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JANUARY-FEBRUARY 1998



American  
Title Insurance:  
An Emerging  
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Canada



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# TITLE *News*

JANUARY•FEBRUARY 1998

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LAND TITLE  
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**On the cover:** Changing of the guard by the Royal Canadian Mounted Police in Ottawa brings to mind the differences accompanying many similarities that bind our northern neighbor to the United States. Lines dividing the approach to real estate enterprise in the two nations are beginning to fade and, if present trends continue, American title insurance could be a dominant force in Canadian conveyancing by the next century. For more on this, please turn to page 10. (Photograph courtesy of the Canadian Embassy)

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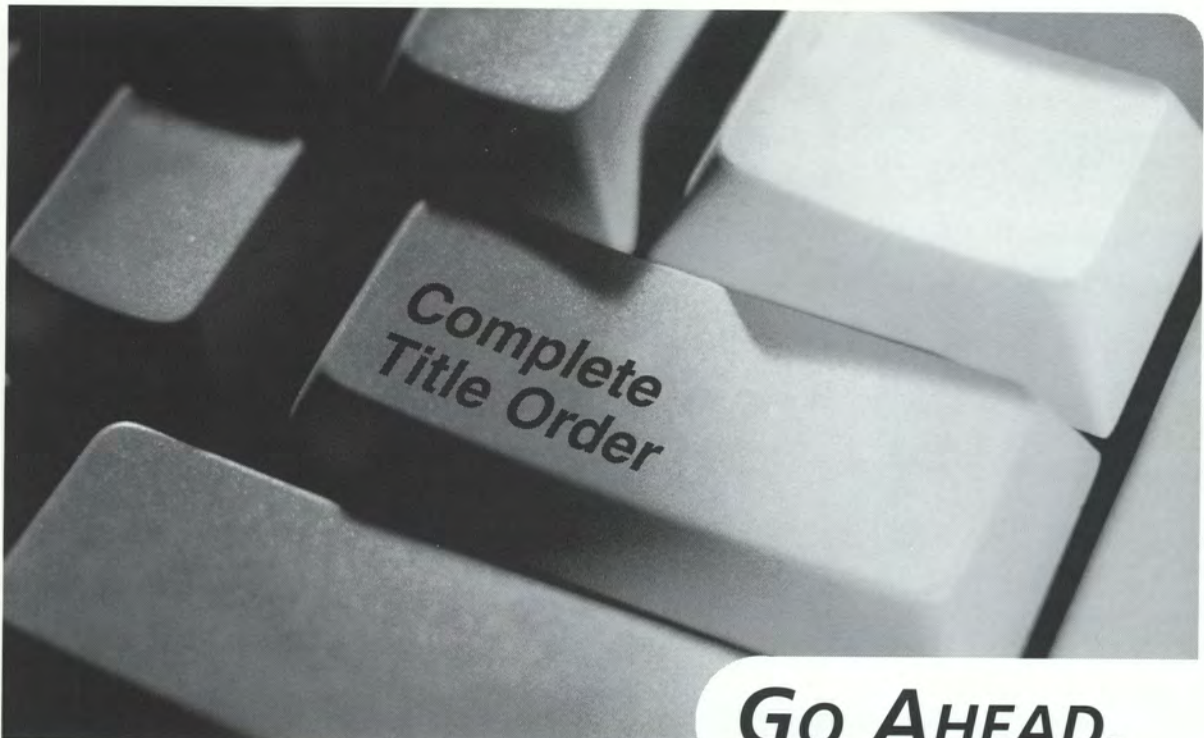
Counsel Lawrence P. Heffernan comments on a decision in which The United States Court of Appeals for the Seventh Circuit has denied First Federal Savings Bank equitable relief because the financial institution procured title insurance.

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## A MESSAGE FROM THE PRESIDENT



**G**reetings from your new president. Let me say thank you for this honor and the trust you have bestowed in me. I realize that this office is one of service to one's industry. Three years ago, I set out to visit every state and, God willing, I hope to have been in all but three or four by October, 1998. In each state, I have asked for your input and guidance.

From listening to you, it is evident that, first and foremost, you rely on ALTA for federal lobbying of Congress and federal regulatory bodies on issues affecting our industry. These duties are made easier by our members who participate in ALTA through your calls, letters, and visits when Ann vom Eigen sends out urgent requests. Currently, the greatest concern seems to be that banks, with their point-of-sale contact with consumers, will use any new insurance powers to gain unfair competitive advantage over independent title agents. The bank would foreclose any opportunity by such agents to compete for the consumer's business and would not be bound by the same rules as face our membership. So far, ALTA has effectively carried your views to the Hill.

The second area where you rely on ALTA for support is state law issues that are either common from state to state, or which could have ramifications beyond the border of one state. ALTA's most recent success has been in assisting the California Land Title Association and others in the effort to fight the assumable title policy concept proposed in California. This proposal stands as a veritable nightmare for both the consumer and the title industry and reflects an incredibly uninformed view of our industry and its important role in the real estate transfer process. In addition, ALTA has assisted many state associations in their battle with Northwest Mortgage over TOP.

The third area where you have relied on ALTA is education. Today, that education extends to technology and ancillary products. The question is what our members must do to stay in business. The answer is, of course, to serve the customer. Our industry has nothing to fear except the inability to change to meet the changing needs of our customers. We are in a changing environment and, if our industry embraces technology and expands to meet the needs of our customers, we have an opportunity to be the "White Knight"—the answer to the future of the real estate transaction. No entities are so uniquely suited to meet the needs of our customers as are our members. But we must be easy to deal with and deliver a timely and less costly title product accompanied by a myriad of other services. This is what ALTA's Technology Forum & Exposition in Orlando, FL, February 1-3, is designed to teach you. If you plan on being in this business in the year 2000, you should plan now to attend.

The Forum & Expo is what you have been asking for, and your presence will make this a successful event. We will share what works and what has not worked, and learn what our customers expect from us in the near future. You also will explore how your office can become the answer to your customer's needs. When you are through changing, you are really through. Well, we certainly are not through. Education is important as an agent of change. Let's all take advantage of this unique opportunity offered by ALTA.

One more giant role for ALTA—public relations. Our industry suffers from a lack of understanding by the public of what we do. Consumers have been known to look on our industry as the people who "hold up" their purchase or loan, give you a whole lot of paperwork to sign which you can't understand, and then ask them for a large check for the "service." Some do not realize that, out of the check they write to us, only a wee bit is for the title insurance. Government types have been heard to ask why title insurance is needed any more. "Haven't all the titles already been insured?" they inquire.

The second law of thermodynamics says that matters left to themselves devolve. That goes for titles as well. Of the titles that our members do, 70 percent are just perfect—it's discovering the 30 percent where corrective action must be taken that makes our job important. Absent the careful role played by our industry, our whole system would soon devolve into chaos.

I have reactivated our Public Relations Committee with a goal to get our story out. It is time we take the initiative in educating the home buyer and the title



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# Congress at Midstream: Major Issues Remain

By Ann vom Eigen  
ALTA Legislative Counsel

**F**rom the ALTA viewpoint, convening of the 105<sup>th</sup> Congress this January is characterized by a midstream atmosphere. Although there were legislative victories in 1997, numerous pending federal issues on this year's agenda reflect action during the previous year.

In the 1997 ALTA victory column are:

- A provision in the Taxpayers Relief Act of 1997 relieving the title industry of liability for reporting on some real estate transactions
- Incorporating the ALTA policy position on bank powers in protection of the title insurance product as stipulated by the House Banking Committee and in the present House Commerce Committee bill
- Deletion of provisions imposing liability for distribution of a new disclosure for private mortgage insurance from pending Senate legislation
- Defeating proposals to modify the test for like kind exchanges, while retaining title industry ability to serve as a qualified intermediary

Turning to the 1998 Congress, the remaining challenges are formidable. There is need to persuade the Treasury Department to implement the law and remove the administrative burden of 1099-S reporting from title companies. Banking reform is likely to be on the table in the House this spring. And, RESPA reform is under active consideration in both House and Senate.

Following is a summary of the major actions, along with a perspective on the scenarios for 1998.

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*Turning to the 1998  
Congress, the remaining  
challenges are formidable.*

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## Bank Powers

### 1997 Legislative Action

ALTA has been actively pursuing a federal legislative and regulatory effort to moderate bank entry into the title insurance industry. In February of 1997, ALTA modified its policy on national bank entry to provide that ALTA would not oppose financial services affiliation,



provided that state regulation of insurance is preserved through absolute functional regulation and that adequate consumer safeguards are adopted, either at the federal or state level, or both.

Consistent with that policy, ALTA sought and achieved adoption of amendments in the House Banking and Commerce Committees when they considered HR 10, the Financial Services Competition Act of 1997. The legislation significantly broadens authorization for national banks to engage in non-banking activities, such as sale of securities, through holding company structures. It also authorizes national bank entry into the insurance industry.

In order to preserve an entity that could be regulated under state law, ALTA sought to ensure that national bank entry into the title industry, unlike other forms of insurance, would be restricted to affiliation. ALTA consequently sought and obtained several amendments to the bill. The House of Representatives failed to pass the bill before Congress recessed, so this legislation remains pending. Consequently, hope remains that ALTA will be able to affect a positive outcome on some of the outstanding issues. A synopsis of the major insurance provisions of the relevant bills is provided below.

### *HR 10: Financial Services Modernization (Reported by the Committee on Banking and Financial Services)*

The Banking Committee version pre-empt's state laws which "prevent or restrict" (the standard established in the United States Supreme Court *Barnett* decision) insured depository institutions from affiliation with insurance entities. The bill would provide that national banks cannot directly underwrite insurance. But, through affiliation



in a holding company regulated by the Federal Reserve Board, banks may underwrite all forms of insurance, including title insurance.

In general, national banks would be able to sell insurance directly from the bank. Thanks to Rep. Rick Hill (R-MT), ALTA was able to obtain adoption of an amendment clarifying that neither national banks nor their subsidiaries would be permitted to underwrite title insurance from the bank. The bill thus includes a *new* prohibition barring both national banks and their subsidiaries from engaging in title insurance sales activities - - which overturns opinions from the Office of the Comptroller of the Currency (the regulator of national banks) allowing these activities.

A grandfather provision is included in the Banking Committee version of the legislation that permits those national banks or their subsidiaries that were engaged in title insurance sales activities prior to January 1, 1997, to continue in those activities. Beyond those grandfathered entities, the amendment extinguishes the rights of national banks to sell title insurance under 12 U.S.C. Sec. 92, and prohibits banks from selling or underwriting title insurance under the incidental powers clause of 12 U.S.C. 24(7). However, consistent with ALTA policy, national banks could engage in title insurance sales activity through affiliation.

The bill also contains some general consumer protection provisions applicable to insurance sales, and establishes a national council on financial services which could determine whether an activity constituted insurance or banking.

*HR 10, Financial Services Modernization (Reported by the House Commerce Committee)*

This version of the bill also revises the bank holding company act to allow bank holding companies regulated by the Federal Reserve Board to engage in insurance activities. Like the House Banking Committee bill, the Commerce version pre-empts state laws which "prevent or restrict" an insured depository institution from being affiliated with an insurance entity. That standard would not pre-empt other state laws, i.e., controlled business statutes. Consequently, only those state laws which prevent a national bank from "engaging," i.e., those with a direct prohibition, or "significantly interfering with the ability to engage" directly or indirectly in an authorized activity, would be pre-empted. This language would present a problem in those states which have a direct prohibition against bank involvement (e.g., New Jersey) in title insurance activities. However, as it is also the

*Barnett* Supreme Court test, it would in all likelihood be upheld in litigation.

The Commerce Committee version of the bill extolls McCarran-Ferguson, requires that insurance entities comply with state insurance licensing laws, and requires that sales of insurance be functionally regulated. It requires that insurance underwriting be done through an affiliate. Unlike the banking bill, the Commerce version includes a definition of insurance. It also divides products developed after January 1, 1997 into insurance and banking products. In order to avoid development of a TOP-like banking product, ALTA sought and obtained an amendment including title insurance in the list of insurance products.

The bill requires that national banks and subsidiaries enter insurance sales for a two-year period only by acquisition of existing licensed agencies.

The bill retains the language offered by Montana Representative Hill, prohibiting direct bank involvement, but includes a "parity" exception. The "parity" provision broadens national bank authority by (1) allowing state-chartered banks authority to sell insur-

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*...it can be expected that there will be concerns with both inadvertent actions of federal legislators and regulators...and actions by our competitors, attempting to shift liability and responsibility to title professionals.*

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ance in towns under 5,000, because national banks now have authority to sell insurance in towns under 5,000, and (2) giving national banks back the authority to sell statewide, in the same manner and extent as provided under state law.

The bill authorizes banking regulators to promulgate consumer protection regulations for insurance products offered by the bank.

### **1997 Regulatory Action**

The Office of the Comptroller of the Currency (OCC) issued several opinions in 1997 granting national banks significantly broader authority to engage in insurance and security sales and underwriting. Namely, the OCC proposed to pre-empt state law in Rhode Island which provides consumer protection requirements for banks selling insurance. ALTA

joined the insurance agent community in submitting comments of February, 1997, and additional comments in May, 1997.

In the late fall and winter, OCC issued several opinions to allow national banks to engage in underwriting, namely, to allow national banks to set up captives to provide mortgage reinsurance, and to underwrite municipal revenue bonds. Banks have been acting on the opinion issued to First Union Corporation in 1996, broadening the scope of the current exemption of national banks to sell insurance from small towns.

## **RESPA**

### **1997 Legislation**

#### *Moratorium on Class Action Lawsuits*

Rep. Bob Ehrlich (R-MD) introduced legislation, H.R. 1283, the "Real Estate Settlement Procedures Class Action Relief Act of 1997," to attempt to place a moratorium on lawsuits which mortgage brokers are subject to under the yield spread premium. No hearings were held in 1997, but the legislation remains pending in 1998.

#### *HUD Rule*

Action has centered on a rule proposed by HUD in the early fall that would provide for up front disclosure of:

- All fees the mortgage broker would receive for obtaining a mortgage for the homebuyer, and
- Whether the mortgage broker commits to getting the borrower the best loan available from the lenders doing business with the broker.

The proposed rule includes a new one-page disclosure form - - the honest lending contract - - written in "plain English" to be signed by a mortgage broker before a borrower applies for a loan. Under the draft rule, brokers will be required to check one of three boxes, which would include a line item stating:

"I represent you, but may get a fee from a lender. A broker who uses the disclosure agreement would be safe harbored from enforcement action as long as their fees fall inside parameters established when the rule becomes final."

ALTA filed a comment with HUD objecting to HUD's request for comments about pricing in the rule, expressing concern that the Department has structured the proposed safe harbor as a presumption that can be rebutted by a determination that the compensation is not actually reasonable, based on elements such as compensation of other

*Continued on page 25*



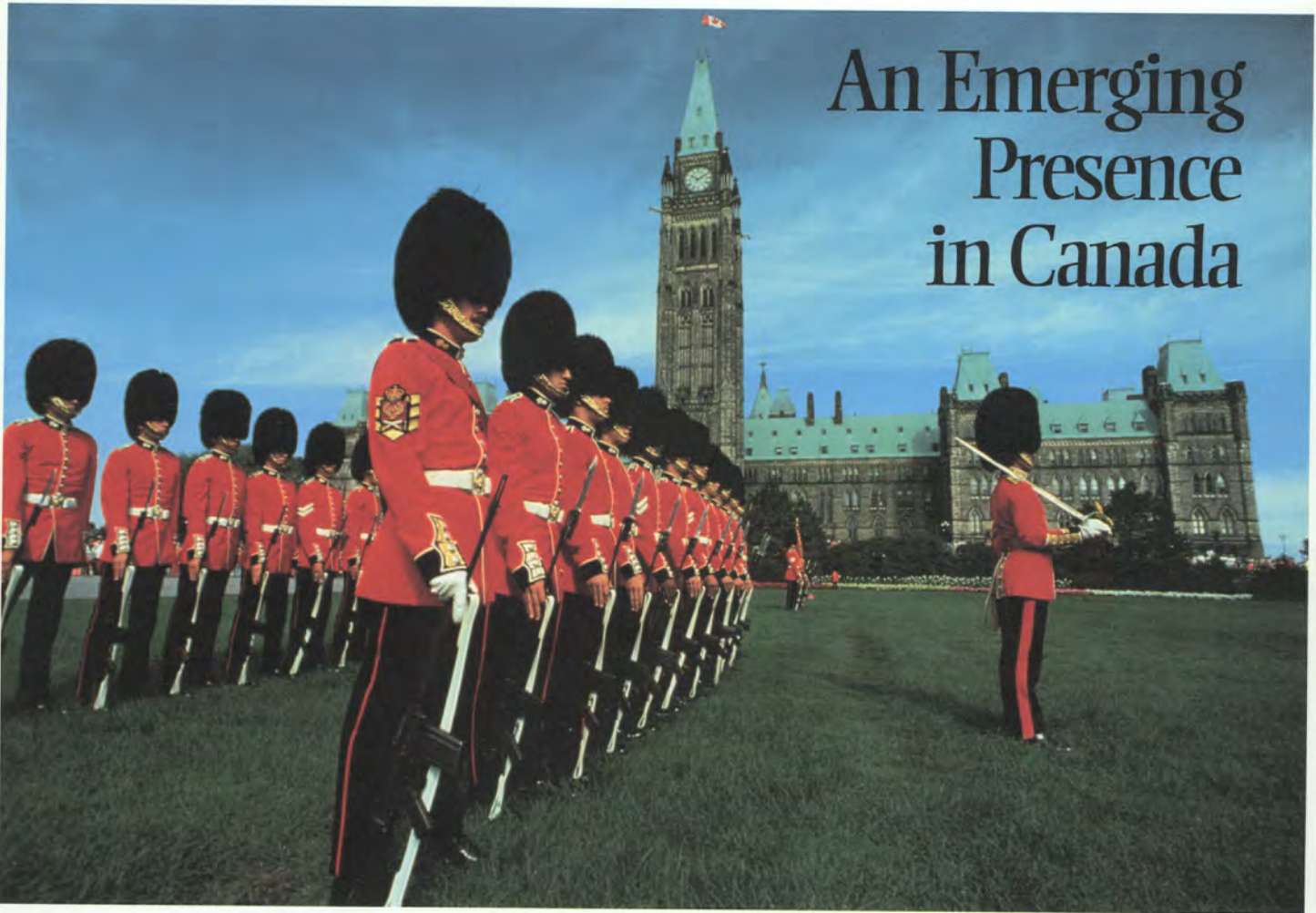
## Federal Scoreboard at a Glance

<b>Issue</b>	<b>Proposed in 1997</b>	<b>Action</b>	<b>Outlook</b>
Expanding powers of national banks	Legislation was introduced in both the House and the Senate expanding the powers of national banks	Legislation was adopted in both the House Banking and House Commerce Committees modifying bank-powers. ALTA achieved adoption of amendments in the House Banking Committee consistent with ALTA policy, getting the OCC out of regulating sales of title insurance by national banks, and allowing sales and underwriting of title insurance through affiliation. Commerce Committee legislation allows sales directly from national banks, and underwriting through affiliation.	The House Leadership has announced its intention to consider legislation early in the spring of 1998.
Private Mortgage Insurance	Legislation was proposed in both the House and Senate to impose new requirements to disclose to consumers balances on private mortgage insurance and impose cancellation requirements.	House passed legislation amending RESPA, disclosure may be required to be distributed at or before closing, Senate proposed legislation requiring closers to prepare and distribute PMI disclosure modified at ALTA request to place requirement on mortgagee.	Conference likely to be scheduled early in the spring.
Information Reporting on Real Estate Transactions	ALTA proposes modification to information reporting to track modification to capital gains in the Taxpayer Relief Act of 1997.	Both the House and Senate included modification to eliminate filing for real estate transactions under \$250,000 for individuals filing separately, \$500,000 for joint filers.	Treasury certification pending. Date of release uncertain.
Modification of Like Kind Exchange Test to eliminate qualified intermediaries	Administration proposes elimination of qualified intermediaries in April, 1997.	ALTA joins with the rest of the real estate industry, prevents inclusion of the provision in both the House and Senate bills.	Unlikely to be put on the table as a revenue raiser in 1998, given the current budget outlook.
Information Reporting Payments to Attorneys	Administration proposes reporting of payments to attorneys in connection with legal services.	Payments made to attorneys are reportable on Form 1099-MISC as of December 31, 1997. ALTA successfully battles requirement to include provision on Form 1099-S. Reporting required on 1099-MISC.	IRS notice on implementation expected in 1998.
<i>McConville</i>	ALTA proposes amendment to the Bankruptcy Code to overturn Ninth Circuit decision denying protection for lenders lien under section 549(c), of the Bankruptcy Code, after the borrower filed an undisclosed bankruptcy.	Provisions overturning <i>McConville</i> included, at ALTA's request in HR 764, the Bankruptcy Amendments of 1997 which passed the House on Nov. 12, 1998. Identical provisions included in legislation introduced in the Senate, S 1301, Consumer Bankruptcy Reform Act.	Adoption likely before Congress recesses in 1998, but provisions fate will be tied to action in the overall technical corrections legislation.
RESPA Lawsuits Legislation Regulations	Proposals to amend RESPA to provide a moratorium on class action lawsuits introduced in the House, hearings held in the Senate.	Rep. Rick Lazio (R-N.Y.) Chairman of the House Housing Subcommittee directs the real estate industry to meet with consumer group representatives to develop a solution. HUD and Fed agree to report suggestions to Congress by March, 1998.	Decisions on class action lawsuits favorable to lenders and action on the HUD rule on mortgage brokers may take steam away from major RESPA reform. Lender proposals to require "packaging" of loan closing costs may gather momentum.
Legislation amending RESPA to allow payments to affinity groups included in S. 1405, introduced in the Senate.			



# American Title Insurance:

## An Emerging Presence in Canada



*By Bruce A. McKenna, Esquire*

**T**here is a developing market for title insurance and related services in Canada, the United States' long standing northern neighbor and friend. There are five title insurance companies active in the market to some degree, four that you are well aware of: Chicago Title Insurance Company ("Chicago Title"), First American Title Insurance Company ("First American"), Lawyers Title Insurance Corporation ("Lawyers Title") and Stewart Title Guaranty Company ("Stewart Title"). In addition, there is a Canadian title insurer, Lawyers Professional Indemnity Company ("LPIC"), wholly owned by The Law Society of Upper Canada ("LSUC"), which is the governing body of all lawyers who practice in the Province of Ontario. The degree to which title insurance has penetrated the market is, to date, relatively small.

Information obtained from Statistics Canada, the Canadian agency which collects and collates such data, can give you an impression of how large a potential market this is. Canada has a population of slightly more than 30 million people, a land area of 22,772,249 acres and in 1996 there was more than \$97 billion of public and private investment in the country. In 1996, there were more than 125,000 housing starts and the value of all building permits was slightly more than \$18 billion. An October report of the Title Insurance Steering Committee of the

Canadian Lawyers Insurance Association ("CLIA") estimated that there were nearly 550,000 new and existing home sales a year in Canada and nearly 350,000 mortgage or credit line refinances. (CLIA has the law societies of six provinces and two territories as participants – all of Canada but the provinces of British Columbia, Ontario, Quebec and Newfoundland).

It is a market that is remarkably similar to that of the United States. We have a similar type of western economy. We rely on and are influenced by the American media to a great degree. We eat at Wendy's, drive Fords, have teams in the World Series. While our law has British roots, the American influence is profound, particularly in its modern commercial aspects. One would think that making great inroads into this largely untapped market should be simple for the title insurance industry.

Yet, as similar as we are, Canada is different in many ways. Simply to give you the information above, it was necessary to convert our 9,970,610 hectares to acres and to calculate the American dollar values using the current exchange rate of about \$.70. Our banking industry is concentrated in the hands of a relatively small number of major national institutions, so a secondary mortgage market isn't as important to ensure the availability of loans across the country and we have no direct



equivalent to Fannie Mae or Freddie Mac. The terms of our mortgages are short, rarely more than 5 years. We have one province that functions largely in another language and has a legal system based on the French civil code. We are fiercely proud of both our real and imagined differences from the United States. Our legal standards, lawyers organizations, registration systems and laws are different enough to make smooth integration difficult and expensive.

While title insurance has been available in Canada for about 30 years, it has made few material inroads until the past few years. Canadian purchasers and lenders have depended upon and been relatively well served by a system of lawyers (and/or notaries in Quebec or British Columbia) giving title opinions. Our registration systems are provincially operated and are relatively effective and efficient. However, change is starting to impact on our traditional approach. The October CLIA report talked about how "In recent years, from the lenders' perspective the mortgage business has moved from being a 'relationship business' to a 'commodity business'. As a result, lenders are moving aggressively to reduce the cost of delivering a mortgage to as low a level as possible. Large U.S. title insurers have now been able to obtain beachheads, as they have been able to deliver perceived cost efficiencies in the eyes of at least some lenders." Much of the focus of this change has been on the province where each title insurer has its primary Canadian base - Ontario.

From a legal perspective, while it is possible to incorporate a Canadian subsidiary to sell title insurance directly in Canada, the existing four American title insurers have each chosen to open a branch office. In addition to their internal organizational reasons, that also presents a substantial, solvent insurer to the potential Canadian consumer. Part XIII of the *Insurance Companies Act* (Canada) applies when a foreign company desires to operate a branch in Canada. The Superintendent of Financial Institutions ("OFISI") may, with the approval of the Minister of Finance, make an order approving of the insuring in Canada of risks by the body corporate. A foreign company cannot insure a risk unless the risk falls within a class of insurance that is specified in the order of the Superintendent approving the insuring in Canada of risks by a foreign company. It is then also necessary to be licensed in each of the provinces or territories in Canada in which the insurer wishes to enter into insurance contracts. That approach will be outlined in greater detail as it relates to Ontario below.

#### **Title Insurance in Ontario**

If you look at the Ontario statistics, while it has only 10 percent of its land area, it

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### *If handled appropriately, I believe that title insurance will come to dominate Canadian conveyancing and lending transactions as we move into the next century.*

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has Canada's capital (Ottawa), its largest city (Toronto) and 11,408,000 people (more than 36 percent of Canada's population). The value of all building permits issued in Ontario last year was more than \$6.7 billion and the CLIA report estimated that 40 percent of the residential real estate transactions in Canada occur in Ontario. While it is the single most important provincial market, and embodies much of what can be said about how Canada is fiercely proud of its real and imagined differences from the United States, the other provinces and territories in Canada are just as proud of their differences from Ontario. So, while this article will focus on Ontario, the last section that talks of recent activities throughout Canada should be noted with care as there is no



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*matters. He acts for parties related to title insurance matters including various title insurers active in Canada and Canadian lending institutions, and represents insured purchasers. He lectures extensively on title insurance and in 1996 delivered a presentation, "The Responsibility of Lawyers with Regard to Title Matters," at the Institute of Continuing Legal Education presented by The Canadian Bar Association-Ontario. In May of last year, he was a speaker at the introductory program on title insurance presented by the aforementioned Ontario bar organization, and by The Law Society of Upper Canada. He is the author of three sections on title insurance for the CCH Ontario Real Estate Law Guide, and continues activity on behalf of CCH. The author may be reached by telephone at (416) 307-4112, or by e-mail at [bmckenna@toronto.langmichener.ca](mailto:bmckenna@toronto.langmichener.ca).*

single uniform approach that can be followed for the entire country.

The *Insurance Act* (Ontario) requires every insurer carrying on business in Ontario to obtain a provincial insurance license. The license is to be obtained from the Commissioner of the Ontario Insurance Commission (the "OIC"). Section 43 of the *Insurance Act* provides that the OIC is to designate classes of insurance and title insurance is set out as Class 15. It is defined as "insurance against loss or liability for loss due to the invalidity of the title to any property or of any instrument, or to any defect in such title or instrument."

It should be noted that "title" has been recently defined in a narrow way in Ontario when dealing with the provisions in purchase agreements. The Ontario Court of Appeal decision in *Cinram Ltd. v. Armadale Enterprises Limited*, (1995), 31 O.R. 258 (Ont. C.A.) held that, where a vendor contracted to give "good and marketable title thereto, free and clear of all mortgages, liens, charges, security interests, adverse claims, pledges, encumbrances and demands ... it is clear that title alone has been made the subject of the warranty and that use of lands was not contemplated therein." That case defined "title" quite narrowly but most title insurance policies, certainly all residential ones, go well beyond that very narrow scope. Title, as described in class 15 under the *Insurance Act*, is almost certainly broader.

Section 403 of the *Insurance Act*, provides for agents and brokers and Regulation 663 under the *Insurance Act* says that a lawyer or an employee of a lawyer can't be an agent because they are deemed to be "in a position to offer inducement or use coercion or undue influence". Accordingly, in Ontario, lawyers cannot, at the present time, be agents for title insurers.

Chicago Title and Lawyers Title were the first title insurance companies licensed in Ontario in the 1960s and, when they were given that right, a provision was added to regulation 666 under the *Insurance Act*. It states:

"A license issued to an insurer to undertake title insurance in Ontario is subject to the limitations and conditions that no policy of title insurance shall be issued unless the insurer has first obtained a concurrent certificate of title to the property to be insured from a solicitor then entitled to practice in Ontario and who is not at that time in the employ of the insurer."

This provision is unique in Canada, was intended to protect the lawyers of Ontario and requires that the insurer



obtain a certificate of title from a solicitor who is not employed by the insurer. I understand that some states, like Ohio, have laws which require a reasonable examination of title before a title insurance policy is issued and statutes like the Ohio Marketable Title Act that help set that standard. In Ontario, there are no statutory standards, just those that have developed in the Canadian courts when deciding cases in solicitor's negligence. The basic standard for solicitors is set out in the 1986 Supreme Court of Canada case, *Central Trust v. Jack P. Rafus and Franklyn W. Cordon* [1986] 2 S.C.R. 147, which held that "A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service he has undertaken."

What is interesting about the *Rafus* case is the fact that the lawyer was held to have had a duty to identify a possible issue and advise a client about a potential problem. This is very different from the conclusion reached in *Watson v. Muirhead* 57 Pa. 161. There the court held that "it cannot be said to be the duty of a lawyer to avert to the existence of" a potential problem. The problem in *Rafus* was whether or not a mortgage had been made illegal by virtue of a particular statutory provision. The question was difficult enough that it wasn't decided in either the lower court or the Court of Appeal.

The issue wasn't settled until a Supreme Court of Canada decision in the case. At this point, some 14 years after the mortgage, the mortgagee brought a negligence claim against the lawyer. That also went back through the courts to the Supreme Court of Canada, which held that the solicitor was "under a duty to inform the client" of the potential problem. The negligence standard imposed by the Supreme Court of Canada in 1986 was much higher than the standard imposed in Pennsylvania in 1868. That is one basic reason why title insurance has been slow to catch on in Ontario – the existing title assurance system, based on lawyers' opinions is, in fact, consistently providing good title to purchasers.

Another factor is that the registration systems are fairly sophisticated and effective. A property in Ontario may be recorded under one of two registration systems, one, called "Land Titles" is a Torrens type of system and the other, larger one called "Land Registry" is a notice system. Both are operated by the Ontario government out of a series of local offices and are basically accurate, reasonable and effective systems. The notice system is based on a 40-year search period and with the lawyer's negligence law standard referred to above, the quality of title conveyancing is quite high. The entire registration system in Ontario is now in the process

of being computerized on a system called Teranet. As a result, title will be accessible directly from remote terminals, more properties are being shifted to the Torrens system and remote electronic registration is being introduced.

On the other side, however, real estate conveyancing in Canada was costing the public, in fees paid to lawyers and in disbursements by lawyers at the time of each conveyance. The CLIA report estimated that the average fees in Canada ranged from \$300 to \$525 and they are considerably higher in Ontario, particularly in major urban areas like Toronto. As governments move to reduce deficits and increase user costs of services, the cost of both title and off title searches like registrations, executions, taxes, agreement compliance and zoning have increased materially. Disbursements have thus become onerous in themselves, routinely costing more than several hundred dollars. On top of that,

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*Large U.S. title insurers have now been able to obtain beachheads as they have been able to deliver perceived cost efficiencies in the eyes of at least some lenders.*

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the general standard in most residential transactions was to have some kind of relatively current survey evidence – an additional cost of hundreds of dollars when required. The cost to maintain Ontario's high registration and professional standards was being borne by the Ontario consumer.

If you recall the comments from the October CLIA report, these costs are a material problem, particularly to lenders that want the price of their product to be as low as possible. It is possible for sophisticated parties like title insurers to either assume risks and "insure over" issues like compliance with subdivision or development agreements or to collect and retain data in an efficient and organized manner so that, instead of paying \$100 to a municipality for each inquiry made, to have a database indicating which agreements are in default. The ability to retain and organize such data better than is currently done in local municipal offices is a clear potential advantage for the sophisticated title company.

A second problem in Ontario was that the high real estate negligence standards

for lawyers, coupled with a drop in property values in the early 1990s, resulted in a larger number of negligence claims against real estate lawyers in Ontario. In fact, more than 40 percent of all of the errors and omissions claims made related to real estate matters. Errors and omissions coverage for lawyers in Ontario is provided, on a mandatory basis, by LPIC. In June 1994, the LPIC discovered that there was a significant deficit (more than \$100 million) in its professional liability insurance errors and omissions fund.

To deal with that deficit, in the fall of 1994 LPIC imposed a capital levy, increased premiums and imposed a series of special levies, including a "real estate transaction levy surcharge." This is contained in an endorsement to the LPIC liability policy and requires each lawyer acting on a real estate transaction to pay to LPIC \$50 Canadian. This is an additional disbursement that is paid by real estate clients and adds to their existing costs.

#### **Market Activity Increases**

In the 1980s, Stewart Title was licensed in Ontario. In 1991, First American obtained its license. At that point, the Canadian title insurance industry was in its infancy. Chicago Title, Lawyers Title and Stewart Title had agents and sold a few policies, using the American ALTA forms in use at the time.

First American worked harder at penetrating the Canadian market. It hired Thomas Grifferty to set up its Canadian operations, became licensed across the country and drafted and issued Canadian policies. It hired a general counsel from my law firm, Lang Michener, and, naturally, we signed the first Solicitor's Agreement (similar to an American agency agreement) with First American in 1991. It designed Canadian residential policies based on the ALTA 1987 "plain language" policy and owners and loan policies based on the 1990 ALTA forms. First American began to aggressively market title insurance in Canada, focusing upon the refinance transactions. The October CLIA report estimates that First American is now doing roughly 70,000 such transactions a year, 10 to 15 percent of the total refinance transactions done in Canada.

With that growth and the resulting decline in Ontario lawyers' work, a great deal of resistance to title insurance generally and First American in particular, arose among the lawyers in Ontario. As many as a third of the more than 20,000 lawyers in Ontario can be considered to have had all or part of their practice in this area, and to depend on its income. An organization called Ontario Real Estate Lawyers Association ("ORELA") was formed by a number of



lawyers to protect these interests and campaigned that title insurance was inappropriate in Ontario. Articles were published, leading off with anonymous quotes threatening that title insurance will put lawyers "out of business" and ending with statements like "Title insurers would like to eliminate lawyers from real estate transactions in Ontario."

At the time of the introduction of the \$50 Canadian real estate transaction levy surcharge, First American objected to increasing costs by having lawyers pay this amount on its title insured transactions and tried to structure its refinancing system for obtaining the required certificate of title in a way designed to minimize the risk of that obligation. Since title insurers are sophisticated purchasers of legal services, the nature and significance of that provision can be greatly limited by the title insurers making informed decisions and giving instructions that sharply limit the scope of a lawyer's work (though keeping in mind that Regulation 666 requires the lawyer's involvement). In the recently decided case of *De Rubeis, Chetcuti v. The Law Society of Upper Canada and Lawyer's Professional Indemnity Corporation*, it became clear that First American was not requiring any kind of detailed analysis and opinion before insuring refinancing transactions. First American also moved for the repeal of Regulation 666. Clearly many Ontario lawyers were not fond of First American.

In the mid 1990s, Lang Michener was part of the Ontario real estate bar that found title insurance a useful tool to provide service to clients as an adjunct to the standard Ontario lawyers opinion. I had used title insurance on several occasions where the coverage offered "insured over" a risk that our opinion could have only asked our client to assume. Then, in 1995, I was involved in a share transaction where the Canadian company, being acquired by an American public company, had done much of its real estate title work in house, without obtaining outside opinions and reports. This did not leave our American purchaser client with the kind of comfort that it wanted regarding title. We outlined for our client and quoted the likely costs of the options of either doing full title investigations and issuing opinions in the traditional Canadian fashion or doing more limited searches and obtaining title insurance policies. The latter option was less expensive, coverage was reasonable and the policies could be issued effective as of closing date, even though it wasn't possible to search the nearly 600 titles at that time.

We negotiated the commitment letter, premiums and endorsement on behalf of our American purchaser client and supervised the completion of and reporting on the title work carried out by

various law firms. While this would be "old news" in the United States, it was the first insured transaction of that size in Canada.

In early 1996, I gave a presentation entitled, "The Responsibility of Lawyers with Regard to Title Matters" that dealt with opinions, the lawyer's standard of care, risk assumption and title insurance matters. It made the point that members of the Ontario legal profession should remember their primary responsibility is to serve its clients and title insurance could often be a useful tool. This was not a popular position in the Ontario bar. At the same time, the CBAO "investigated" title insurance and came to the conclusion that title insurance was unnecessary in Ontario. As well LSUC, concerned with First American's desire to repeal regulation 666, had a Special Committee on Title Insurance investigate title insurance and it both demanded that the regulation stay and

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*One of the aspects that  
new Canadian purchasers  
will have to understand is  
the advantage of the  
insurers duty to defend  
obligation.*

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affirmed title assurance, based on lawyers opinions, in the late summer of 1996.

However, to the surprise of most observers, in September of 1996 LPIC announced that it would be entering the title insurance market itself by introducing a new residential owner and mortgage title insurance product called "TitlePLUS". Chicago Title is the reinsurer on the title insurance aspects of LPIC's TitlePLUS policy. The delivery system for the product would be the new Teranet system and LPIC saw this as a way to introduce a set of conveyancing standards, to shift liability from its errors and omissions coverage and to maintain control of real estate conveyancing with Ontario lawyers.

#### **TitlePLUS**

In its unique role of being both a competing title insurer and the lawyers mandated errors and omissions insurer, LPIC could take unusual initiatives. In February of 1997, its sole owner, LSUC passed a new rule (Rule 30) to be added to Ontario lawyers' Rules of Professional Conduct called *Lawyer's Duties with Respect to Title Insurance in Real Estate Conveyancing*. Rule 30 requires that Ontario lawyers "assess all reasonable

options" in real estate conveyancing and title insurance is one such option. Lawyers are to become "knowledgeable" and be aware of the title insurance products "generally available". Lawyers cannot accept compensation from title insurers. Since there is a potential conflict of interest for lawyers advising clients about which title insurance policy to acquire when LSUC owns LPIC, Rule 30 says lawyers must disclose that as well. LSUC has imposed, by Rule 30, an almost "broker-like" responsibility on Ontario lawyers. Not surprisingly, this has resulted in a great increase in the awareness of title insurance and the number of policies sold in Ontario.

LPIC became a licensed title insurer and the TitlePLUS product was introduced in May of 1997. I was one of the speakers at its introductory program where we were to analyze the TitlePLUS product, compare it to First American's policies and try to help lawyers meet their obligation under Rule 30.

Due to LPIC's desire to have a different product, its ability to be the only title insurer that could offer errors and omissions coverage in Ontario and its existing close connection to the move to electronic title searches and registration in Ontario, LPIC's TitlePLUS policy is different in several ways from the ALTA standard.

First, it is a combined policy that can only be provided through the Teranet computer system by following a prescribed set of searches and inquiries. A policy is issued automatically when the required investigations have been completed. While this will help standardize real estate practice and sharply reduce errors and omission claims, it is a brand new delivery system, only a small number of Ontario lawyers are currently trained to use it, and it appears that direct access to underwriters to modify the system in individual cases is intended to be limited. Both the success of this system and the cost reduction to consumers are unsure.

Second, LPIC has included legal services coverage, basically the errors and omissions coverage which it is already offering to Ontario lawyers.

Third, it has defined actual loss in a specific way that could limit coverage, seemingly designed to avoid a *Jarchow* type of claim. There are also a number of smaller differences that vary its coverage from the ALTA standard, particularly on the lender's side.

Chicago Title and Stewart Title have also introduced Canadian policies this year, both based on the 1992 ALTA forms. There is not yet a Canadian equivalent to ALTA and there are a variety of different title insurance

*Continued on page 27*



# ALTA 1998 Financial Profile: Doing More with Less

By David R. McLaughlin  
ALTA Vice President, Administration

**A**LTA has concluded another successful financial year in 1997. As befits current times, success is defined as doing more with less.


Although 1997 plans called for a balanced budget, the Association incurred a pre-audit deficit of \$137,000, collecting \$3,243,130 in revenue and expending \$3,380,130. This deficit is directly attributable to significant legal expenses incurred as a result of ALTA's three-year involvement with affiliated title associations in our combined industry effort to establish that Norwest's TOP program is title insurance. Technological changes also are reflected in the deficit since certain expenditures in excess of budget were required for both hardware and software in the computer/communications field for improved services to our membership. An annual audit performed by an outside audit firm will be conducted early this year on the 1997 financial records to ensure that your dues dollars are being spent within ALTA Board guidelines.

Turning to 1998, the Board last September approved a budget for the new year that captures projected increases in costs to support the goals of the ALTA Strategic Plan, including technological, educational and legislative activities. The 1998 balanced operating budget is shown in Exhibit 1 and calls for total receipts and expenditures of \$3,545,800. This represents a 10 percent increase over the prior year and will require the Association to draw \$831,500 from its Reserve Asset Fund to achieve a balanced budget. This transfer is in line with the

Board's goal of reducing the Reserve to a \$4 million level on a graduated basis over three years. The ratio of membership dues to total receipts has dropped steadily the past two years to currently represent only slightly over 53 percent of our annual revenue as shown in Exhibit 2. We have continued to maintain an equity position between the abstractor/agent and underwriter member segments, with both groups paying an equal amount in dues. The 1998 membership renewal notices were mailed in late November 1997. As noted on the dues invoice, your membership payment is **fully deductible** as a business expense because ALTA pays the lobbying (proxy) tax.

As we move forward over the next few years, technology and education will continue as ALTA priorities under the Strategic Plan, and the ALTA budget will reflect our commitment to providing services in these areas. One important example of such efforts is the first ALTA Technology Forum and Expo to be held February 1-3 in Orlando, FL.

If you have questions about the Association, finances or resource allocation, please contact either Executive Vice President Jim Maher or me at ALTA. We can be reached at 1-800-787-ALTA or by e-mail (david\_mclaughlin@alta.org; jim\_maher@alta.org).

The Association continues to be financially sound and ready to serve you! 

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*As noted on the dues invoice, your membership payment is **fully deductible** as a business expense because ALTA pays the lobbying (proxy) tax.*

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**Exhibit 1**  
**1998 Approved ALTA Income**  
**And Expense Budget**

*General Fund Income*

Dues . . . . .	\$1,903,400
Investment Income -	
Operating . . . . .	24,000
Investment Income -	
Reserve . . . . .	831,500
Membership Processing Fees . . . . .	3,750
Conventions . . . . .	634,150
Title News. . . . .	70,000
Directory . . . . .	43,000
Product Services . . . . .	20,000
Other Income . . . . .	16,000

**Total Income . . . . . \$3,545,800**

*General Fund Expense*

Legal & Professional	
Services . . . . .	\$375,000
Conventions . . . . .	622,700
Committees . . . . .	192,250
Public Relations . . . . .	30,000
Rent-Occupancy . . . . .	207,000
Personnel-Salaries . . . . .	951,350
Personnel-Benefits . . . . .	150,300
Personnel-Pension . . . . .	120,000
Travel . . . . .	189,500
Telephone . . . . .	49,300
Postage . . . . .	71,000
Supplies . . . . .	11,000
Computer/Word Processor . . . . .	35,000
Duplicating . . . . .	11,400
Title News . . . . .	68,000
Membership & Leadership	
Directory . . . . .	36,500
Bulletins . . . . .	59,000
Dues & Subscriptions . . . . .	7,000
Insurance . . . . .	24,000
Audit . . . . .	18,500
Product Services . . . . .	46,000
Miscellaneous . . . . .	16,000
State Legislative &	
Regulatory Fund . . . . .	150,000
Depreciation . . . . .	70,000
Lobbying Tax . . . . .	35,000
Contribution to Reserve . . . . .	0

**Total Expense . . . . . \$3,545,800**

*General Fund Income*

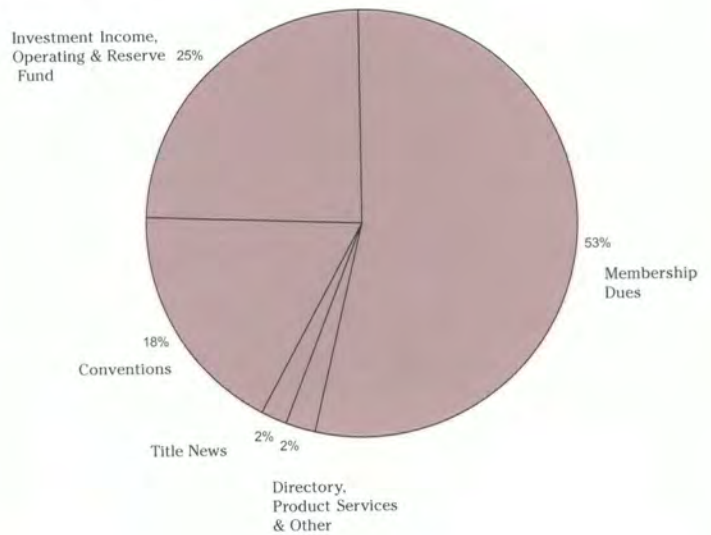
*Over Expense . . . . . 0*

*TIPAC Admin. Fund Income . . . . . \$32,000*

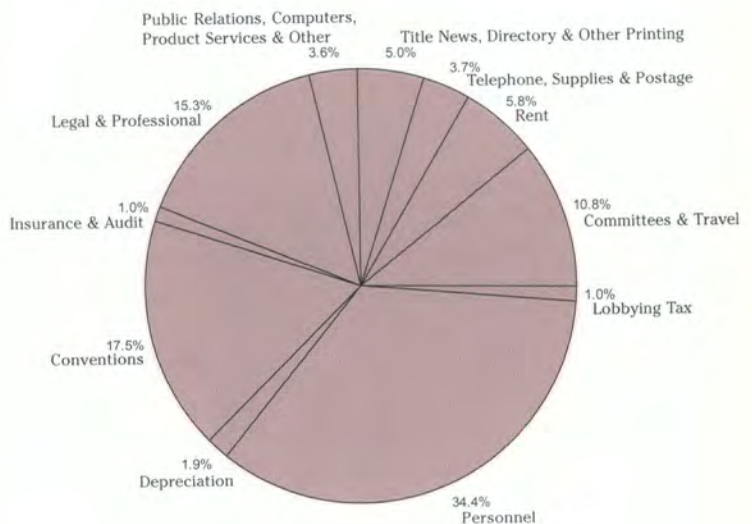
*TIPAC Admin. Fund Expense . . . . . \$32,000*

**Exhibit 2**

**ALTA \$\$\$ Sources**



**ALTA \$\$\$ Expenditures**





# ALTA Abstractor-Agent Survey Shows Average Revenue Near \$1 Million

By Mark A. Bilbrey  
and Richard W. McCarthy

**T**he American Land Title Association, under the direction of the Abstractor-Agent Research Committee, conducted a survey of member abstractor and title agent operations during July and August, 1997. All ALTA members who are title agents and/or abstractors were invited to participate. This article is a summary of the detailed survey results. The full report de-

scribes staffing and types of business activities and breaks out average and median revenue, operating expense and other operating statistics, based on several measures of company size and by geographic region. Ratios that include operating expense as a percent of revenue, and personnel cost as a percent

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Author Bilbrey is vice president, Warranty Title and Abstract, Inc., Reno, OK, and is chairman of the ALTA Abstractor-Agent Research Subcommittee. Author McCarthy is ALTA director of research.

of operating expense, are also reported.

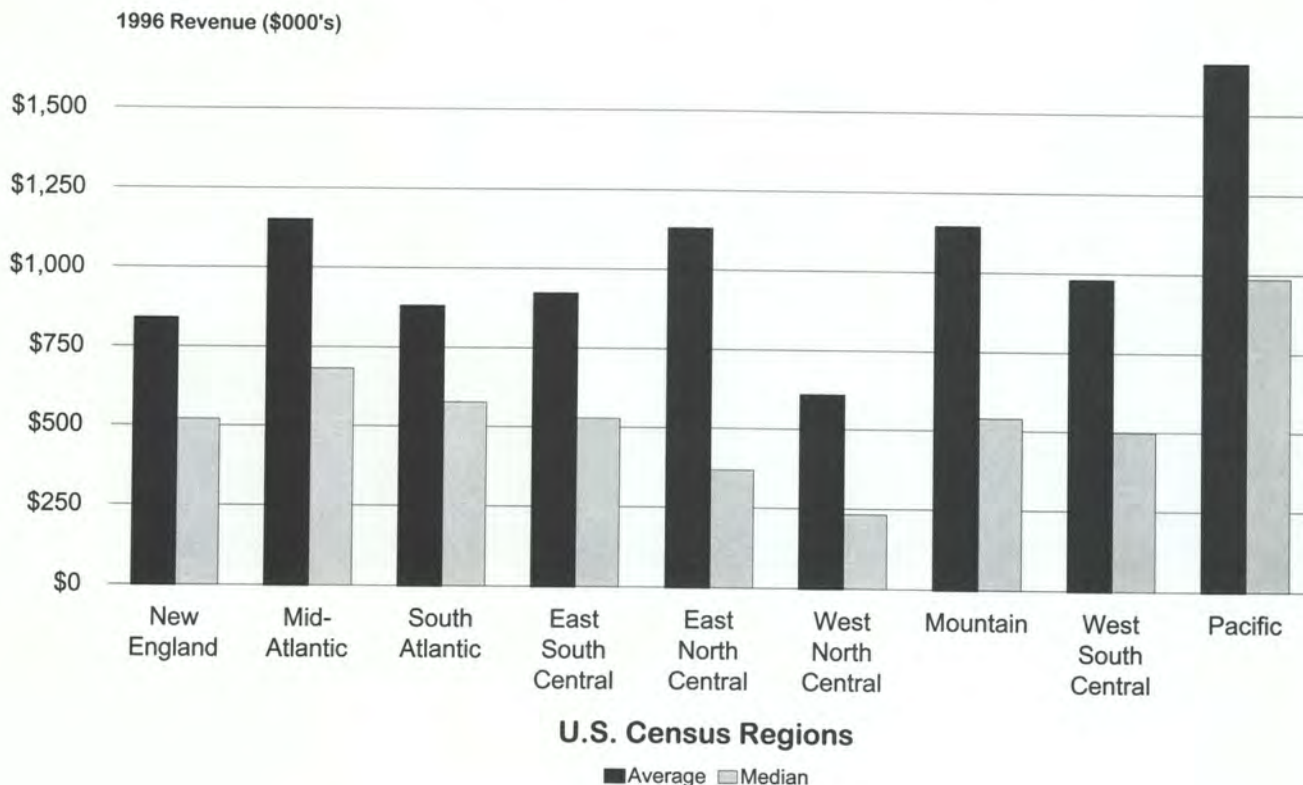
ALTA plans to periodically conduct this survey. Future results will be directly comparable to the current report. The large response - - one third of ALTA's members participated - - ensures accurate and reliable information on the topics covered.

ALTA mailed survey questionnaires to its 1,675 title agent/abstractor members in July and followed up with a postcard reminder encouraging participation. All unusable responses are

continued on page 24

## REVENUE BY REGION

### Average and Median Total Revenue in 1996





**TABLE 1a.**  
**Type of Company and Types of Business Activities**

	Annual Revenue (\$000's)					Full-Time Employees			
	Total	\$150 or Less	\$151- \$500	\$501- \$999	\$1 Million or More	1-2	3-5	6-20	21 or More
Total Survey	524	90	176	69	126	96	137	206	82
<b>Company Type</b>									
Sole Proprietorship	40 8%	20 22%	14 8%	- -	- -	19 20%	16 12%	2 1%	1 1%
C Corporation	249 48%	34 38%	85 48%	37 54%	65 52%	33 34%	66 48%	106 51%	44 54%
Subchapter S Corporation	212 40%	30 33%	72 41%	29 42%	56 44%	38 40%	50 36%	87 42%	36 44%
Partnership	11 2%	2 2%	4 2%	1 1%	3 2%	3 3%	2 1%	6 3%	- -
Limited Liability Partnership (LLP)	7 1%	3 3%	1 1%	2 3%	1 1%	3 3%	- -	4 2%	- -
Other	1 0%	- -	- -	- -	- -	- -	- -	1 0%	- -
Not Reported	4 1%	1 1%	- -	- -	1 1%	- -	3 2%	- -	1 1%
<b>Business Activities</b>									
Title Agent only	166 32%	11 12%	42 24%	30 43%	64 51%	14 15%	33 24%	78 38%	41 50%
<i>Percent who provide closing/escrow services</i>	30%	27%	38%	23%	25%	21%	36%	31%	24%
Title Agent/Abstracter	309 59%	59 66%	117 66%	37 54%	58 46%	61 64%	87 64%	122 59%	36 44%
<i>Percent who provide closing/escrow services</i>	33%	20%	39%	46%	31%	20%	34%	41%	28%
Abstracter only	49 9%	20 22%	17 10%	2 3%	4 3%	21 22%	17 12%	6 3%	5 6%
<i>Percent who provide closing/escrow services</i>	4%	5%	6%	-	-	5%	-	17%	-
<b>All respondents</b>									
Provides closing/escrow services	153 29%	16 18%	63 36%	24 35%	34 27%	16 17%	42 31%	75 36%	20 24%



**TABLE 1b.**  
**Type of Company and Types of Business Activities**

	Total	U.S. Census Regions								
		New England	Mid-Atlantic	South Atlantic	E. South Central	E. North Central	W. North Central	Mountain	W. South Central	Pacific
Total Survey	524	7	30	20	11	114	163	78	63	35
<b>Company Type</b>										
Sole Proprietorship	40 8%	1 14%	1 3%	2 10%	1 9%	7 6%	21 13%	2 3%	5 8%	- -
C Corporation	249 48%	2 29%	12 40%	8 40%	5 45%	55 48%	71 44%	44 56%	33 52%	18 51%
Subchapter S Corporation	212 40%	4 57%	17 57%	9 45%	3 27%	46 40%	60 37%	31 40%	23 37%	17 49%
Partnership	11 2%	- -	- -	- -	- -	3 3%	6 4%	- -	2 3%	- -
Limited Liability Partnership (LLP)	7 1%	- -	- -	- -	2 18%	1 1%	3 2%	1 1%	- -	- -
Other	1 0%	- -	- -	- -	- -	1 1%	- -	- -	- -	- -
Not Reported	4 1%	- -	- -	1 5%	- -	1 1%	2 1%	- -	- -	- -
<b>Business Activities</b>										
Title Agent only	166 32%	- -	12 40%	10 50%	5 45%	33 29%	19 12%	46 59%	7 11%	34 97%
<i>Percent who provide closing/escrow services</i>	30%	-	-	10%	20%	9%	37%	39%	29%	50%
Title Agent/Abstracter	309 59%	6 86%	17 57%	8 40%	6 55%	81 71%	102 63%	31 40%	54 86%	1 3%
<i>Percent who provide closing/escrow services</i>	33%	50%	18%	25%	67%	35%	27%	52%	31%	-
Abstracter only	49 9%	1 14%	1 3%	2 10%	- -	- -	42 26%	1 1%	2 3%	- -
<i>Percent who provide closing/escrow services</i>	4%	-	-	-	-	-	5%	-	-	-
<b>All respondents</b>										
Provides closing/escrow services	153 29%	3 43%	3 10%	3 15%	5 45%	31 27%	37 23%	34 44%	19 30%	17 49%



**TABLE 2a.**  
**Title Insurance Operations and Ownership Structure**

	Annual Revenue (\$000's)					Full-Time Employees			
	Total	\$150 or Less	\$151- \$500	\$501- \$999	\$1 Million or More	1-2	3-5	6-20	21 or More
Total Survey	524	90	176	69	126	96	137	206	82
<b>Number of Title Insurers Company Wrote Business for in the Past Year</b>									
One	205 39%	51 57%	64 36%	27 39%	36 29%	56 58%	54 39%	69 33%	25 30%
Two	135 26%	16 18%	57 32%	16 23%	30 24%	20 21%	43 31%	51 25%	20 24%
Three	68 13%	3 3%	25 14%	12 17%	20 16%	1 1%	16 12%	41 20%	10 12%
Four	39 7%	2 2%	11 6%	7 10%	15 12%	1 1%	5 4%	24 12%	9 11%
Five or More	35 7%	- -	5 3%	5 7%	21 17%	2 2%	3 2%	16 8%	14 17%
Not Reported	42 8%	18 20%	14 8%	2 3%	4 3%	16 17%	16 12%	5 2%	4 5%
<b>Percentage of Title Business Company Placed with Its #1 Insurer*</b>									
Number Reporting	277	21	98	40	86	24	67	132	53
Under 50%	56 20%	1 5%	18 18%	7 18%	26 30%	1 4%	7 10%	34 26%	14 26%
50-74%	117 42%	8 38%	45 46%	18 45%	29 34%	8 33%	33 49%	57 43%	19 36%
75-99%	90 32%	10 48%	33 34%	13 33%	26 30%	11 46%	23 34%	38 29%	17 32%
100%	4 1%	1 5%	1 1%	- -	2 2%	1 4%	1 1%	- -	2 4%
Average percent	64%	75%	64%	63%	62%	71%	68%	60%	65%
Median percent	60%	75%	60%	63%	60%	75%	70%	60%	61%
Not reported	10 4%	1 5%	1 1%	2 5%	3 3%	3 13%	3 4%	3 2%	1 2%

\*Companies that reported they wrote business with two or more insurers.



**TABLE 2a.**  
**Title Insurance Operations and Ownership Structure (continued)**

	Total	Annual Revenue (\$000's)				Full-Time Employees			
		\$150 or Less	\$151- \$500	\$501- \$999	\$1 Million or More	1-2	3-5	6-20	21 or More
Total Survey	524	90	176	69	126	96	137	206	82
<b>Does a Title Insurer Have Ownership Interest in Your Company?</b>									
Yes	12 2%	- -	2 1%	- -	9 7%	- -	1 1%	3 1%	8 10%
<b><u>If Yes, What Percent Does Insurer Own?</u></b>									
<i>Average</i>	66%	-	100%	-	64%	-	100%	44%	67%
<b>Is Your Company Affiliated with Another Real Estate Service Provider?</b>									
Yes	36 7%	9 10%	6 3%	8 12%	8 6%	11 11%	4 3%	15 7%	6 7%
No	484 92%	81 90%	169 96%	61 88%	116 92%	83 86%	133 97%	191 93%	74 90%
Not Reported	4 1%	- -	1 1%	- -	2 2%	2 2%	- -	- -	2 2%
<b>Services Provided by Affiliated Real Estate Service Providers</b>									
Number Reporting	36	9	6	8	8	11	4	15	6
Realty, Brokerage	15 42%	3 33%	4 67%	3 38%	4 50%	4 36%	2 50%	7 47%	2 33%
Lending, Financing	17 47%	4 44%	3 50%	3 38%	6 75%	4 36%	2 50%	7 47%	4 67%
Building, Developing	8 22%	- -	3 50%	2 25%	3 38%	- -	3 75%	3 20%	2 33%
Property Management	5 14%	- -	1 17%	1 13%	3 38%	- -	- -	3 20%	2 33%
Other Asset Management	1 3%	- -	- -	- -	- -	- -	- -	- -	1 17%
Other Services (e.g., Surveying, Legal)	13 36%	4 44%	- -	4 50%	2 25%	4 36%	- -	6 40%	3 50%



**TABLE 2b.**  
**Title Insurance Operations and Ownership Structure**

	Total	U.S. Census Regions								
		New England	Mid-Atlantic	South Atlantic	E. South Central	E. North Central	W. North Central	Mountain	W. South Central	Pacific
Total Survey	524	7	30	20	11	114	163	78	63	35
<b>Number of Title Insurers Company Wrote Business for in the Past Year</b>										
One	205 39%	1 14%	5 17%	7 35%	4 36%	41 36%	55 34%	43 55%	18 29%	29 83%
Two	135 26%	4 57%	6 20%	5 25%	3 27%	30 26%	41 25%	19 24%	21 33%	5 14%
Three	68 13%	1 14%	9 30%	1 5%	1 9%	24 21%	15 9%	5 6%	11 17%	1 3%
Four	39 7%	- -	6 20%	1 5%	2 18%	8 7%	13 8%	5 6%	4 6%	- -
Five or More	35 7%	- -	3 10%	4 20%	1 9%	11 10%	3 2%	5 6%	8 13%	- -
Not Reported	42 8%	1 14%	1 3%	2 10%	- -	- -	36 22%	1 1%	1 2%	- -
<b>Percentage of Title Business Company Placed with Its #1 Insurer*</b>										
Number Reporting	277	5	24	11	7	73	72	34	44	6
Under 50%	56 20%	- -	8 33%	5 45%	- -	21 29%	8 11%	6 18%	8 18%	- -
50-74%	117 42%	3 60%	10 42%	3 27%	5 71%	26 36%	34 47%	14 41%	20 45%	2 33%
75-99%	90 32%	1 20%	4 17%	3 27%	1 14%	26 36%	24 33%	13 38%	15 34%	2 33%
100%	4 1%	- -	1 4%	- -	- -	- -	2 3%	- -	- -	1 17%
<i>Average percent</i>	64%	64%	57%	58%	62%	61%	67%	66%	66%	79%
<i>Median percent</i>	60%	65%	50%	60%	55%	60%	60%	61%	70%	85%
Not reported	10 4%	1 20%	1 4%	- -	1 14%	- -	4 6%	1 3%	1 2%	1 17%

\*Companies that reported they wrote business with two or more insurers.



**TABLE 2b.**  
**Title Insurance Operations and Ownership Structure (continued)**

	Total	U.S. Census Regions								
		New England	Mid-Atlantic	South Atlantic	E. South Central	E. North Central	W. North Central	Mountain	W. South Central	Pacific
Total Survey	524	7	30	20	11	114	163	78	63	35
<b>Does a Title Insurer Have Ownership Interest in Your Company?</b>										
Yes	12 2%	-	-	-	-	2 2%	1 1%	5 6%	2 3%	2 6%
<u>If Yes, What Percent Does Insurer Own?</u>										
Average	66%	-	-	-	-	75%	50%	72%	100%	19%
<b>Is Your Company Affiliated with Another Real Estate Service Provider?</b>										
Yes	36 7%	-	3 10%	2 10%	1 9%	3 3%	18 11%	5 6%	-	4 11%
No	484 92%	7 100%	27 90%	18 90%	9 82%	110 96%	144 88%	72 92%	63 100%	31 89%
Not Reported	4 1%	-	-	-	1 9%	1 1%	1 1%	1 1%	-	-
<b>Services Provided by Affiliated Real Estate Service Providers</b>										
Number Reporting	36	-	3	2	1	3	18	5	-	4
Realty, Brokerage	15 42%	-	1 33%	1 50%	-	1 33%	11 61%	1 20%	-	-
Lending, Financing	17 47%	-	2 67%	-	-	3 100%	9 50%	2 40%	-	1 25%
Building, Developing	8 22%	-	2 67%	1 50%	-	1 33%	3 17%	1 20%	-	-
Property Management	5 14%	-	2 67%	-	-	1 33%	1 6%	1 20%	-	-
Other Asset Management	1 3%	-	-	-	-	-	-	1 20%	-	-
Other Services (e.g., Surveying, Legal)	13 36%	-	1 33%	-	1 100%	1 33%	4 22%	3 60%	-	3 75%



## Questions to ask your E&O insurance company:

### 3. How *committed* are you to the title industry?

Large commercial insurers only *dabble* in E&O insurance for title professionals. Let's face it—there aren't that many of us! As a result you're probably not as important to them as all the butchers, bakers and candlestick makers they insure—there are a lot more of them!

At TIAC, we *only* insure title agents and abstracters, so you get the best service, coverage and claims handling there is!

Plus, we've been around longer than almost any other title professionals E&O insurer and we're the *only* E&O insurer wholly owned and governed by title professionals! Call us and find out what *commitment* really is! We invite title professionals nationwide to make TIAC *your choice* in professional liability insurance.

Call us—we're here to serve *you!*



*Your Company*

1-800-628-5136

*Your Choice*

2 Wisconsin Circle, Suite 650 • Chevy Chase, MD 20815-7011 • FAX: 800-TIAC-FAX



included in this report. Survey responses were returned anonymously to Fetzer-Kraus, Inc., an independent research firm that tabulated the results and prepared the final report. Fetzer-Kraus assures participants that the confidentiality of each response has been maintained at all times and that only grouped data have been reported.

### Survey Results

Type of Company and Types of Business Activities-- approximately one half of the 524 companies that responded to the survey are C corporations. Another 40 percent are Subchapter S corporations. Only 8 percent are sole proprietorships and only 3 percent are organized as partnerships. One fifth of companies with 1-2 full-time employees or with 1996 revenue less than \$151,000 are sole proprietorships. Sole proprietors and partnerships were most prevalent among states in the West North Central region. More than 90 percent of the businesses responding are title agents: 59 percent are both agents and abstracters, 32 percent are title agents only. Relatively few respondents, 9 percent, are abstracters only. Almost 30 percent of respondents commented that their business also provides closing/escrow services. Table 1a and 1b summarize these results.

The largest group of respondents, 39 percent of the 524 companies, wrote business for only one title insurance company in the past year. More than one half of the smaller companies, those with \$150,000 or less revenue, wrote business for only one insurer. Almost two thirds of all respondents wrote business for only one or two insurers. Seven percent of all companies, but including 17 percent of the companies with \$1 million or more revenue, reported they wrote business with five or more insurers. More than 80 percent of the companies in the Pacific states wrote business with only one insurer.

The one half of all surveyed companies that wrote title insurance business with more than one insurer typically placed the majority of their business with the primary insurer for whom they write business. On average, companies writing business with two or more insurers placed 64 percent of their business with their primary insurer. Generally, the smaller the company, the more likely that it wrote business with only one insurer. However, companies in the Pacific states, most of them larger than average, were more likely than companies in other regions to write business with only one insurer.

Only 2 percent of respondents (12 of

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*Average revenue was almost \$1 million, pulled upward by average revenue of \$2.7 million among 126 larger companies.*

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524) reported that a title insurer has an ownership interest in the company. Nine of these 12 respondents reported 1996 revenue of \$1 million or more. Among all 12, average ownership interest of an insurer was 66 percent.

Seven percent (36 of 524) of the abstracters and agents participating in the survey reported that they are affiliated with another real estate service provider. Almost one half of these affiliated real estate firms provide lending and financing, 42 percent provide realty and/or brokerage services, and 22 percent were builders-developers. Only 14 percent are involved in property management. More than one third of these affiliated providers offer services such as escrow, surveying, and legal. Tables 2b and 2c report these results.

One half of the companies responding to the survey conduct business in counties in which they do not have an office. Although business in the non-office counties is 10 percent or less for one half of those reporting, it is substantial for some companies and averages 19 percent of all business among the 256 companies that reported they do business in counties in which they have no office.

The large majority of companies in the Mountain and Pacific states conduct business only in counties in which they have offices.

### Staffing Characteristics

One half of the 515 companies that reported full-time employees have six or more employees. The number of employees ranges into the hundreds -- with the survey average of 16 full-time employees skewed by the larger companies reporting. Companies that reported \$1 million or more revenue reported an average of 38 full-time employees. Three-fourths of the surveyed companies also have one or more part-time employees. Larger companies average four or more part-time employees.

Respondents also reported their full-time equivalent staff, full-time employees plus the equivalent full-time staff, accounted for by part-time employees. Among the 521 companies that reported one or more employees, full-time equivalent

staff averaged 17.1 people. One-half of these 521 companies have seven or more equivalent full-time employees.

One fourth of responding companies reported that they have one or more people on staff who have a master's degree. Larger companies average three or more employees with a master's degree or higher. Sixty percent of respondents reported an average of three people on staff who have a four-year degree. Companies with more than 20 full-time employees reported an average of eight staff members with four-year degrees. Approximately 40 percent of the surveyed companies reported an average of three people on staff who have a two-year degree.

Almost one third of all companies, including one half of the larger companies, have an attorney on staff. Most of these attorneys are full-time employees. Companies in New England, the South Atlantic, and the East South Central states are most likely to have an attorney on staff.

### Employee Benefits

Two thirds of the companies surveyed provide health care insurance or the equivalent. Among companies with more than \$500,000 in revenue, this employee benefit is almost universal. Only 28 percent of companies with one or two employees report this benefit. Most companies, including more than one half of the smaller companies, provide paid vacation, typically 11 days a year. Two-thirds provide paid sick leave, typically allowing employees to accrue and use seven days per year.

Almost one half of respondents provide life insurance for employees. One third provide dental care insurance. Companies in the Pacific states are most likely to provide health care insurance and paid sick leave.

### Annual Revenue

Among the 461 companies that reported 1996 revenue, one half had revenue of \$394,000 or more. Average revenue was almost \$1 million, pulled upward by average revenue of \$2.7 million among 126 larger companies. Average revenue was highest, at almost \$1.7 million per company, among companies in the Pacific states. Revenue is directly related to number of full-time employees. For the four breakout categories of full-time employees, revenue per employee (the ratio of average number of full-time employees to average revenue within each category) was:

1-2 employees	\$54,000
3-5 employees	\$60,500
6-20 employees	\$69,636
21 or more employees	\$53,627



Title insurance accounted for almost two thirds of total revenue among the 439 companies that reported the percent of revenue received from this source. One half of the companies in this group reported that title insurance accounted for 70 percent or more of their revenue. Among 329 companies reporting, abstracts accounted for one third of total revenue, although one half of these 329 companies derived 20 percent or less of their revenue from abstracts. Among 370 companies reporting, closing/escrow functions accounted for an average of 19 percent of total revenue. Relatively few companies reported any other major sources of revenue. Chart A reports average and medial revenue for each region.

In other charts in the report, independent variables (orders received, full-time equivalent staff, population of counties served, and the rest) are divided into five approximately equal groups of respondents to illustrate the relationship, or lack of a relationship, between the independent variable and annual revenue.

### Orders Received

Among the 433 companies that reported orders received in 1996, one half received 1,200 or more orders. Among companies that reported \$1 million or more revenue, one half received 3,000 or more orders. Among smaller companies, those with 1-2 employees or revenue of \$150,000 or less, one half received fewer than 350 orders.

### Operating Expense

With 411 companies reporting, average operating expense in 1996 was \$839,000. One half of these companies reported operating expense of \$320,000 or more. Results in the report suggest that operating expense averages 80 to 85 percent of total revenue regardless of the size of the company.

Personnel cost averages 53 percent of operating expense among 404 companies reporting. One half of these companies reported personnel costs that are 52 percent or a smaller proportion of operating expense (and one half reported personnel costs that are 52 percent or a higher proportion of operating expense). Average and median personnel costs, as a percent of operating expense, vary relatively little by size of company and appear unrelated to company size.

### Title Plants

Eighty percent of respondents maintain a title plant. Smaller companies, as measured by revenue, are as likely to maintain a title plant as larger companies. Among companies that maintain a title plant, 63 percent maintain a complete daily take-off title plant from sovereignty. Another 88 percent maintain a partial daily take-off title plant. Typically, these

in-house title plants cover the last 50 years. Other companies work from a variety of title plant types and methods, including starter files (back title plants).

The majority of the 419 companies that maintain a title plant have not automated their plants. Forty percent, including more than one half of companies with revenue greater than \$500,000, do have automated title plants. Among the companies that maintain automated title plants, only one third use CD-ROM technology for storage and retrieval.


### Office Automation

Although two thirds of companies with revenue greater than \$500,000 report that the public records to which they need access are computerized, only 40 percent of companies with revenue of \$150,000 or less report that public records are computerized. Among the 275 companies that do have access to computerized public records, only 37 percent are equipped to take advantage of this access by on-line connection (computer and modem) from their own offices. Two thirds of the larger companies have this on-line access in comparison with only 17 percent of the smaller companies. Only 16 percent of all companies surveyed reported they have an office in the county recorder's office.

Closing systems are automated in almost two thirds of all companies surveyed. Almost 90 percent of the companies with revenue greater than \$500,000 have automated closing systems.

### Liability Insurance

More than 80 percent of surveyed companies have errors and omissions (E&O) coverage. Smaller companies (89 percent) are more likely to have E&O coverage than larger companies (80 percent). Larger companies (92 percent) are more likely to have workers compensation coverage than smaller companies (59 percent). Almost 80 percent of all companies have an office package policy and one half have fidelity or surety insurance coverage or bond. Other liability coverages were reported by relatively few companies. Approximately 15 percent of the companies with revenue greater than \$500,000 have an employment practices policy.

*A copy of the full report is available for \$125 to ALTA members and \$175 to non-members.* 

### PRESIDENT

*continued from page 5*

customer on the importance of their title insurance. The Public Relations Committee has started by engaging in

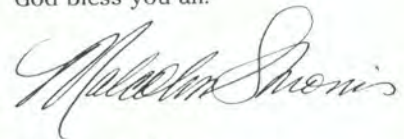
public opinion research that will guide us on where our resources should be concentrated before going to work on improving the understanding of title insurance among these important audiences. We can no longer hide our light under a bushel—it's time we let it shine.

However, we must also enlist and enable you to explain our industry. You are the persons who can best tell the story in your own communities.

If you've got something that you feel is a priority for ALTA to examine, I am here to listen to your concerns and implement needed action.

As I've been touring these United States, I've met a lot of great folks. Not ones ready to give up, but people looking forward to the future and preparing to meet it. As an industry that studies the past, we are constantly reminded of the considerable changes that already have taken place. With our study of history and careful attention to detail, we are a uniquely qualified group to guide and protect the real estate transaction of tomorrow.

God bless you all!



Malcolm S. Morris

### CONGRESS

*continued from page 8*

providers in the marketplace. This approach runs dangerously close to rate regulation, a function which is appropriately conducted in the title industry at the state level. ALTA expressed concern that the avenue taken was beyond the legitimate scope of RESPA regulation. With respect to operational issues, it appears that, if the disclosure is provided when the consumer contracts with the mortgage broker or when the consumer expresses serious interest in obtaining a loan from the broker and prior to application, it would be provided prior to the selection of the title provider and closing agent. If the disclosure is to be provided only before receipt of any payment, and payment is made out of closing funds, ALTA commented that the mortgage broker should remain responsible for preparation of the disclosure.

### Affinity Programs

RESPA is addressed in legislation introduced in the Senate shortly before Congress recessed for 1997. Section 206 of S 1405, the Financial Regulatory Relief and Economic Efficiency Act of 1997,



would clarify that affinity group marketing is not covered by RESPA. This language is similar to language that was included in regulatory relief legislation proposed in the last Congress.

This clarification is intended to accommodate marketing of home equity loans to credit card customers by MBNA and Household International. It may also accommodate existing company arrangements with HFS. ALTA is exploring the implications for the title industry.

### **Mortgage Reform Working Group**

In response to concerns by the lender community stemming from class action lawsuits on the mortgage broker yield spread premium, Congress directed the real estate industry and the consumer group community to meet to develop alternatives to RESPA. Consequently, ALTA has participated in a Mortgage Reform Working Group, which has been attempting to develop a consensus on RESPA reform. A number of groups have developed reform proposals, which do tend to include lender's title insurance in a package. At this writing, the group has decided to reach a determination of "what is consensus." ALTA also participated in a forum with the Federal Reserve Board on December 15, 1997, to discuss this matter.

ALTA policy currently states that ALTA supports packaged pricing of goods and services that are for lender protection only and in which the consumer has no separate benefit or interest in the selection of the product or service.

### **Bankruptcy**

With the help of Joe Bonita of Chicago Title, who testified before the House Judiciary Subcommittee last year, and the assistance of the First American Title Insurance Company, ALTA has achieved inclusion of amendments to overturn *McConville* in HR 764, Bankruptcy Amendments of 1997, which passed the House on November 12, 1997. The amendments are also included in Title IV "Technical Corrections" of S 1301, the Consumer Bankruptcy Reform Act of 1997, which has been introduced in the Senate. In *McConville*, the Ninth Circuit denied protection for a lender's lien under section 549(c) of the Bankruptcy Code to disallow perfection of a lender's lien after the borrower filed an undisclosed bankruptcy. The court limited the application of section 549(c) to transfers of fee interests only. The amendments overturn the Ninth Circuit decision, and clarify (1) that post petition transfers are valid, (2) are exempt from automatic stay, and (3) may be transfers of security interests in real property.

As the language is identical in both bills, it appears likely that the provisions

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*In order to avoid development of a TOP-like banking product, ALTA sought and obtained an amendment including title insurance in the list of insurance products.*

---

will go forward.

### **PMI Legislation**

Legislation introduced in the Senate, S 318, established new requirements for disclosure and mandatory cancellation of private mortgage insurance. One version of the legislation included a statutory requirement for preparation and delivery of the disclosure on the closing agent. Although this provision was dropped in the Senate-passed version, it may reappear. The House-passed legislation does not address this issue.

### **Tax Reporting**

The "Taxpayers Relief Act of 1997" signed by the President on August 5, 1997, modifies both capital gains treatment for sales of principal residences and Form 1099-S reporting requirements.

#### **Capital Gains for Home Sales**

Under prior law, taxpayers can generally roll over the gain on the sale of a personal residence into the cost of a replacement residence without paying any capital gains tax. Taxpayers over age 55 are also provided with a one-time opportunity to exclude up to \$125,000 of gain on the sale of a personal residence. Under prior law, taxpayers track their gain and file Form 2119 to report the transaction with their annual tax returns.

Under the new law (Sec. 312 of the "Taxpayer Relief Act of 1997"), taxpayers are generally able to exclude up to \$250,000 of gain (\$500,000 if married filing jointly) from the sale or exchange of a principal residence. The provision is generally effective for sales after May 6, 1997, although a taxpayer may elect to take prior capital gains treatment if there is a valid contract in effect on August 5. The exclusion can be used only once every two years, and there are many limitations in qualifying for the capital gains exclusion, such as a requirement that the property should have been used as a principal residence for two of the last five years, denial of the exclusion to expatriates, and a requirement for depreciation recapture for home offices and rentals.

### **Real Estate Reporting, Form 1099-S**

Under prior law (Sec. 6045(e) of the I.R.C.), real estate reporting persons file for most real property transactions, information on gross proceeds, and state real property tax proration amounts associated with a sale, on Form 1099-S.

The new law provides that real estate reporting persons generally need not file information reports (Form 1099-S) for sales or exchanges of principal residences with a sale price at or below \$250,000 for a single individual (or at or below \$500,000 if the seller is married), **as long as the reporting person obtains a certification from the seller in a form acceptable to the Secretary [of the Treasury] that the property (1) is the principal residence and (2) the full amount of the gain on such sale or exchange can be excluded.** Consequently, closers should continue to collect information necessary to file Form 1099-S until Treasury issues an "acceptable" certification form. We expect the 1099-S filing requirement will still be applicable in the District of Columbia to track the first-time homebuyers credit of \$5,000.

#### **Illustration**

A single individual bought property for \$100,000 in 1992, has used it as a principal residence for at least two years, and sells it for \$300,000 in December, 1997. The individual would not have to pay capital gains taxes, as they only have \$200,000 worth of gain, and there is an exclusion of \$250,000 from capital gains taxes on sales of principal residences. Nevertheless, *a Form 1099-S should be filed* as the property sale price is over \$250,000.

Implementation of elimination of tax reporting requirements for properties below either \$250,000 in sale price or \$500,000 is currently awaiting a certification notice from the Treasury Department.

### **Like-Kind Exchange**

The Administration's like-kind exchange proposal, which was included in their tax simplification plan early last spring, would have raised \$1.8 billion by narrowing the legal test from like-kind to similar-in-use, and allowing consumers to roll over funds from a like-kind exchange on their own, thereby eliminating the use of title entities as intermediaries.

ALTA actively participated in coalition efforts to oppose the changes, and arranged meetings for Chicago Title Deferred Exchange Corporation with several members of Congress to line up support on the matter.

Acting in conjunction with the real



estate industry, ALTA was successful in preventing adoption of these provisions.

## Payments to Attorneys

The Administration proposed reporting of payments to attorneys in connection with legal services in their tax simplification proposals last spring. Payments made to attorneys are reportable on Form 1099-MISC as of December 31, 1997. ALTA successfully battled the requirement to include this provision on Form 1099-S. IRS notice on implementation is expected in 1998.

## Bankruptcy Code Lien Issues

Senator Charles Grassley (R-IA) has introduced legislation, S 1149, the "Investment in Education Act of 1997," to amend Section 505 of the Bankruptcy Code to permit a bankruptcy court to reverse a property valuation decision only when a bankruptcy debtor has the right to challenge a decision under state law. In addition, the bill would amend Bankruptcy Code Sec. 724(b) to provide that property taxes protected by liens are paid ahead of other expenses. It would prevent out of state bankruptcy judges from determining the fair market value of property located in another state.


The bill is supported by local governments and school districts, but appears to be opposed by the American Bar Association and the National Bankruptcy Conference.

## HR 1534: Private Property Rights Implementation Act of 1997

Legislation clarifying the definition of "final agency action" and expanding the jurisdiction of federal claims courts passed the House late in the session and is moving in the Senate this year. A floor amendment added on the House floor requires federal agencies to give notice to the owners of affected properties explaining their rights under the bill's amendments, and the procedures for obtaining compensation. ALTA members may be interested in the form and content of the notice requirements.

## New Issues in 1998

Congress begins its 1998 work at the end of January. The new agenda was not established at the time of this writing. Republican priorities will include fighting crime, improving education, reforming Social Security, and cutting taxes. Democratic priorities will be balancing the budget and targeted tax cuts. Consequently, title issues are likely not to

be a high priority. But, it can be expected that there will be concerns with both inadvertent actions of federal legislators and regulators unfamiliar with the title product, and actions by competitors, attempting to shift liability and responsibility to title professionals. 

### CANADA

*Continued from page 13*

products on the market. To assist lawyers to meet their obligations under Rule 30, the text most commonly used by real estate professionals in Ontario, the CCH Real Estate Law Guide (the "Guide") has added sections on title insurance. After discussions with the various Ontario title insurers and assistance from members of the ALTA Forms Committee, I drafted those sections of the Guide designed to help to help lawyers through the process. CCH published that material in October.

### Surcharge Removal

In September of 1997, since the LPIC deficit had been reduced to less than \$30 million and it was anticipated that there will be no LPIC deficit by the fall of 1998 (with a fully funded reserve by mid 1999), LPIC proposed that, among other steps, the real estate transaction levy surcharge of \$50 Canadian would be removed "on certain real estate transactions insured by TitlePLUS or other equivalent title insurance policies." Due to the differences in the coverage offered under the TitlePLUS policy in the area of legal services coverage, there is a great deal of concern that, effectively, this will result in a price reduction for the LPIC policy alone. Stewart Title, concerned about that possibility, took pains to be properly prepared to fight that approach, if taken by LPIC. However, it would appear that the likely impact of the new endorsement to the LPIC errors and omissions policy is only that every title insured transaction using an ALTA standard policy will be exempt from the surcharge, so long as all parties to the transaction are insured and the insurer agrees not to claim against the lawyer providing the certificate of title for an amount more than the lawyer's LPIC liability deductible.

All of these steps by LPIC and LSUC have greatly increased the profile and use of title insurance in Ontario. LPIC, First American and Stewart Title have each launched promotional campaigns designed to increase familiarity with their products - emphasizing the cost saving in disbursements on residential transactions. The 1996 income statements filed with OFSI indicated that while Stewart Title and Chicago Title earned small premium amounts, First

American earned nearly \$4.2 million and these amounts were expected to double in 1997. Financial institutions are reviewing and approving policies and starting to develop their own standards. First American advises that, while virtually all of its premium revenues in 1995 would be for refinancing loan policies, in 1996 some 15 percent would have been split equally between residential and commercial policies and that is expected to increase to 30 percent in 1997. It seems clear that title insurance will increasingly become common for residential real estate transactions in Ontario and that commercial use will follow shortly.

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*There are wide variations and different approaches will need to be taken in different jurisdictions.*

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### Other Recent Canadian Activities

The existing Canadian insurers are marketing their product in other provinces as well. Steve Lessack of Stewart Title advises that, in addition to activities with a number of individual lawyers and law firms, he is close to signing agreements with various networks of Canadian lawyers in each province and territory. Chicago Title, as reinsurer for LPIC, cannot sell residential policies in Ontario but is marketing commercial policies there and others elsewhere in Canada. Lawyers Title's Ron Owen advises that Lawyers Title will be taking advantage of its existing established position and expects to be more active in Canada in 1998. First American's Ed Frackowiak advises that it has four regional offices in provinces other than Ontario and that two closing centers, one in Ontario and one in Nova Scotia, are being launched. LPIC has announced that it is taking its TitlePLUS title insurance product across Canada and has approached other law societies in other provinces about using it. LPIC is also investigating the implementation of a national refinance title insurance product. Alberta recently included a provision in Alberta's standard residential sales contracts making a policy title insurance an available option.

There are nine other provinces and two territories with eight of them belonging to CLIA. None of the others have an equivalent to Ontario's Regulation 666, but in British Columbia, documents must be executed in front of a lawyer before they are registered. In Quebec, notaries are solely responsible for title registrations and searches. In



British Columbia, notaries compete with lawyers in real estate conveyancing.

While each province is comfortable with its own provincial standards and none has had the errors and omissions deficit problems of LPIC in Ontario, there is a wide variation in the various registration systems in use. All of western Canada is on various Torrens systems, most of which are fully computerized, very sophisticated and safe. Quebec has a system established under Book 9 of the Civil Code, is a registration/notice type and registrations are carried out by notaries. Eastern Canada uses various forms of registration/notice systems and, while each has some peculiarities, all are, to a reasonable degree, both well understood and effective provincial registration systems.

CLIA's examination of title insurance last fall related to a perceived need to respond to the increased use of title insurance in the Canadian market, to provide a "level playing field" for lawyers, and the desire of lenders and clients to have a more cost effective legal process. Some provincial bars, like Nova Scotia's, are very concerned about the impact of title insurance on their practices. The TitlePLUS option is only one of five under consideration by CLIA, including maintaining the status quo and leaving it to individual lawyers or firms to respond in the competitive market. CLIA is also looking at creating a national real estate lawyers organization, temporarily acting as a national focus point itself or retaining an independent title insurer to bring about those changes.

CLIA and British Columbia were to have decided on a position in early December, but have deferred any action until after a meeting of the Canadian Federation of Law Societies, the organization of all law societies in Canada, in late February.

Other than Ontario, the province that I am most familiar with British Columbia, as Lang Michener has a substantial office there. As noted above, British Columbia has yet not decided to do anything specific to respond to the increased use of title insurance in that province. The differences from Ontario make it obvious why immediate action isn't felt to be required. First, with only about 10 percent of its lawyers involved in real estate transactions, it is not a large part of the bar and they are used to competing with British Columbia notaries. Second, the registration system is Torrens, fully computerized, available on-line and inexpensive. Third, the errors and omissions claims record in real estate matters is not a problem (real estate is underrepresented in their claims history). Fourth, due in some part to their competitive history with notaries, British Columbia lawyers have been responsive to the competitive needs of the market and have developed programs to compete with title insurers in the delivery of services to consumers. Finally, the British Columbia bar has a certain degree of statutory protection in that lawyers must witness the signatures in documents to be registered.

The contrasts between British Columbia and Ontario, the different reactions in other provinces and the slowness of CLIA to react all indicate the difficulty in devising a single simple, straightforward and effective strategy for dealing with title insurance in Canada. There are wide variations and different approaches will need to be taken in different jurisdictions.

However, the following is true. Title insurance is no longer an unknown commodity in Canada. It will be often misunderstood or feared for reasons that are not accurate, but lenders, professionals and others in the Canadian real estate industry are now much more aware about title insurance than they used to be. While it would be helpful for the title insurers in Canada to standardize approaches so that the information provided will be consistent, that will no doubt take a few years. Accordingly, while the process of getting to know each other will take time to be completed, the introductions have already happened.

One of the aspects of title insurance that new Canadian purchasers will have to understand is the advantage of the insurers duty to defend obligation. That aspect has not been a direct benefit under lawyers errors and omissions coverage and is a material advantage

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## NEW ALTA MEMBERS

### ACTIVE

#### *Georgia*

Smith & Hasty, P.C., Roswell  
Ben R. Turner, P.C., Stone Mountain

#### *Illinois*

Brokers Title Insurance Co., Oak Brook  
Near North National Title, Chicago

#### *Indiana*

Town & Country Land Title, Winamac

#### *Kentucky*

Jackson Purchase Title Co., Inc., Murray  
Landmark Title Co., Barbourville  
The Title Company, Louisville

#### *Louisiana*

Cenla Abstract and Land, Alexandria

#### *Maryland*

Chesapeake Appraisal & Settlement  
Services, Inc., Linthicum

#### *North Dakota*

Southwest Abstract & Title, L.L.C.,  
Bowman

#### *Ohio*

AdvantageOne Title Agency, Westerville  
United Title & Escrow Services, Inc.,  
Rocky River  
Virtual Title Agency, Centerburg

#### *Oklahoma*

Adams Abstract Co., Inc., Poteau

#### *Oregon*

Harney County Title Co., Burns  
Northwest Title Company,  
McMinnville

#### *Utah*

Meridian Title Company, Salt Lake City

#### *Virginia*

Sonya B. Post, Bent Mountain

Summit Title Insurance Agency, L.C.,  
Fairfax Station

#### *Wyoming*

Powell Title & Escrow, Inc., Laramie

### ASSOCIATE

#### *Arkansas*

Ultima Software Corporation, Hardy

#### *California*

D. Bello Associates, Inc., Burbank

#### *Idaho*

Wardley Better Homes & Gardens,  
Preston

### ASSOCIATE, LEGAL

#### *Florida*

David E. Todd, Tallahassee

#### *Georgia*

Frank E. Lentz, Lilburn

#### *Indiana*

Sara Harrison Zeidler, Evansville

#### *Massachusetts*

Shelly B. Rainen, Boston

#### *Mississippi*

Dana E. Kelly, Jackson

#### *North Carolina*

James E. Hoshouser, Jr., Pinehurst

#### *North Dakota*

Nilles, Hansen & Davies, Ltd., Fargo

#### *Ohio*

Michael J. Barren, Columbus

#### *Pennsylvania*

William D. Wilson, Franklin


#### *South Carolina*

Ned Gregory, II, Lancaster



that has yet to be emphasized in Canada. This close connection between title insurance and the defense of the title insured through litigation or other means is entirely new in Canada. I have had the opportunity to give expert evidence in the first policy coverage case in Ontario and I know that the policy analysis which I undertook for CCH and others would not have been possible without assistance from Lang Michener's insurance litigators. Other Canadian real estate professionals will soon learn this too.

Obviously, there is a new title insurance competitor - LPIC. That new competitor does lack the background in the industry of its American competitors. It is tied, in Ontario, to a new and untested delivery system and, at times, it also appears to suffer from feeling that it can be "cleverer" than the combined efforts of American title insurers and the American lending industry over the years. However, it is incredibly well connected in Ontario, it is also well connected with the law societies in other provinces, it has an exclusive mandate (not subject to anti-trust review) to provide lawyers errors and omissions coverage in Ontario and it wants to compete in this area across the whole of Canada. Accordingly, LPIC should not be underestimated. At the same time, LPIC should be thanked, as it has taken steps that would seem to make a dramatic increase in the use of title insurance in Canada inevitable.

If handled appropriately, I believe that title insurance will come to dominate Canadian conveyancing and lending transactions as we move into the next century. 

## Equipment Leasing Added by Fidelity

Fidelity National Financial, Inc., parent of firms including Fidelity National Title Insurance Company, has announced an agreement with Granite Financial, Inc., to merge that organization with a newly-formed subsidiary of Fidelity National Financial.

According to the announcement, Granite, located in Golden, CO, is a rapidly expanding speciality finance company engaged in the business of originating, funding, purchasing, selling, securitizing and servicing equipment leases for a broad range of businesses located throughout the nation.

## Merger for Tigor

Tigor Title Insurance Company has announced a merger with its New York subsidiary, Tigor Title Guarantee Co.

# 1998 Affiliated Association Conventions

### February

20-21 **Alaska**, Regal Alaskan Hotel, Anchorage, AK

### April

2-4 **Oklahoma**, Marriott, Oklahoma City, OK

18-22 **Tennessee**, Ritz Carlton-Buckhead, Atlanta, GA

### May

3-5 **Iowa**, Savory Hotel, Des Moines, IA

7-9 **New Mexico**, Holiday Inn de Don Fernando, Taos, NM

14-16 **Palmetto**, Litchfield Beach and Golf Resort, Pawley's Island, SC

### June

2-5 **California**, Resort at Squaw Creek, Squaw Valley, CA

4-5 **South Dakota**, Cedar Shore Resort at Chamberlain, Chamberlain, SD

4-6 **Texas**, Hyatt Regency-Riverwalk, San Antonio, TX

6-8 **Virginia**, The Homestead, Hot Springs, VA

7-9 **Pennsylvania**, Lancaster Host Hotel, Lancaster, PA

7-10 **New Jersey**, Forrestal Center, Princeton, NJ

12-13 **Arkansas**, Inn of the Ozarks, Eureka Springs

18-20 **Colorado**, Keystone Resort, Keystone, CO

25-28 **New England**, Lake Morey Inn Resort Country Club, Fairlee, VT

28-30 **Oregon**, Resort at the Mountain, Welches, OR

### July

9-11 **Illinois**, Opryland Hotel, Nashville, TN

16-19 **Utah**, Homestead Resort, Midway, UT

19-21 **Michigan**, Crystal Mountain Resort, Thompsonville, MI

### August

6-8 **Idaho**, The Coeur'd'Alene, Couer'd'Alene, ID

6-8 **Montana**, Best Western Kwa Taq Nuk Resort, Polson, MT

13-15 **Indiana**, Brown County Inn, Nashville, IN

13-15 **Minnesota**, Regal Hotel, Minneapolis, MN

13-16 **North Carolina**, Sheraton Atlantic Beach, Atlantic Beach, NC

20-22 **Kansas**, Hyatt Regency, Wichita, KS

20-22 **Wyoming**, Saratoga Inn, Saratoga, WY

27-30 **New York**, Royal York Hotel, Toronto, Canada

### September

10-12 **Missouri**, Holiday Inn, Cape Girardeau, MO

17-19 **North Dakota**, Holiday Inn, Bismarck, ND

17-19 **Wisconsin**, Concourse Hotel, Madison, WI

18-20 **Dixie**, Brasstown Valley Resort, Young Harris, GA

20-22 **Ohio**, Akron West Hilton, Akron, OH

23-25 **Nebraska**, Regency Inn (formerly Holiday Inn), Kearney, NE

24-27 **Washington**, Rosario Resort - Orcas Islands de San Juan, East Sound, WA

### November

3-7 **Florida**, Buena Vista Palace, Buena Vista, FL

### December

3-4 **Louisiana**, Chateau Sonesta Hotel, New Orleans, LA



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# Conference Offers Direct Insight

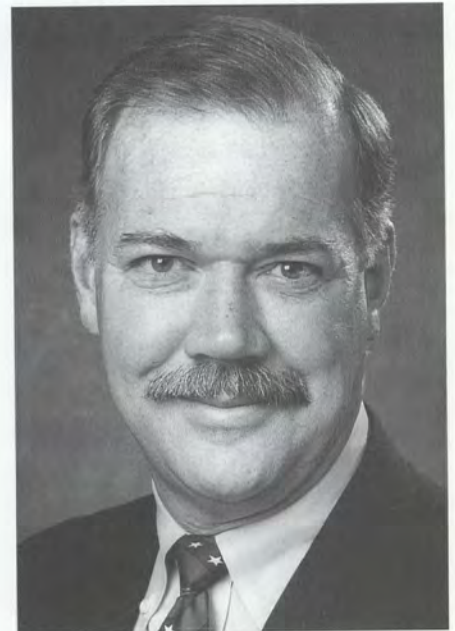
**D**irect insight into the leading 1988 issues and priorities of Congress, federal agencies and the secondary mortgage market awaits ALTA members during the Association Mid-Year Convention/Leadership Conference March 16-18 at Washington's Grand Hyatt Hotel.

Besides updating on major issues including RESPA-Truth-in-Lending reform, packaging loan services and tax initiatives, title professionals in attendance will receive an opportunity to discuss leading industry concerns with their own elected Senators and Representatives.

Providing an appropriate ambiance will be the Ice Breaker/Congressional Reception Tuesday evening, March 17, which will be held at a famous landmark—Washington's restored Beaux Arts Union Station, site of several Presidential Inaugural Balls over the years since its construction in 1908.

Among those scheduled for featured program appearances:

- House Majority Whip Tom DeLay (R-TX), a fiscal conservative who is responsible for completion of the Republican legislative agenda, who will address the Tuesday ALTA/Title Industry Political Action Committee luncheon
- Fannie Mae Vice Chairman Jamie Gorelick, responsible for areas of business and developments affecting the title industry, who is expected to comment on changes in the real estate industry
- Michael Dunn, former House legislative assistant to Representatives David Pryor (D-AR) and congressman G. V. (Sonny) Montgomery (D-MS), who now heads his own public affairs consulting firm; he will offer thoughts on improving the political effectiveness of an association
- Ted Jones, vice president and



Above: One of Washington's spectacular views--the Mall by night (Washington, DC, Convention and Visitors Association photograph). Conference program luminaries, from left, are House Majority Whip Tom DeLay (R-TX), Fannie Mae's Jamie Gorelick and Michael Dunn, political strategist.

*Continued on page 35*







chief economist, Stewart Title Guaranty Company, who will serve as moderator for a panel of real estate economics professionals focusing on the long and short range outlook, as well as the likely future structure of the entire industry

- The Capital Gang of CNN Network prominence (nationally syndicated columnists Robert Novak and Mark Shields, along with *National Review's* Kate O'Bierne) will engage in a lively debate on major political issues

Perspectives on title industry concerns from Capitol Hill and the Federal Reserve also will be highlighted. For an overview of the conference, please see the calendar on the following page.

Questions may be directed to the Association at 800-787-ALTA or e-mail [service@alta.org](mailto:service@alta.org).

## Fidelity to Buy GB Foods Stock

Fidelity National Financial, Inc., parent of organizations including Fidelity National Title Insurance Company, has announced its plan to exercise warrants to purchase 1 million shares of GB Foods Corporation common stock at a purchase price of \$5 per share.

According to the announcement, Fidelity National Financial plans include exercising such warrants following the GB Foods acquisition of Timber Lodge Restaurants, Inc. As a condition to such acquisition, Timber Lodge announced plans to purchase from CKE Restaurants, Inc., for stock between 12 and 20 JB's Restaurants, for conversion to Timber Lodge Steakhouses.

Fidelity's exercise is designated to provide funding for such conversions, the announcement stated.

## Chicago Spin-Off Completion Near

Completion is expected by mid-1998 for the previously announced establishment of Chicago Title and Trust Company title insurance and real estate related service business as an independent, publicly traded company through a spin-off to shareholders of its parent, Alleghany Corporation.

According to the announcement from Alleghany, the spin-off is to be effected

through a pro rata distribution - - expected to be on a tax-free basis - - to the parent shareholders of shares in a newly formed holding company for Chicago Title and Trust.

Chicago Title and Trust has estimated that its after-tax earnings, exclusive of the units that will be retained by Alleghany, are in excess of \$50 million for the year ending December 31, 1997.

The transaction is subject to market conditions, a favorable ruling from the Internal Revenue Service, and any required regulatory approvals.

## First American In Virgin Islands

First American Title Insurance Company has acquired the operations of Service Standard Title and Trust, Ltd., located in Charlotte Amalie, St. Thomas, U. S. Virgin Islands. Besides St. Thomas,

the concern also serves the other main islands of St. John and St. Croix.

Founded in 1987, Service Standard will retain its current name. Thada M. Davis, president of the company the past three years, is continuing as branch manager of the three-person office.

Besides issuing title insurance policies, Service Standard assists Realtors and lawyers with real estate closings.

## CE Credit Approval Sought by Institute

Submission of continuing education credit applications for ALTA Land Title Institute Course 1 to state regulators has begun after contacting more than a dozen jurisdictions regarding their particular requirements.

Work was reported near completion at this writing on the Course 1 final examination to be used in connection with this CE activity.

## LENNAR TITLE SERVICES, INC. Miami, Florida

Has acquired all the common stock  
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## Colorado Asset Development Corp. Phoenix Asset Development Corp.

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## NAMES IN THE NEWS

**G**ary L. Kermott has been promoted to chief operating officer of First American Title Insurance Company with offices in Santa Ana, CA, and retains the positions of executive vice president and Arizona regional vice president. He began working for the company as a law clerk in 1983, and advanced to assistant counsel after passing the bar two years later.

**Sherry Bowers - Walker** has been named vice president - Georgia state manager for the company, Atlanta, and **Dan Voorhies** Louisiana agency representative for the company, New Orleans.

**Larry Robins**, Chicago Title and Trust Company director of risk management, has been promoted to vice president, Chicago.

**William Massey**, Seattle, has been elected senior vice president, Chicago Title Insurance Company. New vice presidents at Chicago Title Insurance are **Bruce Berguson**, Pasadena, CA; **James DeWeese**, New York City; **Barton Lon-**



Kermott



Bowers-Walker



Voorhies



Robinson



Massey



Berguson



DeWeese



London


**don**, Chicago; **James Manguson**, Columbus, OH; **Joe Reinhardt**, Winter Park, FL; **Bruce Sozzi**, New York City; **Eric Swenson**, Pasadena, CA, and **John Walsh**, Indianapolis.

Named resident vice presidents by Chicago Title Insurance are **Joseph**

**Culella**, Albany, NY; **Don Randolph**, Seattle, and **Charles Vachout**, Chicago. New assistant vice presidents for the company are **Michael Dorbritz**, Pittsburgh; **William Norris**, Memphis, and **Patricia Oxford**, Hackensack, NJ. Named assistant vice presidents by Chicago

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Title's subsidiary, Ticor Title Insurance Company, are **David Johnson**, McHenry County, IL, and **Joseph Weihman**, Kane County, IL.

Additional Chicago Title promotions include **Iwona Boyle**, title officer, Wheaton, IL; **Robert Goodside**, Houston area manager; **Richard Miles**, National



Magnuson



Reinhardt



Sozzi



Swenson

Business Unit manager, New York; **Eduardo Perez**, Business Unit controller, West Palm Beach, FL, and **Albert Yorio**, litigation counsel, New York.

**Linda Naylor** and **Margaret Steller** have been elected vice presidents of Chicago Title's CastleLink Division, where **Dawn Svedberg** has become national account manager.



Walsh



Naylor



Steller



Svedberg

**Donald A. O'Neill** has been promoted to senior vice president and western regional manager, ATI Title Company.

**J. Philip Davis** has joined Investors



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Title Insurance Company, Chapel Hill, NC, as vice president - lender relations. **Bryan Coleman** and **Jennifer S. Andrews** have become members of the company's title attorney staff.



O'Neill



Davis



Coleman



Andrews

## Records Backlog Deadline in May

The Philadelphia Department of Records is facing a May 24 deadline for elimination of recording and indexing backlogs following an order to comply with state laws from the Court of Common Pleas of Philadelphia.

This court decision resulted from an action filed by the Pennsylvania Land Title Association, which sued after years of unsuccessful effort to persuade the city to voluntarily comply with the law. PLTA President Mark Korman, Conestoga Title Insurance Co., pointed out that PLTA did not seek monetary damages - - even though its members have suffered substantial losses as a result of the city's conduct - - but only sought to force the city to obey the law.

## Search Operation For First American

First American Title Insurance Company has announced the opening of First American Abstract & Title Services, In., in North Charleston, SC.

The new office operates as a full service abstract company to meet the searching needs of agents and customers in the Charleston tri-county area, and is structured to computerize the title information process, according to Windee A. Little, vice president of the company.



## New Record Set For Homeownership

For 1997, the nation's homeownership rate reached 65.7 percent, highest annual showing in the nation's history. The previous all-time annual high was 65.6 percent, reached in 1980.

ALTA has supported the drive to reach this Administration objective as a member of the National Partners in Homeownership, a voluntary group consisting of 65 public and private real estate entities. Since its creation in 1995, the partnership has been at work on implementation of 100 actions designed to make home buying more affordable, faster and easier. As part of its participation, ALTA is developing a uniform closing instruction letter drafted by the Association Closing Committee.

Activities to encourage home ownership also are being carried out by 132 local homeownership partnerships established to help carry out the national strategy. These include homeownership counseling sessions, homebuying fairs and help with locating homes.

According to the Department of Housing and Urban Development, the 1997 annual home ownership rate increased in all four regions of the country. From 1994 to 1997, the northeast increased from 61.5 percent to 62.4 percent, the midwest rose from 67.7 to 70.5 percent, the south went from 65.6 to 68 percent, and the west advanced from 59.4 to 59.6 percent.

## McAuliffe Is Eyes, Ears for Seniors

A *Washington Post* article describes the Montgomery County (MD) ombudsman program mandated as part of a nationwide activity funded under the Older Americans Act on behalf of some 1.6 million in nursing homes and numerous others in long-term care facilities. Part of the piece focuses on examples of dedicated volunteer ombudsmen across the county who monitor conditions, resolve problems and help protect a frail and vulnerable population of seniors.

Among the leading examples of dedicated volunteer service mentioned is that of Bill McAuliffe, retired ALTA executive vice president and an Honorary member of the Association.

The newspaper account traces Bill's ombudsmanship over the past six years at Mariner Health of Bethesda, a 140-resident facility. His regular visits to those at Mariner are mentioned, including stops with seniors who may have no other callers to break up a long day.

As the article points out, Bill is more

than a friendly face in the halls. For the county, he serves as eyes and ears to any problems that might arise for the residents. He has been there for them -- sometimes when no one else is.

For example, the article mentions a visit Bill made to residents of Mariner this past Christmas. Before sitting down for a holiday dinner with his own family.

## Louisiana Merger Forms New Entity

Two Louisiana firms -- Caddo Abstract & Title Company, Inc., and Louisiana Title Company -- have announced their merger to form United Title of Louisiana, Inc.

The new entity has six offices in the state -- three in Shreveport and one each in Bossier City, Monroe and Slidell.

Executive officers of United Title are George A. Hamilton, chairman of the board; William C. Peatross, chief executive officer, and Ken Wright, chief

operations officer.

Caddo Abstract was founded in 1907, and has served Caddo, Bossier, Webster, Bienville and DeSoto parishes.

Louisiana Title entered business in 1984 and has provided comprehensive title services statewide.

## Monroe Extends Into Two Counties

Monroe Title Insurance Corporation has announced its acquisition of Genesee County Abstract Company, Batavia, NY, to extend its market service into Genesee and Orleans counties in that state.

Genesee County Abstract has been in business in the Batavia and Albion area since its incorporation in 1906.

James B. Isaac, chief operating officer of the abstract concern, remains as vice president for the newly formed Monroe-Genesee County Title Agency, LLC, a Monroe subsidiary.

### LENNAR TITLE SERVICES, INC. Miami, Florida

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# Equitable Subrogation Unsettled

By Lawrence P. Heffernan, Esquire

In an article entitled, "Equitable Subrogation: Not-So-Secret-Defense Weapon," in the July-August, 1994, edition of *Title News*, I extolled the virtues of the doctrine of equitable subrogation which can be invoked to salvage the priority of a supposed first mortgage when the mortgagee discovers an intervening superior lien. Under the doctrine, which is based upon principles of equity and fairness, a mortgagee whose loan proceeds were used to pay off a prior mortgage will be subrogated or substituted into the position of that earlier mortgage and accorded priority over subsequent liens and creditors to the extent it satisfied the earlier debt.

In the article, I described equitable subrogation as a "widely favored" doctrine which had been applied to many different types of liens, even IRS tax liens. I also noted that the fact that the plaintiff mortgagee has a title insurance policy does not constitute a defense to the application of the doctrine. In June, 1997, the United States Court of Appeals for the Seventh Circuit dissented from that position when it handed down *First Federal Savings Bank of Wabash v. United States*, 118 F. 3d 532 (7th Cir. 1997), a decision which has serious ramifications for the title insurance industry.

The facts presented by *First Federal* are typical of equitable subrogation cases. The owners of the property refinanced

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*In the district court's eyes, equitable subrogation was nothing more than a means for the title insurer to avoid its contractual obligations.*

---

their first mortgage with First Federal Savings Bank of Wabash ("First Federal Savings Bank") but a tax lien which was recorded four years earlier was missed. According to the Seventh Circuit, the bank was unaware of the tax lien because its title insurer had failed to discover it.

When the IRS sought to foreclose the tax lien, First Federal Savings Bank brought a wrongful levy action against the United States, arguing that under Indiana law it was entitled to be equitably subrogated to the rights of the first mortgagee which it had paid off. The district court denied the bank's request for equitable subrogation, observing that the bank should have been on guard when the owners doubled their mortgage debt in the refinance and noting that the title insurance company had been negligent in failing to discover the tax lien. The district court dismissed the bank's complaint and denied its motion for reconsideration. First Federal Savings Bank appealed to the Seventh Circuit.

The Seventh Circuit's affirmation of the lower court's decision is not so unsettling as the rationale for that decision. In surveying Indiana law on equitable subrogation, the Seventh Circuit noted that the doctrine is to be applied liberally. It also noted, as had the United States Court of Appeals for the First Circuit in *Progressive Consumers Federal Credit Union v. United States*, 79 F. 3d 1228 (1st Cir. 1996), that the application of equitable subrogation would not leave the government in any worse position than it would have been prior to the discharge of the previous first mortgage. The Seventh Circuit focused,

however, on two factors in holding that the bank was not entitled to equitable subrogation. The Seventh Circuit characterized First Federal Savings Bank as a "sophisticated commercial lender." (Has anyone alive today seen an "unsophisticated" commercial lender other than George Bailey in *It's A Wonderful Life*?) The bank's sophistication had been dispositive in the District Court's view and significant in the eyes of the Seventh Circuit.

It is the Seventh Circuit's consideration of the second factor that is the most alarming aspect of the *First Federal* decision. The Seventh Circuit found it noteworthy that the bank's title insurer was paying the costs of the litigation. (I wonder how that fact was established during the argument of the appeal. While the bank's counsel was expounding on the doctrine of equitable subrogation and its supporting rationale, did the court just come right out and ask him who was paying his fees?) The Seventh Circuit concluded that the title insurer was the real party-in-interest and that equitable subrogation was not appropriate because it would relieve the title insurance company of its contractual obligation. Thus, First Federal Savings Bank was denied equitable relief because it had procured title insurance!

The United States Court of Appeals for the Ninth Circuit took a decidedly different view of the impact of title insurance on a claim for equitable subrogation in *Mort v. United States*, 886 F. 3d 890 (9th Cir. 1996). As was the case in *First Federal*, the intervening lien in *Mort* was an IRS lien. The Morts held a deed of trust which secured a loan whose proceeds had been used to satisfy and release a previous deed of trust. The Morts also had a title insurance policy but the title insurer had failed to discover the federal tax lien, just as the title insurer had in *First Federal*.

When the IRS seized the subject property the Morts filed a complaint in the United States District Court for the District of Nevada asking the court to restrain the IRS and declare that their trust deed interest was superior to the federal tax lien. The district court



The author is a partner in the law firm of Robinson & Cole, LLP, which has offices in Boston, New York City and the Connecticut cities of

Hartford, Stamford and Greenwich. He is a graduate of Boston College Law School, and has specialized in the litigation of title insurance claims and coverage matters for 14 years. An ALTA Associate member, he is a frequent speaker at seminars conducted by the Association, by regional/state title associations, and by bar groups.



ultimately dismissed the Morts complaint without prejudice, ruling that the Morts could not bring their claim for equitable subrogation without first pursuing their legal remedies against their title insurer.

The district court's decision in *Mort* sent shivers through title insurance claims counsel. In the district court's eyes, equitable subrogation was nothing more than a means for the title insurer to avoid its contractual obligations. This weighed heavily in the district court's balancing of the equities. The government was an innocent party. It had done nothing wrong. The IRS merely recorded its tax lien and secured first position when the prior deed of trust was extinguished. The title insurer was the villain in this piece. The title insurer's negligence had caused injury when it missed the intervening tax lien but now it sought to benefit from its own mistake at the expense of the innocent IRS.

On appeal, the Ninth Circuit held that the District Court had abused its discretion in ruling that the Morts must first seek relief from their title insurer before bringing an action for equitable subrogation against the IRS. The Ninth Circuit further held that the Morts were entitled to be equitably subrogated to the position of the previous deed of trust, thus awarding them priority over the IRS lien. The Ninth Circuit acknowledged the basic tenet of equity jurisprudence that courts should not exercise their equitable authority - - their authority to issue injunctions and enter declarations concerning the parties' relative rights and positions - - when the moving party has an adequate legal remedy, i.e., when the moving party can recover monetary damages from another.


The Ninth Circuit, however, pointed out the limit of that principle and the error in the lower court's decision. Equitable relief such as subrogation should not be denied unless the alternate legal remedy is available against the same person or entity from whom equitable relief is sought. In *Mort*, the plaintiffs sought equitable relief against the IRS. They asked the court to declare that their deed of trust was superior to the IRS lien. The Morts did not have any legal remedy against the IRS - - they could not recover monetary damages from the IRS because it had done nothing wrong to them - - so the court's consideration of equitable relief was appropriate. In the opinion of the Ninth Circuit, the fact that the Morts had a legal remedy against a third party, i.e. a title insurer, did not bar equitable relief against the IRS.

I submit that the Ninth Circuit's approach is the correct one, that the existence of title insurance should not bar the application of equitable subrogation or any other equitable remedy. The object of

equitable subrogation is the prevention of unjust enrichment. As I wrote three and a half years ago in *Title News*:

Why should a junior lienholder vault into first position because another party (the insured mortgagee) satisfied a first mortgage under the mistaken belief that it would then become the first mortgagee? Why should the junior lienholder enjoy such a windfall as a result of another's error or fraud?

I would pose a slightly different question in the context of the *First Federal* and *Mort* decisions. Why should a junior lienholder such as the IRS be allowed to move into first position and seize property just because another party obtained title insurance? Why should the IRS or other lienholder benefit from insurance for which it did not pay and to which it is not a party? The foundation of equitable subroga-

tion is fairness and prevention of unjust enrichment. The existence of title insurance does not change the fact that the intervening lienholder will be unjustly enriched unless the doctrine of equitable subrogation is applied. Hopefully, other federal and state courts will recognize this distinction and follow the lead of the United States Court of Appeal for the Ninth Circuit. 

## Regional Insurer In California Niche

Nation's Holding Group has announced that its subsidiary, United Title Insurance Company, has been licensed as a title insurance operation in California.

Henry J. Van Hirtum, chief executive officer for Nation's Holding, said United title fills a strategic niche as a California-based regional title insurer.

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Those desiring to place classified advertising in Marketplace, send ad 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, D.C. 20036. Responses to classified placements should be sent to same address unless otherwise specified in ad copy. Made-up examples are shown below to provide an idea of style.

### Sample: Help Wanted

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## 1998 CALENDAR OF MEETINGS

(For the latest updates on ALTA meeting information, visit the Association Home Page at <http://www.alta.org>)

### February

1-3 **ALTA Technology Forum & Expo**,  
Disney's Coronado Springs Resort,  
Orlando, FL

### March

16-18 **ALTA Mid-Year Convention/  
Leadership Conference**, Grand  
Hyatt Washington, Washington, DC

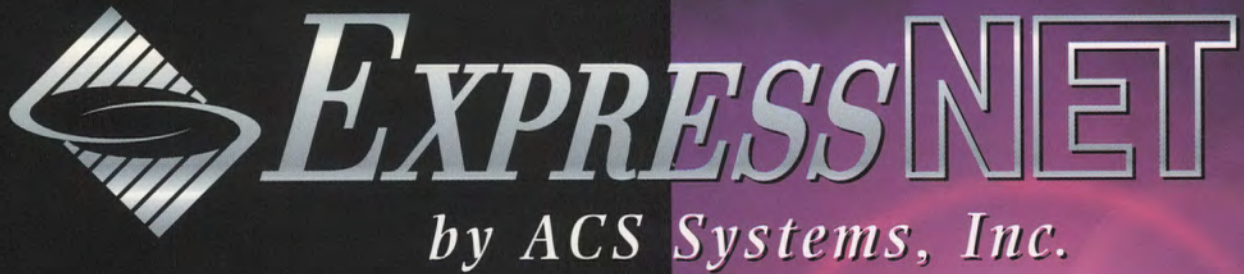
### October

14-17 **ALTA Annual Convention**,  
New York Marriott Marquis, New  
York City

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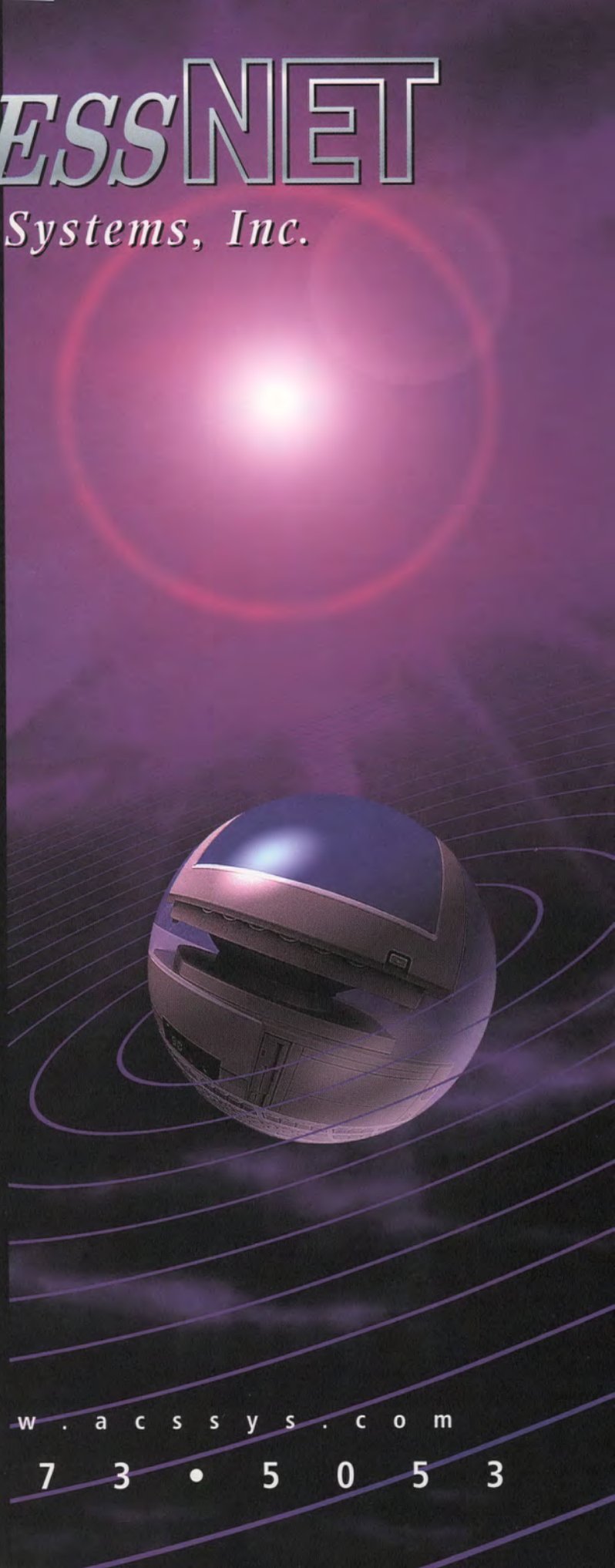
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