sector. I taught the one on campaign management—which is an entirely different form of management. There are very few activities where you get 49% of the market share and you’re still considered a loser. Get 49% of the shampoo or toothpaste share of the market and you’re a genius—you’re a megacapitalist, a great success story. Get 49% in politics and you’re a loser. So in that sense, the job is quite unlike managing anything else.

You mentioned you came from a family of teachers . . . Were you “destined” to be a teacher in the eyes of your family?

No. No, not at all. I was destined to be a grown-up. And I continue to be disappointed! But I’m working on it, and I fully appreciate all the encouragement I’ve been receiving.

Do you miss the “hallowed halls” of academia?

My desire to get across my view or perspective or “finite insights” is satisfied in large part by the writing, the TV and the radio. Senator Moynihan once said, “There are no fights as bitter and as vicious as faculty fights in colleges and universities.” I don’t miss any of that, but I like what I’m doing so I guess I don’t miss anything too much.

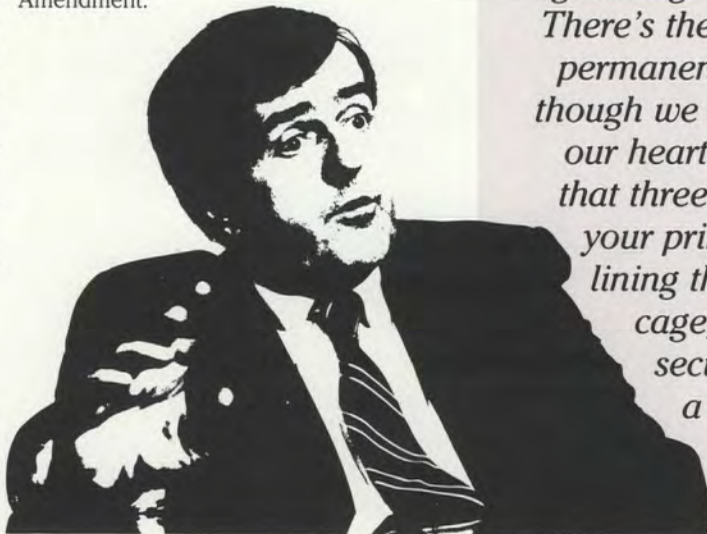
If you were the dean of a school of journalism and knew your students would read only three books in their lifetime, which books would you have them read?

In the eyes of school of political journalism—there are two great American political novels that anybody who’s interested in appreciating and understanding American politics ought to read—**All The Kings Men** and **The Last Hurrah**. Those are two

books which give one a sense of the raw human emotion, ambition, noble purpose, vengeance, suspense and really wonderful energy in the political realm.

With respect to broadcast journalism, have network anchors become “bigger” or more important than the stories they cover?

I think less so than they were. The explosion of cable TV and so many other sources of news and information have minimized that possibility. A late-breaking story that is covered live by stations like CNN have not dealt with the “personality” possibility. So I think there’s less chance of it than there might have been in earlier times when the three networks had a monopoly on the First Amendment.



“**W**riting is great—
but it’s also
agonizing and painful.
There’s the illusion of
permanence—even
though we all know in
our heart of hearts
that three days later
your printed piece is
lining the bird
cage, or wrapped
securely around
a late and
great fish.”

Has this country become too immersed with “trash” journalism—the Geraldo Riveras and Morton Downeys of the nation?

I think Geraldo Rivera is one of the great men of the 20th century. He’s a very understood man. His story on the bisexual Siamese twins who held up a series of 7-11 stores was a great story and he deserves credit for breaking such a newsworthy item. Trash journalism is a commercial enterprise. Soon or later you run out of stories on two-headed babies.

Regarding those who run for or hold public office, is there any question or subject today that should be off limits or outside the boundaries of propriety with respect to the media?

No. I think if you look at the failed presidencies in this country over the past 30 years—whether it’s Lyndon Johnson’s or Richard Nixon’s or Jimmy Carter’s, they

were not presidencies that failed because of their private lives. All three probably had IQs in the upper two percentile of this country. They all worked hard. Their failures were failures of personality and character. In Nixon's case, it was his paranoia; in Johnson's, his hubris; Carter was good with small groups of people, but his quirks inhibited his campaigning and dealing with the masses. These failures, shortcomings, defects, etc., which, if examined before their elections, might very well have changed the end result.

“ *Politics in America is not terribly ideological. At the presidential level, there is that recognition that the person does have some part of his anatomy on the trigger. And so you do want someone that's emotionally stable, psychologically healthy.* **”**



Politics in America is not terribly ideological. At the presidential level, there is that recognition that the person does have some part of his anatomy on the trigger. And so you do want someone who's emotionally stable, psychologically healthy.

Politics is sort of philosophically or ideologically fluid. I'm not interested in who someone dated or double-dated back in junior high, or if he got fresh on a first date. But there are certain areas which are legitimate areas of inquiry.

Are we electing, then, a person or a personality?

We're electing a person, a set of values, someone's record. The best example is Ronald Reagan, who was the ideological leader of the minority party in this country—its conservative wing. Ronald Reagan was easily lampooned and caricatured in the '76 campaign. And yet, when Reagan

appeared on the same stage as Jimmy Carter in the '80 debate, he was likeable, he was avuncular, he was nonthreatening, and people identified with his values. The person who appeared on that stage assured people that he was not the caricature as was depicted.

If that's true, then what do people identify with as far as Dan Quayle is concerned?

I think George Bush won in spite of Dan Quayle, and not because of him. It remains a mystery why Dan Quayle was chosen. Perhaps, once again, it proves my limited powers of understanding political analysis. I'm sure it will eventually come clear to someone as obtuse as myself, why this was such a "genius" move to choose the one person on the list of possibilities that no one expected Bush to choose. There was certainly an element of surprise—especially since Quayle didn't have the element of notoriety or identity like Kemp or Dole did.

Bush made Quayle. By selecting him, George Bush did for Dan Quayle what Ronald Reagan did for George Bush. If you recall, George Bush as of 1980, had never even enjoyed the political success that Dan Quayle had—Bush had never even won a state-wide race. He twice lost for the Senate in Texas. So maybe President Bush feels it's nice to have a vice president that recognizes that you're the president.

Do you think there's any truth to the fact that Bush picked Quayle as his vice president because of Bush's possible involvement in Irangate? That way, if Bush were implicated, he wouldn't be impeached for fear that Congress would never leave the state of the nation in Quayle's hands?

No, I don't think that's true. I think people were both appalled and amazed by the reaction to the Quayle choice. I think one can make a very plausible case that Quayle was selected to appeal to the young, undecided voters, because he was 10 years younger than Dukakis. I don't think anyone anticipated the type of reaction that occurred.

Quayle of course helped the situation by being so damn candid with his answers to the press' questions about his service in the National Guard and his evasion of Vietnam.

The only time I've ever heard this question asked was with respect to Richard Nixon and his selection of Jerry Ford. Nobody thought Nixon would ever be impeached with Ford as his vice president and look what happened.

This past election was one of the dirtiest, where issues were reduced to Willie Horton and Boston Harbor. Should humor enter into politics more?

Sure—but you can't do what isn't natural. Richard Nixon was respected for not telling jokes. Humor works politically, for it sends a message to a politician or elected official who is somewhat lionized or celebrated, that says, "I'm not hung up on myself."

Humor is also humanizing—it helps put things in perspective. You shouldn't try and be funny unless you have a sense of humor. Look at Reagan—he was terrific with humor. He would poke fun at what he was being made fun of. He would hang a lantern on his own problems—that's a great way of diffusing things. Humor is also a wonderful way of minimizing and exposing the pomposity of your opposition.

Why is it that Democrats can take Congress but not the White House?

I think it's a different job description. Different people are looking for different qualities. With representatives, you're looking for someone that represents you, your region, your particular area, set of values, etc., and Democrats are very good at that. I think they're suffering at the presidential level because they're wonderful at addressing the needs of interests of groups like the transvestite taxidermists, whereas a president is required to represent and to speak to all of us at the same time. That's been a continuous problem for the Democrats—they continue to address people as members of groups, rather than as citizens of the country. It has helped them at the local level, but that lack of an entire focus has hurt them on a larger scale.

Which president do you feel has been the best communicator, and not necessarily the master of the one-liners?

Reagan. But that also depends on what you think a president's communication responsibility is supposed to be. Ronald Reagan didn't do windows, he didn't do press conferences. You have to do what you do well, and Reagan did not do press conferences well. Reagan made his case at persuading people as to what he was about—what he stood for. I believe there's a real value and virtue for someone running for the presidency to say, "This is what I'm about."

You're a wonderful story teller—is that the Irishman in you?

WORD ASSOCIATION

Bob Novak—the "Prince of Darkness," the son that Ma Barker and Calvin Coolidge never had, a cuddly, vulnerable, sensitive Alan Alda of the press corps.

Senator Joseph McCarthy—a reminder that divine providence has visited upon our country, demagogues who are flawed. He was a dangerous demagogue who trafficked and trifled with the reputations of good and patriotic Americans. He paralyzed two White Houses. You'd get a good dose of it in the morning papers and another one in the afternoon. I think he spawned a whole generation of imitators.

A "kinder and gentler nation"—Kinder and gentler than whom? Certainly not than Ronald Reagan, because George Bush was his co-pilot. I've always been mystified on this one. We've gone from the politics of active verbs, with Jack Kennedy saying, "Let's get this country moving again," to speaking in comparative adjectives.

Homeless—Un-American. It amazes me why no national political figure in 1988 challenged this. It's not the America I grew up in, it's not the America we want to raise our children in. It's deplorable that other Americans are left on grates and street corners begging for food scraps—it's truly un-American.

Jim and Tammy Baker—A "fun" couple.

Jesse Jackson—Bold in a field of pale pastels. Listening to his speeches could make the hair on one's neck stand up—unlike either Bush or Dukakis who were a serious threat to Sominex.

Liberal—Defensive, defeated, dispirited, loss of self-confidence.

1000 Points of Light—I always thought

it was 1000 pints of Light—I thought it was beer. I thought he was offering drinks on the house. I don't understand it, but I'm sure it fits with "kinder and gentler."

Glasnost—Amazement. A vast series of shocks which have been a contrast to the establishment of our national policy during my adult life time and the life time of the vast majority of Americans.

Damnfederalgovernment—A problem for the Republicans. Their problem is they keep winning the presidency, so for the past 20 years, they've been in charge of the damnfederalgovernment! During the late Reagan era, Reagan would talk about the "puzzle palaces on the Potomac," but you'd have to remind him, "Mr. President, the people that run those 'puzzle palaces' on the Potomac are the people you put there!" So I think damnfederalgovernment is probably heading for the "dustbin" of history.

Factoids—Ronald Reagan in that marvelous twilight zone between empirical data and imaginative construction.

The Pledge of Allegiance—It still bothers me that it wasn't recited at the inaugural. After all it meant to us in the campaign of '88, nobody recited it at the event. And . . . they didn't even give Dan Quayle a speaking part at the inaugural ceremonies. To the best of my knowledge, they never left him near an open microphone—and they never even said the pledge of allegiance. Now what was this campaign about if it wasn't about the pledge of allegiance? I was disappointed and miffed. I was most definitely miffed.

NRA—A narrow-minded group taken over by their Washington leadership (which is out of control). They have forgotten their membership.

Yes it is. It's all the genes—all the chromosomes. I had nothing to do with it. I brilliantly picked my parents. It was an act of original genius on my part—the choice of my parents. My father was a wonderful story teller.

You also happen to be one of the funniest men in and around the Beltway. Do you consider yourself a humorist as well?

I consider myself a remarkable person. The most welcome compliment I can receive after speaking is for someone to come up and say, "You made me laugh, but you made me think." That's the highest

praise one can receive—to have a shelf life longer than an opened bottle of Pepsi. I'm aware of the fact that I can make people laugh—it's a marvelously effective teaching tool. I'd like to think of myself as someone who knows, likes and cares about politics, but is also funny.

Some "Capitol" Moments From The ALTA Mid-Year Convention

Photographs by Ken Abbinante



1



2



3

1. ALTA President Charlie Hon (right) and wife Ann kick off Convention festivities at the Federal Reception with Congressman Pat Roberts, R-KS.



2. Three Nebraskans in a row: TIPAC Trustee Mardy McCullough (right) and Kathie Nathan (left) share a moment with a friend, Senator James Exon, D-NE.

4

3. Charlie Hon (right) and Congressman Larkin Smith, R-MS, take a moment to visit together.

4. Public Relations Committee members Barbara Harms and David Marker clearly tickled to death.

5. TIPAC Chairman Roger Bell (left) and Michael Burch, deputy finance director, National Republican Congressional Committee, pose for the photographer at the TIPAC Trustees Breakfast.



5

6. TIPAC Trustee Jess Nelson (left), and ALTA Past President, TIAC President John Cathey, discuss E&O at the TIAC exhibitor booth.



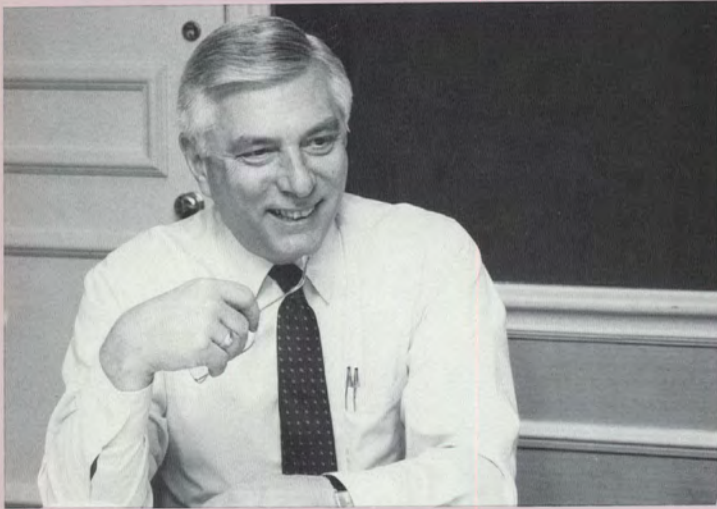
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*The
Serious . . .*



1

*and Not
So Serious
Ones*



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3



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5



1. ALTA Treasurer Parker Kennedy (left) and ALTA President-Elect Dick Toft exchange ideas at the Board of Governors meeting.

2. ALTA Governor Bill Seitz muses over a point made at the Underwriters Section meeting.

3. ALTA Governors Tom Griffin (left) and Dick Oliver have various reactions to matters discussed at the Board of Governors meeting.

4. ALTA Past President Don Kennedy (left) and fellow Government Affairs Committee member Charlie Foster look over agenda material during the Government Affairs Committee meeting.

5. TIAC Chairman Ed Schmidt, Jr. (right), explains a pending proposal to TRC Chairman of the Board Bob Scherer.

6

6. Expressions of a quizzical looking Dave Porter, ALTA finance committee chairman (left), and a pensive looking Dick Cecchettini, ALTA underwriters chairman, are captured by the camera.



7. ALTA Executive Vice President Jim Maher listening intently during one of the many ALTA meetings.

8. Recruitment and Retention Subcommittee members Bill McAuliffe (left) and John Gibbons find themselves entwined in a very serious discussion.

9. ALTA Public Relations Committee Chairman Randy Farmer explains the laws of convergence with respect to public relations.

7



8

9

People Who Know How To Make A Point



1

1. Systems Committee member Fred Hemphill making his point "perfectly clear."

2. TIPAC Speaker Vince Randazzo, legislative director to Congressman Dreier, R-CA, making a little point.

3. Title Insurance Forms Committee member Clark Staves (left) looks on while John Rapp makes a subtle point.

4. Florida Land Title Association Executive Secretary-Treasurer Pete Guarisco makes a point with pencil in hand.

5. Land Title Systems Chairman Ed Marsilje makes a direct point.

6. Education committee member Peter Norden clearly enjoying time at his committee meeting.

7. The littlest member of the Association makes his *Title News* debut.

8. Judiciary Committee member James Weston flashes a "killer" smile for *Title News*.

9. Ellen Proxmire, president of Washington Inc., and wife of former Senator William Proxmire, D-WI, gives a heartfelt smile as the moderator at the Spouse/Guest Brunch.

10. Education Committee member Stanley Friedlander provides a coy smile for the camera.



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*The Smiling Faces
Of ALTA*



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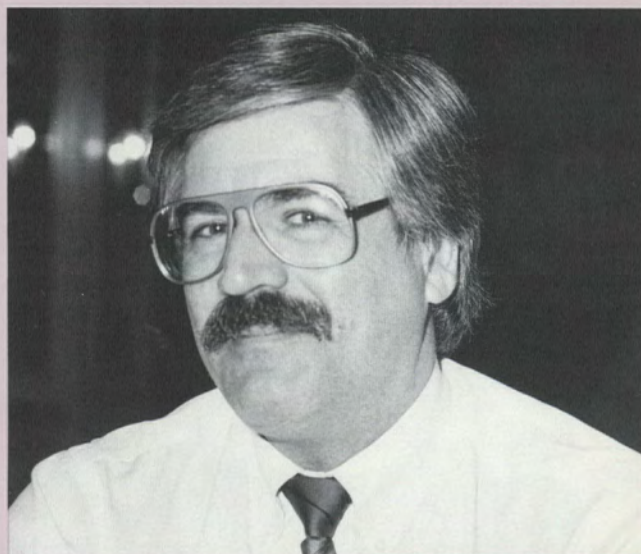
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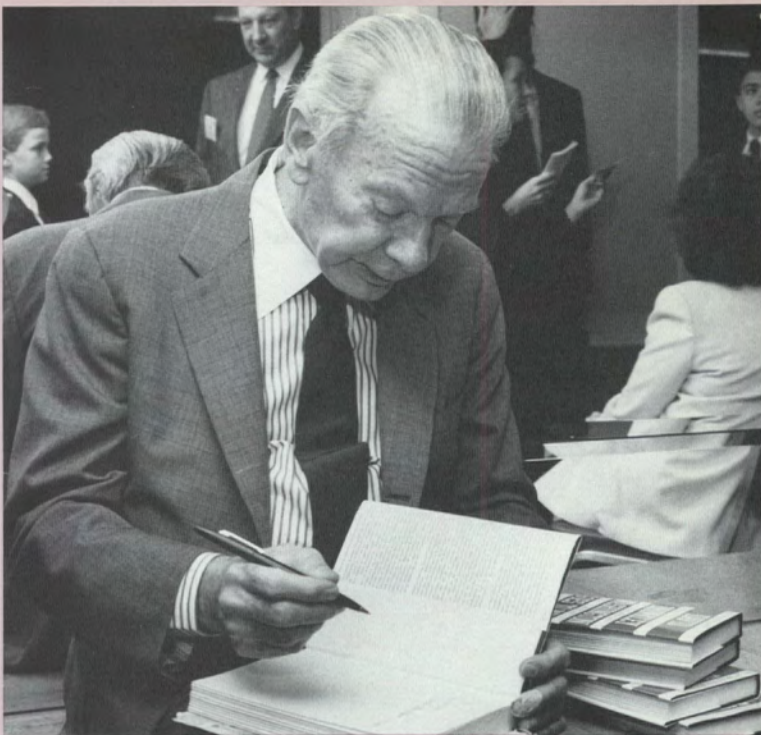
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The General Session

1. General Session speaker David Brinkley, moderator of ABC's *This Week With David Brinkley*, found himself surrounded by books to autograph.

2. Clifton Corenblith (left) and other Association members sit entranced by the quality of speakers presented at the ALTA General Session.

3. Author and General Session speaker Harvey Mackay (right) takes time before being whisked off to another engagement to autograph his book for fans Ray and Corrine Hawkins.



1



2



3

A TITLEPROFILE

Jeffrey M. Dreifuss,
Executive Vice President

Rosemary G. Hall
Settlement Coordinator
Linda O. Crawford
Chief Processor

Company: The Sentinel Title Corporation

Location: Columbia, Maryland Branch

Executive: Jeffrey M. Dreifuss

Education: J.D., University of Baltimore

Favorites:

Author: J.D. Salinger

Sport: Skiing and Golf

Vacation: Any ski resort in Colorado

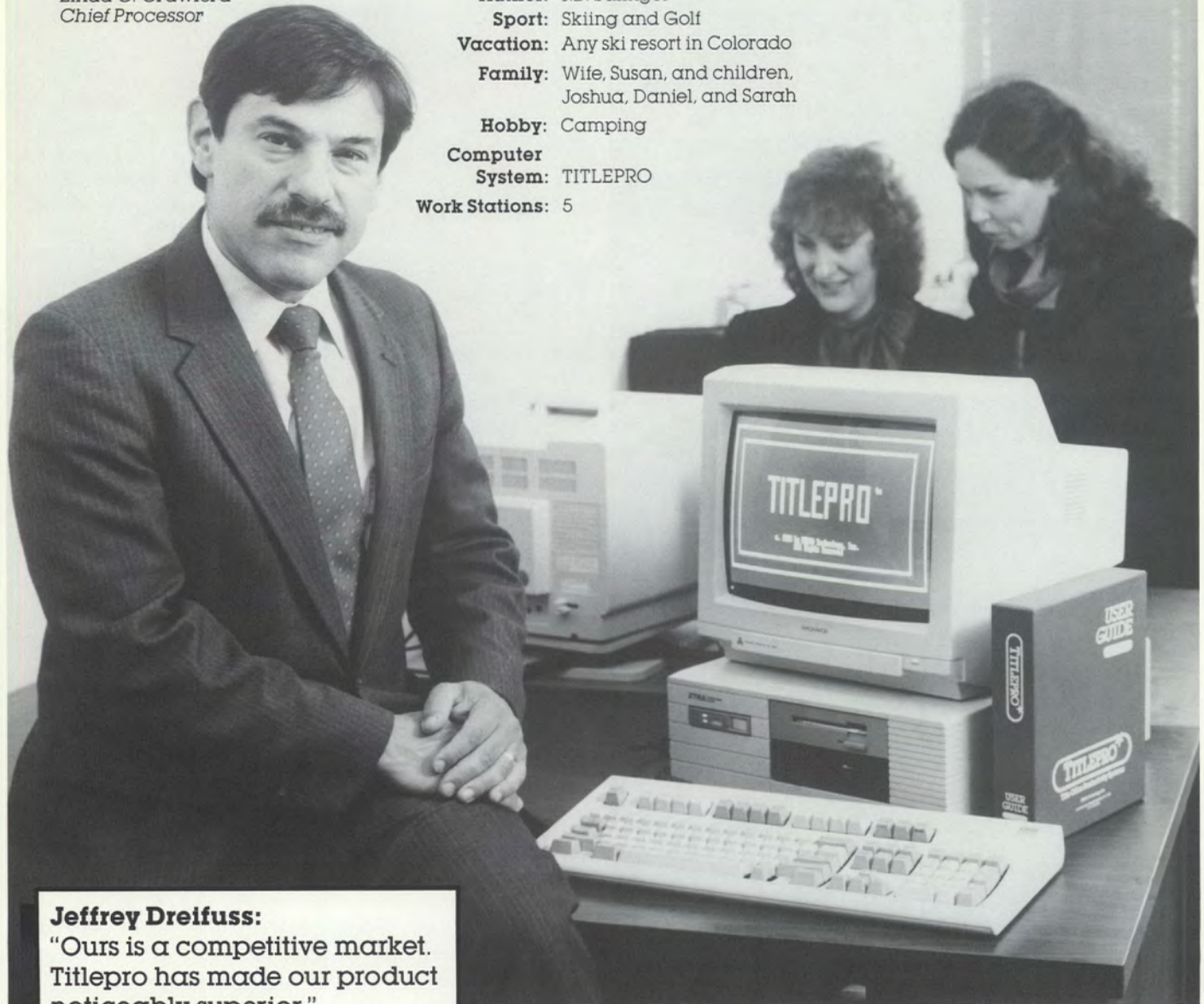
Family: Wife, Susan, and children,
Joshua, Daniel, and Sarah

Hobby: Camping

Computer

System: TITLEPRO

Work Stations: 5



Jeffrey Dreifuss:

"Ours is a competitive market.
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Hail And Farewell

by **Ramona Chergoski,**
registrar
The Land Title Institute, Inc.

An insider's view of her days at an organization she helped to start—from its inception to present.

As we prepare to pack and send to ALTA headquarters in Washington, DC, all records and other accoutrements of The Land Title Institute, we look back with nostalgic pride on the educational service we have administered from our Winter Haven, Florida, offices over the past 18 years.

When Hart McKillop, founder of The Land Title Institute, was preparing to retire as director of Continuing Education from one of the largest title insurance underwriters, as his assistant, I dreaded his exit. Dread was transformed into elation when he advised me of his proposed plan to start The Land Title Institute and asked if I would be interested in joining him. My reply, which took all of 30 seconds, was, "Don't dare start it without me."

Throughout the years Hart McKillop remained my mentor, adviser, and friend. His love for, and dedication to, the title industry shone through every facet of his work—from his textbook authorship to dealing with students and title company administrative personnel. When a student took issue with one of the test questions, Hart meticulously set forth a clarifying letter, explaining, encouraging the student to continue being inquisitive and to seek definitive answers. Hart was first and foremost a teacher in the truest sense. His death in May 1988 was the end of an era.

Occasionally we receive comments from students participating in our courses. A Texas title company employee penned on her final test, "Thank you for all the time and effort that went into preparing this course. I really enjoyed it and will miss participating." From a gentleman in Arizona came this note, "I have been in the title business for over 30 years and thought I'd learned it all, but your course has taught me even more and I applaud you for it." A

California advanced course student wrote this on the final test answer sheet, "Amen! *Greatly enjoyed* doing the course! Thanks." In many offices, competition is keen to see who first completes the course with the best grades. Some avid enrollees resort to submitting their answer sheets via Federal Express or Express Mail.

Our application form lists information regarding previous employment of the applicant. Various interesting previous positions include: professional baseball player, waitress, circus performer, teachers, bank employees, attorneys, tax examiners, nurses, food service manager, mortgage banker, chauffeur, bank teller, financial consultant, messenger, cashier, security officer, store manager, cosmetologist, restaurant manager and pet motel manager.

Other participating students include: an FBI agent, US Navy and US Coast Guard Realty Specialists, state insurance commissioners, bank employees, and data processing company employees. Perhaps our most unusual enrollee is a gentleman in Israel who willingly paid an additional \$50 for postage on his assignment packets. Both his progress and grades are excellent.

For those of us who have administered the courses from our Winter Haven, Florida, offices, it has been a gratifying, rewarding experience to have been instrumental in helping people learn more about the title industry. Our relationship with participating students and title company administrators over the years has provided us with great satisfaction. Testimony to their opinion and approval of our courses is evidenced by the fact that several companies who subscribed to our services years ago are now re-subscribing on behalf of their current employees. Title people seem to be a "cut above" the ordinary individual.

To title company administrators and employees now participating in our courses we say, "Keep up the good work."

To those in Washington, DC who will carry on in the productive, caring tradition established 18 years ago, offering top-notch title industry education, we say, "You are providing a very important service to very important people. Continue to merit their approval by supplying prompt, efficient service which they expect and deserve." May The Land Title Institute continue to provide education on a high level for many years to come.

* * *

Note: Ms. Chergoski is retiring as of June 30, 1989.

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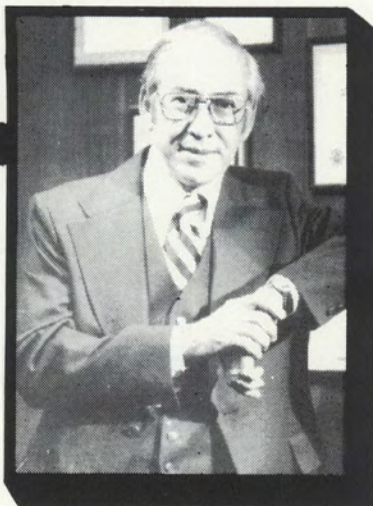
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— John Ruskin (1819-1900)

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Names In The News



Maguire

Michael E. Maguire, formerly chief underwriting counsel for Tigor Title, Los Angeles, CA, has elected to return to his position of senior vice president and New England Zone Manager.

Tigor's Senior Vice President **Joseph Bonita** has been appointed chief underwriting counsel. **Tigor Title Company** has also named **Rose M. Anguili**, district manager for **Tigor's** Riverside operations, CA. **James Brumett** was elected senior vice president and northwestern zone manager, overseeing operations in Washington, Oregon and Alaska from his Seattle location. **Tigor** also announces the following appointments and promotions: **Neil Clark**, appointed national title services manager for the New York Metropolitan area, NY; **Walter E. Davis**, named Georgia state manager, Atlanta; **Robert Fitzgerald**, appointed New York City zone manager, NY; **Charles Hanna**, appointed Connecticut state manager, and **Steve Johnson**, agency manager for **Tigor Title** was appointed the additional assignment of national title services manager for several east/southeast states.

The **Title Insurance Company of Minnesota (Minnesota Title)** has named **Charles T. Harrison, III**, Georgia state counsel. **Harrison** will be based in the Atlanta State office, and will be responsible for all legal and underwriting decisions for the company's Georgia agency operations.

Lawyers Title Insurance Corporation announces the election of **Joseph J. Beck**, as vice-president—Pennsylvania state manager. **Beck** will



Beck



Sheehy

transfer from the company's national headquarters in Richmond, VA, to the company's new state office, to be located in Philadelphia. **Frank J. Sheehy** was elected to the position of senior vice-president—operations. Based in the company's New England states office in Boston, MA, **Sheehy** will assume responsibility for company operations in Massachusetts, Maine, Vermont, Rhode Island, Connecticut, and New Hampshire.



Fromhold

First American Title Insurance Company announces the following personnel changes: **Michael J. Fromhold**, appointed vice president and regional counsel, Media, PA; **William D. Himmelreich**, promoted from state counsel for Pennsylvania to associate regional counsel, serving both Pennsylvania and Delaware, Wayne, PA; and **Warren R. Strouse**, promoted to vice president—branch manager, Jeffersonville, PA.



Himmelreich

James J. Ryan has been promoted to the position of senior vice president and national marketing director at



Strouse

Commonwealth Land Title Insurance Company, Philadelphia.



Ryan

ASC Title and Closing Services, a division of **Ohio Bar Title**, is pleased to announce the addition of **Mark E. Creamer** to its sales team, Columbus, OH.



Creamer

Title USA Houston announces the appointment of **Nancy Coffman**, joining the company as senior title examiner.

Zenith Abstract Company, Inc., has named **Anthony M. Giampietro**, vice president and national director of marketing, Philadelphia, PA.

Fidelity National Ti-



Crandall

le Agency announces the promotions of: **Bonnie McCoid**, commercial branch manager, Phoenix, AZ; **Lynne Russell**, branch manager for **Fidelity's** main office branch, Phoenix; and **Lynn I. Schauer**, continuing as branch manager and appointed technical advisor to **Fidelity** branch manager in the Maricopa County system, Phoenix.

For the second consecutive year, **Harolyn Crandall** has been named top salesperson at **World Title Company**. **Crandall**, a vice president in the corporate sales department of the Burbank headquarters office and one of the highest ranking women in the title industry, captured both top company awards for 1988. **Kelly Nuno** was named top salesperson in resale order for all of **World Title**, as well as the Los Angeles County office. Runner-up to **Crandall** was **Joseph De La Vara**.



Hardecopf

Ralph DiDomencio, appointed assistant vice president, and remains branch manager, Philadelphia, PA; **Mike Hardecopf**, appointed manager, Aurora, IL; **Stephen J. Hughes**, appointed title officer, Dallas, TX; **Jeff Lange**, appointed branch manager, Orlando, FL; **Patricia Weinstein**, appointed assistant vice president and manager of DeKalb County office, Sycamore, IL; **Lynda Winkowski**, appointed assistant vice president and Florida marketing manager, West Palm Beach; **Richard Bowers**, appointed assistant vice president, Sacramento, CA; **Mark Shepherd**, appointed vice president, Pasadena, CA; and



Christiansen

James B. Ogan, appointed manager for Washington County, Portland, OR.

The following people have received promotions at Chicago Title: **Lori Cadavid**, appointed title operations officer, Miami, FL; **Paul Caplinger**, appointed area counsel, Tidewater, VA; **Joby C. Castine**, appointed assistant regional counsel, Columbia, S.C.; **Susan Christiansen**, appointed assistant vice president and remains branch manager, Fort Myers, FL; **Frances DeVaughn**, appointed branch manager, Virginia Beach/Norfolk, VA; **Victoria L. DiPasquale**, appointed escrow officer, Miami; **Ben DuBois**, appointed Florida C&I counsel, Orlando; **Lawrence Frazzini**, appointed assistant title officer, Oak Forest, IL; **Arthur W. Fredder**, appointed assistant regional counsel, Wheaton, IL; **Vincenza Giannelli**, appointed title officer, Chicago; **Sue Gjerde**, appointed operations manager, SAFETRANS, Eden Prairie, Minn.; **Richard M. Hall**, appointed branch manager, Fairfax, VA; **Thomas J. Haynes**, appointed title operations officer, Tampa, FL; **John Kennedy**, appointed assistant title officer, Chicago; **Sheal D. Lisner**, appointed area manager, Tidewater; **Gail Lulling**, appointed assistant escrow officer, Wheaton; **Marcia S. Matthews**, appointed branch manager, Newport News, VA; **Joseph G. Nolan**, appointed assistant vice president and remains associate regional counsel, Seattle, WA; **Gladys Orlando**, appointed assistant vice president and remains branch manager,



Orlando

Daytona Beach, FL; **Judith A. Paine**, appointed agency operations officer, Tampa; **Daryl L. Schlick**, appointed assistant vice president and remains regional claims officer, Seattle; **Benjamin K. Sisk**, appointed assistant vice president and remains branch manager, Stuart, FL; **John G. Stilla**, appointed vice president and regional systems manager, West Palm Beach, FL; **Herbert G. Swan**, appointed vice president and remains branch manager, West Palm Beach; **Linda Yoo**, appointed assistant vice president and remains regional accounting officer, Seattle; and **Ladislaus Zbilut**, appointed assistant title officer, Chicago.

Other appointments include: **Ray Abella** has been appointed vice president, San Mateo, CA.

New 1989 CRE Directory

The American Society of Real Estate Counselors announces the publication of its 1989 CRE Member Directory.

This 36th edition contains geographical listings of the Society's 768 members in the U.S., Canada, England, Australia and Japan. A specialty section listing members' areas of expertise by property types and services also is included.

The 168-page 1989 CRE Member Directory also contains a profile of the Society, its Code of Professional Ethics, Standards of Professional Practice, 1989 officers, governors, past presidents, chapter officers and national committees.

Copies of the new directory are available free of charge by contacting the American Society of Real Estate Counselors, 430 North Michigan Avenue, Chicago, IL 60611-4089, Phone: 312-329-8427, Fax: 312-329-8881.

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CREDITORS RIGHTS

continued from page 5

The New York NYBTU policy form contains somewhat similar provisions in its "Schedule B" printed standard exceptions.

The foregoing exclusions may well apply to most situations where an effort is made to avoid a transaction as preferential or fraudulent under bankruptcy or insolvency laws. However, most courts regard insurance policies, including title insurance policies, as contracts of adhesion and construe them strictly against the insurer. There are several examples in ALTA policy forms where the language of a policy exclusion has been made more specific, even though there was already general language that covered the point. For example, the October 1987 ALTA policy forms Exclusions From Coverage were modified and clarified, particularly with respect to environmental protection laws, since those matters were becoming a growing concern.

Questions such as whether the defect . . . or adverse claim was "created, suffered, assumed or agreed to" may not be easy to determine, and could easily result in lengthy and expensive litigation. Similar problems exist with respect to a determination of the extent of the actual knowledge of the insured of the elements upon which the adverse claim may be based.

The growing concerns with creditors' rights coverage in title insurance policies is reflected in the recent addition to Collier Real Estate Transactions and the Bankruptcy Code of a new Chapter 5, "Creditors' Rights Issues Affecting Title Insurance." That chapter does not attempt to analyze the application of the component parts of ALTA Exclusion 3 to claims that could arise from the assertion of rights under the Bankruptcy Code or under state insolvency statutes. Instead, it deals with the "increasing pressure on title insurers to (a) eliminate or modify "bankruptcy" exceptions customarily included in policies issued for certain types of transactions, and (b) provide affirmative insurance with respect to certain potential problems."

The Collier chapter assumes that the title insurer was able to recognize that a "creditors' rights exception" should be inserted in the Schedule B portion of the title certificate and report, or title commitment. That assumption is not always justified because there are many situations where the title insurer will not realize that it has a problem until the claim notice arrives. There are three main reasons for this—(1) many lawyers are not sufficiently well versed in the developing law of creditors' rights, and do not recognize the pitfalls, (2) most lower level title company personnel are not sufficiently trained to recognize situations that may prejudice other creditors or other persons with interests deserving of protection, and (3) the inadequacy of consideration, or the insolvency or potential insolvency of the transferor or mortgagor, is not usually apparent from the papers seen by the title insurer or its agent.

An example of the problem with making valuation determinations is that since Durrett, many title people follow a so-called "70% rule" and do not raise an exception if the foreclosure sale is for more than 70% of an "appraised" value. Should a title insurer base its title insurance on the sufficiency of an appraisal that may have been made by an M.A.I. (made as instructed) appraiser? It is indeed unfortunate that Durrett was decided as it was, but one could question if it is the proper role of a title insurer to take the risk that the foreclosed owner is not insolvent, and that a future trustee in bankruptcy will not decide to use hindsight and move to set the sale aside as fraudulent because the bid price was less than for "reasonably equivalent value."

Perhaps the most frequent "creditors' rights" issues, particularly

in major transactions, are those with respect to an L.B.O. Everyone involved in a major L.B.O. such as the Macy's transaction or RJR Nabisco knows what it is and its inherent risks. However, there have been and will be countless smaller transactions, without publicity, that are subject to the same basic risks. Would most lower level title people recognize that the mortgaging of the local hardware store building and its adjacent parking area is part of an L.B.O. in which the real estate is being mortgaged to generate part of the purchase price for the sale of the shares of stock of the corporation that owns the hardware business?

What are the risks with respect to creditors' rights problems? Sherwin, "Creditors' Rights Against Participants in a Leveraged Buyout," 72 Minn. Law Rev. 449 (1988)—explores these issues. They include not only fraudulent conveyance law, but the possibility of ultra vires, equitable subordination and breach of fiduciary duty.

Almost all of these issues are discussed in **Wieboldt Stores, Inc. v. Schottenstein**, (No. 87 C8111, U.S.D.C., N.D. Ill.) decided on November 30, 1988, a case in which the corporation, both individually and on behalf of its Official Committee of Unsecured Creditors successfully commenced an action to avoid its L.B.O. as fraudulent under federal and state fraudulent conveyance laws after it became insolvent as a result of the transaction.

The application of fraudulent conveyance law to the L.B.O. is also carefully examined in Baird & Jackson, "Fraudulent Conveyance Law and Its Proper Domain," 38 Vand. Law Rev. 829 (1985).

Leading the way into many of these problems for L.B.O.s are the various Gleneagles decisions (**United States v. Gleneagles Investment Co.**, 565 F.Supp. 566 (1983) 571 F.Supp. 935, 584 F.Supp. 671 (1984), aff'd sub nom. **United States v. Tabor Court Realty Corp.**, 803 F.2d 1288 (3d Cir. 1986)). In that case the parties knew that the loan stood almost no chance of repayment, and both the borrower and the lender knew of the situation. An excellent analysis of the case and its probable consequences can be found in *The Business Lawyer*, Vol. 3, p. 1, Nov. 1987 in an article by David A. Murdock, Linda A. Sartin and Robert A. Zader entitled "Fraudulent Conveyances and Leveraged Buyouts." The authors point out that many L.B.O.s do not violate bankruptcy or state insolvency laws. They cite **Credit Managers Association of Southern California v. Federal Company**, 629 F.Supp. 175 (D.C. Cal. 1985) as an example of an L.B.O. that was upheld even though the corporation had not received "fair consideration." Although defending the L.B.O. as a legitimate and often desirable transactional structure the authors conclude that Gleneagles has placed a cloud on future L.B.O.s "and possibly may deter businesses from completing these transactions without the most accurate, conservative and reasonable analysis that can be generated by counsel, accountants and appraisers for the Lender and the Seller." They also urge careful inquiry into such matters as cash flow, capital maintenance and solvency tests both at the time of the consummation of the transaction and for a period of at least one year thereafter.

Collier lists the following as the critical elements for the utilization of Section 548 of the Bankruptcy Code by a debtor in possession or trustee in bankruptcy to avoid and recover from the recipient thereof any payment, incurrence of indebtedness or other transfer or property that occurred within one year before the date of the filing of the petition commencing the case:

"(1) the transfer was made by the debtor 'with actual intent to hinder, delay or defraud' any creditor of the debtor, or

continued on page 34

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May

- 18-20 Arkansas, Ramada Inn, Bentonville, Bentonville, AK
18-20 New Mexico, Hilltop House Hotel, Los Alamos, NM
21-23 Pennsylvania, Toft Trees, State College, PA

June

- 1-3 Tennessee, Opryland Hotel, Nashville, TN
8-9 South Dakota, Cross Roads Center, Huron, SD
11-13 New Jersey, Harrah's Marina Hotel Casino, Atlantic City, NJ
15-18 Colorado, Sheraton Steamboat Resort and Conference Center, Steamboat Springs, CO
15-18 Illinois, Oak Brook Hills Resort, Oak Brook, IL
15-18 New England, Newport Marriott, Newport, RI
18-20 Oregon/Washington, Salishan Lodge, Gleneden Beach, OR

July

- 13-15 Utah, Olympic, Park City, UT
16-18 Michigan, Shanty Creek Lodge, Bellaire, MI
20-22 Wyoming, Holiday Inn, Thermopolis, WY

August

- 3-5 Idaho, Sun Valley Resort, Sun Valley, ID
10-12 Montana, Holiday Parkside Inn, Missoula, MT
10-14 North Carolina, Seabrook Island Resort, Seabrook Island, SC
17-19 Minnesota, Kaehler Plaza Hotel, Rochester, MN
24-27 Kansas, Holiday Inn/Holidome, Manhattan, KS

September

- 8-10 Missouri, Lodge of The Four Seasons, Lake Ozark, MO
10-12 Ohio, TBA, Cincinnati, OH
10-13 New York, Castle Harbour Marriott, Bermuda
13-15 Dixie, Sheraton Savannah Resort & Country Club, Savannah, GA
14-16 Wisconsin, Grand Hotel, Mackinac Island, MI
14-16 North Dakota, Norway House Motel, Bottineau, ND
20-22 Nebraska, Old Mill Holiday Inn, Omaha, NE
21-22 Nevada, South Shore, Lake Tahoe, NV
23-26 Indiana, Westin, Indianapolis, IN

November

- 2-4 (tentative) Arizona, TBA, Tucson, AZ
15-18 Florida, Doral Resort & Country Club, Miami, FL
Louisiana—Not yet scheduled



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- Planning for Crisis Management—Lloyd N. (Larry) Newman, President, The Newman Partnership, Ltd., Columbia, South Carolina
- Addressing the Problem of “Good Funds”—Lawrence E. Green, Executive Vice President, California Land Title Association, Sacramento, California; Stephanie Martin, Attorney, Legal Division, Federal Reserve Board, Washington, D.C.; Robert B. Buffalo, Vice President, B.F. Saul Mortgage Company, Chevy Chase, Maryland; and Gerard K. Knorr, Vice President and General Counsel, First American Title Insurance Company of the Mid-West, Troy, Michigan.

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CALENDAR OF MEETINGS

1989

June 7 ALTA Board of Governors, The Broadmoor, Colorado Springs, Colorado

June 8-9 ALTA Western Regional Title Insurance Executives, The Broadmoor, Colorado Springs, Colorado

October 15-18 ALTA Annual Convention, Hyatt Regency Embarcadero Center, San Francisco, California

1990

January 15 ALTA Board of Governors, The Ritz-Carlton Hotel, Naples, Florida

April 4-6 ALTA Mid-Year Convention, Hotel Inter-Continental, New Orleans, Louisiana

April 29-May 1 ALTA Eastern Regional Title Insurance Executives Meeting, The Greenbrier, White Sulphur Springs, West Virginia

June 6 ALTA Board of Governors, The Broadmoor, Colorado Springs, Colorado

June 7-8 ALTA Western Regional Title Insurance Executives, The Broadmoor, Colorado Springs, Colorado

September 30-October 3 ALTA Annual Convention, Hyatt Regency, Chicago, Illinois

1991

January 14 ALTA Board of Governors, Quail Lodge, Carmel, California

April 10-12 ALTA Mid-Year Convention, San Diego Marriott Hotel and Marina, San Diego, California

September 25-28 ALTA Annual Convention, The Westin Copley Place, Boston, Massachusetts

1992

March 25-27 ALTA Mid-Year Convention, The Mayflower Hotel, Washington, DC

October 14-17 ALTA Annual Convention, Hyatt Regency and Maui Marriott, Maui, Hawaii

1993

March 24-26 ALTA Mid-Year Convention, The Westin Peachtree Plaza, Atlanta, Georgia

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NEW ALTA MEMBERS

(The names listed in parentheses are recruiters who have now qualified for membership in the ALTA President's Club.)

ACTIVE

Florida

Palm Title, Inc., LaBelle (Tom Garner, Southern Title Insurance Company, Knoxville, TN)

Illinois

UCB Services, Inc., Chicago, IL (Gene Pech, Commonwealth Land Title Ins. Co., Chicago)

Indiana

Columbia Land Title Co., Inc., Fort Wayne (Ron Plassman, Three Rivers Title Company, Inc., Fort Wayne)

Kansas

Tri-County Title & Abstract Co., Inc., Leavenworth

Louisiana

Cabibi Title Insurance Agency, Inc., New Orleans (Charles O. Hon, III, Title Guaranty & Trust Co. of Chattanooga, Chattanooga, TN)
Pioneer Land Title Corp., Metairie

Massachusetts

Registry Research, So. Egremont (Michael Agen, Esq., Lawyers Title Insurance Corp., Springfield)

Michigan

Alger County Abstract & Title, Inc., Munising (T.J. Bonfield, Delta Abstract & Title, Escanaba)
Great Lakes Title of Cadillac, Inc., Cadillac, MI (Mary Isham, Michigan Land Title Association, Lansing)
Mid Michigan Title, Inc., Otsego (Mary Ann Isham, Michigan Land Title Association, Lansing)
Potter Title Co., Lapeer (Mary Isham, Michigan Land Title Association, Lansing)

Minnesota

Chisago County Abstract & Title Co., Chisago City
National Title Resources Corp., White Bear Lake (Michael Fonder, Commonwealth Land Title Insurance Co., Bloomington)
Professional Title, Inc., Edina

Missouri

Elk River Abstract & Title, Pineville (Gary Hendricks, Fidelity Abstract & Title, Neosho)
Guaranty Land Title Ins. of Columbia, Inc., Columbia (Richard A. Mason, Mt. Vernon)
Platte County Title & Abstract Co., Platte City (Steve Crawford, Halls Abstract & Title Co., St. Joseph)

Montana

Pondera County Title Co., Conrad (Bob Field, First Montana Title Co. of Billings, Billings)
Western Land Title Corp., Anaconda

Nebraska

Sarpy Title Company, Inc., Bellevue

New Jersey

Homestead Abstract, Inc., New Brunswick

New York

All State Abstract Corp., Huntington Station (Harold Schwartz, First American Title Ins. Co. of New York, Garden City)

Dutchess Abstract of the Hudson Valley, Inc., Beacon (Harold S. Schwartz, First American Title Ins. Co. of New York, Garden City)

Dynasty Abstract, Inc., Great Neck
Picciano Abstract Company, Inc., Binghamton
Riverside Title Insurance Agency, Inc., Rochester

North Carolina

Statewide Title, Inc., Salisbury (J.H. Boos, First American Title Insurance Co., Plantation, FL)

Ohio

First Service Title Agency, Inc., North Olmsted
Northcoast Title Agency, Independence (James O'Conner, American Title, Dublin)

Oklahoma

Eufaula Abstract & Title Company, Inc., Eufaula (Bob Luttrell, Pioneer Abstract & Title, Muskogee)

Oregon

Ocean Title & Escrow, Gold Beach (Don McKelvey, First American Title Ins. of Oregon, Portland)

Pennsylvania

Lebanon Land Transfer Company, Inc., Lebanon (William Rice, Great Valley Abstract Corp., Wayne)
Robert S. Lehman, Elizabethtown (Robert A. Horst, Realty Settlement Services, Inc., Lancaster)

Texas

Gaines County Abstract Co., Seminole
Lone Star Abstract & Title Co., Inc., Midland
Montague County Abstract Co., Inc., Montague (Catherine Lancaster, Texas Land Title Association, Austin)
West Texas Abstract & Title Co., Midland (Catherine Lancaster, Texas Land Title Association, Austin)

Wisconsin

Countywide Abstract & Title Co., Inc., Sturgeon Bay (Richard Oliver, Smith Abstract & Title, Inc., Green Bay)

Virgin Islands

Fidelity Union Title Services, Inc., Christiansted (Tom Pearson, Security Title & Guaranty, Stamford, CT)

Canada

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Philip Wong, Chicago (Richard C. Jones, Sachnoff, Weaver, Rubenstein, Ld., Chicago)

Ohio

Robert H. Siegel, Cincinnati

Wisconsin

Jeffrey P. Aiken, Milwaukee (Chuck Schiereck, Chicago Title, Waukesha)

CREDITORS RIGHTS

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(2) the debtor received 'less than a reasonably equivalent value' for such transfer, and

(a) was insolvent on the date such transfer was made, or became insolvent as a result thereof;

(b) was engaged or was about to engage in a business or a transaction for which the remaining property of the debtor was 'an unreasonably small capital'; or

(c) intended to or believed that it would incur debts beyond its ability to pay as such debts matured."

Although it is the duty of a lawyer to obtain maximum available protection for the client, whether in the form of representations, covenants, warranties, indemnities, opinion letters, title insurance or other forms of insurance, many sophisticated lawyers have expressed their opinion to this author that the risks of possible future bankruptcy or insolvency of any party to a real estate transaction is beyond the expertise of a title insurance company and is not the type of risk that should be assumed by them in most circumstances. That is not to say that there may not be circumstances under which the risk could not be assumed as a special risk after considered judgment and full disclosure of all pertinent information. It is a special risk and should not be assumed by inadvertence and without special consideration.

Various forms of title policy exceptions as to creditors' rights are already utilized by title insurers when they recognize the problem. Collier gives several examples of such exceptions that would apply in different situations. However, as more title insurers become more involved in expensive litigation involving creditors' rights we may see some of the new 1987 ALTA policy forms sprout a new exclusion from coverage as to fraudulent transfers or preferences under federal or state bankruptcy and insolvency laws. The choice that may have to be made by the title industry may be between a new exclusion, with an endorsement eliminating or modifying it when appropriate, or a mandatory requirement for some form of advance written disclosure as to the full details of the entire transaction so that a creditors' rights problem would be more easily identified. In one way or another creditors' and debtors' rights have become more of a title problem, and we should anticipate that it will receive much more attention.

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ENVIRONMENTAL LIENS

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against errors in the actuarial determination of risk and in the wording of the coverage in the policies. At present, the largest EIL policy available is \$15 million.

To place the demands for title insurance environmental coverage in context with the only line of insurance that covers environmental risks, EIL coverage is compared to coverages with a title insurer which issued "superlien" coverage in New England, as follows. The comparison must be made against EIL coverages because the property/casualty industry is stoutly insisting that its CGL policies do not cover environmental cleanup liability, and, thus, CGL premiums do not reflect environmental risks. This comparison shows why title insurers are not capable of protecting insureds from environmental risks.

There are some caveats to observe in this comparison between title insurance and EIL insurance:

1. Title insurance covers title risks in addition to environmental risks; EIL covers only environmental risks.
2. The title insurer cannot adjust its coverages once the policy is issued, if the current loss experience indicates that a change is necessary because the term of the insurance is coextensive with the insured's interest in the property.
3. Cigna's EIL coverage was written on a "claims made" basis which means the insured had protection only during the term of the policy. Once the policy term expired, the insured had no protection even though the spill or release of contamination had occurred during the term of the policy. Such EIL insurance policies did not provide for "occurrence" insurance which would protect the insured against liability for a spill which occurred during the term of the policy even if the claim was made after the policy expired. EIL was "claims made" insurance because the insurance carriers needed the most strictly defined terms for EIL policies to protect themselves against errors in their actuarial projections of loss experience with this volatile risk.
4. Except for mergers within the title insurance industry, coverage has continued throughout the 1980s with the same companies; EIL was offered by approximately 30-40 companies in 1983-84, but now only one company, AIG, offers this coverage, which is very conservative in its underwriting.
5. The distinction among insureds in a title insurance transaction has less than the usual importance because a discovery of significant contamination on the insured premises usually drives the borrower into bankruptcy, leaving the lender and its title insurer exposed to liability.
6. Cigna's assets were approximately 17 times the assets of the entire title insurance industry in 1984. It is manifest from this comparison that the large casualty insurers occupy an entirely different league.
7. The comparison must be based on 1984 amounts because environmental impairment liability insurance has been almost unobtainable since then, and title insurance superlien coverage has been virtually unobtainable since the end of 1985. Only National Union Fire Insurance Company of Pittsburgh, Pennsylvania, is currently willing to undertake EIL risks. It has a risk limit of \$15,000,000 on its policies.

ALTA Endorsement 8.1

When the 1987 policies were submitted to title insurance customer groups for review and suggestions, the Federal National Mortgage Association (FNMA), as the largest and most important of the secondary market lenders, conditioned its approval of the forms upon a separate environmental protection lien endorsement for policies insuring residential loans. In March of 1987 two forms were agreed upon which became ALTA Endorsement Forms 8 and 8.1. Their only difference was the incorporation by reference of the 1987 policy definition of "public records" to the policy

Conditions and Stipulations in the ALTA 8. The ALTA 8.1 restates the 1987 policy definition of "public records" in the body of the endorsement to permit its use with the older policy forms. By March 1988, the ALTA had withdrawn the ALTA 8 endorsement which is now fully superseded by the ALTA 8.1.

Paragraph (a) of the ALTA 8.1 endorsement gives coverage against environmental protection liens which are of record at the Date of Policy. This affirmative coverage is congruent with Section 1(a)(iv) of the Exclusions from Coverage in the 1987 policies.

Paragraph (b) is designed to disclose any state statute (but not federal statutes or local ordinances) in effect at Date of Policy which may impair the priority of the insured mortgage. In essence, Paragraph (b) is an insured legal opinion that no statute enacted by the state legislature, except the statutes listed on the endorsement, provides for a superpriority lien involving environmental matters. It requires title insurers to search the state statutes and codes for those elusive regulatory sections mentioned in the first section of this article.

The ALTA 8.1 Endorsement is designed to be used only for residential transactions. There may be serious pitfalls to the title insurer which extends this coverage to commercial and industrial loans. As we have seen, the bankruptcy courts may be in the process of creating "superliens" out of conventional environmental liens. These pose no danger to the title insurer if no affirmative coverage is given in commercial and industrial loan policies, but an ALTA 8.1 endorsement in such a policy can be dangerous.

Probably the title insurer will not take exception to a conventional lien statute following paragraph (b) of the endorsement because, on its face, the statute poses no threat to the lien of the mortgage. If the lender claims coverage under the endorsement in such circumstances, the title insurer will certainly claim that the "superlien" arises under principals of bankruptcy law, not the state statute; thus paragraph (b) of the endorsement would not apply.

The title insurer should win, based on the express language of the endorsement, but title insurers must recognize, based on the experience of the property/casualty industry, that a court may decide that the lender had "reasonable expectations" of coverage under the endorsement. See, *Mariotti Financial Services, Inc., v. Capitol Funds, Inc.*, 288 N.C. 122, 217, S.E.2d 551, 77A.L.R.3d 1036 (1975). The doctrine of reasonable expectations allows a court to deviate from the express language of the insurance contract from what the insurer intended to what the insured understood the contract to mean. Having a winning argument does not mean that the insurer will be able to avoid challenges against its coverage, or even that it will win all of the challenges made.

The 1984 and 1987 changes to the ALTA Policies follow a path blazed by the property/casualty carriers in their experiences with CGL policies. Title insurers should study the environmental risk experience of the property/casualty industry in charting a course that will expose the title industry only to those risks that have been accepted and understood by title insurance underwriters.

¹Leslie and Bethel, *The Title Insurance Industry: A Case for Affirmative Rate Regulation*, Journal of Insurance Regulation pp. 610-11, June 1983.

²Leslie and Bethel, *supra*, at p. 611.

³*Broadwell Realty Services, Inc. v. Fidelity & Casualty Company of New York*, 218 N.J. Super. 516, 528 A2d 76, 84 (App. Div. 1987).

⁴*Broadwell Realty, supra*, 528 A2d at 85.

⁵See, *Claussen v. Aetna Casualty & Surety Company*, 676 F Supp 1571 (S.D. Ga. 1987).

⁶Definition "F" of the Pollution Legal Liability Policy of the National Union Fire Insurance Company of Pittsburgh, Pa.

The author is counsel-major transactions in the Law Division at Lawyers Title Insurance Inc.'s national headquarters. He joined Lawyers Title in 1982 as assistant counsel. In 1984 he was named associate counsel. He is a graduate from the University of Virginia, in Charlottesville, with B.S. and J.D. degrees. Bozarth is also a member of the Virginia, Virginia State, and Richmond Bar Associations. A particular area of the author's expertise is hazardous and toxic waste issues. He authored the petition in In re: Lawyers Title Insurance Corporation, which resulted in a prohibition against title insurance companies insuring against environmental superliens in Connecticut.

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