August 2013

TitleNews

Official Publication of the
American Land Title Association

Top Lawsuits Impacting the Land Title Industry

With Litigation Increasing, Here's a Look at Court Decisions Across the Country Every Title Professional Should Know About

American Land Title Association

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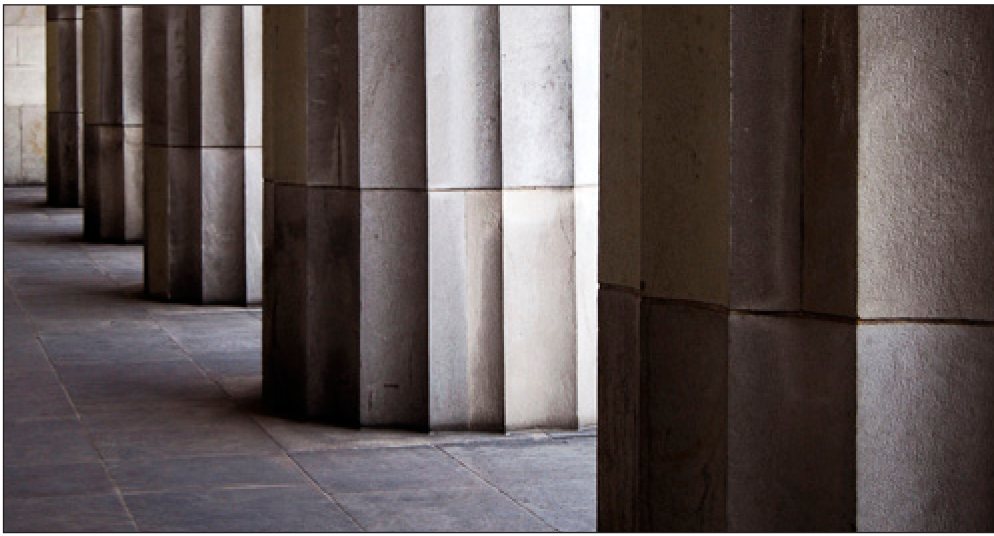

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BEST PRACTICES MEETINGS

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STATE MEETINGS

August 8 - 10 — Minnesota, *Brainerd, MN*

August 15 - 17 — Pacific Northwest (ID, MT, OR, UT, WA), *Portland, OR*

August 18 - 21 — New York, *Lake Placid, NY*

August 29 - 31 — Dixie Land (AL, GA, MS), *Orlando, FL*

September 5 - 7 — North Carolina, *Hot Springs, VA*

September 8 - 10 — Ohio, *Columbus, OH*

September 11 - 13 — Colorado, *Avon, CO*

September 12 - 13 — North Dakota, *Minot, ND*

September 16 - 17 — Indiana, *French Lick, IN*

September 18 - 20 — Arizona, *Tuscan, AZ*

September 18 - 20 — Nebraska, *Kearney, NE*

September 19 - 20 — Missouri, *Branson, MO*

December 4 - 6 — Louisiana, *New Orleans, LA*

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from the publisher's desk

Cordray Confirmed as ALTA Builds Out Best Practices Framework

One of the messages we frequently deliver to elected officials and regulators is that businesses want certainty regarding the laws and regulations they need to follow. Last month, we gained certainty when the U.S. Senate finally confirmed Richard Cordray as director of the Consumer Financial Protection Bureau (CFPB). The confirmation comes after a two-year political battle on Capitol Hill over changes to Dodd-Frank and the CFPB. Cordray's confirmation helps bring needed certainty to those affected by the Bureau's work. ALTA and its members have a good working relationship with Cordray and his staff. All of us at ALTA look forward to continued dialogue with Cordray and the Bureau on proposed new RESPA/TILA mortgage disclosures, as well as ALTA's "Title Insurance and Settlement Company Best Practices."

As we continue to navigate the regulatory environment, I am reminded of a recent quote from Cordray, who said: "The best and most immediate form of consumer protection is self-protection." While he may have been talking specifically about consumers at the time, I think this quote also applies to how our industry and the mortgage lending industry are looking at risk-management efforts. Our Best Practice standards show lenders, regulators and consumers that the land title industry is committed to business practices that facilitate safe and reliable real estate transactions. We also look to other areas of risk in the industry, such as the top lawsuits affecting the title industry this year. You can read about these lawsuits in our cover story starting on page 10. The summaries of cases impacting the industry are from members of ALTA's Title Counsel Committee. We are proud to share their work.

To continue our efforts to help the title industry demonstrate its commitment to following consumer financial laws and protecting consumers, ALTA has released the Best Practices Framework. The Framework is a complete package that a tile or settlement company can use to show its compliance with the ALTA Best Practices. In addition to the Best Practices itself, we have developed Assessment Procedures that can be used by title professionals to have an outside company review their practices to ensure they are compliant with the different pillars of the Best Practices. A Certification Package also is available and can be used by title professionals to warrant and attest to lenders that they have implemented ALTA's Best Practices. To help title professionals examine their adoption of Best Practices and prepare for a company assessment, ALTA has created a workbook that walks you through the questions you must answer and procedures you should have in place. Finally, we are providing tools to help members develop their own written procedures. We plan to provide greater detail of the Best Practices Framework in the September edition of *TitleNews*. In the meantime, you can go to *www.alta.org/bestpractices* to review the updated Best Practices and resources.

As you can see, ALTA is working hard to provide tools to help all title professionals compete in the marketplace. It has taken the work of many to get to where we are and I am thankful to all who have had a hand in the development of the ALTA Best Practices Framework.

- Michelle Korsmo, ALTA chief executive officer

Title Insurance Requirement Included in GSE Reform Bill

A bipartisan bill introduced June 25 would wind down Fannie Mae and Freddie Mac over five years and replace the Federal Housing Finance Agency with a new government agency, the Federal Mortgage Insurance Corporation (FMIC).

The legislation was authored by Sens. Bob Corker (R-TN) and Mark Warner (D-VA) and co-sponsored by Sens. Mike Johanns (R-NE), Jon Tester (D-MT), Dean Heller (R-NV), Heidi Heitkamp (D-ND), Jerry Moran (R-KS) and Kay Hagan (D-NC).

Under the proposed legislation, the FMIC would issue bond insurance on some well-capitalized institutions' mortgage bonds. The mortgages in these bonds would have to meet specific standards—similar to the GSEs' seller servicing guides—set by the FMIC. Issuers would pay for the insurance through a fee that would be held in reserve and only used once a large amount of private capital is exhausted in future downturns.

Of significance to the title insurance industry, the bill includes a list of requirements for eligible mortgages. Because of ALTA's advocacy efforts, this bill would require that mortgages backed by FMIC must be insured by a state-licensed title insurance company.

"We are grateful to Senators Corker and Warner for their recognition of the value of title insurance in their GSE reform bill introduced today," said Michelle Korsmo, ALTA's chief executive officer. "Ensuring that mortgages are insured by a licensed title insurance company is an important risk-management standard. We look forward to more thoughtful conversations with members of Congress as they address reforming Fannie Mae and Freddie Mac."

Also, an eligible mortgage would require a downpayment of at least 5 percent of the purchase price of the property securing the mortgage. Additionally, the bill would allow first-lien holders on a single-family mortgage to prevent a borrower from taking out a second lien. The legislation says if a borrower enters into a credit transaction that increases the combined loan-to-value ratio of the mortgage to 80 percent or more, the second-lien lender must obtain the approval of the first-lien holder.

The bill also calls for the creation of a new database that identifies and tracks second liens or any other subordinated liens issued on a mortgaged residential property. The database would notify the senior-lien holder of the existence of a second lien and track the performance of junior liens.

Early-bird Registration for Annual Convention Ends Sept. 13

ALTA's 2013 Annual Convention is only two months away. You can register online at *www.alta.org/meetings/annual/register* and save $50. Early-bird registration as well as the hotel cut-off date is Sept. 13.

Fourteen of the 21 professional development sessions—nine of which are dedicated to ALTA's Best Practices—will offer CE/CLE credit. While we have not finalized the list, CE will be available in at least 18 states and CLE will be available in at least 26 states.

Check back at *www.alta.org* or follow us on Twitter (*twitter.com/altaonline*) and Facebook (*facebook.com/altaonline*) for conference updates.

FASB Proposes New Accounting for Insurance Contracts

The Financial Accounting Standards Board (FASB) on June 27 issued for public comment a proposal that would change financial reporting of insurance contracts.

The proposal, which would fundamentally change the measurement of insurance liabilities and income as reflected in earnings statements, would apply to all contracts that meet the definition of an insurance contract, not just those written by insurance companies. It would also apply to title insurers in reinsurance contracts. Stakeholders are asked to review and provide comment on the proposal by Oct. 25. Changes would not go into effect until 2018.

The proposal would require accounting to be based on current assumptions of cash flows to fulfill the coverage on a quarterly basis, adjusted for the time value of money—even if the claims are not being paid out for years.

FASB is pushing the proposal in an effort to update the U.S. Generally Accepted Accounting Principles (GAAP) and make the accounting standards more comprehensive as well as forward-looking, or principles-based, and harmonize U.S. and international accounting standards.

One of the most significant changes is that the guidance in the proposal would require contracts that transfer significant insurance risk to be accounted for in a similar manner, regardless of the type of company issuing the contract. In other words, the contractual features of the contract—not the type of insurer—would determine whether it is insurance.

ALTA's Accounting Committee has followed the FASB's efforts to improve financial reporting of insurance contracts for several years. In 2010, ALTA sent a letter to FASB outlining differences between title and other lines of insurance. ALTA's Accounting Committee is examining the proposal to determine what impact, if any, it will have on the title insurance industry.

Fed Finalizes Rule on Basel III Bank Capital Requirements

The Federal Reserve approved a final rule July 2 implementing heightened global capital standards to help ensure banks maintain strong capital positions that will enable them to continue lending to creditworthy households and businesses even after unforeseen losses and during severe economic downturns.

The rule will implement in the United States the Basel III regulatory capital reforms from the Basel Committee on Banking Supervision and certain changes required by the Dodd-Frank Act.

The rule leaves out an increased risk-weighting provision in the earlier proposed version of the rule that would have made residential mortgages more costly to many borrowers. The proposed rule would have required banks to hold more capital on their books for the residential loans they make. But the final rule leaves the risk-weighting requirement for residential loans unchanged.

The phase-in period for larger institutions begins in January 2014, while the phase-in period for smaller, less complex banking organizations begins January 2015.

White House Delays Portion of Health Care Rule

In July, the Obama administration announced it postponed for one year the requirement that businesses cover their workers under the Affordable Care Act (ACA).

There will be no penalties on businesses that don't cover workers the first year. Small businesses, with fewer than 50 workers, were already exempt from that rule. The move does not affect the individual mandate—the requirement that most Americans get insurance. It doesn't delay the new marketplaces where people and small businesses can sign up for coverage starting in October.

ALTA has scheduled a webinar in October titled "What You Need to Know About the Affordable Health Care Act," which will be presented by Norma Shirk of Corporate Compliance Risk Advisor and Michael Curcio of Benefits Inc. Registration information will be available soon.

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American Land
Title Association

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Showing our Industry Pride

Whether you're a real estate attorney, abstractor, examiner, or agent there is one thing we all have in common: WE ARE TITLE. Show us YOUR industry work by submitting pictures and videos of your company in action. From title searches to home closings and staff outings to employee orientations, we want to see the work members of our industry do each day! Send your pictures and videos to *social@alta.org* and we will post them on Facebook and Twitter.

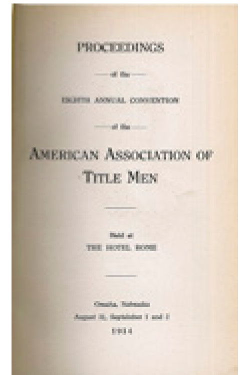
Increase Your LinkedIn Curb Appeal

Curb appeal matters when marketing yourself on LinkedIn. Like when marketing a property, users must keep their LinkedIn profile updated to keep colleagues and industry partners interested in their professional work. Ask your colleagues to schedule an "audit" of your LinkedIn account once a quarter to ensure your photo, job description, and summary are reflective of your current work portfolio. Maintaining your profile a few times a year will ensure you never lose that essential curb appeal.

If you have any questions about this tip, or have a tip of your own, contact ALTA's manager of external communications, Wayne Stanley at *wstanley@alta.org*.

Throwback Title – Industry Through the Years

The title industry has definitely changed through the years. In July ALTA posted photos over the years from industry events. One of the favorite pieces was noting that ALTA was once called the "American Association of Title Men."



PROCEEDINGS

of the

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of the

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Join ALTA's LinkedIn Group

Are you a member of ALTA's LinkedIn group? Join our group and network with more than 5,500 land professionals who are posting job openings, industry information, hiring tips and more each day. To join, simply search "American Land Title Association" and join the group.

Poll: How Do You Use ALTA News

In June and July, ALTA polled its membership, using Facebook and Title News Online, asking what device our members use to view communications and news from ALTA. The overwhelming response has been that many members continue to receive ALTA information from their computers. What do you use? Email us at *communications@alta.org*.

good.

better.

fntg.com/**best**practices

never, never rest.

To improve is to change!

Our commitment to our agents is tireless. That is why we have expended significant effort to not only educate our agency personnel about the regulations and requirements proposed by the CFPB, but also to develop strong affiliations with various service providers that can help our agents in meeting the ALTA Best Practices. Change is good, but it can be daunting. We can help you find the best answers to your questions.

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Top Lawsuits Impacting the Land Title Industry

With Litigation Increasing, Here's a Look at Court Decisions Across the Country Every Title Professional Should Know About

Prudent owners and managers of title operations spend time diligently reviewing production metrics to maximize profit. Many don't follow or consider the impact litigation and court decisions could have on their operations. Unfortunately for title professionals, this is an area of growing concern as litigation is on the rise. According to the "9th Annual Litigation Trends Survey" by Fulbright and Jaworski, businesses faced more lawsuits in 2012 than in 2011. The survey of 392 in-house attorneys found that most companies predict that an easing of litigation during 2013 is unlikely. >>

The majority of all respondents—92 percent (compared with 89 percent in last year's survey)—expect the number of legal disputes their companies will face to rise or stay the same in the next 12 months. The land title insurance industry isn't immune to this trend. To keep members informed of important decisions in courts across the country, members of ALTA's Title Counsel Committee provided a synopsis of 10 lawsuits they believe have significant implications on the land title industry. In addition, we've provided short summaries of six other cases that have relevance to the title industry.

From state supreme courts around the country and other various courts, the lawsuits dealt with a wide range of issues from access to public records to deciding if a policy loss is based on the value of the property when purchased or when title defect discovered. While a decision may not be in a title professional's particular market, the case law could be used as an example for other courts.

"With litigation continuing to increase, you never know what new wrinkle may surface," said Marjorie Bardwell, chair of ALTA's Title Counsel and director of underwriting services of Fidelity National Title Group. "Decisions in these cases could indicate a trend in the interpretation of these legal issues, so it's important all title professionals understand the implications. Agents and underwriters need to keep abreast of these outcomes to protect their operations against any liabilities. In a sense, the Title Counsel Committee provides ALTA members access to the kinds of information that a compliance officer or general counsel would consider."

In no particular order, the following are summaries of the facts from the lawsuits, the courts' decisions and an explanation of why each case is important to the land title industry.

Whitlock v. Stewart Title Guaranty Company

Supreme Court of South Carolina; Sept. 12, 2012, Filed; 732 S.E.2d 626; 2012 S.C. LEXIS 181

Facts: On Oct. 20, 2006, the plaintiff purchased a lot along the Intracoastal Waterway in Myrtle Beach, S.C. Since 1931, the land has been subject to a recorded spoilage easement allowing for the construction and maintenance of the Intracoastal Waterway. The existence of the easement was missed in the title search and therefore was not included as an exception to coverage in the title policy. In January 2010, the plaintiff sought a building permit from the county to construct a home on the property when she learned of the easement that prevented her from obtaining a building permit. The plaintiff filed an action seeking damages caused by the existence of the easement. She contended that her damages, as measured by the diminution in property value, should be measured as of the date the property was purchased. The defendant argued the value of any loss should be measured as of the date of the discovery of the title defect.

Holding: The South Carolina Supreme Court held that the actual loss suffered by the insured had to be measured by the diminution in value of the land due to the title defect as of the date of the purchase of the land. The Supreme Court reached this conclusion because it reasoned that:

1. The title insurance contract did not unambiguously identify a date for measuring the diminution in value of the insured property or otherwise unambiguously provide a method of valuation as a result of the title defect, and
2. Under principles of construction of insurance contracts, this ambiguity had to be construed in favor of the insured and against the insurer.

Importance to the Title Industry: The holding in this case is contrary to the rule followed in the majority of states that values actual loss under an owner's title insurance policy as of the date of discovery of the title defect. It is also contrary to customary claims resolution practices. While it is possible that the consequences of the case are limited to South Carolina, prudent title insurance agents should confirm their familiarity with their title insurer's guidelines and any change in requirements and exceptions as a result.

Edward D. Hellewell is senior vice president, senior underwriting counsel for Stewart Title Guaranty and can be emailed at hellewe@stewart.com.

Title Counsel Committee

The purpose and scope of work of ALTA's Title Counsel Committee is to promote the exchange of information within the ALTA membership about current developments in the law affecting title insurance and conveyancing.

If you are interested in joining Title Counsel or submitting a case summary relevant to the title insurance industry, please contact Steve Gottheim, ALTA's regulatory and legislative counsel, at sgottheim@alta.org.

GMAC Mortgage, LLC v. First American Title Insurance Company

(2013) 985 N.E.2d 823

Facts: In 2001, Thomas Moore refinanced real property through a predecessor to GMAC, and GMAC obtained a lender's title insurance policy from First American. Thomas also executed a deed conveying the property from himself to himself and his wife, Elizabeth Moore, as tenants in the entirety. The parties intended for the mortgage to be recorded before the deed that created the tenancy by the entirety was recorded, however, the deed was mistakenly recorded first. Thomas passed away and the property was vested solely in Elizabeth. GMAC tendered a claim to First American, and First American elected to initiate litigation to cure the title defect. Elizabeth filed various counterclaims against GMAC.

Holding: In holding that the "in for one, in for all" rule is inapplicable to the title insurance context, and that a title insurer generally does not have a duty to defend the insured against all reasonably foreseeable counterclaims, the Massachusetts Supreme Court emphasized that title insurance is fundamentally different from general liability insurance. Thus, "A title insurer does not have a duty to defend the insured in the entire lawsuit where one claim is within the scope of the title insurance coverage and other claims are not. The title insurer is only obliged to defend the insured on the covered claims. With the possible exception of compulsory counterclaims, a title insurer that initiates litigation similarly does not have a duty to defend the insured against all reasonably foreseeable counterclaims."

Importance to the Title Industry: This case is significant and helpful to the industry when evaluating tendered claims in Massachusetts that involve covered and non-covered claims, and when evaluating whether to prosecute an action with the possibility of reasonably foreseeable claims.

Ella Gower is an attorney with the law firm Miller Starr Regalia and can be emailed at ella.gower@msrlegal.com.

The decision in 100 Investment Limited Partnership adds Maryland to the list of states that allow action against a title company for a negligent search.

100 Investment Limited Partnership v. Columbia Town Center Title Company

430 Md. 197 (2013)

Facts: Title companies were engaged to do title work and issue title policies to a partnership seeking to purchase a parcel of land that had been sold previously by the sellers. The prior deed was properly recorded in the county land records. Title companies failed to discover the prior deed and issued policies in conjunction with the partnership's initial purchase and a subsequent transaction involving a transfer of ownership interests in the partnership. Before discovering the prior deed, the partnership executed a special warranty deed conveying the disputed parcel, but only warranting that it did not create any defect in title. It later paid the fair market value of the parcel to cure title defects in the prior conveyances. In a related lawsuit in federal court, the partnership was denied recovery under the title policies for its losses subsequent to the special warranty deed. The complaint in this lawsuit alleged that the title companies were negligent in failing to discover and report the prior conveyance and claimed that their title insurers were vicariously liable for their agents' negligence.

Holding: The Court of Appeals of Maryland held that the title companies owed a duty of care to their customers in conducting the title search and issuing title commitments and found the title companies liable in tort for the damages sustained by the partnership. The opinion recognized that an insured relies on the title information provided in a title commitment. The Court referred to the exculpatory policy language that limited the insurer's liability for a loss to the policy provisions, whether or not a claim is based on negligence, and refused to hold the title insurers

vicariously liable for the negligence of the title companies.

Importance to the Title Industry: This decision adds Maryland to the list of states that allow an action against a title company for a negligent title search. The decision is consistent with the principle stated in Section 552 of the Restatement of Torts 2d, cited in the opinion, that one supplying false information for the guidance of others in their business transactions is liable for losses caused by his failure to exercise reasonable care or competence. It is important that title companies review all contracts and indemnity agreements with abstractors. They should limit their liability by requiring written contracts and only using competent abstractors who carry sufficient errors and omissions coverage. Title companies should also review their own errors and omissions policies to ensure that they have adequate coverage to protect against liability for negligent title searches.

Stephen Sklamba is vice president, state underwriting counsel for WFG National Title Insurance Co. and can be emailed at ssklamba@wfgnationaltitle.com.

Mattson Ridge, LLC v. Clear Rock Title, LLP

824 N.W.2d 622 (2012)

Facts: Mattson Ridge had purchased fee insurance from Ticor Title Insurance Co. When Mattson Ridge tried to sell, the insured description was found to be "vague," rendering the title unmarketable (see sidebar "The Lurking Legacy of Mattson Ridge."). Ticor refused coverage under the policy. Mattson Ridge hired a surveyor and commenced a registration proceeding, resolving the defective description. In the interim, the market crashed and the original sale could not be completed. Mattson Ridge sued Ticor for damages in excess of the policy limit resulting from its failure to defend and indemnify under the policy.

Holding: The Supreme Court of Minnesota determined that Mattson Ridge was entitled to consequential damages measured by the diminution in market valued caused by the defect. The court also determined that the consequential damages were limited to the face amount of the policy. It recognized that an "unreasonably delayed payment of an undisputed amount of benefits"

The Lurking Legacy of Mattson Ridge

The damages engendered by the dramatic market reversal in Mattson Ridge sent shock waves through the title insurance industry. But there is a more sinister rumbling percolating through the opinion that may foretell broader distress: the legacy description.

Before the courts in Mattson Ridge could even reach the issue of damages, they had to determine whether the policy had been breached. The threshold question was whether the description was "vague" enough to render the title unmarketable.

The description in Mattson Ridge contained a substantial amount of detail, but also included a reference to "the county road at or near Charles Magnuson's place in Sunrise City ...." The insured brought in several experts who testified that this reference "rendered the call ambiguous because it was unclear who Charles Magnuson was, where his 'place' was located, and whether he would remain at that place." Ticor did not present any expert evidence defending the adequacy of the property's legal description. The opinion does not tell us why Ticor adopted this approach.

While the opinion does not expressly state, it appears that the description was a "legacy description," i.e., one that had been used for such a long time that the internal references could not be readily ascertained from present day conditions. (In New York, where I practice, it is not unheard of to encounter colonial-era references in descriptions.) While challenging, legacy descriptions can usually be determined through diligent research using land records and other historical resources. This is the approach currently used by the majority of states (see 23 Am. Jur. 2d, Deeds, §45).

Many attorneys, title agents and underwriters dislike changing a description that has been undisputed for decades. "If it ain't broke, don't fix it" has stood the test of time in most jurisdictions.

Let's hope that Mattson Ridge is only the result of a strategic miscalculation. If it is the beginning of a trend amongst courts to impose liability merely because a longstanding description presents difficulty in elucidation, title underwriters will need to ascertain and address this risk. For existing policies that include legacy descriptions, defense costs will increase as insurers will be forced to decipher their latent mysteries.

—Lance Pomerantz

that was a "natural and proximate" cause of lost profits could justify an award of damages in excess of the policy limit, but that such was not the case here. In addition, Mattson Ridge was awarded its out-of-pocket expenses incurred to register title to the property.

Importance to the Title Industry: Each claim must be evaluated on its own merits. Unreasonable coverage denials or payment delays might result in unanticipated damage awards. In Mattson Ridge, the insurer could have avoided more than 99 percent of its ultimate liability by curing pursuant to Condition 9 of the policy, rather than denying coverage altogether.

Lance Pomerantz is a New York sole practitioner who focuses exclusively on land title issues and can be emailed at lance@landtitlelaw.com.

Bank of America v. Superior Court

(2012) 212 Cal.App.4th 1076.

Facts: This case addressed the scope of the attorney-client privilege with respect to communications between the insured's retained counsel, the insured and the insurer. Fidelity was the insurer under a lender's policy issued to Bank of America (BofA). Fidelity retained a law firm to represent BofA and to prosecute an equitable subrogation action against Pacific City Bank (PCB). PCB served subpoenas on Fidelity requesting the production of documents, including communications between the GKCJ law firm and Fidelity. BofA asserted that those communications were protected under the attorney-client privilege and/or the attorney work product doctrine.

Holding: When an insurer retains counsel to defend its insured, a tripartite relationship arises among the insurer, the insured and counsel. No formal retainer agreement is required; the retention itself creates the tripartite attorney-client relationship. As a consequence, confidential communications between either the insurer or the insured and the retained counsel are protected by the attorney-client privilege. Both the insurer and insured are holders of the privilege. The retained counsel's work product does not lose its protection when it is transmitted to the insurer. Also, the insurer's reservation of rights does not destroy the tripartite attorney-client relationship.

Importance to the Title Industry: In California, questions previously existed regarding whether communications between the insurer and the retained counsel were protected under the attorney-client privilege. This case confirmed the existence of a tripartite attorney-client relationship that is formed when the insurer retains counsel on behalf of its insured. Because communications (relating to the litigation) between a title insurer and counsel retained to represent the insured are protected under the attorney-client privilege, a title insurer may more freely participate in the defense of the insured.

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McBurney v. Young

569 U. S. ____(2013)

Facts: Parties sued under the Virginia's Freedom of Information Act (FOIA) for, among other things, real estate tax information. The FOIA provided that "public records shall be open to inspection and copying by any citizens of the Commonwealth," The plaintiffs were not citizens of Virginia. When the information was not forthcoming, they filed this action, claiming that their constitutional rights were violated by the limitation contained within the FOIA. Under the Privileges and Immunities Clause, "[t]he citizens of each State [are] entitled to all Privileges and Immunities of Citizens in the several States." There are district court decisions that are in conflict on this issue.

Holding: The Supreme Court held that the FOIA was not enacted to provide an economic edge to the citizens of Virginia, but rather to have transparent government to those who are governed by that state, and the economic impact, if any, is incidental to its purpose.

Importance to the Title Industry: Access to "public" records is at the very heart of our business. Any limitation that a state can impose to hinder that access will affect some if not all segments of our industry.

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Levy Gardens Partners 2007, L.P. v. Commonwealth Land Title Ins. Co.

Case No. 12-30010 (5th Cir. Jan. 31, 2013) (affirming judgment)

Facts: Levy Gardens purchased a title insurance policy and a zoning endorsement insuring that, at the date of the policy, the property was zoned to allow multi-family residential. The City of New Orleans initially confirmed the property was zoned to allow multi-family residential pursuant to a 1995

comprehensive zoning ordinance (1995 CZO), but, after a state neighborhood commission brought two actions, the state court ultimately held that the property was subject to a 1985 ordinance that precluded a multi-family residential use and that the 1995 CZO had not overridden the 1985 ordinance. The state court then issued an injunction precluding Levy Gardens' development of the property. Levy Gardens gave notice to Commonwealth, and, after a failed appeal, again notified Commonwealth and then filed an action. The district court granted Levy Gardens' motion for summary judgment finding coverage under the policy and conducted a bench trial on damages. The district court entered a judgment ruling, among other things, that Levy Gardens was entitled to diminution in value per section 8 of the policy and that the meaning of loss or damage in section 8 is clear and means loss in value of the title to the property. The parties cross-appealed.

Holding: On appeal, Levy Gardens claimed all of its losses, including the cost of preparing the property for development, were recoverable under the policy. Commonwealth maintained that section limited liability to the diminution in value to the title to the property. Levy Gardens argued Commonwealth waived section 8 by failing to raise it as an affirmative defense and, alternatively, that the zoning endorsement provided stand-alone coverage not subject to section of the policy. The 5th Circuit held that

i) *the policy insured against only the diminution in value of title to the property pursuant to section of the policy*

ii) *the zoning endorsement did not provide standalone coverage and any coverage afforded pursuant to the zoning endorsement was subject to the limiting provisions of section 8 of policy,*

iii) *section 8 is a limitation on liability and not an affirmative defense to coverage, like an exclusion, and*

iv) *Commonwealth's failure to raise section 8 as an affirmative defense did not waive its application.*

Importance to the Title Industry: Levy Gardens is a significant decision because title insurance insures title to property and not an insured's proposed use of the property. This is precisely why the limitation to liability is contained in the policy. Premiums are calculated based on matters of record title, not the risks associated with development of a property and title insurers should not be responsible for the costs associated with a development or the loss of a proposed use.

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Levy Gardens is a significant decision because title insurance insures title to property, not an insured's proposed use of the property.

Commonwealth Land Title Insurance Company, Plaintiff and Counter-Defendant, v. OMG Americas, Inc., Defendant and Counter-claimant

Case No. 2:10-CV-1027-TC. U.S. District Court for the District of Utah, Central Division. 2012 U.S. Dist. LEXIS 147538. 10/12/2012, Decided. 10/12/2012, Filed.

Facts: This case involves the Bureau of Indian Affairs (BIA) declaring in 2000 that a lease entered into in 1995 between a mining company (OMG) and a tribe (Shivwits Paiute Band) was void ab initio because the BIA field representative who signed the lease indicating BIA approval did not have the necessary authority to approve the lease. The lease was for 25 years with a 25-year renewal option. The BIA field representative had only 10-year approval authority with respect to business leases. Commonwealth Land Title Insurance Co. (CLTIC) insured the leasehold interest for $3 million. OMG asserted that it invested more than $31 million in upgrading the facility in reliance on its leasehold interest in the property. The tribe was willing to pursue a new long-term lease if OMG paid $250,000 and posted a $10 million reclamation

bond. The original annual rent ranged from $31,000 to $42,000. The BIA and the tribe proposed new annual rents under a new lease ranging between $143,000 and $215,000. Eventually OMG abandoned the project and vacated the land. The case was bifurcated into a liability phase and a damages phase.

Holding: OMG's motion for summary judgment against CLTIC on the liability phase was granted in this proceeding. The court held that the policy continued to provide coverage to an insured that refused to execute a new lease after the original lease was voided despite the fact that the insured voluntarily abandoned the leasehold and no longer retained an estate or interest in the land.

Importance to the Title Industry: As economic and housing development efforts have increased on land owned by Native American tribes, so has the participation of commercial lenders and the requirement for title insurance. This case illustrates the risks involved in underwriting these transactions. When BIA officials sign an approval of a lease, mortgage or other document, the typical BIA approval boilerplate language refers to a delegation of authority pursuant to internal Interior Department delegation memos. If BIA approval of a document or transaction is required, the title insurer and title insurance agent must confirm that the BIA has expressly approved the requisite documents, and that the BIA representative has the actual, current authority to approve the transaction.

The ALTA Native American Lands Committee has contacted the Interior Department in an effort to develop a better understanding of the delegation process and how evidence

Four Additional Cases Garnering Attention

Here's a Quick Review of Additional Cases Impacting the Land Title Industry

Cox v. Commonwealth, 2013 ME 8, 59 A.3d 1280

Significance: In holding that the insurer had a duty to defend because the ambiguous nature of the policy concerning the references to easements and partial releases did not clearly exclude coverage for claims involving the subject easement, the court's decision increases potential liability for an insurer and highlights the necessity to draft clear and precise language as to when the duty to defend will arise.

In re Roberts-Dude, 484 B.R. 891 (Bankr. S.D. Fla. 2012)

Significance: In holding that a title insurer's expertise should have raised suspicions of the validity of a debtor's affidavit stating that there were no existing liens and that reliance, therefore, on the owner's affidavit was not justifiable, the court's decision puts a burden on title insurers to make inquiries regarding the validity of title from an industry professional's perspective. The insurer cannot justify relying simply on an owner's affidavit when, given their industry knowledge, substantial questions regarding authenticity should have been raised.

Fifth Third Mortgage Co. v. Chicago Title Ins. Co., 692 F.3d 507 (6th Cir. 2012).

Significance: An insured lender's alleged faulty, negligent or otherwise inadequate loan underwriting practices do not qualify as "other matters" under the exclusion terms of an insurance policy. The insurer, therefore, should investigate a lender's underwriting practices prior to insuring a loan and take whatever precautions necessary to mitigate the risks that may stem from imprudent lending practices.

Bullock v. BankChampaign, N.A., 133 S. Ct. 1754 (2013)

Significance: The Supreme Court's decision to recognize that defalcation of a fiduciary's duty will render a debt exempt from discharge will allow a greater chance of recoupment of losses from parties that mishandle escrow funds that are in their care.

— Summaries provided by Zachary Davis, an intern for Fidelity National Title Group and third-year law student from Emory University School of Law.

of delegation and re-delegation can be verified. Until a response is received, title insurance agents should consult with their title insurer when the chain of title includes documents approved by BIA officials or when BIA approval is required.

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Bedrock Financial, Inc. v. United States of America

Case No. 1:10-CV-01055-MJS (U.S.D.C., E.D. Cal., November 11, 2012)

Facts: First American insured a refinance mortgage. In so doing, First American found but failed to omit a previously recorded IRS lien. The insured lender brought an action seeking to have the IRS lien declared equitably subordinate to the mortgage.

The IRS opposed subrogation because First American, which would ultimately bear the lender's loss, instigated the litigation and was funding, controlling and directing it. The argument maintained that the relationship between the insurer and insured was sufficiently linked as to be characterized as "collusive" and render equitable relief inappropriate. The court noted that the lender's involvement in the litigation was "dormant except as necessary to pursue this action."

Holding: Equitable subrogation was granted. While noting authority to the contrary, the court relied on a Ninth Circuit Bankruptcy Appellate Panel case in deciding that "[c] ollusion requires an agreement to defraud or obtain a result contrary to law. Here ... the parties seek only to enforce their contractual rights and obligations and obtain an equitable remedy authorized by law."

Importance to the Title Industry: The ability to prosecute actions in defense of an insured is a cornerstone of title insurance coverage. Indeed, it is an integral part of most insurance regimes. This decision recognizes that the incidental benefit that may accrue to the insurer is insufficient to warrant a finding of "collusion" when the insurer is acting legally, within the scope of its policy.

Caveat: There is a split among the circuits that have considered this

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issue. Construing Indiana law, the Seventh Circuit has determined that the title insurer was the real party in interest. (*First Federal Savings Bank of Wabash v. U.S.*, 118 F. 3d 532 (7th Cir., 1997)). Ostensibly basing its determination on the fact that the insurer was paying the costs of the litigation, the Court relied heavily on an Indiana Court of Appeals opinion that found it inequitable to apply subrogation when so doing would relieve an insurer of the consequences of its mistake.

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Chassen v. Fidelity National Financial, Inc.

Case No. 09-291 (D.N.J. Jan. 10, 2012) (order granting motion to compel arbitration); Chassen v. Fidelity National Financial, Inc., Case No. 09-291 (D.N.J. Sept. 18, 2012) (order on motion for rehearing)

Facts: The plaintiffs brought a putative class action against a group of title insurers for breach of closing protection letters. The plaintiffs alleged that the closing agent collected more than was required to actually record documents in connection with the closings and retained and misappropriated the additional money. The closing protection letters limited liability to the conditions and stipulations in the title insurance policies to be issued in connection with the transactions. The polices all contained arbitration provisions. During the litigation, the U.S. Supreme Court decided AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011), deciding that the Federal Arbitration Act preempted California's rule on the unconscionability of class arbitration waivers in consumer contracts. Defendants then notified the plaintiffs of their intent to arbitrate and filed a motion to compel arbitration and stay the litigation. The plaintiffs argued that the defendants had waived their right to seek arbitration by litigating the case. The defendants argued that seeking arbitration would have been futile prior to the decision in *Concepcion*.

Holding: The district court found the defendant's arguments compelling and granted the motion to stay and to compel individual arbitration of each claim. On rehearing, however, the District Court retreated from its original Order. Noting that the arbitrator is in a better position than the District Court to initially decide the facts and law as to whether the parties had consented to class arbitration, subject to the District Court's review, the District Court held that it had erred in compelling individual arbitration.

Importance to the Title Industry: Chassen's importance is two-fold. First, it is significant because it recognizes the intimate interconnection between the closing protection letter and the policy. Second, it holds that arbitration is an option in the closing protection letter context and may be so even in class actions.

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U.S. Supreme Court Ruling on DOMA Impacts Property Rights Involving Same-Sex Couples

Many Unanswered Questions Remain as Some States Permit Same-Sex Marriages While Others Adhere to Traditional Definition of Marriage

BY HARVEY S. JACOBS

The U.S. Supreme Court issued its 5-4 opinion in the case of United States v. Windsor on June 26, 2013. The opinion found that section 3 of the Defense of Marriage Act (DOMA) was unconstitutional. Section 3 defined the word "marriage" to mean "only a legal union between one man and one woman as husband and wife, and defined the word "spouse" to a person of the opposite sex who is a husband or a wife.

With this ruling, the high court changed the coverage of more than 1,000 federal laws and impacted several thousand regulations that use marital status to confer, withhold or affect a person's federal rights. While the court's majority opinion does not actually come out and say that the decision is based on a federalism argument, it hints at it. The court essentially has now re-affirmed that it is the states that have the power to continue to be the final word on family relations. What this means is that there will still be plenty of unanswered questions surrounding real property rights within same-sex marriages so long as some states permit and recognize same-sex marriages while others adhere to the traditional definition of marriage.

Twelve states (Maryland, Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, Minnesota, Rhode Island, Delaware, Washington, Maine and New York) and the District of Columbia have legalized same-sex marriages. While those laws may have settled the big question on who can get married, they raise a number of practical real estate questions.

One question arises from the manner in which co-owners hold title to their property. Traditionally, co-owners can own their property as tenants in common or as joint tenants with rights of survivorship. Married couples have the additional advantage of being able to own real property as tenants by the entirety. Now, same-sex couples can own real property as tenants by the entirety. What does this mean and why is it relevant?

Tenants in common each share their percentage interest in the real property. Business partners typically use tenancy in common as their preferred way to hold title. Each co-owner can sell and/or borrow against his percentage interest in the property. One main attribute is that each co-owner can bequeath his interest in his will. Each co-owner's creditors can attach that co-owner's percentage interest in the real property to satisfy claims.

Joint tenants with rights of survivorship are each deemed to own their pro-rata interest in the real property. If there are two joint tenants, then each is deemed to own a 50 percent interest. A joint tenant cannot sell or borrow against his interest. Any attempt to do so will convert the joint tenancy into a tenancy in common. A joint tenant also cannot bequeath his interest. By definition, when one joint tenant dies, his interest automatically gets transferred to the surviving joint tenant. Many same-sex couples use the joint tenancy to ensure that upon

Joint Ownership Categories of Real Estate in the U.S.

Changes in state laws defining and recognizing marriages will require title agents to ask additional questions prior to closing. The industry may be able to address this issue on conveyance documents in the form of "A and B, married to one another." Title Insurers will need to further advise their agents about the required form of documentation of marital status.

Title agents closing transactions involving same-sex couples may be unsure if they need to obtain the not-in-title, same-sex spouse's signature, according to Michael Holden of North American Title Insurance Co. As an example, consider a same-sex couple purchasing property in a state categorized as a dower state. If the not-in-title, same-sex spouse does not sign the deed or mortgage, could that leave a dower interest which may come back to cause a claim down the road if the in-title spouse dies? The closing agent should have the in-title spouse sign the warranty deed identifying him or her as "grantor." The closing agent should then have the same-sex spouse sign a quit claim deed to the buyer to prevent any future claim. "Our job as the title company is to prevent claims, and gaining the signature of a person who could cause a problem down the road is always the best step when insuring titles," Holden said.

Here's a look at the different joint ownership categories of real estate in the United States:

- Tenancy by the Entirety States: This type of joint ownership is reserved for married couples. A tenancy by the entirety has two primary distinctions. First, ownership is treated as a right of survivorship ownership. If one owner of a joint tenancy dies while still married to the tenant entirety spouse, the surviving spouse receives the property without probate or other operation of estate law. Second, the ownership of the married couple is treated as a whole, not two individuals. This means that if a judgment lien or other attack on title is made claiming through only one spouse, it cannot attach to title held by tenancy by the entirety unless it is against both spouses. Most states require such a tenancy be created by deed and expressly state that it is the intent to create a tenancy by the entirety. For a mortgage or sale to be valid, the signature of both spouses must be obtained to transfer or encumber all of the real estate interest.

- Dower States (Also called Marital Interest): The idea of dower comes from the term "dowry" or the property brought and given to the husband from the bride's family on the event of marriage. In a dower state, when a spouse dies owning property in his/her name only, the surviving spouse has an interest, defined by state law, which supersedes probate. Depending on the state, this can be anywhere from a life estate to full fee simple estate. In the case of creating a mortgage or sale, all spouses in a dower state must sign to prevent the rise of a surviving spouse's dower interest after death of the in-title spouse, which can cancel out or take priority over such sale or mortgage. In other words, if a surviving spouse has not signed the mortgage, upon death of the mortgagor, the mortgage may not be enforceable as to the real estate.

- Community Property States: Laws vary among the states that recognize community property, however, the basic idea is that a husband and wife each acquire a one-half interest in what is labeled community property. A determining factor in the classification of a particular asset as community property is the time of acquisition. Community property is ordinarily defined as everything the couple owns that is acquired during the marriage with the exception of separate property owned by either of them individually. To determine if a spouse must join any mortgage or deed in a community property state, you must first ascertain if the property was acquired during the marriage, or if it was acquired by one spouse prior to the marriage. If acquired during the marriage, both spouses must sign. If acquired before the marriage, it is possible that only the spouse in title may sign. (Consult your underwriter prior to making this determination.)

- Simple Tenancy States: Simple tenancy does not afford any protection to married couples in the ownership of real estate. Judgments can attach to the ownership of one spouse in any jointly held property. Married couples must use a joint tenancy with the right of survivorship to allow the other spouse to inherit the property in the event of death of one of the spouses. A person can hold title to real estate separate from his or her spouse and does not need the non-title spouse to sign any mortgage or deed of conveyance. One exception is a state may have a rule for the primary residence of the married couple. Some states call this a "Homestead" Rule. This exception would require, even in a simple tenancy state, that the spouse sign any mortgage or deed for the couple's primary residence, even if the title was only in the name of one spouse.

death, their partner becomes sole owner. However, one main drawback is that property held in a joint tenancy is vulnerable to the claims against all other joint tenants. So, for example, if one joint tenant is held liable for a car accident, and has a judgment entered against him or her, that judgment is a lien and will attach to the interest in any real property he or she owns.

The strongest way to hold title, available only to married couples, is the tenancy by the entirety. Like the joint tenancy, the tenancy by the entirety has the attribute of survivorship. This means that when one tenant dies, the surviving tenant automatically becomes the sole owner. The reason this is considered to be the strongest form of ownership is that the claims of one tenant's creditors do not attach to the real property owned by the tenancy by the entirety. The one exception is if the creditor is the Internal Revenue Service.

"Same-sex couples who now own real property as joint tenants, and who marry, should re-title their property as tenants by the entirety," said Lawrence S. Jacobs, an attorney at the law firm McMillan Metro, P.C., which specializes in estate planning for same-sex couples.

Re-titling is a relatively simple matter. All that is involved is to prepare and record a new deed. Deeds to modify the tenancy are exempt from transfer and recordation taxes in all three local jurisdictions.

Roy L. Kaufmann, an attorney at Jackson & Campbell in Washington, agrees. "Why not enjoy the protections against creditors that the tenancy by the entirety provides?" he said. Kaufmann added that "unless estate planning dictates otherwise, tenants in common should also consider re-titling their property into a tenancy by the entirety."

Until all states recognize same-sex marriages, transfer and recordation taxes between spouses will need to be factored into any re-titling decision.

Since the *Windsor* case was an estate-tax case, it resolves the issues of the disparate treatment of same-sex couples for the purposes of state and federal estate and gift taxes. Since many other provisions of the federal estate and gift tax statutes now cannot apply to the traditional definition of marriage and spouse, this decision will have significant impact on same-sex couple estate plans as well. It would appear that since federal estate and gift tax laws can no longer use the traditional definition of a marriage or spouse, they will look to each state's definition for guidance.

Additional questions arise when same-sex couples residing in Maryland or the District own property in a state that has not yet legalized same-sex marriage: Can or should that couple re-title their second home or investment property? What happens if one partner dies? Which state's inheritance laws apply?

The answers depend on the state in which the property is located. For example, in states that currently recognize civil unions, but not gay marriages, same-sex couples can hold real property as tenants by the entirety. In order to re-title property already owned, the law requires that all lenders consent to such change. Jacobs said his clients "have not experienced any problems obtaining lender consents in Delaware." Jacobs added, however, that in Virginia—which does not recognize same-sex marriages, civil unions or domestic partnerships—"the best you can do is a joint tenancy with rights of survivorship."

At the federal level, the Garn-St. Germain Act provides that real property transfers between spouses are exempt from the "due-on-sale" clauses contained in virtually all mortgages. It appears that when a same-sex couple resides in a state where gay marriage is recognized, transfers between those partners will also be exempt. But what about when that same couple seeks to transfer property located in a state that does not recognize their marriage? Will they be subject to the onerous due-on-sale clause that permits a lender to declare the loan to be in default and accelerate the entire unpaid principal balance? The recent Windsor decision would appear to leave this as an open question. The penultimate sentence states that "This opinion and its holding are confined to those lawful marriages," such as marriages that are already lawful in the 12 states accepting same sex marriages as valid.

These issues are far from clear. As with most radically new laws, it will take many years for the regulations and subsequent court cases to clarify just how the new laws will apply to the various real-world scenarios impacted. Regulators and jurists should use this opportunity to re-think whether marital status should be a factor at all when determining federal and or state private property rights. If all persons were treated equally under both state and federal laws regardless of their sex or marital status, cases like Windsor would never be necessary. ■

Harvey S. Jacobs is a real estate lawyer with Jacobs & Associates. He is an active real estate investor, developer, landlord settlement attorney and Realtor. This column is not legal advice and should not be acted upon without obtaining legal counsel. Jacobs can be reached at *harvey@harveyjacobs.com*.

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With Foreigners Snapping up U.S. Properties, Title Agents Must Remember FIRPTA

Title Professionals Could Be Liable for Full Amount of Tax Required to Be Withheld

Unless a property is exempt from taxation, closing agents must collect and remit 10 percent of the "amount realized" to the IRS on foreign owners at the time of sale of the property.

The U.S. continues to remain a top destination for foreign buyers as sales to international buyers accounted for more than 6 percent of all existing home sales.

Foreign clients bought $68 billion worth of stateside houses and apartments during the 12-month period that ended in March 2013, according to the National Association of Realtors (NAR) 2013 Profile of International Home Buying Activity. While the volume was down compared to 2012, sales over the past year are the second highest since NAR started collecting this data.

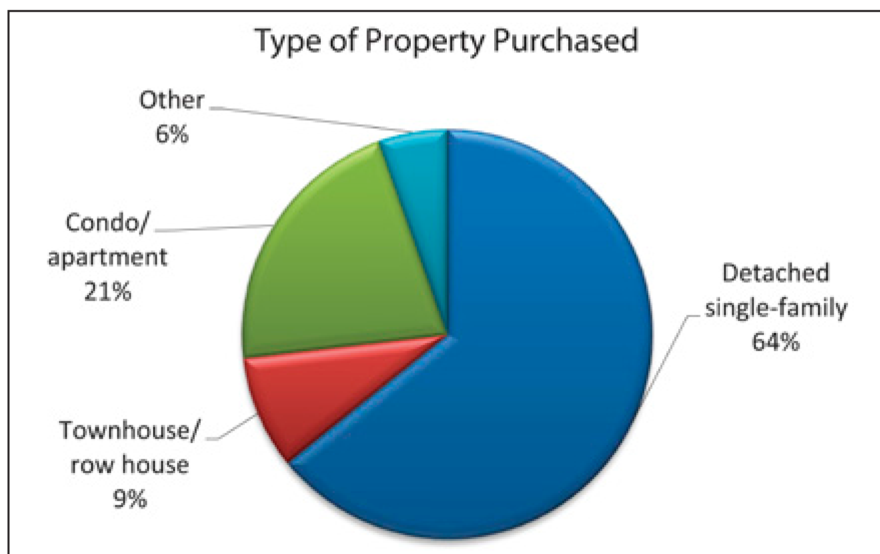
The four states with the heaviest concentration of international buyer activity have remained the same over the past five years. Florida (23 percent), California (17 percent), Arizona (9 percent) and Texas (9 percent) accounted for 61 percent of all reported international purchases.

Foreign nationals tend to buy homes in communities where they already have roots or where large immigrant populations exist. In Florida, Cubans, Haitians and Colombians account for the majority of foreign buyers. Mexicans make up the majority in the Southwest and Chinese buyers dominate in California, while Canadians buy heavily all across the country. According to NAR, the top five countries of buyer origin were Canada (23%), China (12%), Mexico (8%) India (5) and the UK (5%).

With foreign buyers representing a growing segment of homebuyers, title and settlement agents must remember the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) withholding requirement applies to these transactions.

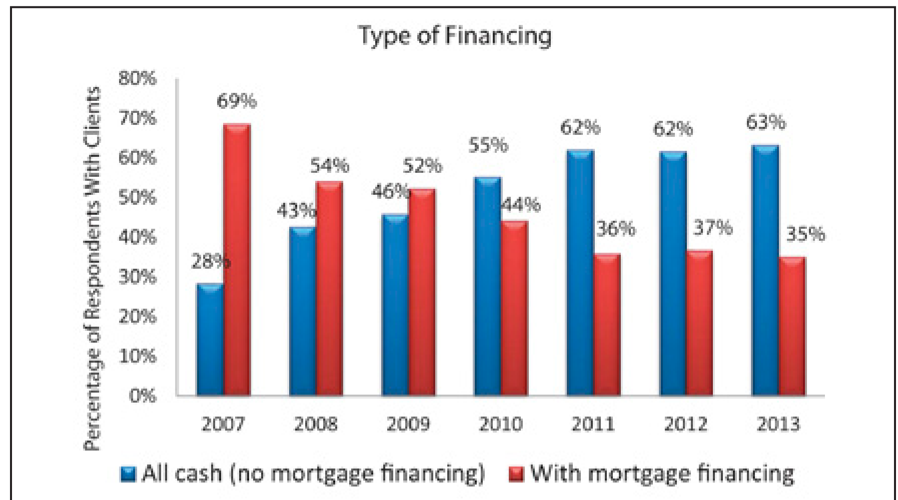
Marlen Rodriguez, south Florida regional manager for Universal Land Title, has seen a noticeable increase in foreign homebuyers over the past few years.

"Investors will look for a safe place to put their money and they still see U.S. real estate as a relatively safe investment, particularly with today's



prices and plentiful inventory," Rodriguez said. "With foreigners comprising a significant portion of the buying market, title companies must remember to keep their staff trained on the FIRPTA requirements."

FIRPTA authorized the United States to tax foreign persons on dispositions of U.S. real property interests. This includes but is not limited to a sale or exchange, liquidation, redemption, gift, transfers, etc.



U.S. Real Property Interest

A U.S. real property interest is any interest, other than solely as a creditor, in real property (including an interest in a mine, well or other natural deposit) located in the United States or the U.S. Virgin Islands, as well as certain personal property that is associated with the use of real property (such as farming machinery or hotel furniture). It also means any interest, other than solely as a creditor, in any domestic corporation unless it is established that the corporation was at no time a U.S. real property holding corporation during the shorter of the period during which the interest was held, or the five-year period ending on the date of disposition. If on the date of disposition, the corporation did not hold any U.S. real property interests, and all the interests held at any time during the shorter of the applicable periods were disposed of in transactions in which the full amount of any gain was recognized, the FIRPTA withholding would not apply.

Rates of Withholding

Unless a property is exempt from taxation under the present IRS code, closing agents working with foreign buyers must collect and remit 10 percent of the "amount realized" to the IRS on foreign owners at the time of sale of the property. If this is not done, or not done properly, the buyer could be held liable for the tax, including penalties and interest.

At a minimum, the "amount realized" equals the contract price. However, there has been no IRS ruling as to whether the amount of debt forgiven is also included in the "amount realized." Therefore, for a short sale it is recommended that the 10 percent be calculated based on the outstanding amount due on the mortgages, if known, or if not known, the aggregate face amount of all mortgages encumbering the property.

A foreign corporation that distributes a U.S. real property interest must withhold a tax equal to 35 percent of the gain it recognizes on the distribution to its shareholders. A domestic corporation must withhold a tax equal to 10 percent of the fair market value of the property distributed to a foreign shareholder if (1) the shareholder's interest in the corporation is a U.S. real property interest, and (2) the property distributed is either in redemption of stock or in liquidation of the corporation.

Exemptions

There are some FIRPTA exemptions, however. If a property is being sold for less than $300,000 and the buyer will reside in the property for at least 50 percent of the time the property will be occupied over the two-year period following the purchase, the property can be exempted from the payment of the FIRPTA tax at closing. However, the buyer and seller will be required to sign an affidavit affirming the facts. According to the IRS, the property can be a primary residence or a second home, but not an investment property. Here are additional withholding exceptions if notification requirements are met:

1. *The property disposed of (other than certain dispositions of non-publicly traded interests) is an interest in a domestic corporation if any class of stock of the corporation is regularly traded on an established securities market. However, if the class of stock had been held by a foreign person who beneficially owned more than 5 percent of the fair market value of that class at any time during the previous five-year period, then that interest is a U.S. real property interest if the corporation qualifies as a United States*

Real Property Holding Corporation (USRPHC), and you must withhold on any disposition.

2. *The disposition is of an interest in a domestic corporation and that corporation furnishes you a certification stating, under penalties of perjury, that the interest is not a U.S. real property interest. Generally, the corporation can make this certification only if the corporation was not a USRPHC during the previous five years (or, if shorter, the period the interest was held by its present owner), or as of the date of disposition, the interest in the corporation is not a U.S. real property interest by reason of section 897(c)(1)(B) of the Internal Revenue Code. The certification must be dated not more than 30 days before the date of transfer.*

3. *The transferor gives you a certification stating, under penalties of perjury, that the transferor is not a foreign person and containing the transferor's name, U.S. taxpayer identification number and home address (or office address, in the case of an entity).*

4. *You receive a withholding certificate from the Internal Revenue Service that excuses withholding.*

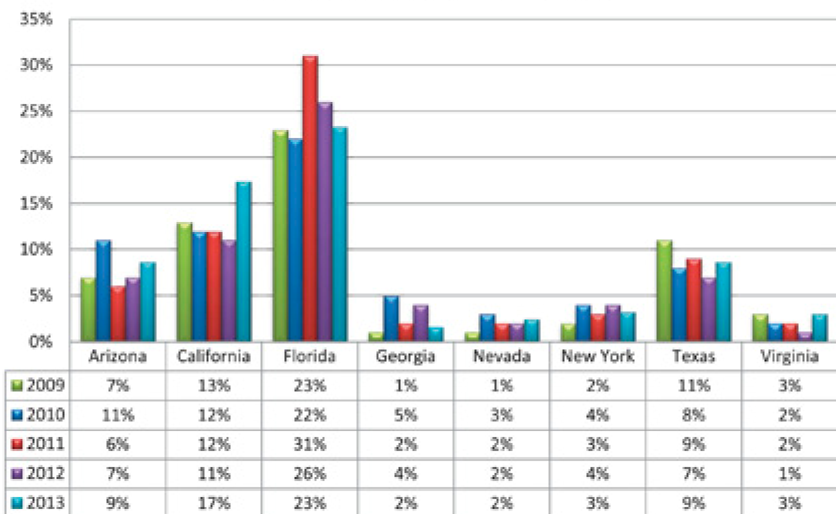
5. *The transferor gives you written notice that no recognition of any gain or loss on the transfer is required because of a nonrecognition provision in the Internal Revenue Code or a provision in a U.S. tax treaty. You must file a copy of the notice by the 20th day after the date of transfer with the: Internal Revenue Service Center P.O. Box 409101; Ogden, UT 84409*

6. *The amount the transferor realizes on the transfer of a U.S. real property interest is zero.*

7. *The property is acquired by the United States, a U.S. state or possession, a political subdivision thereof or the District of Columbia.*

8. *The grantor realizes an amount on the grant or lapse of an option to acquire a U.S. real property interest. However, you must withhold on the sale, exchange or exercise of that option*

9. *The disposition (other than certain dispositions of nonpublicly traded interests) is of publicly traded partnerships or trusts. However, if an interest in a publicly traded partnership or trust was owned by a foreign person with a greater than 5 percent interest at any time during the previous five-year period, then that interest is a U.S. real property interest if the partnership or trust would otherwise qualify as a USRPHC if it were a corporation, and you must withhold on it.*



	Arizona	California	Florida	Georgia	Nevada	New York	Texas	Virginia
2009	7%	13%	23%	1%	1%	2%	11%	3%
2010	11%	12%	22%	5%	3%	4%	8%	2%
2011	6%	12%	31%	2%	2%	3%	9%	2%
2012	7%	11%	26%	4%	2%	4%	7%	1%
2013	9%	17%	23%	2%	2%	3%	9%	3%

Liability of Agents

According to the IRS, an agent is any person who represents the transferor or transferee in any negotiation with another person (or another person's agent) relating to the transaction, or in settling the transaction. A person is not treated as an agent if the person only performs one or more of the following acts related to the transaction:

- receipt and disbursement of any part of the consideration;
- recording of any document;
- typing, copying and other clerical tasks;
- obtaining title insurance reports and reports concerning the condition of the property; or
- transmitting documents between the parties.

A withholding agent is personally liable for the full amount of FIRPTA withholding tax required to be withheld, plus penalties and interest. A withholding agent is any person having the control, receipt, custody, disposal or payment of income that is subject to withholding. Generally, the person who pays an amount to the foreign person subject to withholding must do FIRPTA withholding. ■

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Three Steps to Help Homebuilding and Real Estate

U.S. Representative from Washington Pushes for Partnership to Achieve Progress

BY REP. DEREK KILMER

As someone who worked in economic development for a decade, I know the importance of homebuilding and real estate. Both industries were hit hard in our economic collapse and their recovery should be a key part of our overall economic recovery strategy.

There's some hope that we're starting to turn the corner. In March, home ownership hit a 17-year low, but year-to-year home prices saw the biggest gain in seven years. And the National Association of Realtors says prices are up in 133 of 150 metropolitan areas.

However, even with those positive signs, there's a lot of work to do. Among other things, let me mention three things our country needs to do to get the economy — and specifically the real estate and homebuilding industries — back on track.

First, and most importantly to our overall economy, Congress should stop sequestration and pass a budget. I use a technical term to describe these cuts resulting from sequestration — they are dumb. When your business or your home budget is facing financial difficulty, you wouldn't cut across-the-board. You would prioritize spending and find areas where you can spend less. The cuts under sequestration are not just non-strategic, they are anti-strategic.

What's worse, with sequestration and Congress' inability to pass a budget, we haven't just faced a fiscal cliff—we're facing a fiscal mountain range. There's no long-term plan in place for our national budget. It's fissuring trust and predictability—something local businesses desperately need.

Here's an example: I recently held a roundtable discussion with 10 Realtors in my area. Of the 10, three of them told me they've recently had closings fall through due to concerns about furloughs resulting from sequestration.

This should be Congress' top priority. In fact, I recently voted for a bill—a bill that a lot of folks in my party voted against—called "No Budget, No Pay." It said, quite simply, that if Congress doesn't pass a budget, then members of Congress shouldn't get paid. Never in my professional career have I ever held a job where I continued to get paid if I didn't do my job. We need to end the uncertainty caused by dysfunction in Congress and pass a budget.

Second, tax reform is rightly becoming an important piece of the dialogue about how to balance our budget and make our economy more competitive. There are many loopholes that need to be erased from our system, and I know that with sensible reform we can make our system smarter while protecting the middle class and small businesses.

But Congress must be strategic about changes to tax policy and be careful not to throw the baby out with the bath water.

For example, Congress should extend provisions that ensure property owners going through foreclosure, short sales or loan modifications won't pay income tax on forgiven loan debt. Also we need to protect the mortgage interest deduction because it is an effective tool for home ownership. And there is value in the low income housing tax credit in order to support the continued production and rehabilitation of affordable rental housing.

Finally, we need to bolster real estate lending and address the credit crisis. The time of approving loans to anyone who could fog a mirror is over, but we can't ratchet things down so much that responsible people can't qualify. Access to capital is fundamental—for businesses seeking to invest in equipment or expand, and to homebuyers seeking to buy a home. That means the rules that regulate our financial institutions must be sound.

The truth is if we want to get the housing industry and our economy back on track we need an environment that fosters trust and predictability and improves access to capital.

There are plenty of other steps as well—everything from reforms to the appraisal process to efforts to identify more buildable lands.

As a starting point, that means folks in Congress need to stop defining success as making the other party look bad. There are some glimmers of hope on the horizon that this will change. Every Wednesday morning I attend a meeting called the "Bipartisan Working Breakfast Group" where about 20 members of Congress from both sides of the aisle check their snarky talking points at the door and talk about what we can work on to actually create progress for the people we represent.

It's only 20 people right now. I wish it was 200. But it's a start.

And it's important because both parties must work together to pass a bipartisan budget that addresses our long-term fiscal sustainability and ends this era of uncertainty. It's time to stop the focus on partisanship and start focusing on progress. ■

Derek Kilmer is a U.S Representative for Washington's sixth congressional district..

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Jury Acquits Wells Fargo, Long & Foster of Allegedly Forming 'Sham' AfBA

A Maryland jury in June reached a unanimous decision and acquitted Wells Fargo and Long & Foster Real Estate for allegedly setting up a sham affiliated business arrangement.

The verdict ended a class-action lawsuit filed in 2007 with the U.S. District Court in Baltimore by homeowners who obtained mortgages from Prosperity Mortgage, an entity the homeowners alleged that Wells Fargo and Long & Foster formed to facilitate the collection of fees and payments. The suit alleged that Wells Fargo and Long & Foster created Prosperity Mortgage as a "sham" business entity that performed little or no work in connection with mortgage transactions.

According to Long & Foster, the facts showed that Prosperity is and has been operating as a fully legitimate mortgage lender across the Mid-Atlantic region with multiple locations across several states.

"We believed all along that the allegations made in the case were unfounded," said Jeff Detwiler, president and chief operating officer of The Long & Foster Companies. "While it has been a long and drawn-out process, we are pleased with the results. This validates what we knew all along—that our mortgage company did, does and always will act in full compliance with the law; but more importantly that no consumers were ever harmed in any way. We remain committed to helping homebuyers and sellers achieve successful real estate and mortgage transactions."

Denise Minter, a homeowner from Baltimore who settled on her house in 2006, charged that Long & Foster required her to use Prosperity as her lender and that at closing, Wells Fargo, which funded her loan, allegedly withheld $945 in fees that the bank and the real estate company later divided between themselves. The borrowers also charged that paperwork they received in connection with their loan originations misled them about the services Prosperity provided.

WFG Enters Nevada Market with Acquisition of Title Company

Williston Financial Group, the parent company of WFG National Title Insurance Company, has acquired Community Title Services of Nevada.

Based in Las Vegas, Community Title Services of Nevada will now operate as WFG National Title Company of Nevada. Alan Maynor will oversee the local operation as division president and will be charged with growing the company's footprint in the market while maintaining relationships with existing clients.

"This acquisition is consistent with the steady, strategic pace WFG has set for its growth," said WFG President and CEO Patrick Stone. "We are looking forward to extending our presence with an established direct operation in one of the nation's critical real estate markets."

GSEs Announce New Short Sale Guidelines

Fannie Mae and Freddie Mac reported changes to their Standard Short Sale and HAFA guidelines to improve transparency and marketing of listed properties that will require GSE approval. Starting Aug. 1, any property considered for short sale approval must be listed on the multiple listing service (MLS) for five consecutive days, including one weekend, prior to Fannie Mae or Freddie Mac approving a short sale offer. The property must be listed on the applicable MLS that covers the geographic area in which the property is located and a printed copy of the property's MLS listing must be kept on file. If a property is located in an area that is not covered by an MLS, the property must be advertised in a manner customary for that real estate market for at least five consecutive calendar days, including one weekend.

RamQuest Integrates with WFG's e-CPL Service

RamQuest Inc. announced that its Closing Market digital network is now integrated with WFG National Title Insurance Company's e-CPL service. This integration enables WFG agents to generate closing protection letters without ever having to leave their RamQuest title production solution.

"In this competitive and compliance awareness market, our agents are always looking for technology that saves them money, eliminates duplicate data entry, streamlines their processes to maximize efficiency and helps keep them compliant," said Rick Diamond, vice president and IT director for WFG.

Timios Acquires California-based Title Company

Timios National Corp. completed the purchase of Glenn County Title Company (GCTC) after receiving regulatory approval from the California Department of Insurance on June 6. Located in Willows, Calif., GCTC was a privately held title company serving businesses and residents in Glenn County, Calif., since 1891.

Pursuant to the purchase agreement signed and disclosed in May 2012, GCTC will be wholly owned by Timios Inc., the primary title and settlement subsidiary of the company. Financial results will be consolidated under Timios and into Timios National Corp.

"We are pleased the acquisition has been completed on the terms of our purchase agreement," said C. Thomas McMillen, president and CEO of Timios National Corp. "This acquisition will allow us to enter the title insurance market in California and will expand our coverage area and continue to grow our revenue."

Richard and DeAnnah Thomas owned and operated Glenn County Title for the past 15 years and have a combined 60 years of experience in the industry. Richard Thomas has managed a diversified suite of title insurance products ranging from commercial to residential policies. Richard and DeAnnah Thomas will join Timios' executive management team.

MERS Prevails in Several Federal Rulings

Judges in three federal courts recently ruled in favor of Mortgage Electronic Registration Systems Inc. (MERS) and its co-defendant members in cases alleging wrongful foreclosure.

In Washington, Judge Thomas Rice of the U.S. District Court, Eastern District of Washington, denied a nine-count complaint alleging wrongful foreclosure and violations of Washington's Consumer Protection Act (CPA).

In *Ukpoma v. U.S. Bank*, the plaintiff, citing the Washington Supreme Court's decision in *Bain v. Metropolitan Mortgage Group Inc.*, argued that a wrongful foreclosure claim exists against MERS because MERS cannot act as trust deed "beneficiary" under Washington law and therefore, its assignment of the deed of trust to the foreclosing bank was void. Judge Rice found no merit to the plaintiff's reliance on Bain in support of a wrongful foreclosure count against MERS.

In New York, Judge William F. Kuntz II of the U.S. District Court for the Eastern District of New York ruled in favor of MERSCORP and dozens of MERS member institutions in a suit asserting a litany of allegations surrounding conspiracy and fraud.

In *Abraham v. American Home Mortgage Servicing Inc. et al*, Judge Kuntz rejected a "mass action" attempt by hundreds of borrowers, finding that they were joined improperly and that, more importantly, the bases for their complaint were "threadbare recitals" and "conclusory statements" unsupported by specific facts.

Meanwhile, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit ruled in favor of BAC Home Loans Servicing LP (BAC) and Fannie Mae, affirming a lower court's decision dismissing claims of wrongful foreclosure.

In *Martins v. BAC Home Loans Servicing LP*, Judges Jerry E. Smith, Edward C. Prado and Priscilla R. Owen dismissed the plaintiff's "show-me-the-note" theory, alleging that the defendant lacked standing to foreclose because the assignment of the mortgage by MERS to BAC separated the note from the deed of trust, rendering the mortgage unenforceable and invalid.

Partnership Simplifies Lender Ability to Order Title, Settlement Services

Customers of TSS Software's TitleExpress can receive title and settlement orders from lenders through the ClosingCorp's online calculator, the companies announced.

Lenders order services by visiting a title company's website to access ClosingCorp's SmartGFE Calculator. Accurate rates for title and settlement as well as recording fees and transfer taxes are provided by the calculator. After cost estimates are generated, orders for title and settlement are placed online. The online orders from lenders are submitted into TitleExpress with an electronic document containing the estimate.

Assurety Title & Escrow is the first mutual user to leverage this new capability.

"Simplifying the estimate-to-order process for title and settlement services is a big benefit to both title companies as well as their lender clients," said Troy Hodgdon, president of Assurety Title & Escrow.

Title Company Appeals Ruling in Cyber Crime Case

A Missouri-based title company appealed a U.S. district court's ruling that rejected its lawsuit attempting to recoup money stolen during a fraudulent wire transfer.

In an appeal filed June 17, Choice Escrow Land Title asked the U.S. Court of Appeals for the Eighth Circuit to review the circumstances surrounding the fraudulent transfer of $440,000 from its escrow account in March 2010.

Hackers stole the title company's online banking ID and password and made the unauthorized wire transfer to a corporate bank account in Cyprus.

In its appeal, Choice Escrow said that it sent an email in November 2009 to BancorpSouth instructing the bank to limit transfers to foreign banks. Attached to the email was a bulletin from Choice Escrow's underwriter warning of the treat of foreign cyber-criminals stealing funds from escrow/trust accounts and advising that all wiring capabilities to foreign banks be disabled.

Choice Escrow contends the bank's verification procedures for wire transfers were not commercially reasonable under the Uniform Commercial Code.

SoftPro Integrates with Fidelity's agentTRAX

SoftPro has integrated Fidelity National Title Group's agentTRAX system to the SoftPro 360 business exchange platform. SoftPro 360 provides a bridge between agents using ProForm, SoftPro's closing and title software, and a wide-range of vendors that provide title, escrow and closing services.

By linking SoftPro 360 and agentTRAX, Fidelity agents are able to generate policy jackets and auto report gross premiums to Fidelity National Title Group's Agency Accounting Department, while working in SoftPro. This eliminates the need to create separate remittance reports and minimizes having to work across multiple systems.

"Information is shared automatically between ProForm and agentTRAX reducing errors and increasing agent productivity," said Joyce Weiland, president of SoftPro.

OCC Says Cyber Security Among Fastest-growing Risk to Banks

The Office of the Comptroller of Currency's Semiannual Risk Perspective cited cyber security as the second biggest worry for bankers, right after struggles to maintain revenue.

The report said the increasingly sophisticated cyber threats, expanding reliance on technology and changing regulatory requirements are heightening lenders' operational risk. Because of this, lenders must spend more resources to identify and mitigate the associated risks.

The effects of cyber attacks include reduced availability or diminished response times of online banking services, identity theft, fraud and theft of proprietary information, according to the OCC. The costs and resources needed to manage the risks continue to increase as the attacks broaden and intensify. Over time, the effects could expand as the capabilities and tactics of cyber criminals evolve.

ALTA's "Title Insurance and Settlement Company Best Practices" provides guidance to title professionals on how to protect against cybercrime and safeguard non-public personal information.

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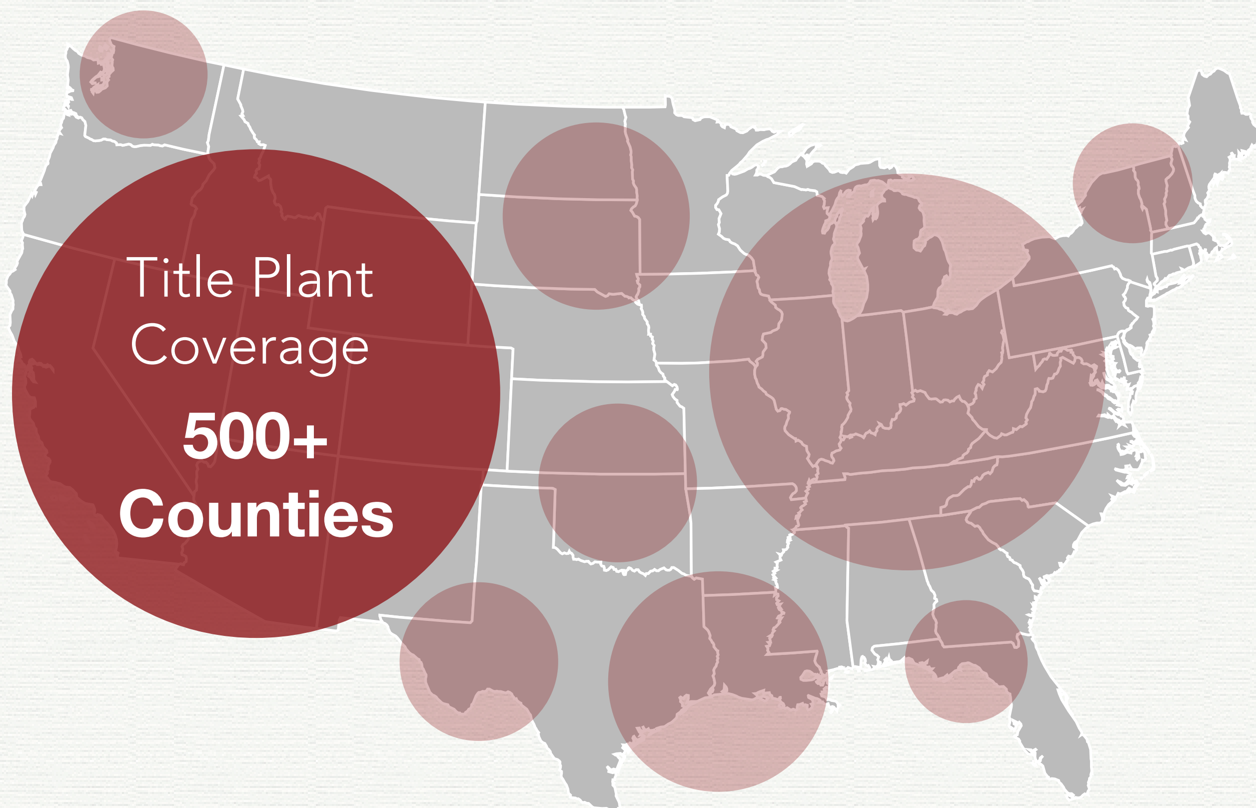

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Educating Next Wave of Employees Vital to Industry's Future

I'm guessing that, like mine, your staff is much more likely to have listened to music on albums rather than downloading songs to computers or streaming them through smartphones.

How you listen to music isn't the point. The issue is that the majority of our talented and knowledgeable workforce is moving closer toward to retirement. To replace the people in these positions, we need to turn our sights to educating the next generation of employees, and making them aware of our fabulous and essential industry.

Traditionally, we've thought of ourselves as secondary to the rest of the players involved in real estate transactions. But why shouldn't we proudly promote a career as a title professional? There's nothing too glamorous about being in our industry, but it's definitely nothing to sniff your nose at. It's been a rewarding career for many of us and for many of our family members as well. There probably aren't many of us who said to their parents as a teenager that we wanted a career in the title business, but there's a large group of untapped potential employees in the younger generations.

According to a recent survey of more than 500,000 workers born between 1982 and 1993, the best opportunities for America's young workers were in technology (telecommunications and Internet services), medical, aerospace, and gas and oil. These industries provide annual income for these Gen Y workers ranging from $55,000 to more than $90,000. Compare this to the pay of a cashier ($17,000), which is the lowest-paying job commonly held by Gen Y workers.

Meanwhile, the title industry offers a great career and should be considered a viable option for those entering the workforce. As reported in the June edition of TitleNews, the average hourly earnings for abstracters and settlement agents is $23.67, which translates to more than $45,000 per year. The average annual pay for a similar position for a direct operation is $10,000 more.

As the industry implements ALTA's Best Practices, it will be essential to have trained employees to replace positions of those who retire. According to the U.S. Census Bureau, there are more than 130,000 people working as abstracters, settlement officers or with direct operations. That's a lot of potential employment opportunity. We just have to reach out, connect and educate prospects.

This is an important discussion at ALTA because we deeply care about the future of this great industry. To help with this, start thinking about what education and information would help produce better qualified employees. Is there anything your company does now to educate younger generations? Does your company reach out to local universities or career centers? If so, how and what do you say? Please share your ideas and thoughts with us at *education@alta.org*.

Let's start preparing our future workforce now!

\- Frank Pellegrini, ALTA president

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