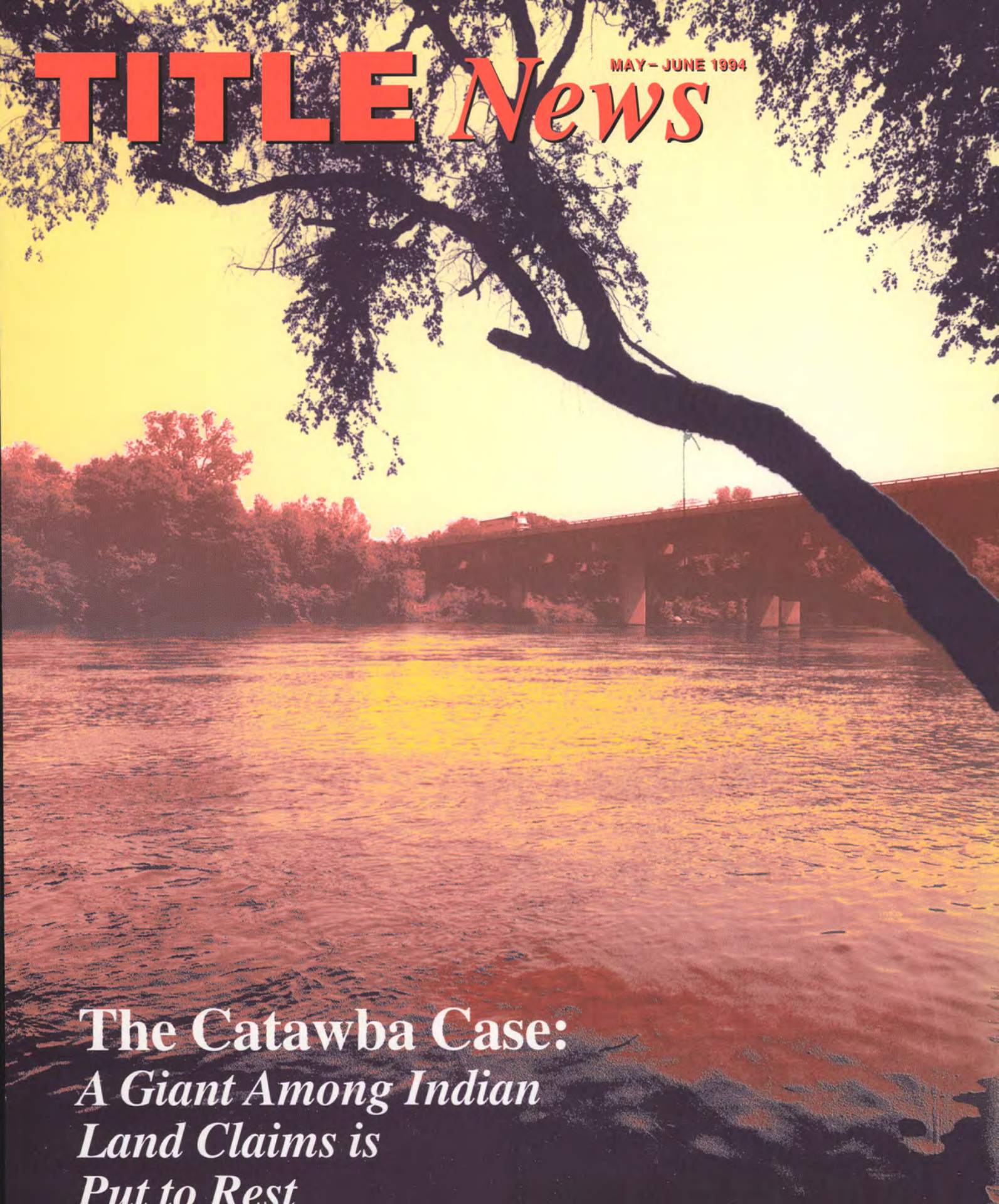
TITLE News
MAY – JUNE 1994



The Catawba Case:
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TITLE News

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On the Cover: *The Catawba River near Rock Hill, SC, in the vicinity of land subject to a remarkable 13 years of litigation arising from a claim by the Catawba Indian Tribe. Before being extinguished by the Catawba Settlement Act signed by President Clinton last fall, the claim was before the United States Supreme Court once, the Fourth Circuit Court of Appeals seven times, and the Supreme Court of South Carolina once. John C. Christie, Jr., Washington, D. C., based attorney who represented the insureds of the title insurance industry in defending against this extraordinary claim, analyzes the litigation in a special article beginning on page 6. (Photograph by Richard Johnson, owner of a home in the claim area. Design by Halford Design and Graphics and by Oliver.)*

FEATURES

DEPARTMENTS

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A MESSAGE FROM THE ABSTRACTER-AGENT CHAIRMAN

Since receiving the honor of election as Abstracter-Agent Section chairman during the ALTA Annual Convention last fall, I have been doing everything possible to familiarize myself with the activities of the four committees assigned to the Section Executive Committee. These are Education, Land Title Systems, Liaison with the American Congress on Surveying and Mapping, and the Abstracter-Agent Research Subcommittee.

I have attended some meetings of these committees and in the past have followed their activities while Abstracter-Agent representative serving on the ALTA Board of Governors. As as result, I have learned that the committees–like others within the Association–include conscientious and diligent members who voluntarily devote considerable time to ALTA projects.

When we attend the Conventions, we hear about or observe some of the results from what these committees do. But, perhaps we should become more aware of their efforts behind the scenes. It is one of my objectives as Section chairman to help the Board of Governors stay better informed on the activities of our committees while maintaining liaison between them and the Board, as well as with the ALTA staff. They deserve our continued respect, support and encouragement.

Thus far, the matter with which I have been most involved as Section chairman is the Title Insurance Agent Model Act being developed by the National Association of Insurance Commissioners Title Insurance Working Group. Assisting the Working Group are several title industry technical advisors including regulatory counsel from various title underwriting companies, and Dan Wentzel and myself from the ALTA Board of Governors. Providing liaison is Richard McCarthy of our Association staff. My involvement has included participation in Working Group hearings in Boston and Denver, along with drafting meetings in Chicago. I cannot overemphasize the importance of the Model Act to the title industry, and to the ALTA Abstracter-Agent Section in particular.

The purpose of the Model Act is to make more uniform the state laws across the country with regard to title insurance agents. To achieve this objective for all 50 states is of course extremely difficult since the regulation of title agents varies greatly from one jurisdiction to another. Many states have more than adequate regulation of agents, while others have very little supervision and probably need the Model Act. Some states have no regulation at all, and one does not even require the licensing of agents.

This wide variance has created a tremendous task for the Working Group and its advisors. The title underwriters are well represented among the Working Group advisors by their regulatory counsel. Dan Wentzel and I are representing the agents viewpoint, especially that articulated through the Abstracter-Agent Section Executive Committee.

In the Model Act, attention has been given to such matters as licensing requirements, mandatory annual audits, requirement of an errors and omissions policy, and fidelity coverage if an agent handles escrows. There are specific requirements in the latest draft of the Model Act with regard to the handling of escrow funds.

There are also requirements as to the content of underwriter/agency contracts, which have been streamlined from earlier versions. As the Model Act has progressed through various drafts, the representatives from both the underwriter and agency sides of our industry have done a good job in making its language more responsive to title insurance problems.

The most controversial parts of the Model Act are Section 5, the anti-rebate section, and Section 6, which covers controlled business. Section 5 will remain in the Model Act, while Section 6 probably will be made an option for the various state regulators. ALTA has maintained a strong position in favor of keeping Section 5 in the Model Act, although there has been vigorous opposition to this from controlled business factions presenting testimony at Working Group hearings. By early this summer, we should know the final form of the Model Act as proposed and should have an idea of its chances for approval by the full NAIC membership in September.

My experience so far as Section chairman, and as an ALTA governor, is that serving the Association in these positions is interesting and rewarding work which can be difficult at times.

continued on page 9

The Catawba Case -- Extraordinary by Any Measure

By John C. Christie, Jr., Esquire

On October 27, 1993, President Clinton signed the Catawba Land Claim Settlement Act[1]. By the stroke of his pen, the legislation ended over 13 years of litigation by extinguishing the claim of the Catawba Indian Tribe to 144,000 acres of highly developed South Carolina land and to trespass damages for the 140 years the Catawbas had been out of possession of the land.

The 13-year history of this litigation was indeed extraordinary by more dimensions than the length of its existence. During that time, the case was before the United States Supreme Court once, the Fourth Circuit Court of Appeals seven times (six of those by the entire court sitting en banc), and the Supreme Court of South Carolina once. In addition, there were numerous hearings before the United States District Court in South Carolina, presided over by Senior Judge Joseph Willson from the Western District of Pennsylvania, who was specially appointed to the case by Chief Justice Warren Burger.

Despite the length of this proceeding, the merits of the Catawbas' claim never came to be litigated. Instead, the defendants responded to the complaint by raising an affirmative defense in a motion to dismiss and the impact of that defense continued to be litigated when the Catawba Land Claim Settlement Act brought the case to an end.

Thousands of persons had interests in the land which was the subject of this claim, and many of those interests were insured by members of ALTA. Shortly after the complaint was filed, the affected insurers came together to retain counsel to represent their respective insureds in defending against the claim. The considerable time and effort dedicated to the defense provides vivid testimony to the value of title insurance.

The considerable time and effort dedicated to the defense provides vivid testimony to the value of title insurance.

The author is managing partner of Bell, Boyd & Lloyd, Washington, DC, and represented the insureds of the title insurance industry in defending the claim which is the subject of this article. The author writes with grateful acknowledgment for the contributions to this litigation by his friend and colleague Bill Hayton, who died shortly after the Catawba claim ended. Author Christie recalls that, as many members of ALTA know, Bill Hayton worked with distinction in the defense of Indian land claims involving title insured lands around the country, including claims in Arizona, California, Kansas, Louisiana, New Mexico, South Carolina, Texas and Wisconsin.

Nature of the Claim

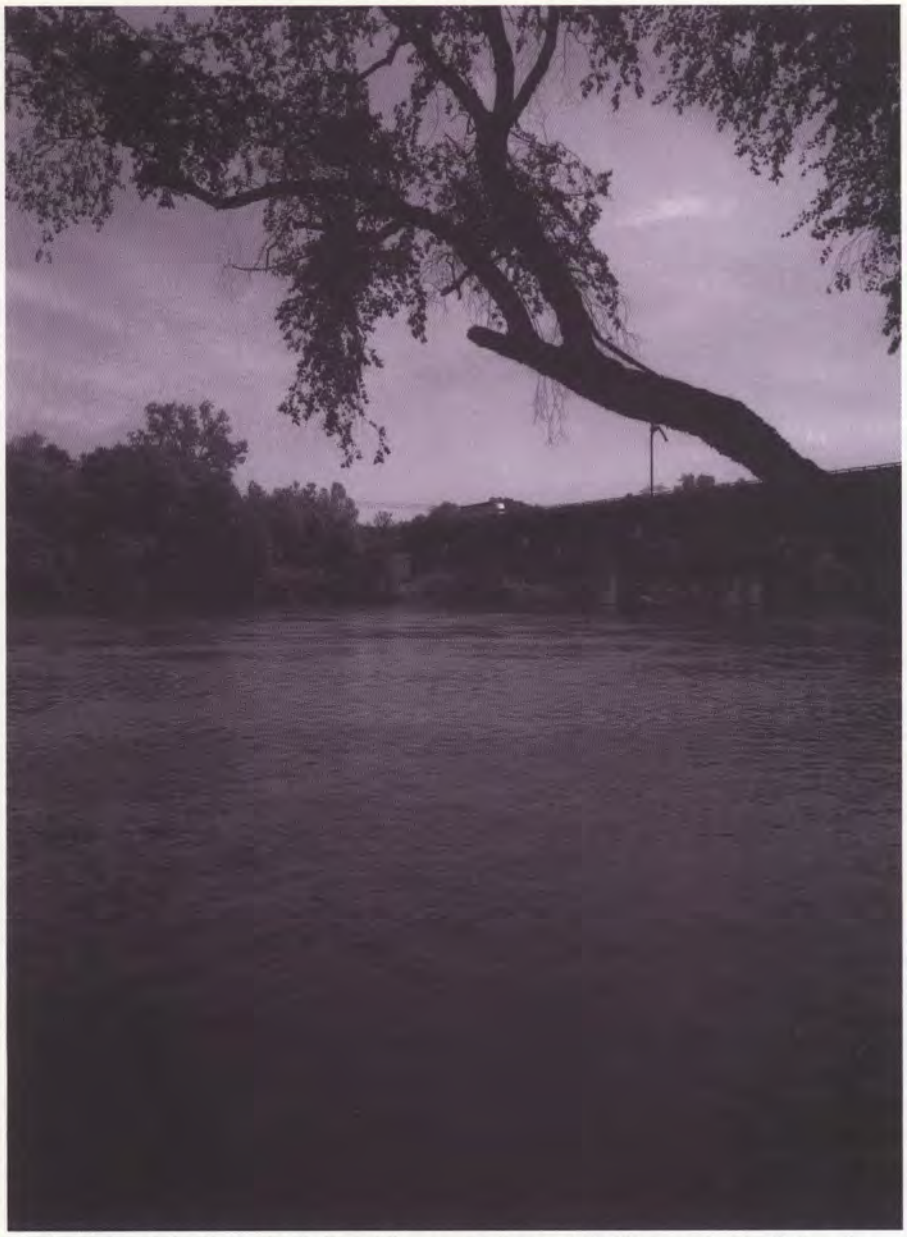
On October 28, 1980, the Catawba Indian Tribe, Inc. of South Carolina filed this action in the United States District Court for the district of South Carolina. In the complaint, the Catawbas claimed the current right to own and possess approximately 144,000 acres of land at the northern border of South Carolina immediately south of Charlotte, North Carolina, together with trespass damages in an unstated amount.

The claimed ownership of this land was premised upon an alleged grant to the Catawbas from the King of England in 1760 by the Treaty of Pine Tree Hill. It was alleged that a later voluntary sale of the land by the Catawbas pursuant to a treaty in 1840 with the State of South Carolina was void, causing all subsequent transactions since that time from the state to present day private landowners to be void. The basis for this contention was a federal statute known as the Nonintercourse Act[2], which required federal approval or consent to the transfer of Indian tribal land, and the Catawbas alleged that such federal approval was lacking.

The defendants were 76 individuals, companies and public entities who were named for their own property interests in the area as well as representatives of a putative defendant class alleged to consist of all of those who had property interests in the land at issue. Among the group of representative defendants were a number of insureds, including the Celanese Corporation, the Wachovia Bank, and Jim and Tammy Bakker's celebrated Heritage Village, which was located within the claim area.

Beyond the original group of representative defendants, no one ever came to know precisely how large the putative class may have been. However, knowledgeable estimates assumed over 60,000 separate interests, of which perhaps 40 percent were title insured.

With the filing of the complaint came a motion to certify the defendant class which the Catawbas, represented principally by the Native American Rights Fund, hoped would result in the immediate inclusion in the litigation of everyone in the claim area so as to enhance their political leverage. However, the named defendants sought to have the certification issue deferred pending resolution of a motion to dismiss premised upon a 1959 federal statute commonly referred to as the "Catawba termination act."[3]



The claim of the Catawba Indian Tribe covered some 144,000 acres in South Carolina.

The Catawba Termination Act

The "Catawba termination act" had been passed during a period in the 1950s and early 1960s when Congress sought to end federal paternalism toward Indians. A dozen of these acts were passed, affecting approximately 100 tribes or groups of Indians, including the South Carolina Catawbas. In addition to providing certain benefits to the Catawbas, the termination act went on to provide that, upon its effective date in 1962, all federal statutes that affect Indians because of their status as Indians would no longer be applicable to them and that "the laws of the several states shall apply to (the Catawbas) in the same manner they apply to other persons or citizens within their jurisdiction."[4]

In the motion to dismiss, the named defendants asserted that, by the terms of the termination act, the laws of South Carolina, including its statutes of limitations, became applicable to the Catawbas. Therefore, even if as a general rule state laws of limitations may not bar federal Indian tribal claims[5], they did so in this case by the expressed intent of Congress. Moreover, by the passage of more than 10 years since the effective date of the termination act, we urged that South Carolina limitations laws applicable to transfers of real estate would serve to bar this claim.

Responding to the defendants' suggestion that this would be an "expeditious" way by which to resolve this case, at the conclusion of a preliminary hearing Judge Willson determined to defer the class action issue and take up instead the issue presented by the motion to dismiss. Following briefing and argument, he granted the motion and dismissed the case. In doing so, he ruled that the "explicit statutory language directed that state law apply to the Catawbas" once the act became effective and that state law served to bar the claim in its entirety.[6]

The Catawbas appealed to the Fourth Circuit Court of Appeals. A three-judge panel of the court reversed Judge Willson by a 2 to 1 split.[7] The majority opinion, written by Senior Judge Butzner, read the text and the legislative history of the termination act as intending only to end federal supervision and assistance with respect to the Catawbas. "(T)here is no explicit or implicit indication of any desire to extinguish any tribal claims against (present day landowners)." Judge Hall dissented, finding the act to have "unquestionably" made South Carolina fully applicable to whatever claim plaintiff may have had to the tribe's ancestral land.

The defendants sought a rehearing en banc, which was granted. However, following another round of briefing and another oral argument, the en banc panel of the Fourth Circuit, by a split of 4 to 3, affirmed the panel's original ruling.[8] Although concurring with the majority, Judge Murnahan authored an interesting separate opinion. Despite his reading of the termination act, Judge Murnahan worried that "innocent good faith landowners" were left with the "awesome risk" that the absence of a political resolution of the dispute "might lead to the Queen of Spades ultimately winding up in the hands of the individual owners."

Supreme Court Review

The defendants filed a petition for certiorari urging that this preliminary issue be resolved by the Supreme Court before forcing innocent landowners to a lengthy and expensive trial on the merits of the Nonintercourse claim, during which titles to land in the area would remain essentially nontransferable. With the helpful intercession of Senator Strom Thurmond of South Carolina, the Solicitor General of the United States ultimately supported the petition and the Supreme Court determined to take the case.

In June, 1986, by a six to three vote, the Supreme Court agreed with Judge Willson's interpretation of the meaning of the Catawba termination act.[9] In an opinion written by Justice Stevens, the majority held that the termination act in "unmistakably clear language" made state laws apply to the Catawbas in precisely the same fashion as they applied to others. Justice Black-

mun, writing for the dissenters, read this same "unmistakably clear language" differently. Starting from the assumption that any ambiguity was to be resolved in favor of the Indians, he interpreted this language to make state statutes applicable but not to a pre-existing federal claim.

However, having ruled that state laws were applicable to the Catawbas, the Court determined to remand to the Fourth Circuit the question of what the impact of that application would be under South Carolina law. In dismissing the case, Judge Willson had determined that South Carolina laws would work to bar the claim in its entirety, but the Fourth Circuit majority had never reached that issue given its initial interpretation of the termination act.

South Carolina Limitations Laws

Back we went to the Fourth Circuit, still sitting en banc. There the state law issue was briefed and argued twice. In the course of this, the defendants filed an unusual motion to certify the state law question of first impression to the Supreme Court of South Carolina for resolution. The Fourth Circuit finally agreed to do just that but, within three weeks of the arrival of the case before the South Carolina Supreme Court, that court in effect said, "Thanks, but no thanks," by issuing an order declining to answer the questions certified.[10]

With nothing else to do but to have to decide the state law issue, the Fourth Circuit acted, this time by a split of 4-2.[11] South Carolina has a limitations statute providing that no action for the recovery of real property may be brought unless the plaintiff was possessed of the premises within 10 years of the commencement of the action, a requirement which the Catawbas clearly could not meet. However, the majority relied on another statutory provision that purports to create a "presumption of possession," once a plaintiff establishes "legal title." The defendants argued that "legal title" was "record title," which the Catawbas did not have because the public land records reflected ownership elsewhere. However, the majority found that, assuming the allegations of the complaint as true for purposes of the motion, the Catawbas had "legal title" premised upon the King's grant.

Under the South Carolina statute relied upon by the majority, once "legal title" was shown, the presumption of possession could only be rebutted by a showing that the land had been "held and possessed adversely to such legal title for 10 years before the commencement of such action." Because South Carolina is one of the few (if not the only) jurisdictions not to allow tacking by successive adverse possessors for purposes of demonstrating adverse possession, the Fourth Circuit majority's ultimate holding was that the Catawbas' claims against the named defendants were barred under these South Carolina limitations provisions only as to those properties that had been held and possessed adversely without tacking for 10 years after July 1, 1962 (the date the termination act became effective) and before October 28, 1980 (the date the litigation was commenced).

Resumption of the Proceedings Below

Having spent a nine-year interlude seeking justice on high, we returned to the district court, Senior Judge Willson still presiding. At this juncture, the question came to be whether Judge Willson would proceed to apply the Fourth Circuit's limitations ruling to the properties of the original group of named defendants or take up the plaintiff's deferred motion to certify a defendant class or both. Judge Willson chose to deal with the remaining limitations issues, which prompted the Catawbas to lodge a mandamus petition with the Fourth Circuit to force the district court to entertain the class certification issue. The Fourth Circuit instead declined to entertain the mandamus petition.

Thousands of persons had interests in the land which was the subject of this claim, and many of those...were insured by members of ALTA.

Ultimately, 46 of the original named defendants filed a supplemental brief, together with dozens of supporting affidavits asserting that, under the Fourth Circuit's rule, adverse possession was demonstrated for the requisite period of time and the claim should be dismissed. In total, these affidavits covered more than 1,000 separate parcels of land.

Although the substance of the affidavits varied considerably, substantially all of them asserted that the landowner (or his predecessor) had continuously occupied or possessed the property without tacking for 10 years during the requisite period, had treated the property as his own, paid taxes thereon and taken steps to protect it against trespassers. The principal issue came to be whether these representations were sufficient, without recitation of specific acts of possession, to demonstrate "actual, open, notorious, hostile, continuous and exclusive possession," at least absent some showing by the Catawbas of specific facts demonstrating a genuine issue for trial.

Judge Willson found that the affidavits were sufficient and in a series of judgment orders dismissed substantial numbers of properties from the case and certain of the named defendants whose entire holdings in the claim area were the subject of affidavits. The Fourth Circuit still sitting en banc affirmed in large part by an undivided decision.[12] "To survive the claimants' motions for summary judgment, the Tribe must establish that there is a genuine issue as to whether the claimants have satisfied South Carolina's adverse possession requirements" and this was not done.

Having so disposed of the pending adverse possession issues, the district court finally invited briefs from the parties on the class certification motion. The defendants asserted that certification was inappropriate because each potential class member could raise an individualized, fact-based defense of adverse possession. Moreover, by the passage of now more than 20 years since the effective date of the termination act, we argued that another South Carolina limitations doctrine--the so-called presumption of grant doctrine--would now operate to bar litigation against all landowners except the original group of named defendants. The Catawbas asserted that without certification they would be forced to individually sue each of the more than 60,000 landowners in the claim area and that, moreover, the filing of the original complaint against the named defendants, together with the class certification motion, served to toll any unexpired limitations period as to everyone in the alleged class.

Judge Willson denied the motion to certify and denied as well a motion to certify the question for immediate appeal. As a result, the Catawbas were forced to seek reversal of the certification decision through another mandamus petition. The petition was subsequently denied by the Fourth Circuit en banc in an opinion in which it held that the district court's conclusion that the individualized nature of the defenses of the potential class members made certification inappropriate did not "present a proper case for use of the writ of mandamus."[13] In so holding, the Fourth Circuit ex-

pressly declined in this context to address the alternative ground for the certification decision below; namely, the application of the presumption of grant doctrine to bar new litigation against any landowner beyond the original group of defendants. The viability of this defense was thus left to further litigation.

Settlement

At this stage, the Catawbas had no choice but to begin serious preparations for the filing of more than 60,000 separate complaints against all of the individual landowners in the claim area. Even by their own reading of applicable limitations doctrines, the Catawbas conceded that these complaints had to be filed, if they were ever to be filed, by October, 1992.

The complaints, together with a separate summons, were drafted and printed. A docket number was obtained and an anticipatory order entered by the district court, setting out a procedure and schedule for service and a response by the thousands of new defendants. It would have been the largest single filing of separate complaints in the history of the federal court system, causing the district court to seek emergency funding in order to be in a position to deal with the anticipated blizzard of paper.

As might be expected, the anticipated filing also generated a firestorm of political heat in the claim area and the state generally. Representatives of the Catawbas, the governor, and the congressman from the area, John Spratt, together with a representative of the Secretary of the Interior, reacted by entering into intense negotiations designed to try to reach a settlement agreement prior to the October deadline.

On the basis of the progress made by August, 1992, Congress by voice vote enacted legislation purporting to toll any unexpired state statute of limitations for an additional year in order to allow for the necessary drafting of a definitive settlement agreement and the passage of enabling legislation in both South Carolina and the Congress. On the basis of that legislation, the Catawbas determined to defer the filing of the new litigation for a year.

As it began to take shape, the settlement contemplated that the Catawbas would receive certain federal and state entitlements, including restoration as a federal tribe, and the payment of $50 million. In exchange, the Catawbas would agree to federal legislation extinguishing the claim in language drafted in 1978 by ALTA's Indian Land Claims Committee. Inevitably, pressure mounted for private contributions to the settlement and ultimately the title insurers involved in the claim agreed to make what was, in the aggregate, the largest grant of private monies.

Passage of the necessary legislation in Washington came to be difficult. Basically, there was hostility from both directions--those who thought the Catawbas had won too much in federal monies, particularly given their lack of litigation success and federal status, and those who thought the Catawbas had not won enough, particularly relative to other Indian land claim settlements. Congressional passage of the legislation occurred in the middle of the night in August, 1993, shortly after passage of the Administration's budget legislation. Critical Administration support for the passage of the Catawba legislation may well have turned on the President's need to line up votes for passage of the budget legislation.

The Catawbas asserted that without certification they would be forced to individually sue each of the more than 60,000 landowners in the claim area....

Conclusion

Given the general direction of the litigation, it may well have been that a good defense was available to all of the landowners in the claim area but those unfortunate few in the original group of defendants who were unable to avoid the no-tacking implications of the Fourth Circuit's adverse possession opinion. We shall never know the answer and perhaps that is just as well, given the vagaries inherent in all litigation and the certain additional costs of getting there.

However, the next time you hear it suggested that title insurance has no value or that claims are never made, the Catawba case would serve as a useful vehicle for rebuttal. It was truly a giant among claims.

1. Public Law No. 103-116

2. The Nonintercourse Act is presently codified at 25 U.S.C. Sec. 177 (1976). The term refers to restrictions on the alienation of Indian lands contained in a series of more comprehensive acts regulating Indian affairs, each known as the "Indian Trade and Intercourse Act," first enacted in 1790 and most recently modified in 1834.

3. 25 U.S.C. Secs. 931-938 (1976)

4. 25 U.S.C. Sec. 935 (1976)

5. "(F)ederal policy may preclude the ordinary applicability of a state statute of limitations (for a federal claim brought by an Indian tribe) in the absence of a specific congressional enactment to the contrary...." South Carolina v. Catawba Indian Tribe of South Carolina, 476 U.S. 498, 507 (1986), citing County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985)

6. Memorandum and Order of June 10, 1982, paragraph A(1)

7. Catawba Indian Tribe v. South Carolina, 718 F.2d 1291 (4th Cir. 1983)

8. Catawba Indian Tribe v. South Carolina, 740 F.2d 305 (4th Cir. 1984)

9. South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498 (1986)

10. Order of September 9, 1987

11. Catawba Indian Tribe v. South Carolina, 865 F.2d 1444 (4th Cir. 1989). The defendants filed a petition for certiorari from this decision, which was subsequently denied. 491 U.S. 906 (1989)

12. Catawba Indian Tribe of South Carolina v. State of South Carolina, 978 F.2d 1334 (1992). The lengthy opinion also favorably disposed of the Catawbas' other arguments involving smaller numbers of landowners. The Catawbas filed a petition for certiorari from this opinion, which was denied by the Supreme Court. U.S., 113 S.Ct. 1415 (1993).

13. In re Catawba Indian Tribe of South Carolina, 973 F.2d 1133 (4th Cir. 1992)

ABSTRACTER-AGENT

continued from page 5

One of the rewards is having an opportunity to associate with title persons from all over the country who have wide-ranging expertise in our business. I look forward to working with the ALTA membership in coming months.

Joseph M. Parker, Jr.

Joseph M. Parker, Jr.

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Why The McCarran Exemption Should Not Be Limited by Congress

(Editor's note: The McCarran-Ferguson federal antitrust exemption for the business of insurance remains under attack in the 103rd Congress. Chairman Jack Brooks (D-TX) of the House Judiciary Committee once again has introduced his Insurance Competitive Pricing Act (HR 9), which would severely limit the McCarran Act exemption.

In addition, Chairman Brooks has been negotiating with the American Insurance Association, large organization of property/casualty insurers, to develop a compromise proposal which would protect certain operational aspects of that insurance line. If the chairman and AIA reach an agreement, it could weaken previously solid insurance industry opposition to HR 9.

Congressman Hamilton Fish, Jr. (R-NY), ranking minority member of the Judiciary Committee which has jurisdiction over the bill, is an outspoken opponent of HR 9. The New York Representative sets forth his objections in the following excerpts from remarks presented earlier this year before a meeting of the National Association of Independent Insurers.

Recently, ALTA representatives met with staff members from the Judiciary Committee and the Justice Department to discuss title industry concerns over provisions in the bill related to risk pooling and the extent of the "safe harbor" for forms.

Congressman Fish has stated that he does not intend to seek re-election in November.)

***

As many of you know, I have been the ranking Republican on the House Judiciary Committee and its Economic and Commercial Law Subcommittee since 1983. During that time, I have worked extensively on insurance issues in general and on the McCarran-Ferguson Act in particular.

For some years, first under Chairman Peter Rodino and now under Chairman Jack Brooks, there has been an effort to severely limit the antitrust protections contained in the McCarran-Ferguson Act. I have opposed those efforts for more than a decade.

I have done so because I consider the legislative attack on the McCarran-Ferguson Act to be uninformed and misleading. The antitrust exemption for insurance makes economic common sense–it reflects the marketplace realities that are faced by the insurance industry and by the property/casualty industry in particular.

McCarran-Ferguson allows insurers to safely share statistical information without fear of antitrust liability.

McCarran-Ferguson protects the ability of insurers to cooperate in the development of standardized insurance policy forms–which are so helpful to insurance agents and to consumers. Further, this exemption protects the ability of insurers to join together in high risk pools.

At the beginning of this Congress, Chairman Brooks introduced his bill known as the "Insurance Competitive Pricing Act"–HR 9. The bill has been the focus of one subcommittee hearing in this Congress.

As introduced, HR 9 is virtually the same bill that emerged in the House Judiciary Committee back in 1988. It is more than a mere amendment to the McCarran Act. The bill would severely reduce the antitrust immunity granted to the business of insurance under the act.

Congressman Fish

So, one could say that nothing has changed on this issue. However, there are a number of important changes and developments that have taken place during this Congress...that prompt comment.

Justice Becomes Pro-Active

The first big change is at the Antitrust Division (Department of Justice)–where Assistant Attorney General Anne Bingaman has become pro-active in the effort to pass legislation along the lines proposed in the Brooks bill. When she testified before the Economic and Commercial Law Subcommittee last summer, Ms. Bingaman stressed that the Justice Department believes "that the time has come to act on such legislation."

While she was careful not to endorse the exact language contained in HR 9, her tone clearly was that of one eager and willing to work closely with Chairman Brooks to enact a McCarran bill in this Congress. So...the first big change in the 103rd Congress is that the Justice Department is aggressively sympathetic to Chairman Brooks in his effort to pass a bill to extensively amend the McCarran Act.

The second significant change in the 103rd Congress is in the overall makeup of the U.S. House of Representatives. In the election of 1992, 110 new members were elected to the House–representing the largest freshman class in over 40 years. When the 103rd Congress was sworn in, we had 47 new Republicans and 63 new Democrats. Since then, five additional new members have been added as a result of death or resignations.

Consequently, out of the 435 members who now serve in the House, 115 members are in their first term.

I am not exactly sure which way the changed makeup of the House breaks on an issue like amending the McCarran-Ferguson Act. But the point is that the votes of the freshman class could determine the

outcome if there is a House floor vote.

Brooks-AIA Proposal Emerges

At this point, I would like to discuss another changed factor–the new proposal, apparently now on the table–representing an agreement between Chairman Brooks and the American Insurance Association (AIA). As many of you know, negotiations between the AIA and Chairman Brooks' staff began in earnest in 1992, but those negotiations came to no final resolution.

Based on reports...it appears that AIA and Chairman Brooks have now worked out a revised version of HR 9 that they can both support. It is my understanding that Department of Justice officials (i.e., the Antitrust Division) have been consulted throughout the recent negotiating process and that the Justice Department may well endorse the amended version of H.R. 9.

The revised bill does contain some improvements over the old HR 9. For example, it would eliminate the highly-charged and implicitly accusatory terminology that has long been present in HR 9. Specifically, the laundry list of prohibitions appearing to impose *per se* antitrust liability on insurers for everyday business decisions would be gone from the bill. Implicitly critical terms like "price fixing, allocation of territories by market rivals, unlawful tying arrangement, monopolization" and "conspiracy" are gone from the bill.

Importantly, the draft revises the language on Section 5 of the FTC Act and appears to limit its coverage to the FTC's actual antitrust jurisdiction. If so, the bill would prevent FTC "fishing expeditions" into the trade practices of the insurance industry.

Even more importantly, language would now be included in the bill saying that the state action defense is available to the business of insurance in the same manner and "to the same extent" as the "defense is available to other persons." For years, I have expressed my concern that the language of HR 9 could eviscerate the state action defense. However, the approach taken in the Brooks-AIA bill is not the preferable approach. I would prefer that state action preservation language be in the body of the statute rather than in a new "rule of construction" as the revised proposal would do. Why not put it in the McCarran Act itself?

On the negative side, the proposed AIA-Brooks "deal" does not protect collectively developed trending information. Without question, this is the most serious defect in the proposal.

I am also concerned about the definition of "loss development factor" in the revised bill because it does not explicitly cover claims incurred but not yet reported (IBNR). The proposal also contains language that would allow plaintiffs to use jointly developed policy forms as evidence in litigation. Such evidence on policy forms, however, would only be admissible in circumstances where there has already been separate evidence admitted previously regarding adherence requirements.

The changes in HR 9 make a bad bill a better bill. However, the revised version still contains flaws and defects. The revised bill is not one I can support.

Health Insurance Impact Seen

One last point is about the Clinton health insurance plan. As you all know, the so-called "Health Security Act" (HR 3600) would, among other things, repeal the McCarran-Ferguson Act as it relates to the provision of health benefits. Specifically, Section 5501 of the Clinton bill says that the McCarran-Ferguson Act shall not apply to the "business of insurance to the extent that such business relates to the provision of health benefits."

The antitrust exemption for insurance makes economic common sense...

Clearly, this language goes well beyond covering health insurance companies and is broad enough to encompass major aspects of property/casualty policies. So, those aspects of your business pertaining to health benefits–such as payments compensating for personal injury or payments for medical or hospital services–would be covered. This language would cover personal and commercial automobile policies, general liability, commercial liability and workers compensation.

This little-discussed but important aspect of the Clinton health care proposal is a backdoor method of repealing the McCarran Act. Its consequences could be severe and it should be debated openly in those terms.

It remains to be seen whether or not the revised AIA-Brooks proposal will have any impact on the language contained in the health care legislation.

So, as is usually the case, we have our work cut out for us in the remaining days of the 103rd Congress.

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Mid-Year Brings Sunny Edification

There is a sense of purpose as spring comes to the Arizona desert country. As cacti and other indigenous plants bloom with delicate colors, the seasonal transformation is accompanied by a feeling that now is the time to get on with the business of nature. The pastel blossoms soon will be reduced to a memory by the intense heat of summer.

Members of the title industry brought their own dedication to getting things done when they came to the sun-drenched region in April for the ALTA Mid-Year Convention at the Scottsdale Princess. During a compact time frame, they were brought up to date on leading issues, attended educational sessions designed to expand their effectiveness as managers, and tackled a sizeable load of ALTA committee work extending across a wide range of subjects.

Despite the demands of a full meeting schedule, those on hand were able to take advantage of marvelous weather to enjoy the outdoor attractions offered in the desert setting.

The accompanying photographs offer a glimpse of activity that made Convention Scottsdale a first priority event.

In these views from the Convention, ALTA President Park Kennedy (left) and Russell Schrage chat during the Ice-Breaker Reception, top, left. Government Affairs Committee Member Bill Rice, left, spends a moment with a prominent guest speaker, Former Vice President Dan Quayle, at top, right. In the photograph at lower left, a pair of ALTA governors from the abstracter-agent side of the aisle talk with two guest speakers from the NAIC Title Insurance Working Group, a body for which they have provided extensive ALTA input in development of the regulator organization's proposed Title Insurance Agent Model Act. From left are Abstracter-Agent Section Chairman Joe Parker and Finance Committee Chairman Dan Wentzel, Working Group Chairman Bob Lange (Nebraska Department of Insurance director) and Alaska Department of Insurance Market Surveillance Chief Donald Koch. At lower right, ALTA President-Elect Mike Currier, left, hears from Ohio Land Title Association Executive Director Dan Dozer during a break enjoyed in the sun.

At top, left, Dorie Astle (Tulsa attorney) is shown with a Convention speaker who is a colorful part of American political history--former Arizona Senator Barry Goldwater. ALTA Governor Malcolm Morris and Linda Bennehoff visit at top, right. In the second row of photographs, Association President Park Kennedy presents attendance drawing prizes to three lucky winners, who are, from left, Anita Hochstein (Connecticut Housing Finance Authority), Mardy McCullough and Georgia Harvey. Immediately below, from left, are ALTA Past President Bill Thurman, ALTA Treasurer Dick Pollay and TIPAC Trustee Joe Jenkins. Minnesota Land Title Association Secretary-Treasurer Tony Winczewski, left, and ALTA Governor Charlie Foster chat at lower left, next to ALTA Underwriter Section Chairman Herb Wender, left, and William Serber (Serber-Konschak).

Tom Klemens shows daughter Kelly around the Convention at top, left, while ALTA President Park Kennedy, right, and Nelson Lipshutz (Regulatory Research) talk at top, right. Shown immediately below are ALTA Governor Bayard Waterbury, left, and Bill Gowen, Abstracter-Agent Section Executive Committee member. In the third row, from left, are Fred Hemphill, Land Title Systems Committee; Abstracter-Agent Section Chairman Joe Parker; Recruitment and Retention Subcommittee Member Lou Meyer; and ALTA President-Elect Mike Currier. Enjoying the perfect Scottsdale weather in the lower photographs are State Legislative/Regulatory Action Committee Chairman John Dozier, left, and Title Insurance Forms Committee Member Oscar Beasley, pictured at left, and, from left, Government Affairs Committee Member Chuck Kovaleski, Underwriter Section Executive Committee Member Bill Margiotta, Rich Patterson and New Mexico Land Title Association President Ed Lee.

LaNette Zimmerman and Peter Norden portray bumbling buyers, Jack Rattikin, III their attorney; Herschel Beard a befuddled closer.

Theater in the Absurd Educational Hit

It was theater in the absurd during the 1994 ALTA Mid-Year Convention. Those in the audience thoroughly enjoyed the performance–although some of the comedic scenes suggested experiences all too familiar in actual work settings.

When it was over, attendees wholeheartedly agreed the dramatics offered a most worthwhile learning experience. After some fine tuning through experience with two earlier "on the road" performances in individual states, members of the ALTA Education Committee had successfully brought their "Closings from Hell" workshop to the Scottsdale Mid-Year.

There were two major theatrical segments depicting a closer's worst nightmare--one residential and one commercial. Both segments were broken down into separate skits depicting specific problem areas. Following each skit, a moderator stopped the performance long enough to assign the problem depicted to a certain round table of attendees. Those at the round tables discussed their assigned problems and presented recommendations for solution at the end of the segment.

Amid the humor, the Education Committee actors visited aspects of major problem areas that are of widespread interest in closings across the nation. Common insight was abundant among the round table analysts, even though their work experience represented separately located jurisdictions. These skit topics from the residential closing segment illustrate the range of subject matter:

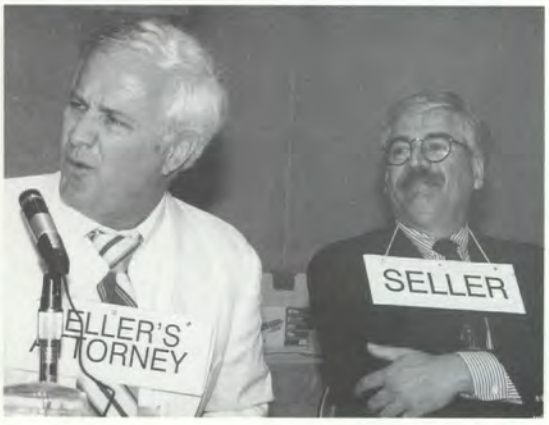
- Competency
- Identification
- Lien Waiver
- Possession
- Authority of Trustee
- Personal Representative Authority
- Disclosure of Pest Problem
- Validity of Owner's Affidavit
- Personal Property
- Uniform Commercial Code
- Mortgage Identity
- Escrow Closing
- Insurance Rating
- Good Funds
- Garnishment of Broker Commission

Inspired performances by the Education Committee "actors" added impact to the message of the performance. By almost universal acclaim, LaNette Zimmerman (Chicago Title) was the Gloria Swanson of both productions, starring with Myron Ely (East Tennessee Title) as home buyer husband and wife in the residential segment and teaming with Peter Norden (First American Title) to portray the buyer couple in the commercial presentation.

Other "actors"–too numerous to mention here because of space limitations–were memorable as well. Among them, Committee Chairman Jack Rattikin, III (Rattikin Title) and Tom Simonton (Commonwealth Land Title) turned in first rate performances as attorneys. Stanley Friedlander (Continental Title Agency) was well cast as a lively broker. Overall, though, it was a fine team effort by the entire committee cast–combined with enthusiastic participation in problem solving discussion by round table attendees–that made the production work.

Affiliated regional and state title associations interested in producing their own "Closings from Hell" dramatic epics are being offered a how-to kit by the Education Committee. For an enclosed payment of

Round Table Groups Offer Problem Solutions



At top, left, Raymond Kintz presents the solution to a closing problem as determined by his round table group. Also at top, Tom Simonton, left, and Stanley Friedlander appear respectively as the seller's attorney and the seller in the commercial transaction drama. Cynthia Pomeroy offers the advice of her round table group as Kathie Nathan listens, second row, left. In the other second row photograph, Peggy Stilwell enjoys the comedic dimension of the production. Shown in the cast photograph after the commercial transaction production, which included a "surprise" appearance by homeless persons claiming squatters rights, are, back row, from left: Joe McNamara, LaNette Zimmerman, Peter Norden, Jack Rattikin III, Cara Detering, Tom Simonton, Stanley Friedlander. In the front row, from left, are Betty Sagatelian, Herschel Beard, Dennis Satriani, Rick Maliszewski, and Myron Ely.

$20 (check made payable to Land Title Institute), requesting affiliates will be sent a videotape of a previous presentation of the drama at the state level, along with suggestions on how to plan a similar event, sample scripts and actual handout materials previously used.

Orders should be accompanied by the business card or letter on affiliate letterhead from the sender, and should be addressed to The Land Title Institute, 1828 L Street, N. W., Washington, DC 20036.

Profits Surge At First American

The First American Financial Corporation, parent of First American Title Insurance Company, has reported record 1994 first quarter pre-tax profits that are more than double those of the same period last year. First quarter after-tax earnings of the company were $9.4 million, compared with $4.5 million for the 1993 first period, before the effect of an accounting change.

Revenues for the first three months of 1994 totaled $372.4 million for the Santa Ana, CA, headquartered company, highest for that quarter in the organization's history and 33 percent above the same period last year.

Income Advances For Lawyers Title

Net income of $1.8 million has been reported by Lawyers Title Insurance Corporation for the first quarter of 1994, compared to a net loss of $4.2 million for the same period last year. According to the Richmond, VA, based company, the 1994 quarter included capital gains of $700,000, and a charge of $700,000 for income taxes–while the 1993 quarter included $2.9 million in capital gains, no income tax charge, and a one-time charge of $5.2 million for settlement of the so-called "Drexel litigation."

Income Improves For Monroe Title

Monroe Title Insurance Corporation, Rochester, NY, has reported first quarter 1994 net income of $867,642, which is 18 percent above that for the same period a year earlier. Operating revenue for the quarter was reported at 27 percent above the 1993 first quarter.

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❑ #2 TITLE INDUSTRY RATE REGULATION-- THE BENEFITS AND BURDENS OF ALTERNATIVE METHODS, Moderator: Richard W. McCarthy, Leaders: John Christie, Nelson Lipshutz, Ph.D., Guy Paquin

❑ #3 A PERSPECTIVE ON DRUG AND ALCOHOL ABUSE AND VIOLENCE IN THE WORKPLACE, Peter B. Bensinger

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❑ #4 NAIC TITLE INSURANCE AGENTS MODEL ACT, Moderator: Joseph Parker, Leaders: Robert Lange, Donald Koch

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NAMES IN THE NEWS


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Lakatos

William Halvorsen, Chicago Title Insurance Company vice president, has been appointed Western Region manager with offices in Rosemead, CA. He replaces **Russell Sherman**, who retired after more than 31 years with the company.

In other changes at Chicago Title Insurance and its affiliated companies, **William Fleming** has been named southwest Chicago metro area manager. **Marianne Zarzecki** has been appointed human resources officer, Chicago.

Also at Chicago Title Insurance, **James Sabaitis** has been appointed senior underwriting counsel and **Carole Sawdon** resident vice president, commercial and industrial sales, both Boston. **James Pullman** has been named branch manager and assistant vice president and

Adrienne Verdone underwriting counsel, Philadelphia. **Dorette Jandura** has been appointed construction escrow officer, Arlington Heights, IL, and **Cathy Gilley** human resources officer, Dallas. **Patricia Oxford** has joined the company as sales representative, Hackensack, NJ.

At Crown Point, IN, Chicago Title's Ticor Title Insurance Company has named **Gloria Miller** escrow manager and **Jackie Stuck** account manager. **Linda Wood** is now escrow manager for Ticor Title at Highland, IN. **Alan Dick** has been appointed resident vice president for Chicago Title, Ticor Title and Security Union Title, Southfield, MI.

Pamela Saylors has been named vice president-product quality assurance administrator and **Robert Palmer** vice president-director of systems development and support, Lawyers Title Insurance Corporation, Richmond, VA. In the company's Troy, MI, branch, **Sherry Hinsperger** has been named vice president, branch manager and assistant secretary; Linda Latakos vice president-manager and **Elaine Moloney**, corporate counsel, both National Division; and **Lana Archer** assistant vice president-title operations manager.


Moloney


Sojka


Schmidt


Strickler


Coffman


Merlino


Dunham


Neigebauer


Wilson


Cunningham


Gilleo


Valentine

Agnes Sojka has been named vice president and remains branch manager, Chardon, OH; named assistant vice president and branch manager are **Patricia Schmidt**, Saginaw, MI, **Ellen Strickler**, Sandusky, MI, and **Katherine Coffman**, Crown Point and Valparaiso, IN. Named branch manager by Lawyers Title are **Kathleen Merlino**, Jackson, MI, **Robert Dunham**, Lansing, MI, and **Marcia Neigebauer**, Ann Arbor, MI. **Richard Holifield** has been named Broward County manager, Fort Lauderdale, FL.

Walter Wilson, III, has been named vice president and senior counsel and **Marilyn Cunningham** vice president-counsel for Real Title Company, Inc., Lawyers Title subsidiary with offices in Fairfax, VA.

New assistant vice presidents at Commonwealth Land Title Insurance Company are **Marie Gilleo** (also named branch manager), Trenton, NJ; **Gretchen Valentine** (also named counsel for the company and its subsidiary, Transamerica Title Insurance Company), Seattle, and **Teresa Long**, also named branch manager of the recently opened title and escrow office, Columbia, MO. **Vincent Sette** has been named assistant vice president and remains assistant branch manager, Garden City, NY, and **Donald**

Long

Sette

Maffei

Mendler

Ogden

Berry

Ellason

Gilmore

Aalseth

Marlin

Serrano

Martin

Maffei has joined the company as assistant vice president and title operations manager, San Joaquin County, CA.

Ernest Mendler is now title officer for the company, Garden City, NY. **Cheryl Ogden** has been named sales representative, Indianapolis, and **Christy Berry** marketing representative, Vero

Beach, FL.

Ray Ellason has been appointed vice president of builder development for the company's subsidiary, Commonwealth Land Title Company of Dallas.

Dennis Gilmore has been named vice president-manager for California Lenders Services, a new statewide division for First American Title Insurance Company, Santa Ana, CA. **Gene Aalseth** has moved to Santa Ana headquarters as vice president-assistant senior underwriter. **James Marlin** has been named assistant vice president-Wisconsin state counsel with offices in Milwaukee.

Cathy Serrano has been named closing manager for First Land Title Company, Fort Wayne, IN.

Rattikin Title Company, Fort Worth, TX, has announced the promotion of **Jeanne Anderson** to vice president and quality control department manager, and the appointment of **James Shackelford** to branch manager/escrow officer.

Jeanne Martin has been appointed executive vice president and general counsel, Strategic Mortgage Services, nationwide provider of mortgage services based in Costa Mesa, CA.

Suzanne Coccagna has been named general manager by Sulcus Law Management Services, Inc., systems and software company headquartered in Greensburg, PA.

Astle Writes Legal Treatise Chapter

Doris J. (Dorie) Astle, an ALTA Associate member as shareholder with the Tulsa law firm of Hall, Estill, Hardwick, Gable, Golden & Nelson, P. C., is the author of a chapter entitled, "Third Party Guaranties of Tenant Performance," in the 1994 edition of *Real Estate Transactions: Current Leasing Law & Techniques*, a national multi-volume treatise published by Matthew Bender & Co., Inc.

The chapter focuses on the scope and effectiveness of third-party guaranty contracts in commercial leasing transactions.

She is currently in her thirteenth year with the Tulsa firm, where her practice is concentrated in commercial real estate and loan work.

Mrs. Astle is the wife of Dale L. Astle, member of the ALTA Public Relations Committee and Oklahoma Land Title Association past president, who is executive vice president and general counsel, Guaranty Abstract Company, Tulsa.

Environmental Link For Lawyers Title

Lawyers Title Insurance Corporation has acquired a minority interest in Environmental Warranty, Inc., West Hartford, CT, through its newly formed subsidiary, Lawyers Title Environmental Service Agency.

According to Lawyers Title, Environmental Warranty is a leading environmental insurer that has created and now markets an environmental site insurance program allowing lenders, developers and trustees of commercial real estate to transfer the risk associated with undiscovered environmental contamination.

Part of the alliance between the two organizations calls for LTESA to market environmental insurance to commercial title insurance customers and prospects.

1994 AFFILIATED ASSOCIATION CONVENTIONS

May

28-31 **New Jersey**, The Southampton Princess, Bermuda

31-June 3 **California**, Squaw Creek, Lake Tahoe, CA

June

2-4 **Colorado**, Hyatt Regency Beaver Creek, Avon, CO

9-10 **South Dakota**, Community Center, Sturgis, SD

10-12 **Virginia**, Boar's Head Inn, Charlottesville, VA

12-14 **Pennsylvania**, The Omni Sagamore Resort, Bolton Landing, NY

23-25 **Illinois**, Marriott City, St. Louis, MO

23-26 **New England**, Stowflake Resort, Stowe, VT

24-25 **Arkansas**, Holiday Inn West, Little Rock, AR

26-28 **Oregon**, Skamania Lodge, Stevenson, WA

July

14-16 **Utah**, Deer Valley Resort, Park City, UT

24-26 **Michigan**, Shanty Creek, Bellaire, MI

August

4-6 **Idaho**, The Coeur d'Alene Resort, Coeur d'Alene, ID

10-13 **North Carolina**, Grove Park Inn, Asheville, NC

11-13 **Minnesota**, Izatys Golf & Yacht Club, Lake Mille Lacs; Onamia, MN

12-14 **Indiana**, Westin Hotel, Indianapolis, IN

18-20 **Montana**, Kwa Tag Nuk Resort, Polson, MT

19-20 **Kansas**, Marriott, Wichita, KS

21-24 **New York**, Site unannounced, Newport, RI

September

8-10 **North Dakota**, Site unannounced, Devil's Lake, ND

9-10 **Missouri**, Adams Mark Hotel, St. Louis, MO

15-17 **Dixie**, The Sandestin Beach Hilton, Destin, FL

18-20 **Ohio**, Dayton Marriott, Dayton, OH

October

12-14 **Nebraska**, Midtown Holiday Inn, Grand Island, NE

13-14 **Wisconsin**, Holiday Inn East Towne, Madison, WI

23-26 **Florida**, Lake Buena Vista Hilton, Orlando, FL

November

2-4 **Arizona**, Site unannounced, Lawson, NE

MARKETPLACE

Rates: Situations wanted or help wanted, $80 for first 50 words, $1 for each additional word, 130 words maximum (reduces to $70 for first 50 words, $1 for each additional word, three or more consecutive placements). For sale or wanted to buy, $250 for 50 words, $1 for each additional word, 130 words maximum (reduces to $225 for 50 words, $1 for each additional word, three or more consecutive placements). Additional charge for box around ad: $20 per insertion for situations wanted or help wanted, $50 per insertion–for sale or wanted to buy. Send copy and check made payable to American Land Title Association to Title News Marketplace, American Land Title Association, Suite 705, 1828 L Street, N. W., Washington, DC 20036. Responses to classified placements should be sent to same address unless otherwise specified in ad copy.

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CALENDAR OF MEETINGS

1994

June 9 **ALTA Board of Governors**, Dallas, TX

September 21-24 **ALTA Annual Convention**, Walt Disney World Dolphin, Orlando, FL

1995

April 5 - 7 **ALTA Mid-Year Convention**, The Westin Resort, Hilton Head, SC

October 18-21 **ALTA Annual Convention**, Loews Anatole Hotel, Dallas, TX

1996

March 18-20 **ALTA Mid-Year Convention**, Stouffer Mayflower Hotel, Washington, DC

October 16-19 **ALTA Annual Convention**, Westin Century Plaza Hotel, Century City, CA

1997

September 24-27 ALTA Annual Convention, Westin Hotel Seattle, Seattle, WA

Chamber Salutes Bell Contributions

John M. Bell, chairman of the ALTA Public Relations Committee and longtime secretary-treasurer of the Kansas Land Title Association, is the recipient of the 1994 Wichita Area Chamber of Commerce "Uncommon Citizen" award for exemplary and dedicated service to that community.

He is executive vice president, Security Abstract and Title Co., Inc., a firm celebrating its 50th anniversary this year.

Now serving his third term as chairman of the Kansas Abstracters' Board of Examiners, he is a past governor of ALTA and KLTA past president who has received the Title Man of the Year award from the state organization.

Among his many achievements are serving two terms as president of the Wichita Area Chamber of Commerce, and serving as president of the Wichita Crime Commission, Kansas Foodbank Warehouse, and chairman of the Wichita Area Bicentennial Committee. He has been vice president of the Wichita Area Builders Association and has held membership on the Wichita Airport Authority, and Wichita State University Real Estate Advisory Committee and Endowment Committee.

Fellow members of the Public Relations Committee recently presented Chairman Bell with a resolution of commendation upon the occasion of this honor.

Chairman Bell is presented with a resolution of commendation from fellow ALTA Public Relations Committee members for receipt of his Wichita Chamber honor. Making the presentation is Marjorie Schwartz, Columbia Title, fellow committee member.

Fidelity National Net Earnings Rise

Fidelity National Financial, Inc., parent of Fidelity National Title Insurance Company and other organizations, has reported first quarter 1994 net earnings of $6,805,000, an increase of 58.1 per cent above the same period a year earlier.

Fully diluted earnings per share in the 1994 period were 40 cents, arising from the conversion feature of Liquid Yield Option Notes sold by the company in February of this year.

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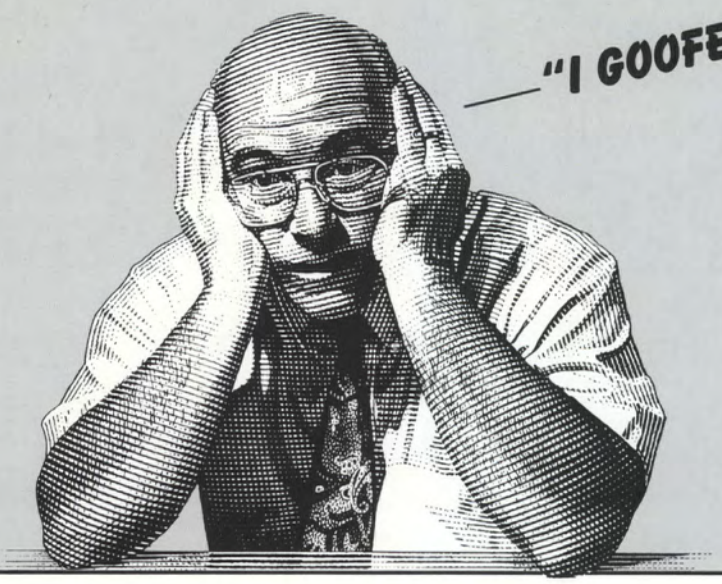

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