

TITLE INSURANCE

QUINTIN JOHNSTONE †

TITLE insurance is a means of protecting against the risks inherent in the uncertainty of land titles by delineating some defects of title and by insuring against potential losses from others. Conceived in this country in the latter part of the nineteenth century,¹ title insurance is now written by 147 companies, of which 77 have more than one outlet in their home state, 31 operate in more than one state, and 11 in 5 or more states.² As an indication of the present size of the business, premiums on title insurance written in 1954 totaled about 100 million dollars³—representing, at an average premium rate of 3½ dollars a thousand, 28½ billion dollars of title insurance coverage.⁴ Although the extent of its use varies, being highest on the Pacific Coast and least in New England, title insurance has become the predominant method

†Associate Professor of Law, Yale Law School.

1. The first title insurance company was formed in Philadelphia and received its franchise in 1876. Rhodes, *The Insurance of the Real Estate Title*, 10 CONN. B.J. 115, 206, 211 (1936).

Title insurance has been almost entirely restricted to the United States. In England "conveyancing insurance" can be obtained, *Insurance in Aid of Conveyancing*, 100 SOL. J. 139, 157 (1956), although the volume written is small. A policy of this kind insures against loss from a known defect, such as a restrictive covenant or a lost deed, or from the risk that an adverse possessor for the statutory period has not acquired good title. The policy is issued for a fixed period, and only one premium is paid. It resembles American title insurance in that it is ordinarily written to facilitate a conveyance or the making of a mortgage.

2. These computations are based on listings in the 1956 DIRECTORY OF THE AMERICAN TITLE ASSOCIATION, state insurance commission reports and correspondence. They are only approximations. Home offices, branch offices and agencies are considered as outlets, and subsidiaries are treated as separate companies. Multi-state operations include only the writing of title insurance policies and do not include reinsurance. Territories and the District of Columbia are considered as states.

3. The estimate of 100 million dollars as the gross title insurance premiums for 1954 is based on the reported premiums, listed in APPENDIX I, *infra* p. 518, plus an estimate of unreported premiums.

4. This is a rough estimate because of the contingent character of both the 100 million dollar premium total and the 3½ dollar a thousand rate.

About 20% of the total was written by one company, the Title Insurance and Trust Company, and its subsidiaries, operating exclusively on the Pacific Coast. The 1954 premium income of the parent and its subsidiaries was \$19,262,614, and their total assets on December 31, 1954, were \$49,262,858. ANNUAL REPORT, TITLE INSURANCE AND TRUST COMPANY (1954). The 1954 premiums of the parent company, which operates only in California, were \$15,630,324, and it paid losses of \$308,118. REPORT OF THE CALIFORNIA INSURANCE COMM'R 167 (1954). The second largest title insurance company in the United States is the Chicago Title and Trust Company, which writes policies only in Illinois. In 1954 its premium income was \$11,413,924; its total assets at the end of 1954 were \$65,390,006. ANNUAL STATEMENT, CHICAGO TITLE AND TRUST COMPANY (1954).

of title protection in many metropolitan areas and has been written on some land in every state.⁵

Although there has been a large increase in the amount of title insurance written in urban America since the mid-nineteen-forties,⁶ the generally prevailing method of title protection in smaller towns and rural areas is the lawyer's opinion,⁷ based either on abstracts of title prepared by professional abstracters or on title searches made by examining lawyers. A third system of title protection, Torrens registration, has only very limited use in this country and is permitted in only eleven states.⁸

Despite the growing use of title insurance, it has in the past been difficult to make a rational judgment of its relative merits as a means of title protection, for lack of adequate information. This Article will attempt to describe the content and coverage of title insurance, the operations of the companies that issue it, and the scope of governmental regulation of the business. The basic source material for this study consists largely of interviews and correspondence with leading title insurers, lenders and Torrens officials in all parts of the country, as well as data obtained through state insurance commissions.⁹ The latter part of the Article will present the author's opinions on the merits and future of title insurance compared with competing methods of title protection—the lawyer's opinion system and Torrens registration.

TITLE INSURANCE PROTECTION

Probably a majority of fee simple purchasers and certainly a majority of mortgagees of fee interests in real property obtain title insurance policies or lawyers' title opinions, and it is becoming increasingly common for long-term

5. A survey giving rough estimates by state as to the relative use of various types of title evidence appears in *Report of the Committee on Acceptable Titles to Real Property, Appendix A, PROCEEDINGS OF THE ABA SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW 47 (1953)* (hereinafter cited as *Acceptable Title Rep.*).

Of the title insurance policies written in the state of New York in 1953, 91.5% were issued against property in metropolitan New York City: New York, Bronx, Kings, Queens, Richmond, Westchester, Nassau and Suffolk counties. PRELIMINARY REPORT OF THE NEW YORK SUPERINTENDENT OF INSURANCE 40 (1955).

The business of title insurance may be carried on in all states except Iowa, IOWA CODE ANN. § 515.48 (Supp. 1956), and policies on Iowa land are written outside the state.

6. See APPENDIX II, *infra* p. 520.

This increase is due in large part to the rising volume of conveyances and mortgages resulting from the increase in private construction. See APPENDIX III, *infra* p. 520. In part it is due to inflation in real estate prices.

7. See *Acceptable Title Rep., App. A, 47.*

8. See note 93 *infra*.

For the description, history and extent of Torrens registration, compare POWELL, REGISTRATION OF THE TITLE TO LAND TO THE STATE OF NEW YORK (1938), with McDougal & Brabner-Smith, *Land Title Transfer: A Regression*, 48 YALE L.J. 1125 (1939) (a critical review of POWELL). See discussion in text at notes 90-97 *infra*.

9. Any statements of fact in text or footnotes not attributed to cited authority are based on these interviews and correspondence.

lessees to do so. The parties to the contract are usually interested in obtaining title protection as quickly as possible, for performance is frequently delayed until it is provided.¹⁰ When title insurance is obtained, it is the usual practice for the mortgagee to require that the mortgagor pay for the policy.¹¹ Similarly, in some areas contracts of sale customarily provide that the seller shall pay some or all of the cost of a policy insuring title in the buyer. These contracts frequently give the seller the alternatives of providing either a title insurance policy or an abstract showing marketable title in the seller. In other areas the buyer pays the entire cost of title insurance coverage, if he wants insurance.¹²

Applicants for a title insurance policy are interested in obtaining the insurance coverage, but they are sometimes more interested in what the company examination of title discloses. This is perhaps partly at the base of the prevailing philosophy of title insurance companies—stressing the service of risk delineation rather than risk coverage. In many contracts of sale the buyer agrees to buy only if the seller's title is one that a named title insurance company will insure subject to no more than the standard exceptions. Or contract purchasers may have agreed to buy only if the title is marketable, depending on the title insurance examination report for this determination; and if the title is not marketable, the seller will want to know what defects must be cleared to make it so. If the applicant is planning to erect a church, a factory or a liquor store on the premises, he will of course be anxious to know if there are restrictive covenants against such usage or easements inconsistent with the type of building he proposes to erect. Or if the property is to be mortgaged with a life insurance company, the title insurance examination report may be used to determine whether the title is sufficiently unencumbered to meet the legal standards set for life insurance investments. It is not unusual for title policies applied for never to be issued, for the examination report of the title insurance company may disclose a title that the buyer is not obligated to accept.

Risk Coverage

Title insurers argue that theirs is a dual system of title protection—combining a thorough title examination with the insurance of losses from some potential defects. Their critics assert that title insurance companies are not in fact insurers since they except any risks apparent after the title has been examined. Although this assertion is overbroad, the risks assumed by title

10. Because they are more willing to assume the risks of bad titles, purchasers of lesser interests in real property, donees and owners who have not recently acquired their interests seldom obtain formalized title protection. Of course, the recording acts, adverse possession, prescription and tort and contract rights against transferors give some protection to a transferee even though he has no lawyer's title opinion or title insurance policy. See, generally, 3 AMERICAN LAW OF PROPERTY §§ 11.66-11.81 (Casner ed. 1952).

11. *Acceptable Title Rep., App. A*, 53.

12. *Ibid.*

insurers compared to most other kinds of insurers are very slight, and title companies except most risks disclosed by the title examination. All policies contain printed general exceptions, and in addition, defects in the particular title are excluded from coverage in a separate schedule. Title companies frequently refuse to insure a title unless exceptions for known defects are added to their regular form of coverage.

Many companies offer a variety of both owners' and mortgagees' policies, differing from one another in the extent of risk coverage. In addition, the risks covered and excepted may vary from one company to another. Nevertheless, the pattern of title insurance risk coverage outlined below is generally adhered to by most firms.

Risks Usually Covered by Title Insurance Policies

Errors in the title examination. These include any negligence or fraud by an employee or agent of the company in making the title search and analyzing its results. The most common error is negligently failing to note a title defect appearing in the public records. Another common error is the failure to recognize defects that should be disclosed by a survey or other inspection of the premises whenever such examinations are actually made by the company or acceptable independent surveyors.

A few known defects. These are occasionally covered, particularly in mortgagees' policies, if they are trivial or probably unenforceable because of estoppel or a statute of limitations. Examples of this kind of occasional coverage are setback requirements, restrictive covenants, easements, possibilities of reverter, rights of re-entry and slight encroachments made by improvements on neighboring land.¹³

Defects that would be disclosed by an examination which the company intentionally does not make. Some companies make only partial examinations and assume the risks of any defects that a complete examination would disclose. For example, in the eastern part of the United States insurance is often written on a search that goes back only sixty years. It is thought that there are few defects older than sixty years, and that it is unduly expensive to search for them.¹⁴ Also, some companies insure against defects that would be disclosed by a survey, even though the examination is by a company inspector qualified to make only rough measurements.

Some hidden defects not disclosed by a competent examination of public records, physical inspection of the premises, or survey. Since the protection of the recording acts prevents most of these defects from being risks to the insured, there is no risk for the insurer. But the recording acts do not eliminate all such defects, and title insurance policies usually protect against some, including: a recorded instrument, appearing to be valid, but void because it

13. Henley, *What Investors in Mortgage Loans are Demanding in Title Insurance*, Title News, May 1956, p. 9.

14. See REEVE, *GUARANTEEING MARKETABILITY OF TITLES TO REAL ESTATE* 82-83 (1951).

was forged, never properly delivered, or executed by a person without capacity; any judgment that from the records appears valid but which is void for lack of jurisdiction; a deed incorrectly stating that the grantor is unmarried, if the fact of his marriage does not appear elsewhere in the records; failure of any public records to disclose an instrument or claim that need not be recorded under the recording acts, including the claim of an heir or devisee unknown at the time of examination; errors in the public records made by public officials, to the extent they are not protected against by the recording acts, including failure to put on record and failure to make a correct copy; errors resulting from the practice of some tax offices of promptly showing taxes as paid upon receipt of a payment check, then altering this record if the check is returned for lack of sufficient funds.

Marketability. This risk is generally covered in mortgagees' policies and often in owners' policies. One of the risks involved in insuring marketability is correctly anticipating the judicial meaning that will be given to this vague concept, for courts have been far from consistent in their interpretations of "marketable title."¹⁵

Risks Usually Not Covered in Title Insurance Policies

Defects disclosed by the title examination. Defects of this sort are generally not covered, and when found are listed as exceptions in the policy.

*Defects that physical inspection and survey of the premises would disclose.*¹⁶ Defects of this kind are usually not covered in owners' policies, but ordinarily are in mortgagees' policies. They include such possible interests as adverse possession and unrecorded leases and easements that would be disclosed by an inspection of the premises. They also include the defects that surveys would disclose, including encroachments, incorrect boundary lines and setback violations.

Defects created subsequent to the date of the policy.

Defects of which the insured was aware or which he assumed prior to the date of the policy. The general insurance doctrines of misrepresentation and concealment by the insured also apply to title insurance.¹⁷

Restrictions of any government police power regulation on the use and

15. See 3 AMERICAN LAW OF PROPERTY §§ 11.48 & 11.49 (Casner ed. 1952).

In Texas the Board of Insurance Commissioners does not permit marketability to be insured but does allow the insurance of "good and indefeasible" title. TEX. Bd. OF INS. COMM'RS, BASIC MANUAL OF RULES, RATES AND FORMS FOR WRITING OF TITLE INSURANCE IN THE STATE OF TEXAS § III (1956) (owner's policy and leasehold policy). Until recently marketability was not insured in Chicago, even in mortgagees' policies. The case against marketability is made in REEVE, GUARANTEERING MARKETABILITY OF TITLES TO REAL ESTATE (1951); written by a senior vice-president of the powerful Chicago Title and Trust Company, the book seeks to justify that company's former stand against insuring marketability.

16. A typical clause excepting risks of this sort provides: "Rights or claims of parties in possession not shown of record, and questions of survey. . . ."

17. See, e.g., *Rosenblatt v. Louisville Title Co.*, 218 Ky. 714, 292 S.W. 333 (1927); *First Nat'l Bank & Trust Co. v. New York Title Ins. Co.*, 171 Misc. 854, 12 N.Y.S.2d 703

enjoyment of the premises. These include building, fire and zoning ordinances. The apparent reasons for the limitation are that these regulations are difficult to ascertain, and that they are frequently ambiguous or of dubious constitutionality. But the limitation has been rationalized on the grounds that title policies insure titles, and police power regulations involve paramount government rights of a non-title character.¹⁸

Title to personal property, even when affixed to the realty.

Some hidden defects not disclosed by a competent examination of public records, physical inspection of the premises or survey. More risky defects of this sort often are expressly excepted. They include mechanics' and materialmen's liens which are effective as liens without being recorded at the date of the policy;¹⁹ and dower, curtesy, community property and homestead rights of the insured's spouse. Some companies except tax titles because of the limited rights acquired at tax sales and the frequent errors in tax title proceedings. Mechanics' and materialmen's liens are often covered in mortgagees' policies if a physical inspection of the premises shows no sign of recent construction, or—when there has been recent construction—if there is satisfactory evidence of payment, if lien waivers or releases are secured, or if security is posted for payment of any unpaid construction costs.

The Scope of Coverage

Under a title insurance policy only one premium is paid by the insured—at the time the policy goes into effect. The insurance is not written for a fixed term, but coverage—up to the face amount of the policy—continues as long as the insured can suffer any loss from the risks covered. Insurance under a mortgagee's policy ends when the debt is paid or the mortgage released. But mortgagees' policies usually provide that protection continues if the mortgagee becomes an owner of the property through foreclosure or purchase in settlement of the mortgage debt. Insurance under an owner's policy ends when the insured conveys all his interest in the property, except that an insured grantor remains covered for his continued liability under title covenants, unless, as is occasionally possible, he has assigned the policy. Title policies uniformly contain subrogation clauses for the protection of the insurer; and mortgagees' policies contain salvage clauses providing that if the insurer pays the full amount of the debt to the insured mortgagee, the mortgage and indebtedness shall be assigned to the insurer.

(Sup. Ct. 1939). For a treatment of concealment and misrepresentation, see, generally, VANCE, INSURANCE §§ 61-70 (3d ed. 1951).

18. Rhodes, *Treatment of Restrictions in Title Underwriting*, Title News, Sept. 1940, pp. 13, 14.

19. Lien preference without recording continues for 4 months to 2 years after completion of contract, ILL. ANN. STAT. c. 82, §§ 1, 7 (Supp. 1956); for 60 days to 6 months after indebtedness accrues, MO. ANN. STAT. §§ 429.010, 429.060, 429.080 (Supp. 1956); for 90 days after cessation of performance of labor or furnishing of materials, WASH. REV. CODE §§ 60.06.010, 60.04.040-60.04.060 (1956).

Mortgagees' policies usually cover assignees of the mortgage, but owners' policies do not cover grantees of the insured, and assignments to grantees are seldom permitted by title insurers.²⁰ Thus, each new grantee must take out a title policy, if he wishes title insurance coverage. He can secure some of the advantages of his grantor's policy, however, if there are title covenants in his deed.

Liability for Negligence

In addition to its liability under the policy, the company may be liable for negligence in performing title search and examination. If the opinion is in error due to negligence in the search or analysis of the facts disclosed by the search, the company is liable, provided the customer detrimentally relied on the opinion.²¹ Ordinarily under such circumstances the customer will claim under the policy, but it could be more advantageous for him to bring a tort action for negligence. This would be the case if a negligent search had been made but no policy issued, if it had been issued on the wrong tract,²² or if the policy had been issued after the reliance and it contained an exception to a defect not appearing in the examination report.²³ A tort action would also be better if the loss from the reliance were greater than the face amount of the policy.

Title Protection Afforded by Competing Systems

The protection provided by the lawyers' opinion system is almost as great as that provided by title insurance, if competent abstracters and lawyers are used. The added protection of title insurance covers only remote risks, although the losses can be heavy if they do occur. Abstracters and lawyers are liable in tort for their negligence,²⁴ but it is difficult to secure a judgment against a lawyer for negligence in examination. Abstracters often are covered by liability insurance, and some states require that they be bonded against the

20. Owners' policies usually contain this or a similar clause:

"This policy is not transferable to subsequent owners. A reissue policy in favor of new purchasers should be obtained."

But some owners' policies contain this clause:

"Assignment of this policy must be with the assent of this company endorsed hereon. This policy necessarily relates solely to the title as of the date of the policy, and, therefore, in assenting to such assignment, this Company assumes no liability for defects, liens or incumbrances attaching between the date of the policy and the date of assignment. In order to protect an assignee against intermediate defects, liens or incumbrances, this policy should be reissued to cover the date of assignment."

21. *Glyn v. Title Guarantee and Trust Co.*, 132 App. Div. 859, 117 N.Y. Supp. 424 (1st Dep't 1909).

22. See *Ehmer v. Title Guarantee and Trust Co.*, 156 N.Y. 10, 50 N.E. 420 (1898).

23. *Dorr v. Massachusetts Title Ins. Co.*, 238 Mass. 490, 131 N.E. 191 (1921).

24. An attorney was held liable in *Bayerl v. Smyth*, 117 N.J.L. 412, 189 Atl. 93 (1937), for a defective title examination. Other such cases are cited in the *Bayerl* opinion and in Annot., 5 A.L.R. 1389 (1919)*

risk of loss to others from negligence.²⁵ Many abstracters voluntarily pay for losses due to their negligence rather than incur the expense and adverse publicity of litigation. But even though they keep lower reserves than other insurance companies, title insurance companies are better able financially to pay losses than are abstracters and lawyers, and they are more likely to be in existence when the losses occur.

The protection provided by the Torrens system is broad but not absolute.²⁶ Under this system the original applicant brings an action similar to a quiet title suit, naming all known adverse claimants as defendants. After the resulting decree a certificate is filed in the registrar's office that is determinative of all rights and interests in the land, and a duplicate copy is issued to the owner. But for a period after the decree, it may be attacked by certain persons who have been deprived of rights.²⁷ In addition, the holder of a certificate is not protected from a few possible types of encumbrances, even though they are not noted on the certificate.²⁸ The Torrens statutes provide for indemnity or assurance funds, established from registration fees, to compensate those wrongfully deprived of interests in land through the negligence or fraud of the registrars' staffs or others.²⁹ In all important Torrens areas the funds are more than adequate.³⁰

Additional Services of Title Insurance Companies

In addition to title search and insurance, most title insurance companies perform other services usually but not always related to their title insurance business. One advantage that title insurance provides over other forms of

25. KAN. GEN. STAT. ANN. § 67-802 (Supp. 1955); NEV. REV. STAT. § 76-501 (1950).

26. See note 8 *supra*.

27. ILL. ANN. STAT. c. 30, § 70 (Supp. 1956) (decree may be attacked within two years by persons with an interest in the land who were unaware of the proceedings and were not served with process); MASS. ANN. LAWS c. 185, § 45 (1955) (within one year of a decree fraudulently obtained); MINN. STAT. ANN. § 508.26 (Supp. 1956) (within 60 days by interested persons who were unaware of the proceedings and were not served with process).

28. The decree is conclusive after two years, by the literal language of the Illinois statute. ILL. ANN. STAT. c. 30, § 70 (Supp. 1956). But the Illinois Supreme Court has held the certificate subject to attack by persons in possession at the time of registration and who were sought to be made parties not by being expressly named but under the heading "all whom it may concern." *Chicago Title and Trust Co. v. Darley*, 363 Ill. 197, 1 N.E.2d 846 (1936). And the court has held that an execution purchaser of a Torrens title is estopped to deny a common law dedication made by his grantor, even though never registered. *Hooper v. Haas*, 332 Ill. 561, 164 N.E. 23 (1928). These cases are discussed in POWELL, *op. cit. supra* note 8, at 140-43. The Massachusetts statute lists five encumbrances that, although unregistered, prevail over a certificate. MASS. ANN. LAWS c. 185, § 46 (1955). The Minnesota statute lists six such exceptions. MINN. STAT. ANN. § 508.25 (Supp. 1956).

29. *E.g.*, ILL. ANN. STAT. c. 30, §§ 136-40 (Supp. 1956); MASS. ANN. LAWS c. 185, §§ 99-109 (1955); MINN. STAT. ANN. §§ 508.74-508.79 (Supp. 1956).

30. The Cook County, Illinois fund is \$1,200,000, and claims paid have totaled \$72,000. In the two largest Minnesota counties, no claims have ever been paid. Other recent data

title protection is that the title insurer agrees to defend at its expense all litigation against the insured based upon a title defect covered in the policy. This obligation includes court costs as well as attorneys' fees, and must be paid in addition to any losses incurred by the insured. Failure of the insurer to defend when obligated to do so has been held to give the insured the right to defend and then recover the expenses of the suit from the insurer.³¹

A few companies qualified to write title insurance are primarily casualty or fire insurance underwriters. Some title insurance companies do a substantial banking or trust business, and many of them offer an escrow service. Most title insurance companies with title plants prepare and sell abstracts and frequently sell title data to credit agencies. At the risk of practicing law without authorization, some companies even draft legal instruments pertaining to the titles sought to be insured. Usually documents are drafted without charge as an accommodation to the customers who have applied for insurance. At least one large title insurance company makes a charge for advising lawyers on pleadings prepared in connection with litigation involving titles for which an application for title insurance is pending. Some title insurance companies formerly guaranteed the payment of mortgages, but this proved so disastrous during the depression of the thirties that few title companies now engage in this business.

Premium Rates

The major national companies, when writing policies through agents, charge only for insurance coverage unless arrangements have been made to permit the agent to charge for search and examination. The basic rates are \$3.50 per thousand for owners' policies and \$2.50 per thousand for mortgagees' policies, with some reduction as the amount of coverage increases. Because of differences in coverage, competition and cost of searching and examining, these rates vary somewhat among companies.³² But careful and detailed actuarial risk studies used in computing many kinds of insurance rates are not made for title insurance risks. Such studies would be of limited value because of the lack of data on uninsured losses, inconsistencies among insurers in methods of computing losses, and unstandardized coverage practices of insurers.

A number of factors affect the cost of a given policy. For example, mortgagees' insurance is sold at lower rates because it usually terminates more quickly, the risk decreases as the debt is paid, and the insurer has a chance to salvage losses through debt assignments; furthermore, most mortgagees are

on Torrens funds and claims appear in 4 AMERICAN LAW OF PROPERTY 648 n.6 (Casner ed. 1952).

31. Overholtzer v. Northern Counties Title Ins. Co., 116 Cal. App. 2d 113, 253 P.2d 116 (1953); Fidelity Union Cas. Co. v. Wilkinson, 94 S.W.2d. 763 (Tex. Civ. App. 1936), *aff'd*, 131 Tex. 302, 114 S.W.2d 530 (1938).

32. For sample rate charges in different parts of the country, see APPENDIX IV, *infra* p. 520.

large lending institutions that have a strong bargaining position.³³ If an owner's policy is obtained at the same time as a mortgagee's policy the cost of the latter is often nominal. Rates are usually lower for policies covering title that the company has previously insured, reflecting the lower cost of the limited search and examination and the negligible extent of the new risk. Some title insurance premiums include charges for title searches and examinations, but without distinguishing the charge for these services and that for the insurance of risks assumed. Some companies also include in their single premium a charge for survey and physical inspection of the premises.

Losses

Accurate quantitative data on title insurance losses are difficult to obtain. The accounting methods used by title companies for computing losses differ to such an extent that comparison is likely to be misleading. Some companies include as losses only claim payments that clear policyholders' titles from defects; others add the full cost of maintaining and operating a claims department, including the cost of investigation and defense of claims for which no payments are made. Some companies subtract recoveries from their loss totals, others do not. And variations in methods of computing premiums affect the comparative value of loss ratio data. Many companies are reluctant to disclose their loss records; if their loss ratio is low, they are subject to criticism that title risks are so trivial that insurance is unnecessary. In addition, accurate reports on types of loss are likely to show a high percentage of loss due to company negligence or to "casualty" risk assumption.

Despite the confused state of title insurance loss statistics, a few generalizations about title insurance losses can be made with considerable accuracy. The percentage of losses to premiums is much lower than for most kinds of insurance—the national loss ratio for 1954, based on reports of public agencies, was 1.69 per cent.³⁴ Loss ratios are generally higher when examinations are made by agencies or approved attorneys than when made by full-time company personnel, indicating greater accuracy, knowledge and honesty in home office systems of examination. The risk of loss is greatest during the first few years after a policy is written since defects are most likely to be discovered during these years; and as time passes, there is the increasing likelihood of defects being cured by statutes of limitations, adverse possession and prescription. Loss ratios are higher during periods of business recession and falling real estate prices, for the volume of new policies declines, more defects are raised by buyers seeking to avoid executory contracts of sale, and salvage under

33. See text at note 45 *infra*.

34. APPENDIX I, *infra* p. 518. Ratios of losses to premiums for groups of companies show group averages varying from 1.5% to 12%. GAGE, LAND TITLE ASSURING AGENCIES IN THE UNITED STATES 111-14 (1937); Burlingame, *Experiences in Losses and Claims, Eastern Area*, Title News, Dec. 1953, p. 66; Davenport, *Title Insurance—Losses and Claims*, Title News, Mar. 1952, p. 97.

mortgagees' policies is less. More losses result from the negligence of company employees and agents than from any other cause; negligent failure to note unpaid taxes, restrictive covenants, easements and judgments have proved particularly troublesome.³⁵ Losses from insuring marketability have been small or even nonexistent.³⁶

Because of their small losses title insurers give less attention to maintaining the ability to pay losses than is true of insurers assuming greater risks. The reserves of most title insurers are low,³⁷ and some companies maintain no reserves at all. The practice of reinsurance is nevertheless well developed in the industry, some companies reinsuring all risks over \$25,000. This practice is encouraged by the refusal of national lenders to accept title policies of small companies that do not reinsure a safe percentage of each large policy they write. Even the major title companies often reinsure large risks.³⁸

THE RELATIONSHIP BETWEEN TITLE INSURANCE AND THE LARGE INSTITUTIONAL LENDERS

Of vital significance to title insurance as a business and as an institution is the fact that the most important consumers of mortgagees' title insurance are the large institutional lenders, which hold eighty per cent of the national non-farm real estate mortgage debt.³⁹ All of these lenders except life insurance companies and some savings banks concentrate on loans secured by lands located close to their centers of business activity.⁴⁰ Life insurance companies,

35. GAGE, *op. cit. supra* note 34, at 109; *Losses and Claims*, Title News, Dec. 1955, p. 75; Burlingame, *supra* note 34, at 66.

36. REEVE, *op. cit. supra* note 15, at 67(i), 76(b).

37. A recent study of twenty-four companies that write title insurance or are agents for title companies showed that the percentage of operating expense allocated to reserves for insurance losses during the years 1949 to 1952 rarely exceeds 2% and frequently is below 1%, although three companies showed allocations averaging 5-8%. Sheridan, *Operating Expenses in Percentages*, Title News, Jan. 1954, p. 14. A study of seventeen companies for the years 1954 and 1955 disclosed that of the companies studied, only those domiciled in New York, where loss reserves are required by law, had such reserves. *Losses and Claims*, Title News, Dec. 1955, pp. 75, 76.

38. Recently twelve major title insurance companies entered into a treaty under which large risks assumed by one company are automatically reinsured by the others. REVISED TREATY FOR AUTOMATIC TITLE REINSURANCE BY AND AMONG ABSTRACT AND TITLE GUARANTEE COMPANY, DETROIT, MICHIGAN, AND OTHER COMPANIES (Feb. 27, 1956).

39. Institutional lenders' 96 billion dollars in debt holdings were divided as follows: building and loan associations, 32 billion; life insurance companies, 27 billion; commercial banks, 20 billion; and mutual savings banks, 17 billion. DEP'T OF COMMERCE, SURVEY OF CURRENT BUSINESS 14 (May, 1956). See also APPENDIX III, *infra* p. 520.

In 1954, when the farm mortgage debt was 7.7 billion dollars, life insurance companies held almost 2 billion dollars of it and commercial banks held over 1 billion dollars. STATISTICAL ABSTRACT OF THE UNITED STATES 454 (1955).

40. HOAGLAND, REAL ESTATE FINANCING 235 (1954); MORTON, URBAN MORTGAGE LENDING 61-65 (1956). Building and loan associations in some states are subject to legal restrictions drastically limiting the geographical area within which they may do business. See, e.g., MINN. STAT. ANN. § 51.36 (Supp. 1956); MO. ANN. STAT. § 369.400 (Supp. 1956).

however, are national lenders, and the larger companies hold mortgages on lands located in all parts of the United States. They do not originate all of their mortgage loans, but buy extensively from mortgage banks and others.⁴¹

Because the life insurance companies wish to know quickly and accurately whether a mortgage is acceptable to them no matter where the property is located, they prefer to obtain standardized forms of title protection. From a title point of view, mortgage acceptability to a life insurance company means that the land must be readily marketable if foreclosure becomes necessary. It also means that the mortgage must satisfy the limitations states put upon the investment practices of life insurance companies; many states, for example, restrict life insurance mortgage investments to otherwise unencumbered real property.⁴²

Since title insurance tends to be the most standardized form of title protection, life insurance companies making mortgage loans in several states usually insist on it as a condition of approving a mortgage, except in localities where title insurance is uncommon and to require it would put them at a severe competitive disadvantage with lenders willing to take other forms of title protection. Other reasons for this preference for title insurance are its ease of home office examination, the coverage it does give, the assumption of claim negotiation and litigation by the title insurers, and the financial ability of the title insurers to pay claims. Some companies do not loan on Torrens certificates unless a title insurance policy is obtained. Other companies accept Torrens certificates without restriction; still others accept them only for loans up to a certain sum, varying from \$25,000 to \$150,000; and some do not take an uninsured Torrens certificate for the period following initial registration when the registration is subject to attack.⁴³ The savings banks, mortgage bankers and the Federal National Mortgage Association also prefer title insurance and will insist on it to about the same extent as do the large life insurance companies.

Lenders that do most of their mortgage lending in areas close to their home offices accept any form of title protection that is customary in the locality. This is the usual position of building and loan associations, many commercial banks and smaller life insurance companies that do most of their mortgage lending in one state. But these lenders may require title insurance if they contemplate reselling the mortgage in the national market. Neither the Federal Housing Administration nor the Veterans Administration insist on title insurance as a condition of insuring mortgages.

Most life insurance companies are reluctant to accept lawyers' opinions

41. On the operation of mortgage banks, see HOAGLAND, *REAL ESTATE FINANCING* c. 15, 250-67 (1954). The organization of life insurance companies for originating mortgage loans over wide areas is discussed in SAULNIER, *URBAN MORTGAGE LENDING BY LIFE INSURANCE COMPANIES* c. 3 (1950).

42. CAL. INS. CODE ANN. § 1176 (Deering Supp. 1955); CONN. GEN. STAT. § 6168 (1949); N.Y. INS. LAW §§ 81, 85, 90.

43. See note 27 *supra*.

because the examination criteria and reports are much less standardized than those of title insurance, but some life insurance companies will accept them from lawyers whom they approve. In part as an attempt to counteract this competitive disadvantage, the bar in some states has sought, with partial success, to create greater title analysis consistency among lawyers by adopting uniform title standards.⁴⁴

As the leading customers of mortgagees' title insurance, the life insurance companies have been able to force the title insurance companies to offer policies giving broad, standardized coverage. Some of the usual exceptions are often eliminated from the policies, so that the companies insure known and unknown risks they would prefer not to cover.⁴⁵ In addition, the industry was forced to adopt the American Title Association mortgagee's policy, known as the ATA policy.⁴⁶ The standard provisions of this form are written by almost every title insurance company in the United States.⁴⁷ This and similar broad policies are the ones preferred by most institutional lenders, and only when competition makes it necessary will they accept a narrower policy.

Although little judicial construction of policies has taken place,⁴⁸ there are expressions by a few courts that title policies, like other insurance policies, should be construed against the insurer.⁴⁹ Such a doctrine may well be valid when the policies are contracts of adhesion and the insurer can present the insured with a take-it-or-leave-it proposition.⁵⁰ But this is plainly not the

44. Payne, *Increasing Land Marketability Through Uniform Title Standards*, 39 V.A. L. REV. 1 (1953); *Acceptable Title Rep., App. B*, 54.

45. The opposition of many insurers to broadening risk assumption for institutional lenders is expressed in Henley, *What Investors in Mortgage Loans Are Demanding in Title Insurance*, Title News, May 1956, p. 9.

46. The origins of the ATA policy and its predecessor, the LIC, or Life Insurance Company form, are discussed in REEVE, *op. cit. supra* note 15, at 127, and in *The American Title Association Standard Loan Policy of Title Insurance*, Title News, July 1929, p. 5.

There are two forms of the American Title Association loan policy now being written; the standard loan policy (revised 1946) and the additional coverage loan policy (revised 1946). Only the former is widely used. REEVE, *op. cit. supra* note 15, at 129. A copy of the policy is reprinted in APPENDIX V, *infra* p. 521.

47. The American Title Association is still trying to develop an acceptable standard owner's policy. Henley, *Report of Committee on Standard Form of Title Insurance*, Title News, Dec. 1955, p. 72.

48. Very few losses occur, and when they do, insurers are generally liberal in adjusting them. Cases on the construction of title insurance policies are collected in 9 APPLEMAN, *INSURANCE LAW AND PRACTICE* c. 210 (1943); and in 2 FITCH, *ABSTRACTS AND TITLES TO REAL PROPERTY* c. 33 (1954). The measure of damages under title policies has caused the courts some difficulty. The damage cases are discussed in Hilton, *Theories of Liability*, Title News, May 1956, p. 16; and Comment, 6 WESTERN RES. L. REV. 49 (1954).

49. *Coast Mut. Building-Loan Ass'n v. Security Title Ins. & Guaranty Co.*, 14 Cal. App. 2d 225, 57 P.2d 1392 (1936); *Broadway Realty Co. v. Lawyers Title Ins. & Trust Co.*, 226 N.Y. 335, 123 N.E. 754 (1919).

50. A contract of adhesion is one in which one of the parties merely has the choice of accepting or rejecting the contract, with little or no choice as to its terms, because of

case when the insured is a life insurance company that has had a hand in shaping the content of the policies, and it is doubtful that this rule of construction should be applied to most mortgagees' policies.

PATTERNS OF TITLE INSURANCE COMPANY OPERATION

Although some title companies insure titles only in one county, there are many national or statewide companies that insure titles in many counties or even many states. The Lawyers Title Insurance Company, operating over the widest area, has title insurance offices or agents in forty-three states, the District of Columbia, Hawaii and Puerto Rico.⁵¹ Nearly all national companies maintain dual title insurance operations, organized as separate operations: a local business in the home office county, and a national business for the rest of the area served. In its local business, the company offers full title examination and abstract service and maintains its own title plant. Some of the national companies do a larger business locally, both in dollar volume and in number of policies written, than all their national business combined.

Outside of the home office locality the national companies usually act through agents and approved attorneys, although some companies also have branch offices. The agents are mostly independent abstract companies, often with title plants of their own, but a few agencies are wholly or partially owned subsidiaries of the national company.⁵² There are both exclusive agencies and agents that represent several insurers. For the insurers that permit attorneys in private practice to act as agents, only those attorneys

his relatively inferior bargaining position. See Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

51. Other major national companies include the Kansas City Title Insurance Company (Missouri), operating in 22 states, Alaska and the District of Columbia; Louisville Title Insurance Company (Kentucky), operating in 17 states and the District of Columbia; Title Guarantee Company (Maryland), operating in 14 states and the District of Columbia; and Title Insurance Company of Minnesota, operating in 19 states. A company in this footnote is classified as a national company only if it does more than 25% of its premium business outside of its home state. In title insurance premium volume, Lawyers Title Insurance Corporation is the third largest title insurance company in the United States, with 1954 premium income of \$6,939,852. The 1954 title insurance premium income of other national companies was: Kansas City Title Insurance Company, \$1,647,337; Louisville Title Insurance Company, \$1,282,815; Title Guarantee Company, \$985,428; and Title Insurance Company of Minnesota, \$967,572. REPORT OF THE MISSOURI DIVISION OF INSURANCE 77 (1955); REPORT OF THE TENNESSEE COMMISSIONER OF INSURANCE AND BANKING 218 (1955). In 1955 these companies, with more agencies, increased their total premium volume by almost one-third.

52. The Lawyers Title Insurance Corporation has 36 branch offices, 193 agencies and over 12,000 approved attorneys. In comparison, the Chicago Title and Trust Company, which has sought more intensive development of title insurance outside its home office county than have most national or statewide companies, has 5 regional offices, 7 wholly or partly owned associated title companies, and 80 abstract company agents. These are all located in Illinois outside of Cook County, except for one associated company in Indiana.

who have considerable skill and experience in abstract examination work are approved.

Ordinarily, when a policy is issued through an agent, the agent has prepared an abstract, the abstract has been examined by an attorney in private practice approved by the insurer, and the attorney has given a written opinion as to the state of the title. The agent then issues the policy in the name of the insurer, although some approval by personnel from the insurer's home or branch office may first be required. Title insurance written through a national insurer's agent usually does no more than add title insurance protection to that provided by a lawyer's opinion.⁵³ The examining attorney secures his usual fee for an abstract examination; the abstracter obtains not only a fee for preparing the abstract, but he also receives part of the insurance premium as a commission, often as high as forty per cent of the total premium. A title insurance business operated in this way does not compete with abstracters and lawyers; it supplements their services. Since it is difficult to convince a person with a lawyer's opinion showing marketable title that he should also have title insurance, this type of insurance develops resistance because of cost. Such a noncompetitive approach has probably prevented the development of intensive title insurance coverage in individual counties, although some new business has been skimmed from areas where title insurance was never before written, most of it resulting from lenders' insistence on coverage.

Some forms of national title operation, however, adversely affect local abstracters and lawyers in private practice. Abstracters are foreclosed from a considerable amount of business when title insurers open branch offices and make their own title searches or hire lawyers in private practice to do so, all without the aid of independent abstract companies. And lawyers in private practice lose potential fees when the insurers or their agents use full-time employees to handle title examination.

The national insurer does more for an agent than merely insure policy risks. Its advertising and promotion of title insurance in the agent's area and its financial and service reputation develop both insurance and abstract business. Some insurers provide a legal advisory service for those agents that make title examinations. On their part, agents are expected to actively seek new title insurance business; and agency contracts commonly provide that agents shall indemnify the insurer for losses caused by negligence in their searches and examinations.⁵⁴

Title Plants

Because financial success in the title insurance business depends to a large extent on ownership or control of private title plants, title insurers writing a

53. For excerpts from a sample contract between a company and its agents, see APPENDIX VI, *infra* p. 523.

54. A typical agent's indemnification clause is reprinted in APPENDIX VII, *infra* p. 524.

large volume of insurance in any one county characteristically own a title plant in that county, or have an agent, usually an abstractor, that owns one. These plants consist of copies or summaries of public records pertaining to land titles, indexed so as to facilitate rapid and accurate search of the title history of any parcel of land in the county. Included in this consolidation are recorded instruments; records of real estate tax payments; probate court records; and records of such judicial proceedings as quiet title suits, actions resulting in liens on realty, foreclosures and divorce proceedings. With rare exceptions each private title plant contains data on land in but one county.

It is possible for abstracts to be prepared and title insurance searches to be made directly from the public records, and this is done by many small abstract and title companies, but searches made from the records of private title plants can be made much more rapidly. This is due largely to the superior indexing systems used by the private plants, and in large counties, to the more convenient arrangement of data for examination purposes. Title plant tract indexes or geographic filing systems are much superior to the grantor-grantee indexes customary in most public recording offices. In addition, for unplatted urban land, title companies make unofficial plats and indexes to the tract descriptions in these plats.⁵⁵ Miscellaneous indexes in title plants, also known as general indexes, are more efficiently arranged than the comparable public indexes, if, indeed, there are any. The vast collection of tax data, copies of recorded instruments, and copies of documents filed in judicial proceedings that are part of many title plants makes it possible for company employees to prepare an abstract or search and examine a title solely from company records without the necessity of locating and checking the official copies at the various public offices. A large title plant is operated essentially as a factory, with many semiskilled employees performing highly specialized and mechanized tasks.

Title plants are costly to maintain, for every day a large volume of instruments must be copied and transactions indexed if the plant is to remain current. In Cook County, Illinois, for example, about 300,000 real property instruments were recorded during 1954.⁵⁶ About 900,000 real property instruments were filed in Los Angeles County, California, during the same year. In addition to these instruments filed under the recording acts, each large title plant annually processes thousands of tax and judicial documents.⁵⁷

55. This is known as the arbitrary tract system or progressive arbitrary system. For a detailed description of one such system, see Myren, *Arbitraries*, Title News, Dec. 1953, p 3.

56. In the nine-month period from December, 1953, to August, 1954, there were 222,369 real estate recordings in Cook County. 2 THE COOK COUNTY RECORDER 1 (1954). During the same period, an additional 47,928 Torrens filings were made. *Ibid.*

A statistical study of deeds recorded in eight selected counties and the District of Columbia annually from 1895 to 1946 appears in FISHER, URBAN REAL ESTATE MARKETS, CHARACTERISTICS AND FINANCING 160 (1951).

57. The Chicago Title and Trust Company has 650 employees maintaining its Cook County title plant and making searches and examinations. For Los Angeles County, California, the Title Insurance and Trust Company has 450 employees doing similar work.

Whether or not a title or abstract company finds its profitable to maintain a title plant depends on the location, arrangement and indexing of the public records; the volume of title search business done by the company in the county; and the extent of the competition. In counties of large population it is usually profitable for at least one company to maintain a complete plant, and frequently several do so. But in New York City, with twelve companies competing for title insurance business, no company now finds it profitable to keep a tract index or make daily take-offs from current recorded instruments. The larger companies discontinued this practice within the past decade, and although some of them make current miscellaneous take-offs and use their title plants for older recordings, searches for recently recorded transactions are made exclusively from public records. Fortunately, a form of tract index is maintained by the public recording authorities. The New York experience runs counter to the national trend, which is toward more title plants and more complete title plants, even in smaller counties.

Title Examination

Title insurance is issued only after an examination of the title and a report to the applicant. The examination is based on data secured from public records or a title plant, frequently supplemented by a survey or inspection report of the premises. The data from the public records and title plant may be assembled in the form of a complete abstract, certified as accurate by an abstracter and belonging to the owner of the property. Or it may consist of the same information, assembled in more economical form and remaining in possession of the examining company. Examinations are usually made by members of the bar, but some companies employ laymen with extensive experience in title work and law students. In most companies examiners are restricted to the specialized task of analyzing title data assembled for them and making reports to applicants on the conditions and exceptions under which policies will be written. After receiving these reports, applicants or their attorneys frequently negotiate with the insurer for the elimination of at least some exceptions. A suit to quiet title may be necessary to cure a defect, but this is less the case with title insurance than with the lawyer's opinion system,⁵⁸ for insurers are somewhat more liberal than lawyers in passing titles as marketable.

Examinations for title insurance applications are made only back to the date of the last policy issued by the company on the tract in question. This differs from the practice under the lawyer's opinion system, where the full abstract is customarily re-examined. The reasons for the title insurers' practice in this regard are that risks of error in prior examinations are small, the added

58. Kansas is an example of the significance of quiet title suits in predominantly abstract opinion states. In that state such suits constituted 15% of all civil litigation filed in the general courts of first instance for a ten-year period from 1946 to 1955. KAN. JUN. COUNCIL BULL. 33 (Oct. 1955).

expense of re-examination is considerable, and the company may already be under an indirect obligation to the applicant if the prior insured is liable to the applicant under title covenants. The result of this practice is to simplify title insurance examinations, especially for old successful companies, since they have insured the titles to most tracts in their counties at some time in the past.

Advertising

The ability to conduct aggressive advertising and promotion is a major advantage that title insurance has over competing systems of title protection. Some appeal is made to the public at large, but attention is centered on the businesses and professions that seek title protection for themselves or their customers and clients: lawyers, realtors, builders and institutional lenders. Personal solicitation from members of these groups has been especially effective; one large Eastern company has a forty-man staff making personal calls on potential sources of business. Individual lawyers are prohibited by canons of ethics from advertising or soliciting, and the occasional advertising by bar associations of the title examination services provided by lawyers has not been effective. The Torrens system has been similarly handicapped. Government agencies traditionally are not expected to advertise their services, and funds for this purpose are difficult to secure. For example, the registrar in Cook County, Illinois, does distribute some promotional literature on recording and registration, but he has never had over \$10,000 a year available for promotion, and in Minnesota, there has never been any paid promotion of the registration system.

The Lawyers' Title Guaranty Fund

Recently a form of title insurance operation has developed in Florida that may be the lawyer's answer to the inroads title insurance has made. A title insurance business was formed by 1,400 members of the Florida bar and is conducted in the form of a common law business trust.⁵⁹ The trust, or fund as it is called, is managed by a board of fifteen member trustees elected by the members, who must be Florida lawyers. In the name of the fund the members issue title insurance policies providing conventional coverage,⁶⁰ including the ATA mortgagee's form. Expenses and reserves for losses are provided by the initial contribution of \$200 made when members join the fund, and additional contributions, analogous to premiums, made by the clients when the policies are written. All contributions of a member are credited to his account, and

59. Carter, *Lawyers' Title Guaranty Fund*, 8 U. FLA. L. REV. 480 (1955).

In 1955 a similar organization of lawyers was licensed to write title insurance in Ohio, starting business with more than 750 lawyer shareholders. *Ohio Bar Title Company Licensed by State*, 28 OHIO BAR ASS'N REP. 480 (1955).

60. There are some limitations that the fund places on the rights of members to issue policies. REGULATIONS UNDER DECLARATION OF TRUST OF LAWYERS' TITLE GUARANTY FUND, Regs. 1, 4(i).

at the end of the year expenses are allocated among members in proportion to their contributions made that year.⁶¹ Losses on insurance risks are allocated among all the members as expenses, except that losses caused by the negligence of a member in issuing a policy are charged only to that member's account. Provision is made for withdrawal of a member's unimpaired credit balance that has been in the fund more than seven years.

GOVERNMENT REGULATION OF TITLE INSURANCE

Title insurance companies are all subject to some form of government regulation, closely resembling that of life, fire and casualty insurance, and ordinarily under the authority of the state insurance commission.⁶² Some of the statutes regulating title insurers were passed in the legislative flurry that followed the *South-Eastern Underwriters* case⁶³—holding that interstate insurance transactions are interstate commerce—and the enactment of Public Law 15⁶⁴—declaring a congressional policy in favor of state regulation of insurance. They are chiefly the result of efforts to forestall federal regulation of the insurance industry.⁶⁵ Most regulation is designed to reduce the likelihood of insurers becoming insolvent. But frequently regulation seeks to protect policyholders from unfair rates and unfair policy terms, or to give competitive or monopoly advantages to insurers, abstracters or other favored groups affected by title insurance.

States commonly restrict the businesses in which title insurers may engage.⁶⁶ Some states have prohibited them from writing any kind of insurance except title insurance,⁶⁷ from guaranteeing mortgage loan payments,⁶⁸ or from engaging in the banking business⁶⁹—all of which are or have been important

61. In 1954 the Fund had assets of \$407,530. In that year the premiums on policies it wrote totalled \$156,140 and its losses were \$717. FLA. INS. DEPT REP. 38 (1955).

62. But in Illinois it is the State Auditor of Public Accounts, ILL. ANN. STAT. c. 73, §§ 479-85 (Supp. 1956); in Ohio, for title guarantee and trust companies, the State Auditor, OHIO REV. CODE § 1107.23 (Anderson 1953); in Colorado, the State Bank Commissioner, COLO. REV. STAT. ANN. § 31-11-2 (Supp. 1955); in Kansas, for trust companies writing title insurance, the State Bank Commissioner, KAN. GEN. STAT. ANN. §§ 9-1701, 9-1704 to 1707, 17-2002 (Supp. 1955).

63. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

64. 59 STAT. 33 (1945), 15 U.S.C. §§ 1011-15 (1952).

65. Examples of statutes pertaining exclusively to title insurance and passed shortly after the enactment of Public Law 15 are: Cal. Stat. 1949, c. 891; Md. Laws 1947, c. 270; and Wash. Laws 1947, c. 79, art. 29.

66. *E.g.*, CAL. INS. CODE ANN. §§ 12390-12392 (Deering Supp. 1955); KY. REV. STAT. ANN. §§ 287.040, 304.918 (Baldwin 1955); TEX. INS. CODE ANN. art. 9.01 (Supp. 1956).

67. CAL. INS. CODE ANN. § 12360 (Deering Supp. 1955) is applicable to domestic and foreign companies, and foreign companies that write other kinds of insurance even outside California are ineligible to transact the business of title insurance in California. See also VA. CODE ANN. § 38.1-25 (Supp. 1956).

68. *E.g.*, KY. REV. STAT. ANN. § 304.923 (Baldwin 1955); N.Y. INS. LAW §§ 432, 436; TEX. INS. CODE ANN. art. 9.04 (Supp. 1956).

69. *E.g.*, TEX. INS. CODE ANN. art. 9.01 (Supp. 1956); VA. CODE ANN. § 38.1-31 (Supp. 1956).

activities of title insurers. Many states require title insurers to make substantial deposits of cash or securities with the state as a condition of doing business.⁷⁰ Reserve⁷¹ and capital⁷² requirements are also common, as are restrictions on the investments that title insurers may make.⁷³ A few states restrict the amount of risk that any one company may assume without reinsurance.⁷⁴ Many statutes provide that rates be reasonable and not unfairly discriminatory between similar risks,⁷⁵ and that rate schedules and policy forms be filed with the state insurance commission, which may be given the right to disapprove rates as filed.⁷⁶ Statutes have been passed, since Public Law 15 became effective, prohibiting title insurers from granting rebates, discounts or commissions, except to their agents.⁷⁷ A few statutes expressly authorize lawyers to act as agents for title insurers in the procuring of business.⁷⁸ If the financial condition of a title insurer becomes impaired, some statutes

70. *E.g.*, CAL. INS. CODE ANN. § 12350 (Deering Supp. 1955), \$100,000 with its home state; ILL. ANN. STAT. c. 73, § 479 (Supp. 1956), \$500,000 for Cook County, \$50,000 for any one county plus \$5,000 for each additional county; MO. ANN. STAT. § 381.030 (Supp. 1956), \$50,000; TEX. INS. CODE ANN. art. 9.07 (Supp. 1956), one-fourth of authorized capital but not in excess of \$100,000.

71. *E.g.*, CAL. INS. CODE ANN. § 12370 (Deering Supp. 1955), 25% of the aggregate of the insurer's subscribed capital stock; MO. ANN. STAT. § 381.040 (Supp. 1956), 10% of premiums collected; TEX. INS. CODE ANN. art. 9.11 (Supp. 1956), 5% of gross premiums but not in excess of \$100,000, and with release and withdrawal rights.

72. CAL. INS. CODE ANN. § 12359 (Deering Supp. 1955), at least \$250,000; MINN. STAT. ANN. § 68.01 (Supp. 1956), at least \$200,000; TEX. INS. CODE ANN. art. 9.02 (Supp. 1956), at least \$100,000.

73. Investment is usually permitted in government bonds, real estate mortgages and title plant; and limited investment is frequently permitted in corporate securities. N.J. STAT. ANN. §§ 17:24-7, 8 (Supp. 1955); N.Y. INS. LAW § 79; *id.* § 435; VA. CODE ANN. §§ 38.1-179 to 217, 38.1-724 (Supp. 1956); WASH. REV. CODE § 48.29.130 (Supp. 1956).

74. MISS. CODE ANN. § 5671 (Supp. 1956) (risks may not be over 15% of capital and surplus); TEX. INS. CODE ANN. art. 9.12 (Supp. 1956) (not over 50% of capital stock and surplus); VA. CODE ANN. § 38.1-727 (Supp. 1956) (not over 50% of the aggregate amount of capital and surplus and reserves other than loss and claim reserves).

75. N.Y. INS. LAW §§ 438, 440; ORE. REV. STAT. § 748.086 (1955); PA. STAT. ANN. tit. 40, §§ 477b, 1241-1264 (Purdon 1955).

76. N.Y. INS. LAW §§ 184, 440; PA. STAT. ANN. tit. 40 § 1247, (Purdon 1955). The Texas Board of Insurance Commissioners fixes uniform title insurance rates and policy terms, applicable to all companies doing business in Texas. TEX. INS. CODE ANN. art. 9.03 (Supp. 1956); TEX. BD. OF INS. COMM'RS BASIC MANUAL OF RULES, RATES AND FORMS FOR THE WRITING OF TITLE INSURANCE IN THE STATE OF TEXAS §§ II, III (1956). The power of the Texas Board of Insurance Commissioners to fix uniform rates for all companies has been upheld as constitutional, on the basis that insurance was a business affected with a public interest. *New York Title & Mortgage Co. v. Tarver*, 51 F.2d 584 (N.D. Tex. 1931); *Daniel v. Tyrrell & Garth Inv. Co.*, 127 Tex. 213, 93 S.W.2d 372 (1936).

77. CAL. INS. CODE ANN. §§ 12404, 12405 (Deering Supp. 1955); MO. ANN. STAT. § 381.100 (Supp. 1956); TEX. INS. CODE ANN. art. 9.22 (Supp. 1956). In Texas only a person owning and operating an abstract plant may share in a title insurer's premiums. *Ibid.* *Board of Ins. Comm'rs v. Title Ins. Ass'n*, 153 Tex. 574, 272 S.W.2d 95 (1954).

78. FLA. STAT. ANN. § 625.01 (Supp. 1955); MISS. CODE ANN. § 5671 (Supp. 1956); N.Y. INS. LAW § 440.

authorize the commission to require that the insurer reinsure its policies⁷⁹ or even discontinue its business;⁸⁰ the state may have the right to rehabilitate or liquidate the company.⁸¹

Some statutes are designed at least in part to give competitive or monopoly advantages to a favored group. Among them are laws that establish extremely high deposit requirements, discouraging new companies from coming into an area;⁸² that prevent companies writing other kinds of insurance from engaging in the title insurance business;⁸³ and that require a title insurer to have a complete tract index or title plant in the county where its principal office in the state is located.⁸⁴ Similar preferences are shown by the Texas statute requiring that a title insurance agent own a title plant if it is to qualify for a division of premiums,⁸⁵ and by the Oregon statute requiring that the insurer, its agent or someone certifying to the insurer the status of the title, own and maintain a title plant in every county in which the insurer does a title insurance business.⁸⁶

Title insurance companies, wherever they do business, are generally required each year to file detailed financial statements.⁸⁷ Audits of domestic companies are usually made every two or three years,⁸⁸ and occasionally representatives from other states where the companies do business join in the examinations. These audits are the only supervision that most state agencies give to title insurance companies. Most state regulatory bodies, which are generally understaffed, concentrate their attentions on other kinds of insurers, but in Texas and New York state agencies give more than average attention to title insurance. This is explained by the greater degree of state regulatory activity required under the Texas title insurance statutes, and by the insolvency record of New York insurers during the thirties.⁸⁹ In New

79. *E.g.*, N.Y. INS. LAW § 434.

80. ILL. ANN. STAT. c. 73, § 482 (Supp. 1956); N.Y. INS. LAW §§ 510, 511, 513; TEX. INS. CODE ANN. art. 9.13 (Supp. 1956).

81. N.Y. INS. LAW § 434.

82. *E.g.*, the \$500,000 deposit requirement to do title insurance business in Cook County, Illinois. ILL. ANN. STAT. c. 73, § 439 (Supp. 1956).

83. See notes 66-69 *supra*.

84. ORE. REV. STAT. § 748.084 (1955); WASH. REV. CODE § 48.29.020 (Supp. 1956).

85. See note 77 *supra*.

86. ORE. REV. STAT. § 748.084 (1955).

87. *E.g.*, IDAHO CODE ANN. § 41-2805 (Supp. 1955); ILL. ANN. STAT. c. 73, § 485 (Supp. 1956).

88. IDAHO CODE ANN. §§ 41-2809, 41-702, 41-708 (Supp. 1955); ILL. ANN. STAT. c. 73, § 484 (Supp. 1956); MO. ANN. STAT. § 381.120 (Supp. 1956).

89. Thirty-one of the forty-four title and mortgage guaranty companies organized in New York from 1920 to 1930 were eventually taken over by the state for rehabilitation and subsequent liquidation. GRAY, TITLE INSURANCE COMPANIES 23 (1954) (a pamphlet reprinting a lecture given at the In-service Training Program of the New York State Insurance Department); see also FISHER, URBAN REAL ESTATE MARKETS: CHARACTERISTICS AND FINANCING 33-35 (1951). Supervision of title insurers by the Texas Board of Insurance Commissioners includes an audit of each domestic and foreign insurer at least every two years, occasional unscheduled spot-check audits of these insurers, approval

York the Title and Mortgage Section of the State Insurance Department's Property Bureau has an eight-man staff that audits and examines title insurers and investigates their agents and those accused of engaging in the title insurance business without authorization. The Section's audit of title insurers includes a spot-check of their title searches and examinations to determine the amount of risk really being assumed. It also handles applications for title insurance rate changes.

FUTURE PROSPECTS OF THE TITLE PROTECTION SYSTEMS

Existing systems of title protection have made titles sufficiently certain to enable vast land resource development in the United States without serious interference from title risks. But the prevailing systems are cumbersome and expensive. They are often as ingeniously and efficiently operated as the controlling legal structure will permit. That structure, however, is faulty. It is based on a recording system that provides inadequate protection and necessitates intricate record and non-record searches before even partial title protection can be offered.

Torrens Registration

Torrens registration, a cheaper and simpler system, has been rejected by all but a few counties in the United States.⁹⁰ Although this system had considerable support fifty years ago, its promise has never been realized. Torrens registration has had strong opponents whose economic lives it threatened: title insurance companies, abstracters and important elements in the bar. The registrars' offices have not been aggressive in their competition with the other systems and, unlike the title insurers, have done little or no advertising and promotion. Their service has too often been slow, and there has been delay in securing the necessary personnel and equipment to remedy this problem.⁹¹ Nor

of policy forms and fixing of premium rates. A study of title insurance premium rate fixing is currently being made by the Texas Board in an effort to develop more precise rate fixing standards than the desires of insurers tempered by vague feelings of the commissioner as to what is fair.

90. See notes 26-30 *supra* and accompanying text.

After initial registration, Torrens is the cheapest form of title protection. For a discussion of costs during the 1930's, see McDougal & Brabner-Smith, *Land Title Transfer: A Regression*, 48 YALE L.J. 1125, 1138 (1939). The same is true today, even in Illinois, which in 1955 increased its registration fees. ILL. ANN. STAT. c. 30, § 145 (Supp. 1956). In the few counties where appreciable new Torrens registration is still taking place, the cost advantage is the reason. Statistics on new registration in Massachusetts, Minnesota and Illinois appear in 4 AMERICAN LAW OF PROPERTY § 17.40 (Casner ed. 1952). Many of the new registrations are by urban developers who register titles to large tracts, subdivide the tracts into small lots, and sell them individually. Another important type of new registration is that of titles so defective that judicial action is needed to clear them.

91. This has been most noticeable in Cook County, Illinois. Recently, when after many years a substantial staff increase was made, the time for issuing new certificates

do they have the power of their competitors to broaden coverage and cut rates when necessary to attract and hold new business.

The Torrens acts that have been passed contain shortcomings that discourage registration. There is ordinarily no financial inducement to put property into Torrens, for the judicial proceeding required by initial registration is both slow and expensive, and the financial benefits of the system accrue only to subsequent transferees. The existing statutes also have gaps in the protection they provide: initial registration may be attacked for a limited period, and registration does not protect against all encumbrances. Nor does the Torrens system provide any inspection, release or other procedure to protect against possible unrecorded mechanics' liens. These risks, although slight, have been sufficient to deter many institutional lenders from loaning on Torrens titles.

The future of the Torrens system in the United States is bleak, for interest in it has declined.⁹² The recent repeal of the California registration act destroyed the system in one of the five states where it has been most extensively used.⁹³ In Illinois, another of these five states, deregistration bills have been introduced in recent sessions of the legislature, and once deregistration is passed, repeal may follow.⁹⁴

A revival of interest in land registration might take place if the existing acts were amended so as to make initial registration more attractive to owners and lenders. The time required to obtain an initial registration should be reduced, as should its cost. This could be done by making the initial registration an administrative proceeding with right of appeal to the courts. An early Illinois act so providing was declared unconstitutional,⁹⁵ but develop-

on property already registered was reduced from six weeks to eight days. But space and equipment are still short. Much of the added staff must work at night because there is no office space for them during the day.

92. There was renewed interest in the Torrens system during the nineteen-thirties after many New York title insurance companies became insolvent. The most compelling argument in favor of the Torrens system made during this period is McDougal & Brabner-Smith, *supra* note 90.

93. Cal. Stat. 1955, c. 332. Seven other states have passed and later repealed registration acts: Mississippi, Nebraska, North Dakota, South Carolina, South Dakota, Tennessee and Utah. The following registration statutes are still on the books: COLO. REV. STAT. ANN. art. 10 (Supp. 1955); GA. CODE ANN. tit. 60 (Supp. 1955); ILL. ANN. STAT. c. 30, §§ 45-148 (Supp. 1956); MASS. ANN. LAWS c. 185 (1955); MINN. STAT. ANN. c. 508 (Supp. 1956); N.Y. REAL PROP. LAW §§ 370-435; N.C. GEN. STAT. c. 43 (Supp. 1955); OHIO REV. CODE ANN. cc. 5309, 5310 (Anderson 1953); ORE. REV. STAT. c. 94 (1955); VA. CODE ANN. § 55-112 (Supp. 1956); WASH. REV. CODE §§ 65.12-800 (Supp. 1956). Hawaii also has a registration act. HAWAII REV. LAWS c. 307 (1945). A substantial volume of registrations exists in parts of only four states: Illinois, Minnesota, Massachusetts and Ohio. Adoption in Illinois is by referendum vote of the people of each county. ILL. ANN. STAT. c. 30, § 148 (Supp. 1956). Such a vote has carried only in Cook County.

94. Deregistration preceded repeal in California. Cal. Stat. 1949, c. 293.

95. Ill. Laws 1895, at 107, §§ 15, 81, was declared unconstitutional in *People ex rel. Kern v. Chase*, 165 Ill. 527, 46 N.E. 454 (1896). Cf. *State v. Guilbert*, 56 Ohio St. 575, 47 N.E. 551 (1897).

ments in administrative law since that time make doubtful the same position today.⁹⁶ An inducement to new registrations would also be made if no charges or costs were assessed the initial registrant by the registrar or court. By means of slightly increased registration charges when the property is later transferred, costs of the system could be passed on to the subsequent beneficiaries of registration. Another improvement would be reducing the kinds of encumbrances excepted from the protection of the act, and providing insurance from the indemnity fund for the rest, as well as for any losses resulting from successful attacks on registration decrees during the period when such attacks are permitted. Existing indemnity funds could probably take care of these added risks without any rate increases.

But even if these amendments were adopted, it is doubtful that a Torrens system could become the prevailing system of title protection in the United States without mandatory registration. Registration is generally compulsory in those countries where Torrens has been successful, but none of the American registration acts have had such a provision.⁹⁷

Title Insurance v. Lawyer's Opinion

In large cities title insurance has been very successful in its competition with both the Torrens and the lawyer's opinion systems. In these cities most lawyers in private practice no longer want to search or examine titles; the practice is too unremunerative and few lawyers possess the specialized knowledge needed. The mass production techniques of the large insurers, high overhead in metropolitan law offices and prohibitions against advertising and solicitation have made the lawyer's opinion system competitively unprofitable in many large cities. But in small towns and rural areas title insurance has been far less successful. What success it has had is due mostly to the demands of the national lenders for title insurance as a condition to their making mortgage loans. To some extent it is used to resolve disagreements between lawyers over marketability in sale or mortgage transactions. Heavy title insurance saturation in small towns apparently will require all-inclusive service by an agent or branch office of the insurer, using a title plant. If the insurer aggressively promotes title insurance and also provides efficient search, examination and policy-issuing service, small town saturation is possible. The lawyers in private

96. The following are a few of the many cases holding statutes constitutional against the assertion that they granted judicial powers to administrative officials: *Twin Falls Canal Co. v. Huff*, 58 Idaho 587, 76 P.2d 923 (1938) (water permit awards); *Porterie v. Grace*, 184 La. 443, 166 So. 133 (1936) (interpretation of mineral leases from the state); *Clark v. Briscoe Irrigation Co.*, 200 S.W.2d 674 (Tex. Civ. App. 1947) (water right appropriation). See also *Brown*, *Administrative Commissions and the Judicial Power*, 19 MINN. L. REV. 261 (1935).

97. An Illinois act requiring that representatives of decedents' estates register lands held by them was held unconstitutional. *Anderson v. Shephard*, 285 Ill. 544, 121 N.E. 215 (1918).

practice apparently must be excluded from land transfers, except possibly as drafters and over-all supervisors of closings, for this to be done. In many counties under 100,000 population lawyers will be difficult to eliminate from searches and examinations, particularly in the counties where the public records are easy to use.

The competitive position of lawyers would be improved if better and more complete title standards were adopted and adhered to.⁹⁸ And the Michigan type forty-year curative act also should competitively benefit lawyer examiners by simplifying examinations and making titles more certain.⁹⁹ The Florida lawyers' fund form of title protection, if it can be effectively administered, provides an added incentive to the private practitioner by making title examination work more remunerative. The growth of this kind of operation should make it far more difficult for the conventional insurers to dislodge private practitioners from the title examination field.

"Casualty" Insurance

In metropolitan centers the large title insurers with complete title plants are being threatened by low overhead insurers operating without title plants. These latter operate on the casualty principle of risk assumption rather than on loss prevention. They can afford heavier losses because of their lower costs for search and examination, since they check back only to the last previous policy issued by a competitor that made a thorough examination, and use the public records for the searches and examinations that they do make. Many of these low cost insurers are branches or agents of large national companies and therefore have prestige and strong financing. Whether or not they will make extensive headway in large cities cannot yet be determined, but they have already caused concern to their large local competitors, who have introduced some rate and coverage modifications favorable to consumers.

If broadly applied, the typical casualty insurance approach to risk assumption could have a disastrous effect on titles. If title insurance generally were written on a risk basis only, without search or examination, there would be a gradual deterioration in the certainty of titles. It is the curative action taken by owners upon receiving examination reports from insurers that maintains the high degree of record title certainty of insured titles. Elimination of the search and examination would remove the basis for curative action, and as titles become more uncertain, losses would increase and insurance rates would go up. The apparent trend toward more widespread adoption of the casualty approach in title underwriting should be watched with care. If carried so far as to impair the certainty of titles, corrective government action may be desirable.

98. See note 44 *supra* and accompanying text.

99. *E.g.*, MICH. STAT. ANN. §§ 26.1271-79 (Supp. 1955); IOWA CODE ANN. § 614.17 (Supp. 1956); MINN. STAT. ANN. § 541.023 (Supp. 1956).

Title Insurance Reform

For title insurance companies to be of maximum value to the community at large, they should provide broad coverage, charge fair rates, be able to pay losses occurring long after the date of the policy, fully and accurately disclose the nature of their services, and provide service with sufficient promptness to meet the needs of parties to sales and lending transactions. To the extent that these goals cannot otherwise be achieved, government intervention is justified.

Where substantial competition prevails, rigorous government regulation of the title insurance industry is unnecessary as long as risks of loss remain low. Because competition has generally meant lower rates, broader coverage and faster service for the insured,¹⁰⁰ regulation should be confined to providing adequate reserve or deposit requirements and reinsurance requirements. But in the few large cities where a title insurer has a monopoly or near monopoly over title protection, the state should regulate rates and policy terms.¹⁰¹ Companies that assume relatively heavy risks due to careless or limited searches and examinations or to exceptionally broad coverage should be subjected to stricter reserve, deposit and reinsurance requirements. Nationally uniform methods of computing losses should be required so that comparative loss ratio statistics would be more meaningful to state regulatory bodies and to consumers. Some surveillance should be maintained over advertising in order to prevent exaggeration of title risks and insurance coverage.

One aspect of a monopoly situation that should be encouraged in other large cities is the existence of only one title plant, for complete plants are expensive to develop and maintain and duplication is economically wasteful. The single plant could be operated jointly by several competing insurers, or one insurer could be given the sole operating rights. But perhaps the best solution would be to divorce the business of title plant maintenance from that of examining and insuring, thereby eliminating the waste of title plant duplication and retaining competition in examination and insurance. Such a system would resemble the customary division of function between lawyers and abstracters under the lawyer's opinion system of title protection, although abstracts in permanent form would not be necessary. On the other hand, title plant monopoly might retard the development of new plant maintenance techniques, for highly competitive markets have resulted in the invention of some important new title plant methods and equipment.

100. Competition among national companies has also been directed towards securing field representation. This has been expressed in such diverse ways as higher commissions and nonexclusive agreements with preferred agents, usually abstracters with title plants; agency agreements with lawyers and "curbstone" abstracters, those without title plants willing to undercut the charges of more desirable agents; and the establishing of branch offices owned and operated by the insurer.

101. Some of the problems in regulating title insurance rates are discussed in Leary, *Rate Regulation and Title Insurance*, 1953 *Ins. L.J.* 613.

Private plants are also economically wasteful to the extent that they duplicate public records. Greater attention should be given to eliminating the need for private title plants by introducing more complete and efficient indexes and arrangements of public records. To the extent that government record offices can not or will not adapt themselves to efficient title searching, consideration should be given to reducing the costs of these offices if complete private title plants are locally maintained. For example, the maintenance of tract indexes by recorders could be dropped. Title plant copies of recorded real property instruments could be made the official copies and the title plant indexes the official indexes. Companies with title plants could then be paid by the counties for part of plant maintenance cost, and county recorders would no longer maintain indexes or keep copies of recorded instruments. The companies would of course be required to make recorded data available to those interested, usually only county officials and professional title examiners.

CONCLUSION

There have been three major reasons for the growth of title insurance in the United States: the life insurance companies' strong preference for it in their lending operations; the efficiency with which title insurers having complete title plants can search and examine titles, particularly in large cities; and the aggressive promotion of title insurance by the insurers. Because these factors are likely to continue, title insurance will probably become even more successful in the future. The Torrens system offers no serious competition, and the lawyers have shown surprisingly little opposition. Perhaps the lawyers will resist title insurance more strenuously if it threatens to exclude them from searches and examinations in small towns and rural areas. More state-wide and national companies may shift their emphasis from developing large networks of small volume agencies to heavy saturation of favorable areas, following the Pacific Coast and Illinois patterns. Finally, rigorous government regulation of the title insurance industry is unlikely, unless Public Law 15 leads to more intensive regulation of all kinds of insurance or unless insolvency again threatens title insurers.

APPENDIX I

Title insurance premiums and losses paid for 1954.

| <i>State</i> | <i>Premium Income</i> | <i>Losses Paid</i> |
|--------------|---------------------------|------------------------|
| Alabama | \$ 526,392 | \$ 19,038 |
| Arizona | 3,140,087 | 31,146 |
| Arkansas | 116,028 | 2,873 |
| California | 30,954,882 | 451,492 |
| Colorado* | 102,131 | none |
| Connecticut | 117,073 | 1,479 |
| Delaware | 182,813 | none |
| Florida | 2,256,610 | 52,862 |
| Georgia | 665,550 | 6,707 |

| <i>State</i> | <i>Premium Income</i> | <i>Losses Paid</i> |
|------------------------|---------------------------|------------------------|
| Idaho | 133,957 | 4,952 |
| Illinois | 13,079,050 | not reported |
| Indiana | 1,148,253 | 17,208 |
| Iowa | none | none |
| Kansas* | 257,282 | 4,814 |
| Kentucky | 538,482 | 5,608 |
| Louisiana | 436,554 | 49,178 |
| Maine | 6,700 | none |
| Maryland | 1,284,463 | 28,065 |
| Massachusetts | 15,502 | none |
| Michigan | 4,476,051 | 22,126 |
| Minnesota † | | |
| Mississippi | 189,825 | 7,652 |
| Missouri | 1,020,261 | 7,561 |
| Montana † | | |
| Nebraska | 21,382 | |
| Nevada | 148,594 | 239 |
| New Hampshire | 1,400 | none |
| New Jersey | 3,226,261 | 65,738 |
| New Mexico | 215,207 | 2,393 |
| New York | 3,247,947 | 150,939 |
| North Carolina | 310,427 | 573 |
| North Dakota | 11,544 | none |
| Ohio* | 1,353,230 | 11,220 |
| Oklahoma | 89,911 | 300 |
| Oregon | 2,744,713 | 60,690 |
| Pennsylvania | 4,906,941 | 99,031 |
| Rhode Island | 6,240 | none |
| South Carolina | 153,333 | 30,827 |
| South Dakota | 15,891 | none |
| Tennessee | 1,001,322 | 13,361 |
| Texas | 10,638,976 | 115,545 |
| Utah | 105,689 | 4,390 |
| Vermont | 842 | none |
| Virginia | 903,510 | 29,010 |
| Washington | 3,852,720 | 68,234 |
| West Virginia | 88,844 | 365 |
| Wisconsin | 942,519 | 15,617 |
| Wyoming* | 26,530 | none |
| Alaska* | 15,412 | none |
| District of Columbia † | | |
| Hawaii | 25,897 | none |
| Puerto Rico | 16,369 | none |
| Totals | \$94,719,597 | \$1,381,233 |

Loss ratio 1.69% (Does not include Illinois.)

* Omits domestic insurers.

† Reports not available.

The above data were obtained from the records of state agencies, in most instances as published in state insurance commission reports. The state agencies secure their title insurance statistical data from reports that the title insurance companies must file. Some

companies report as premiums the entire cost of a title policy to the customer, including the charge for the search and examination. Other companies report as premiums only the charge for insurance, exclusive of search and examination. Most companies in reporting losses paid apparently include only claim payments and not costs of investigating and defending against claims.

APPENDIX II

Some examples of title insurance premiums and losses for 1940, 1945 and 1950, as obtained from state insurance commission reports, are as follows:

| | 1940 | | 1945 | | 1950 | |
|--------------|-----------------|---------------|-----------------|---------------|-----------------|---------------|
| | <i>Premiums</i> | <i>Losses</i> | <i>Premiums</i> | <i>Losses</i> | <i>Premiums</i> | <i>Losses</i> |
| California | \$5,927,097 | \$74,076 | \$13,405,156 | \$229,026 | \$23,547,875 | \$138,190 |
| Florida | 206,514 | 1,772 | 363,881 | 3,909 | 1,315,555 | 32,003 |
| Michigan | 695,322 | 4,458 | 599,637 | 8,604 | 3,153,382 | 8,543 |
| Pennsylvania | 1,006,997 | 42,798 | 1,803,419 | 38,861 | 4,446,171 | 65,422 |
| Tennessee | 274,648 | 4,288 | 432,680 | 5,033 | 802,730 | 16,252 |
| Texas | | | 2,271,270 | 57,060 | 7,866,346 | 56,112 |
| Washington | 908,023 | 11,671 | 2,046,715 | 11,378 | 3,780,934 | 38,813 |

Texas premiums and losses are unavailable for 1940.

APPENDIX III

Share of Nonfarm Mortgage Debt Institutionally Held
(in billions of dollars)

| <i>Year</i> | <i>Total Nonfarm Mortgage Debt</i> | <i>Institutionally Held</i> | |
|-------------|--|-----------------------------|-------------------------|
| | | <i>Amount</i> | <i>Percent of Total</i> |
| 1920 | 15.3 | 7.9 | 52 |
| 1925 | 25.7 | 15.2 | 59 |
| 1930 | 37.7 | 22.7 | 60 |
| 1935 | 28.4 | 15.5 | 55 |
| 1940 | 30.0 | 18.0 | 60 |
| 1945 | 30.8 | 19.7 | 64 |
| 1950 | 66.7 | 49.3 | 74 |
| 1953 | 93.4 | 72.0 | 77 |
| 1955 | 120.8 | 95.9 | 79 |

STATISTICAL ABSTRACT OF THE UNITED STATES 454 (1955) and MORTON, URBAN MORTGAGE LENDING 36 (1956).

APPENDIX IV

The following are examples of rate charges in various parts of the country, taken from interviews and company rate schedules:

Company A, for a large Eastern city:

For a \$10,000 owner's policy, \$107; for a \$100,000 owner's policy, \$357. For a \$10,000 mortgagee's policy, \$60; for a \$100,000 mortgagee's policy, \$310. Charge for a mortgagee's policy is one-third the regular rate if it is issued simultaneously with an owner's policy. Rates include search and examination.

Company B, for a large Eastern City:

For a \$10,000 owner's policy, \$115; for a \$100,000 owner's policy, \$515. Mortgagees' policies will be issued simultaneously with owner's policies for \$10. Rates include search and examination.

Company C, for a large Mid-Western city:

For a \$10,000 owner's policy, \$84; for a \$100,000 owner's policy, \$444. For a \$10,000 mortgagee's policy, \$61; for a \$100,000 mortgagee's policy, \$331. Additional premiums

charged for extraordinary risks. Reissue rates are based primarily on the extent of the search required. The charge for a mortgagee's policy is \$5 when issued with an owner's policy. An added charge is made for inspection and report of possession. Rates include search and examination.

Company D, for a large Mid-Western city :

For a \$10,000 owner's policy, \$35; for a \$100,000 owner's policy, \$307.50. For a \$10,000 mortgagee's policy, \$25; for a \$100,000 mortgagee's policy, \$206.25. Reissue rate is 60% of the original rate and applies to some policies issued within 10 years of a policy on the same tract. The charge for a mortgagee's policy is \$7.50 when issued with an owner's policy. Rates do not include search and examination.

Company E, for a Mid-Western city of 100,000 population :

For a \$10,000 owner's policy, \$70; for a \$100,000 owner's policy, \$370. For a \$10,000 mortgagee's policy, \$49; for a \$100,000 mortgagee's policy, \$249. Reissue rate for either an owner's or mortgagee's policy is \$23.50 on a \$10,000 policy, and \$143.50 on a \$100,000 policy. The charge for a mortgagee's policy when issued with an owner's policy is \$5. Rates include examination, but \$15 is charged for a title search if no abstract is provided.

Company F, for a large Pacific Coast city :

For a \$10,000 owner's policy, \$60.25; for a \$100,000 owner's policy, \$327.75. For a \$10,000 mortgagee's policy, \$48.20; for a \$100,000 mortgagee's policy, \$262.20. Added charges are made for inspections, ATA policies (see text at notes 46-47 *supra* and accompanying text), and extended coverage including mechanics' liens. Rates include search and examination.

APPENDIX V

AMERICAN TITLE ASSOCIATION STANDARD LOAN POLICY, REVISED 1946

[p. 1]

THE TITLE INSURANCE COMPANY

a corporation of _____, herein called the Company, for a valuable consideration, paid for this Policy of Title Insurance,

Does Hereby Insure

the owner of the indebtedness secured by the mortgage or deed of trust described in Schedule A, herein called said indebtedness, and each successor in interest in ownership thereof, and also any such owner who acquires the land referred to in this Policy in satisfaction of said indebtedness as provided in the conditions and stipulations hereof, herein called the Insured, against loss or damage not exceeding _____ Dollars, which the Insured shall sustain by reason of any defect in the execution of said mortgage or deed of trust, but only insofar as such defect affects the lien or charge of such mortgage or deed of trust upon the said land, or by reason of the invalidity of the lien thereof upon said land, or by reason of title to the said land being vested at the date hereof otherwise than as herein stated, or by reason of unmarketability of the title of the mortgagor or trustor, or by reason of any defect in, or lien or encumbrance on said title at the date hereof, or by reason of any statutory lien for labor or material which now has gained or hereafter may gain priority over the lien upon said land of said mortgage or deed of trust, other than defects, liens, encumbrances and other matters set forth in Schedule B, or by reason of the priority thereto of any lien or encumbrance at the date hereof except as shown by Schedule B, all subject, however, to the conditions and stipulations hereto annexed, which conditions and stipulations together with said Schedules A and B are hereby made a part of this Policy.

Subject to the provisions of Schedule B and the conditions and stipulations hereof, the Company further insures that, at the date hereof, any assignments shown by Schedule

A, whether recorded or not, are good and valid and vest title to said mortgage or deed of trust in the Insured free and clear of all liens.

In Witness Whereof, THE TITLE INSURANCE COMPANY
has caused its corporate name and seal to be hereunto affixed by its duly
authorized officers, this day of

THE TITLE INSURANCE COMPANY

[p. 2]

SCHEDULE A

1. The fee simple title to said land is at the date hereof vested in .
2. The mortgage or deed of trust and assignments, if any, covered by this Policy are described as follows: .
3. The land described in the instrument above mentioned and with respect to which this policy is issued is described as follows: .

SCHEDULE B

Showing defects, liens, encumbrances and other matters against which the Company does not, by this Policy, insure:

[p. 3]

CONDITIONS AND STIPULATIONS

1. If any Insured acquires said land, or any part thereof, by foreclosure, trustee's sale, or other legal manner in satisfaction of said indebtedness, or any part thereof, this Policy shall continue in force in favor of such Insured, subject to all of the conditions and stipulations hereof. The benefits hereof shall inure to any federal agency or instrumentality acquiring said land under an insurance contract or guaranty insuring or guaranteeing said indebtedness, or any part thereof, whether named as an insured herein or not, subject otherwise to the provisions hereof.

2. The Company at its own cost shall without undue delay defend the Insured in all litigation consisting of actions or proceedings commenced against the Insured, or defenses, restraining orders, or injunctions interposed against a foreclosure or sale of said land in satisfaction of said indebtedness, which litigation is founded upon a defect, lien or encumbrance insured against by this Policy, and may pursue such litigation to final determination in the court of last resort. In case any such action or proceeding shall be begun or defense interposed, or in case knowledge shall come to the Insured of any claim of title or interest adverse to the title as insured, or which might cause loss or damage for which the Company shall or may be liable by virtue of this Policy, the Insured shall at once notify the Company thereof in writing. If such notice shall not be given to the Company within ten days of the receipt of process or pleadings or if the Insured shall not, in writing, promptly notify the Company of any defect, lien or encumbrance insured against which shall come to the knowledge of the Insured, in respect to which loss or damage is apprehended, then all liability of the Company in regard to the subject matter of such action, proceeding or matter shall cease and terminate; provided, however, that failure to notify shall in no case prejudice the claim of any Insured unless the Company shall be actually prejudiced by such failure and then only to the extent of such prejudice. In all cases where this Policy permits or requires the Company to prosecute or defend any action or proceeding, the Insured shall secure to it the right to so prosecute or defend such action or proceeding, and all appeals therein, and permit it to use, at its option, the name of the Insured for such purpose. The word "knowledge" in this paragraph means actual knowledge and does not refer to constructive knowledge or notice which may be imputed to the Insured by reason of any public record or otherwise.

3. If any Insured shall in good faith contract to sell the evidence of indebtedness and mortgage or deed of trust described in Schedule A, or having acquired said land as in paragraph 1 hereof provided, in good faith contracts to sell the same, and any such contract fails, or if the successful bidder at a foreclosure or trustee's sale refuses to complete the purchase, because of alleged defects in the title to said land, and, in any of such events, the said title has been declared by a court of competent jurisdiction to be defective or encumbered or otherwise unmarketable by reason of any defect, lien, or encumbrance insured against by this Policy, the Company at its option shall either (a) pay such Insured the amount of this Policy, (b) purchase said indebtedness, (c) establish the marketability of the title by decree of court, or (d) otherwise save the Insured harmless. In the event of any litigation involving refusal of title because of defects insured against hereunder, the Company will, at its own cost, promptly and diligently prosecute such action as may be available to establish title as insured, and if such action is not successful, will reimburse the Insured for all costs and attorneys' fees in said litigation involving refusal of title.

4. The Company reserves the option to pay, settle, or compromise for or in the name of the Insured, any claim insured against or to pay this Policy in full, and payment or tender of payment of the full amount of this Policy shall terminate all liability of the Company hereunder. In such cases the Company shall be liable to pay in addition all costs and attorneys' fees incurred by it.

5. Whenever the Company shall have settled a claim under this Policy, all right of subrogation shall vest in the Company unaffected by any act of the Insured, except that the Insured may release

or substitute the personal liability of any debtor or extend or otherwise modify the terms of payment provided such act does not result in any loss of priority of the lien of the mortgage or deed of trust herein, but such subrogation shall be in subordination to the lien of the Insured under its said mortgage or deed of trust and to the right of the Insured to receive and be fully paid for the amount of principal and interest and other sums, if any, secured by said mortgage or deed of trust. If loss of priority should result from any act of the Insured, such act shall not void this Policy, but the Company, in that event, shall be required to pay only that part of any losses insured against hereunder which shall exceed the amount, if any, lost to the Company by reason of the impairment of the right of subrogation. The Insured, if requested by the Company, shall transfer to the Company all right, securities, and remedies against any person or property necessary in order to perfect such right of subrogation.

6. The Company has the right and option, in case any loss is claimed under this Policy, to pay to the Insured the entire indebtedness secured by said mortgage or deed of trust to the Insured, together with all costs and attorneys' fees which the Company is obligated hereunder to pay, in which case the Company shall become the owner of, and the Insured shall at once assign and transfer to the Company said mortgage or deed of trust and the indebtedness thereby secured and such payment shall terminate all liability under this Policy and the Insured shall surrender the same.

7. A statement in writing of any loss or damage for which it is claimed the Company is liable under this Policy shall be furnished to the Company within sixty days after such loss or damage shall have been determined and no right of action shall accrue to the Insured under this Policy until thirty days after such statement shall have been furnished, and no recovery shall be had by the Insured under this Policy unless action shall be commenced thereon within one year after expiration of said thirty-day period. Failure to furnish such statement of loss or damage, or to commence such action within the time hereinbefore specified, shall be a conclusive bar against maintenance by the Insured of any action under this Policy.

8. The Company will pay, in addition to any loss insured against by this Policy, all costs imposed upon the Insured in litigation carried on by the Company for the Insured, and all costs and attorneys' fees in litigation carried on by the Insured with the written authorization of the Company or as provided in paragraph 3 of the conditions and stipulations hereof but not otherwise. The Company will not be liable for loss or damage by reason of defects, claims or encumbrances created subsequent to the date hereof (excepting any statutory lien for labor or material insured against by this Policy) or for defects, claims or encumbrances created or suffered by the Insured claiming such loss or damage, or existing at the date of this Policy and known to the Insured claiming such loss or damage at the date such Insured claimant acquired an insurable interest but not known to the Company or disclosed to it in writing by the Insured. The liability of the Company under this Policy shall in no case exceed in all the actual loss of the Insured and costs and attorneys' fees which the Company is obligated hereunder to pay. All payments under this Policy shall reduce the amount of the insurance pro tanto and no payment shall be made without producing this Policy for endorsement of such payment unless the Policy be lost or destroyed, in which event proof of such loss or destruction shall be furnished to the satisfaction of the Company. Payment in full by any person or voluntary satisfaction or release by the Insured of the mortgage or deed of trust described in Schedule A shall terminate all liability of the Company under this Policy, except as provided in Condition 1.

9. Nothing contained in this Policy shall be construed as an insurance against action by any governmental agency for the purpose of regulating occupancy or use of said land or any building or structure thereon.

10. The term "Land" when used herein shall be construed to include the land herein described specifically or by reference and improvements affixed thereto which by law constitute real property.

11. All notices required to be given the Company and any statement in writing required to be furnished the Company shall be addressed to it at its Home Office at

APPENDIX VI

The standard contract of one large national company with its agents contains these typical provisions:

Section 9. Each commitment to insure and each policy of title insurance shall be based upon a title report and opinion made by an attorney approved by principal, in writing, for such purpose, after such attorney shall have examined the complete record title to the property described in such commitment or policy as disclosed by all public records of the county and city or town or district wherein such property is located. "Public Records," as here used, shall be deemed to include all recording offices where instruments of conveyance or mortgage or other instruments may be filed or recorded, all courts, including probate courts and other courts where wills, estates, guardianships, suits, bankruptcies, or other actions at law or in equity may be filed or judicial proceedings had or judgments rendered, all offices where mechanics' or materialmen's liens or other liens or claims may be filed or otherwise evidenced, or where taxes or assessments may be levied or charged, or where condemnation proceedings may be had, affecting the title to property. An abstract of title purporting to reflect the results of a search to all such public records and certified to that effect by a duly recognized and responsible abstracter or abstracters or abstract company or companies may be accepted by agent and furnished to the approved attorney for his use in making his examination of title, but, as to any of the said

public records not covered by such abstract as certified, agent shall make proper search and furnish report thereon to such approved attorney. It is understood and agreed that agent is now lawfully engaged in the abstract of title business in the area covered by this contract and that, in such capacity, agent may make all or part or parts of the abstracts of title above mentioned and/or furnish record information with respect to any property in said area. Where the title to the particular property in question shall have been theretofore insured by principal, subsequent examinations may begin with the date of the prior policy, but all matters of lien, charge, restrictions, encumbrance, exception or objection disclosed by the prior policy and/or the approved attorney's title report and opinion made for such prior policy remaining unreleased or undisposed of shall be reflected in any commitment or policy then to be issued.

Section 10. No commitment to insure or policy of title insurance shall be issued and delivered until it shall have been fully prepared in conformity with the application, the approved attorney's title report and opinion and the agent's knowledge, and then validated by the signature of an authorized signatory named and designated thereon, who shall be only such person or persons as shall be appointed in writing signed by principal. The appointment of any authorized signatory may be revoked by principal at any time and shall be revoked by principal upon written demand of agent.

Section 11. Agent shall keep a permanent file on each parcel of property upon which agent receives an application for title insurance, wherein agent shall preserve the applications, approved attorneys' title reports and opinions, copies of commitments and policies, and all other related matters and data, including surveyor's plat and certificate of survey in all cases where general survey exception is not shown in the commitment or policy issued.

Section 14. No commitment to insure, or policy of title insurance, in excess of the sum of \$ shall be issued until the approved attorney's title report and opinion, together with an analysis of such title, giving its origin and course of devolution and its important characteristics, shall have been submitted to principal at its Home Office for review, accompanied by the approved attorney's and agent's reports of their check of such title and their recommendations with respect thereto, and principal shall have expressly authorized agent, in writing, to issue such commitment or policy, or both.

APPENDIX VII

A typical agent's indemnification clause provides:

Section 16. Agent agrees to indemnify principal against any and all loss, cost or damage which principal may sustain or become liable for on account of the failure of agent to comply with the terms of this contract, or on account of agent's failure to comply with any rules, regulations or instructions delivered or given to agent by principal; or on account of any error or omission in any abstract of title or other record information furnished by agent in agent's capacity as an abstractor of titles; or on account of the failure of any commitment or binder or policy issued by agent hereunder or through agent's office to contain an appropriate requirement or exception as to any lien, claim, encumbrance, defect or objection disclosed by the application, the approved attorney's title report and opinion, or known to agent, unless expressly authorized in writing by principal to disregard the same; or on account of the failure of any commitment or binder or policy issued by agent hereunder or through agent's office to correctly describe the property and reflect the then condition of the title thereto in the light of the application, the approved attorney's title report and opinion and other relating paper and documents, the agent's knowledge, and the rules, regulations and instructions delivered or given to agent by principal.

THE YALE LAW JOURNAL

VOLUME 66

FEBRUARY, 1957

NUMBER 4

ROBERT W. BLANCHETTE
Editor-in-Chief

ARTHUR L. LIMAN
STEPHEN A. WEINER
Comment Editors

H. E. DUNKELBERGER, JR.
*Article and Book Review
Editor*

RODNEY E. EYSTER
ALVIN FRIEDMAN
Note Editors

AXEL H. BAUM
Managing Editor

MATTHEW T. ADAMS
MALVIN E. BANK
JOHN W. BARNUM
THOMAS D. BARR
ROBERT T. BASSECHES
FREDERICK L. BERNSTEIN
NEIL N. BERNSTEIN
DAVID P. BICKS
JUDITH MYRA BLEICH
NEWTON D. BRENNER
GUIDO CALABRESI
LAURA M. CHAPMAN
PAUL H. DECOSTER
ROBERT J. DEL TUFO
MILTON P. DEVANE

JOHN RICHARD DUFFIELD
ARTHUR FLEISCHER, JR.
GERALD T. FLOM
SETH E. FRANK
VICTOR S. FRIEDMAN
MORTON I. GREENBERG
MILTON S. GWIRTZMAN
ALAN M. HOFFMAN
WILLIAM E. HUTH
LLOYD J. KENO
DAVID KLINGSBERG
HAROLD S. LEVY
IRWIN A. LEVY
JULIUS LEWIS

RICHARD MARLIN
RICHARD M. MEYER
JERROLD L. MORGULAS
HUGH G. MOULTON
WALTER W. OBERREIT
RICHARD W. PENDLETON, JR.
BURTON RAFFEL
JEROME HOWARD REICHMAN
RICHARD J. SEXTON
STEPHEN N. SHULMAN
LEWIS A. STERN
CHARLES W. THOMASSON
STANLEY E. TOBIN
FRANK E. G. WEIL
ROBERT L. WEINBERG

MARIE McMAHON
Business Secretary

The YALE LAW JOURNAL mourns the death of

JEROME N. FRANK

Judge of the United States Court of Appeals
for the Second Circuit and Visiting Lecturer in
Law at the Yale Law School.

CONTRIBUTORS

JOSEPH W. BISHOP, JR. A.B. 1936, Dartmouth College; LL.B. 1940, Harvard University.
Member of the District of Columbia and New York Bars.

QUINTIN JOHNSTONE. A.B. 1936, J.D. 1938, University of Chicago; LL.M. 1941, Cornell
University; J.S.D. 1951, Yale University. Associate Professor of Law, Yale Law School.