IOWA'S PROHIBITION OF TITLE INSURANCE—LEADERSHIP OR FOLLY?

I. INTRODUCTION

The complexities of today's real estate transactions have made it necessary for buyers, sellers, and lenders to seek as much reassurance as possible that their title expectations will be met and that their interests will be protected.[1] Subsequent loss of property due to title defects can wipe out a family's entire capital and savings, or cause huge losses to a commercial development.[2] To avoid such costly losses, the title insurance industry was created over one hundred years ago and American consumers now pay more than one billion dollars in title insurance premiums every year.[3] Title insurance provides an option for the real estate purchaser or lending institution to pay a relatively small one-time premium to insure their newly acquired interest in the property against the possibility of losing title to the property because of a title defect which was not discovered at the time of the purchase.[4]

Title insurance has become an essential requirement in many real estate transactions.[5] Many "[p]rivate institutional lenders and governmental organizations such as the Federal Home Loan Mortgage Corporation and Federal Mortgage Association automatically require title policies today."[6] In many areas, lenders require potential mortgagors to obtain title insurance prior to granting the mortgage.[7] Title insurance is almost universally purchased for large commercial transactions.[8] Often it is the availability of title insurance that convinces a purchaser to accept a title he might have otherwise refused.[9] Title insurance also helps to ease some of the worries associ-

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1. Kulkin, *Title Insurance Isn't Everything*, in TITLE INSURANCE AND YOU: WHAT EVERY LAWYER SHOULD KNOW! 49, 49 (A.B.A. Sec. Real Prop. Prob. & Tr. 1979).

2. Gaudio, *Title Covenants for the Iowa Homeowner—Some Good News and Much Bad News*, 23 DRAKE L. REV. 1, 1 (1973).

3. Pedowitz, *Introduction*, in TITLE INSURANCE AND YOU: WHAT EVERY LAWYER SHOULD KNOW! 1, 1 (A.B.A. Sec. Real Prop. Prob. & Tr. 1979). It is interesting to note the growth of the industry. It was claimed in a 1965 publication that "[t]itle insurance . . . is a business that develops over $100 million in annual premiums." Kelley, *Title, Plat Glass, Credit, and Export Credit Insurance*, in J. LONG & D. GREGG, PROPERTY AND LIABILITY INSURANCE HANDBOOK 633, 633 (1965).

4. Rooney, *Title Insurance: A Primer for Attorneys*, 14 REAL PROP. PROB. & TR. J. 608, 610 (1979).

5. Pedowitz, *supra* note 3, at 1.

6. Kulkin, *supra* note 1, at 49.

7. *Id.*

8. *Id.*

9. Pedowitz, *supra* note 3, at 1.

ated with the single-state orientation of real property law by filling the gaps between local laws and customs and the requirements of national or nonlocal lenders, developers, lessees, and/or owners.[10]

Despite its flexibility and availability in most areas of the country, and its almost universal usage in many areas, title insurance may not be issued by any corporation authorized to do business in Iowa.[11] The Iowa Supreme Court has upheld this prohibition as constitutional.[12] The Attorney General, however, has issued an opinion stating that although Iowa law prohibits the sale of title insurance "in this state," Iowa lending institutions are free to purchase title insurance on Iowa property out of state.[13] Hence, although the Iowa legislature refuses to allow title insurance to be marketed within Iowa, it has been willing to turn a blind eye to purchases made out of state and over which they can exercise no oversight and provide no regulation.

The Iowa legislature, however, is beginning to feel the pressure to conform to the practices of the other forty-nine states and allow title insurers to do business in the state. In four of the last five legislative sessions, bills have been proposed to authorize the sale and regulation of title insurance in Iowa.[14] Bills introduced in the sixty-sixth, sixty-eighth, and sixty-ninth General Assemblies each died in committee, as did the bills proposed in the last session.[15] A proposed amendment in the seventieth General Assembly to tack a title insurance provision onto a Senate bill failed.[16] It is surprising to

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10. *Id.*

11. IOWA CODE § 515.48(10) (1983).

12. Chicago Title Ins. Co. v. Huff, 256 N.W.2d 17 (Iowa 1977).

13. Op. Iowa Atty. Gen. (Dec. 5, 1979).

14. H.F. 376, 65th Iowa G.A., 1973 Sess. (introduced by representative Hill); H.F. 675, 66th Iowa G.A., 1975 Sess. (introduced by Representatives Pellett and Hennessey); H.F. 46, 48th Iowa G.A., 1979 Sess. (introduced by Representative Bennett); H.F. 262, 69th Iowa G.A., 1981 Sess. (introduced by Representative Halvorson); H.F. 832, 69th Iowa G.A., 1981 Sess. (formerly H.F. 262); H.F. 2153, 69th Iowa G.A., 1982 Sess; S.F. 98, 70th Iowa G.A., 1983 Sess. (introduced by Senator Hulse); H.F. 374, 70th Iowa G.A. 1983 Sess. (introduced by Representatives Skow and Halvorson); H.F. 483, 70th Iowa G.A., 1983 Sess. (introduced by Representative Chiodo).

15. H.F. 376, 65th Iowa G.A., 1973 Sess. was referred to the House Commerce Committee and then referred to subcommittee. 65 IOWA HOUSE JOURNAL 519, 615 (1973). The Committee reported and passage was recommended.

H.F. 2153, 69th Iowa G.A., 1982 Sess. was referred to the House Commerce Committee, 69 IOWA HOUSE JOURNAL 149 (1982), and referred to subcommittee. *Id.* at 210. No further action was reported on the bill. 69 IOWA HOUSE JOURNAL INDEX 375 (1982).

S.F. 98, 70th Iowa G.A., 1983 Sess. was referred to the Senate Commerce Committee, and then referred to subcommittee. 70 IOWA SENATE JOURNAL 209, 272 (1983). H.F. 374, 70th Iowa G.A., 1983 Sess. was referred to the House Small Business and Commerce Committee and then referred to subcommittee. 70 IOWA HOUSE JOURNAL 552, 705 (1983). H.F. 483, 70th Iowa G.A., 1983 Sess. was referred to the House Small Business and Commerce Committee and then referred to subcommittee. 70 IOWA HOUSE JOURNAL 728, 815 (1983).

16. Amend. H-3598 to S.F. 223, 70th Iowa G.A., 1983 Sess. (amendment introduced by Representative Chiodo). S.F. 223, as amended, was passed by the house during the 1983 Session of the Seventieth General Assembly. 70 IOWA HOUSE JOURNAL 1258-86 (1983). The original bill

even the most casual observer that a state which provides the corporate home for so many insurance companies that it is often called "The Insurance Capitol of the Midwest" has not succumbed to the pressure of its strong insurance lobby to change its stubborn ways.

The purpose of this Note is to provide a basis for determining whether the Iowa legislature should reconsider its present position against the sale of title insurance. Several considerations bear upon that decision: the adequacy and presence of alternatives to the use of title insurance, the criticisms commonly lodged against the title insurance industry, the reasons for the widespread usage of title insurance throughout the United States, and the steps that can be taken to curb abuses.

II. Iowa's Prohibition On the Sale of Title Insurance

Prior to 1944, it was assumed that "[i]ssuing a policy of insurance [was] not a transaction of commerce,"[17] and therefore, the power to regulate the industry of insurance rested exclusively with the states. In 1944, however, in *United States v. South-Eastern Underwriters Association*, the Supreme Court held that insurance transactions were subject to federal regulation under the commerce clause,[18] and particularly to regulation under the federal antitrust laws.[19] The McCarran-Ferguson Act[20] was passed by the Con-

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related to "increasing the principal amount of the bonds and notes which may be issued by the Iowa Housing Finance Authority under the Iowa small business loan program." S.F. 223, 70th Iowa G.A., 1983 Sess. Representative Chiodo's offered amendment, which was filed by the House Committee on Small Business and Commerce, contained extensive provisions relating to the sale and regulation of title insurance. Amend. H-3598 to S.F. 223, 70th Iowa G.A., 1983 Sess.; 70 Iowa House Journal 1258, 1263-68. After a number of amendments were proposed to amend the amendment, the House adopted an amendment which removed any reference to title insurance from the committee amendment by a vote of fifty-seven to forty-two, with one absent or not voting. Amend. H-3661, S.F. 223, 70th Iowa G.A., 1983 Sess. (amendment introduced by Representative Chapman); 70 Iowa House Journal 1281-82.

Since this was a very backhanded way to get the issue of title insurance before the House, it should probably not be considered an absolute statement of the House position. The suspicion arises as to whether the title insurance provisions were added only as a means of diverting attention from the controversial portions of the original bill, and then discarded primarliy to simplify the passage of the bill. *See infra* note 227.

17. *See* Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869).
18. U.S. Const. art. I, § 8, cl. 3.
19. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553, 561-62 (1944).
20. 15 U.S.C. §§ 1011-15 (1982), which provides:

> § 1011. Declaration of Policy
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> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
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> § 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948.
>
> (a) The business of insurance, and every person engaged therein, shall be subject

gress during the next year in reaction to *South-Eastern Underwriters*. That statute gave the states the ultimate power to regulate the "business of insurance" but not the activities of insurance companies.[21] The "business of insurance" has been interpreted to include the relationship between the insurer and the insured,[22] the type of policy issued,[23] the rates at which it is issued,[24] the selling and advertising of insurance,[25] and the licensing of insurance companies and agents.[26] The title insurance industry has been held subject to state regulation under the McCarran-Ferguson Act.[27]

Prior to 1947, Iowa permitted title insurance to be sold within the

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to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, . . . the Sherman Act, . . . the Clayton Act, and . . . the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

§ 1013. Suspension until June 30, 1948, of application of certain Federal laws; Sherman Antitrust Act applicable to agreements to, or acts of, boycott, coercion, or intimidation.

. . . (b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

§ 1014. Applicability of National Labor Relations Act and Fair Labor Standards Act of 1938.

Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the . . . National Labor Relations Act, . . . as amended, known as the Fair Labor Standards Act of 1938, or . . . the Merchant Marine Act, 1920.

§ 1015. Definition of "State."

As used in this chapter, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, Guam, and the District of Columbia.

21. *See* 15 U.S.C. § 1012 (1982); *see supra* note 20.

22. S.E.C. v. National Sec., Inc., 393 U.S. 453, 460 (1969).

23. *Id.*

24. *Id.*

25. F.T.C. v. National Casualty Co., 357 U.S. 560, 564 (1958).

26. *See* Robertson v. California, 328 U.S. 440, 452 (1946).

27. Lawyers Title Co. of Mo. v. St. Paul Title Ins. Corp., 526 F.2d 795, 798 (8th Cir. 1975) (a Missouri statute generally regulating the pricing activities of title insurance companies was held to exempt title insurers, under the McCarran-Ferguson Act, from the application of federal antitrust statutes in an action alleging predatory pricing in the St. Louis metropolitan area); Crawford v. American Title Ins. Co., 518 F.2d 217, 220 (5th Cir. 1975) (the Fifth Circuit Court of Appeals held that Alabama's statutory provisions generally regulating insurance premium rates applied to the title insurance industry, and consequently the McCarran-Ferguson Act exemption from federal antitrust laws was activated); Commander Leasing Co. v. Transamerica Title Ins. Co., 477 F.2d 77, 86 (10th Cir. 1973) ("the business of title insurance is included in the phrase 'business of insurance', and therefore falls under the provisions of the McCarran-Ferguson Act").

state.[28] On May 1, 1947, Governor Blue signed into law a bill which redefined the types of insurance that may be written in Iowa.[29] The statute, which excepts title insurance, provides as follows:

> 515.48. *Kinds of insurance.* Any company organized under this chapter or authorized to do business in this state may: . . .
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> 10. Insure any additional risk not specifically included within any of the foregoing classes, which is a proper subject for insurance, is not prohibited by law or contrary to strong public policy, and which, after public notice and hearing, is specifically approved by the commissioner of insurance, except title insurance or insurance against loss or damage by reason of defective title, encumbrances or otherwise.[30]

In 1977, the Iowa Supreme Court in *Chicago Title Insurance Co. v. Huff* upheld the constitutionality of the provisions of Iowa Code section 515.48(10) which prohibit the sale of title insurance in Iowa.[31] The Chicago Title Insurance Company (Chicago Title), which was writing title insurance in forty-six states,[32] had sought authority from the Iowa Insurance Commission to sell title insurance in Iowa, and was denied permission on the basis of the prohibition contained in section 515.48(10).[33] Seeking to enjoin the enforcement of the statute, Chicago Title brought an action in Polk County District Court and made the following assertions:

> [t]hat Section 515.48(10) of the Code of Iowa violates the Plaintiff's property rights under the Constitutions of the United States and the State of Iowa in that the Plaintiff is being denied the right to do business in Iowa *without due process of law*, and is being denied the *equal protection of the laws*. With the sole exception of the State of Iowa, the business of title insurance is recognized as a lawful commercial enterprise in every jurisdiction of the United States, and said statute is unreasonable, arbitrary, and constitutes unconstitutional class legislation.[34]

On appeal to the Iowa Supreme Court, Chicago Title also asserted that section 515.48(10) violated the commerce clause.[35]

The court first struck down Chicago Title's commerce clause argument.[36] The court refused to consider this argument because Chicago Title had preserved nothing on the issue in the trial court for review, but did

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28. *See* IOWA CODE § 422.34(1) (1946) (which exempted title insurance companies from the state corporate tax under Chapter 422).

29. S.F. 370, 52d Iowa G.A., 1st Sess., 52 SENATE JOURNAL 1485 (Iowa 1947).

30. IOWA CODE § 515.48(10) (1983) (originally enacted as *Insurance Risks Act*, ch. 258, § 5, 1947 Iowa Acts 333-34).

31. Chicago Title Ins. Co. v. Huff, 256 N.W.2d 17, 17, 30 (Iowa 1977).

32. *Id.* at 22.

33. *Id.* at 19.

34. *Id.* at 19-20 (emphasis in original).

35. *Id.* at 20. U.S. CONST. art. I, § 8, cl. 3. "The Congress shall have the power . . . to regulate commerce . . . among the several states . . . . "

36. Chicago Title Ins., Co. v. Huff, 256 N.W.2d at 21.

indicate that even if the issue had been properly raised previously, Chicago Title would not have been successful.[37] The court relied upon *Prudential Insurance Co. v. Benjamin*[38] and *In re Insurance Tax Cases*[39] in which the United States Supreme Court held that the McCarran-Ferguson Act[40] grants to the several states the power to impose burdens on the insurance industry which would otherwise be struck down as violative of the commerce clause.[41]

Chicago Title based its other allegations on the proposition that "[t]he absolute prohibition of a *legitimate business* as mandated by Code Section 515.48(10) cannot be sustained," and that since "title insurance is written by Chicago Title in all but four states . . . it is a business which must be permitted to operate in Iowa."[42] Calling these arguments "self-serving rationale," the court asserted that merely because "a business activity [is] deemed 'lawful' or 'legitimate' in forty-nine states does not compel Iowa, or any other state, to embrace the same standards . . . . The genius of our federal system is to permit the states to experiment at local levels with those laws thought to be in the best interests of their citizenry."[43] The court also stated that the state has the police power to regulate any activity it deems potentially detrimental to its citizens, even to the point of total prohibition if it is "essentially injurious to public welfare."[44]

The court rejected Chicago Title's due process claim by holding that section 515.48(10) does not deprive title insurance companies of a property right by refusing to allow them the right to conduct their business in Iowa, because the statute functions not to extinguish an existing right, but to preclude the very creation of such a right in Iowa.[45] The court indicated that only title insurers operating in Iowa when the statute banning their business was enacted might be entitled to claim that they had been deprived of property rights by the statute, but Chicago Title was not then in operation in Iowa.[46]

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37. *Id.*

38. 328 U.S. 408, 440 (1946). In *Prudential*, a South Carolina statute requiring foreign insurance companies to pay a three percent annual tax on business conducted in the state, regardless of whether interstate or intrastate in nature, prior to the issuance of a certificate of authority to do business in the state, but imposing no similar tax on domestic insurers, was upheld against allegations that it violated the commerce clause by favoring local business while discriminating against interstate commerce. *Id.* at 410-11, 440.

39. 160 Kan. 300, ___, 161 P.2d 726, 735 (1945), *aff'd*, 328 U.S. 822 (1946) (upholding a Kansas statute similar to the statute upheld in *Prudential Ins. Co. v. Benjamin*, 328 U.S. at 440).

40. 15 U.S.C. §§ 1011-15 (1982).

41. Chicago Title Ins. Co. v. Huff, 256 N.W.2d at 21.

42. *Id.* at 22. (emphasis original).

43. *Id.* at 22, 23.

44. *Id.* at 25.

45. *Id.* at 27.

46. *Id.*

The court also stated that in order to succeed when challenging a state statute as violative of the due process clause,[47] a plaintiff faces a heavy burden, and must negate every reasonable basis which supports the statute.[48] The court concluded that since Chicago Title failed to discredit evidence offered by the state as to the general abuses of the title insurance industry,[49] "this court cannot say the general assembly overstepped its power in barring a costly form of 'insurance' for which Plaintiff's own testimony demonstrates there is little need," and denied Chicago Title's claim that section 515.48(10) deprived it of property without due process of law.[50]

Chicago Title's allegation that section 515.48(10) "is unreasonable, arbitrary and constitutes unconstitutional class legislation"[51] violative of the equal protection clause, was also determined to be without merit. The court concluded that title insurance differs from other forms of insurance allowed by the statute in several fundamental ways,[52] thereby providing an ample basis for the class distinction.[53]

The court also dismissed Chicago Title's claim that section 515.48(10) violates Iowa's uniformity clause[54] as "devoid of substance," but did so without explanation.[55] Concluding that all issues raised by Chicago Title were without merit, the court held that it was constitutional for the state of Iowa

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47. Chicago Title alleged that section 515.48(10) violates both the due process clause of the Iowa Constitution and the due process clause of the Federal Constitution. *Id.* at 19.

48. *Id.* at 25, 28.

49. The court cited Chicago Title's loss ratio of zero percent on title insurance written out of state insuring titles to Iowa property, even though nearly $370,000 of premiums had been written in a five-year period, calling title insurance a "lucrative source of revenue to an insurer of titles" for a service for which the loss ratios demonstrate very little need. *Id.* at 27. The court concluded that the statute "was adopted in order to avoid needless consumer costs and impede the machinations which would otherwise become prevalent between Iowa lenders and title insurance companies, all to the public detriment." *Id.* at 28.

50. *Id.* at 27-28.

51. *Id.* at 20.

52. The court noted that unlike most forms of property and casualty insurance which are directed at risk assumption and distribution, title insurance is concerned with loss prevention. *Id.* (discussing Quiner, *Title Insurance and the Title Insurance Industry*, 22 DRAKE LAW REVIEW, 711, 714-15 (1973)). The premium for title insurance, unlike most other forms of insurance, is paid only once, and the policy is effective until the purchaser of the policy sells the property. *Id.* And title insurance insures against a past event which may cause the owner to sustain a loss in the future rather than against a future event. *Id.* Unlike other forms of insurance, title insurance insures against an event which has already happened, so that the premium does not cover the future, but the past. *Id.*

The court also again noted some of the public protection policy reasons that may have caused the Iowa legislature to conclude that Iowa consumers are less capable of protecting against the abuses of title insurers, as another basis for classifying title insurance differently than other forms of insurance, warranting the more severe treatment of prohibition instead of the more usual treatment of regulation. *Id.* at 29-30.

53. *Id.*

54. IOWA CONST. art. I, § 6.

55. Chicago Title Ins., 256 N.W.2d at 30.

to prohibit insurers from engaging in the business of selling title insurance in the state of Iowa.[56]

III. The Coverage of Title Insurance

There are a great number of title defects which cannot be disclosed by a thorough examination of public title records.[57] It is the purpose of title insurance to assume *some* of the risks to title of the insured property due to unknown title defects at the time of purchase.[58] Some of the most common hidden risks include fraud or duress, forged deeds, false impersonations of the transferor, mistaken identities due to similar or identical names, defective deeds due to lack of delivery or execution under a lapsed or expired power of attorney, deeds executed by minors, mental incompetence of the transferor, undisclosed heirs, undisclosed rights of dower or curtesy, mistaken interpretation of the instruments conveying title, errors in the public record, lawsuits, and mechanic's liens.[59]

Title insurance has been defined as a contract "whereby the insurer, for a valuable consideration, agrees to indemnify the insured in a specified amount against loss through defects of title to, or liens or incumbrances [sic] upon realty in which the insured has an interest as purchaser or otherwise."[60] "Title insurance is a contract of indemnity. Title insurance policies are subject to the rules generally applicable to contracts of insurance."[61]

Although title insurance is subject to the same basic rules generally applicable to contracts of insurance, it differs from other forms of insurance in some very basic aspects.[62] Like other forms of insurance, its primary purpose is to indemnify the insured individual against losses he sustains which are specifically insured against by the policy, on the theory of risk assumption and risk spreading.[63] But unlike other types of insurance which insure against events happening *subsequent* to the purchase of the insurance, title insurance insures against future loss due to title defects which were in existence at the time the insurance was purchased.[64] Title insurance, then, covers events which have already occurred (with limited contractual exceptions), while other types of insurance cover events which have yet to occur.[65]

Another primary difference is that of risk elimination. With other forms

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56. *Id.*

57. Rooney, *A Primer for Attorneys*, in Title Insurance and You: What Every Lawyer Should Know! 3, 4 (A.B.A. Sec. Real Prop. Prob. & Tr. 1979). *See generally* Quiner, *supra* note 52.

58. *See* Rooney, *supra* note 57, at 4.

59. Kelley, *supra* note 3, at 634; Rooney, *supra* note 57, at 4; Kulkin, *supra* note 1, at 49.

60. 9 Appleman, Insurance Law and Practice § 5201 (1981).

61. Couch on Insurance 2d § 1:101 (1959 & Supp. 1982) (citations omitted).

62. Pedowitz, *supra* note 3, at 1.

63. Rooney, *supra* note 4, at 610.

64. *Id.*

65. Kulkin, *supra* note 1, at 49.

of casualty insurance, the insured must take steps to eliminate or minimize risk in order to minimize the amount of premium he must pay, or to persuade the insurer to accept the risk.[66] For title insurance on the other hand, it is the insurer who takes steps to eliminate the risk of loss.[67] This is done by searching public records, by accepting an abstracter's title search or attorney's title opinion, or by searching the company's own title plant,[68] and then taking the measures necessary to clear any possible title defects.[69]

Often, "defects which are discovered prior to the issuance of the policy are excluded from coverage."[70] In some cases, however, it may be more economical for the title insurer to voluntarily assume a known risk rather than to take the steps necessary to eliminate the defect.[71] When the company can charge an "additional risk" premium for such a risk, this course is especially commonplace.[72] If, on the other hand, it appears that in order to remove clouds on the title, litigation will be necessary, then the policy will probably not be issued, or will be issued only if losses caused by the known defects are excluded from coverage.[73]

Unlike other forms of insurance, title insurance requires the payment of only a single premium.[74] After payment of the premium, the policy then remains in effect until the insured transfers his interest in the insured property, or it is otherwise terminated.[75] Generally, after issuance of the policy by the title insurance company, the policy cannot be cancelled by either the insurer or the insured.[76]

There are generally two basic types of title insurance policies, owner's policies and mortgagee, loan or lender's policies.[77] Owner's policies are purchased by the actual buyer of the property to protect himself or his heirs from losses until the property is sold.[78] Loan policies insure the collateral

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66. Rooney, *supra* note 57, at 3.

67. *Id.*

68. *See* Quiner, *supra* note 52, at 717.

69. Rooney, *supra* note 57, at 3.

70. U.S. DEPT. OF JUSTICE, THE PRICING AND MARKETING OF INSURANCE 274 (1977) (A report of the U.S. Dept. of Justice to the Task Group on Antitrust Immunities, January, 1977).

71. Rooney, *supra* note 57, at 4.

72. *Id.*

73. U.S. DEPT. OF JUSTICE, *supra* note 70, at 253 (citing Owen, *Licensing of Real Estate Brokers as Underwritten Title Agents*, in STUDIES IN INDUSTRY ECONOMICS No. 64 18 (Department of Economics, Stanford University 1976).

74. Pedowitz, *supra* note 3, at 1.

75. Quiner, *supra* note 52, at 715. The coverage also extends to the heirs of the insured. *Id.* at 716.

76. Pedowitz, *supra* note 3, at 1. Coverage under an owner's policy extends protection at the insured's death to his heirs or devisees, or in the case of a corporate owner, to the corporate successors. Kelley, *see supra* note 3, at 635. A mortgage or lender's policy, on the other hand, automatically expires when the mortgage is discharged, unless the mortgagee forecloses or receives a deed in lieu of foreclosure. *Id.*

77. Quiner, *supra* note 52, at 716.

78. *Id.*

interest of the lender in the property.[79] They protect the lender for the portion of the debt outstanding at the time of loss due to a covered risk, and consequently expire when the loan is paid off.[80]

Title policy forms may vary widely from state to state, and even from county to county.[81] Some states prescribe acceptable policy forms, while in other states policies may be uniform throughout the state because title insurers have formed trade associations or rating bureaus.[82] Most title insurance companies today, however, use the standard title insurance forms developed by the American Land Title Association (ALTA).[83]

A title insurance policy has three parts: the indemnity agreement, which contains general information including the name of the insured, the policy limits, and a description of the risk insured; Schedule A, which contains a description of the insured property; and Schedule B, which lists all exclusions from coverage.[84]

The ALTA has developed two basic owner's policies, Form A and Form B.[85] Form B is customarily used throughout the United States, except in certain parts of Florida and Illinois.[86] Form B provides as follows:

> [the insurer] insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the amount of insurance stated in Schedule A, and costs, attorneys' fees and expenses which the Company may become obligated to pay hereunder, sustained or incurred by the insured by reason of:
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> 1. Title to the estate or interest described in Schedule A being vested otherwise than as stated therein;
> 2. Any defect in or lien or encumbrance on such title;
> 3. Lack of a right of access to and from the land; or
> 4. Unmarketability of such title . . . .[87]

Form A excludes unmarketability of title from coverage.[88] Form B ex-

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79. *Id.*

80. *Id.* A loan policy may be issued in an amount greater than the principal debt. *See Exhibit R - Title Insurance Rates*, in TITLE INSURANCE AND YOU: WHAT EVERY LAWYER SHOULD KNOW! 237, 237 (A.B.A. Sec. Real Prop. Prob. & Tr. 1979).

81. Rooney, *supra* note 4, at 609.

82. *Id.* at 612-13.

83. Rooney, *supra* note 57, at 5. "The ALTA is a voluntary association of title insurance and abstract companies which has developed uniform policy forms in response to the need created by large institutional lenders (such as banks and life insurance companies) whose loans are secured by real estate mortgages located in many jurisdictions." Rooney, *supra* note 4, at 613.

84. *See, e.g., Exhibit C - American Land Title Association Owner's Form "B" Policy*, in TITLE INSURANCE AND YOU: WHAT EVERY LAWYER SHOULD KNOW! 139-46 (A.B.A. Sec. Real Prop. Prob. & Tr. 1979).

85. Rooney, *supra* note 4, at 616.

86. *Id.* at 615-16.

87. EXHIBIT C, *supra* note 84, at 139.

88. Rooney, *supra* note 4, at 615. Note, however, that if the loss due to unmarketability of

cludes from coverage under the policy zoning regulations,[89] governmental exercise of police power or eminent domain,[90] and defects created by an act of the insured.[91] The Schedule B exceptions to coverage vary from state to state.[92] Examples of Schedule B exceptions include: claims of adverse possessors,[93] easements not shown in public records,[94] boundry disputes easily disclosed by a survey,[95] mechanic's liens,[96] taxes not shown in public records,[97] mineral interests in the property,[98] and mortgages.[99]

Under the standard policies, the title insurance company agrees to assume all costs of defending the title,[100] and may institute actions to establish title at its own cost.[101] Other special forms of coverage are also negotiable, and fall into three basic categories: coverage by the elimination of an exception, coverage of specific affirmative insurance, and coverage outside the title policy.[102]

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title results from a title defect which is otherwise insured against under the policy, the insured will be entitled to indemnification. *Id.*

89. 1. Any law, ordinance or governmental regulation (including but not limited to building and zoning ordinances) restricting or regulating or prohibiting the occupancy, use or enjoyment of the land, or regulating the character, dimensions or location of any improvement now or hereafter erected on the land, or prohibiting a separation in ownership or a reduction in the dimensions or area of the land, or the effect of any violation of any such law, ordinance or governmental regulation.

Exhibit C, supra note 84, at 140.

90. "2. Rights of eminent domain or governmental rights of police power unless notice of the exercise of such rights appears in the public records at Date of Policy." *Id.*

91. 3. Defects, liens, encumbrances, adverse claims, or other matters (a) created, suffered, assumed or agreed to by the insured claimant; (b) not known to the Company and not shown by the public records but known to the insured claimant either at Date of Policy or at the date such claimant acquired an estate or interest insured by this policy and not disclosed in writing by the insured claimant to the Company prior to the date such insured claimant became an insured hereunder; (c) resulting in no loss or damage to the insured claimant; (d) attaching or created subsequent to Date of Policy; or (e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the estate or interest insured by this policy.

Id. Exception 3(e) turns on whether the owner is entitled to protection of his title under the state's Recording Act for the particular title defect involved. *See* Rooney, *supra* note 4, at 615.

92. *See, e.g., Exhibit C, supra* note 84, at 142-46.

93. *E.g.*, Wyoming, Oregon, and Florida. *Id.* at 143-45.

94. *E.g.* Wyoming and Florida. *Id.* at 143, 145.

95. *E.g.* Wyoming, Oregon, and Florida. *Id.* at 143-45.

96. *E.g.* Wyoming, Oregon, and Florida. *Id.*

97. *E.g.* Florida. *Id.* at 145.

98. *E.g.* Wyoming. *Id.* at 143.

99. *E.g.* Florida. *Id.* at 145.

100. *See supra* text accompanying note 87.

101. Beasley, *Special Forms of Coverage*, in TITLE INSURANCE AND YOU: WHAT EVERY LAWYER SHOULD KNOW! 19, 23 (A.B.A. Sec. Real Prop. Prob. & Tr. 1979).

102. *Id.* at 21-23; Kulkin, *supra* note 1, at 51-52. For a discussion of available indorsements to insure particular risks not covered under a standard policy, and approaches to drafting an indorsement when no existing standard indorsement fits the insured's needs, see Ring,

The ALTA standard loan policy insures the mortgagee against the four risks insured by Form B[103] when the lender "purchases the property at a foreclosure sale."[104] A loan policy also insures against the following contingencies:

> 5. The invalidity or unenforceability of the lien of the insured mortgage upon said estate or interest except to the extent that such invalidity or unenforceability, or claim thereof, arises out of the transaction evidenced by the insured mortgage and is based upon
>
> a. usury, or
>
> b. any consumer credit protection or truth in lending law;
>
> 6. The priority of any lien or encumbrance over the lien of the insured mortgage;
>
> 7. Any statutory lien for labor or material which now has gained or hereafter may gain priority over the lien of the insured mortgage, except any such lien arising from an improvement on the land contracted for and commenced subsequent to Date of Policy not financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance; or
>
> 8. The invalidity or unenforceability of any assignment, shown in Schedule A, of the insured mortgage or the failure of said assignment to vest title to the insured mortgage in the named insured assignee free and clear of all liens.[105]

Like an owner's policy, a loan policy also excludes from coverage zoning regulations,[106] governmental exercise of police power or eminent domain,[107] and defects created by an act of the insured.[108] Additionally, loan policies include a fourth exclusion: "unenforceability of the lien of the insured mortgage because of failure of the insured at Date of Policy or of any subsequent owner of the indebtedness to comply with applicable 'doing business' laws of

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Title Insurance for the Owner - or What You See is Not Necessarily What You Get! 52 L.A.B.J. 20 (1976).

103. *See supra* text accompanying note 85.

104. Beasley, *supra* note 101, at 19.

105. *Exhibit D - American Land Title Association Loan Policy*, in TITLE INSURANCE AND YOU: WHAT EVERY LAWYER SHOULD KNOW! 147-52 (A.B.A. Sec. Real Prop. Prob. & Tr. 1979).

106. *See supra* note 89.

107. *See supra* note 90.

108. 3. Defects, liens, encumbrances, adverse claims, or other matters (a) created, suffered, assumed or agreed to by the insured claimant; (b) not known to the Company and not shown by the public records but known to the insured claimant either at Date of Policy or at the date such claimant acquired an estate or interest insured by this policy or acquired the insured mortgage and not disclosed in writing by the insured claimant to the Company prior to the date such insured claimant became an insured hereunder; (c) resulting in no loss or damage to the insured claimant; (d) attaching or created subsequent to Date of Policy (except to the extent insurance is afforded herein as to any statutory lien for labor or material).

Exhibit D, supra note 105, at 148.

the state in which the land is situated."[109]

IV. Criticisms of Title Insurance

Title insurance policies traditionally appeared "to be intentionally worded so as to obfuscate [their] true meaning and to confuse all but the select few truly knowledgeable insurance gurus in existence."[110] Although the forms have been greatly simplified, and the language made more understandable, most consumers still do not understand their policies.[111] They purchase the policy wanting the protection they believe it affords them, but are totally unaware of its dimensions and limitations.[112] The typical title insurance purchaser not only does not understand the policy he purchases, but he is also totally without knowledge about available sellers and the services they offer.[113]

Since real estate transactions are a rare occurrence in a typical property purchaser's life, there is no incentive for him to develop even a basic knowledge of title insurance.[114] A basic lack of interest, and a desire not to slow down the transfer process usually lead the purchaser to delegate the selection of a title insurer to his attorney, banker, or real estate broker.[115] Being unfamiliar with property law, and trusting the real estate professional's judgment, the purchaser usually accepts his recommendations without ever seeking out alternatives.[116]

Due to the purchaser's nonparticipation in the selection of a title insurer, the market is an ineffective control on the industry,[117] and the demand for owner's title insurance does not change significantly with changes in policy prices.[118] When the purchase of title insurance becomes an integral step in real estate transactions, as it has in most states, consumer demand becomes highly inelastic, and the effectiveness of price competitiveness between sellers diminishes entirely.[119]

The commercial title insurance industry operates as an oligopoly.[120] There are only about ninety title insurers writing title insurance policies today,[121] and over one-half of the title insurance written in this country is

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109. *Id.*
110. Ring, *supra* note 102, at 20.
111. *Id.*
112. *Id.*
113. U.S. Dept. of Justice, *supra* note 70, at 255 (citations omitted).
114. *Id.*
115. *Id.* at 255-56.
116. *Id.* at 256.
117. Quiner, *supra* note 52, at 721.
118. U.S. Dept. of Justice, *supra* note 52, at 255.
119. *Id.*
120. Rooney, *Bar Related Title Insurance: The Positive Perspective*, 1980 S. Ill. U.L.J. 263, 266 (1980).
121. U.S. Dept. of Justice, *supra* note 70, at 263. The American Land Title Association

written by the nation's four largest title insurers.[122] Although competition between title insurance companies is fierce,[123] this competition does not manifest itself in premium rates which differ significantly within a geographic market.[124] In many states, this lack of rate competition is forced upon the title insurance companies by state regulations setting the premium rates.[125] In other areas, title insurers have formed state-sanctioned rating bureaus to gather industry loss data, and set uniform statewide rates.[126]

As a result of the purchaser's lack of participation in the purchase of title insurance and the general unavailability of price competition, companies that have wished to increase their market share have been unable to do so by reducing prices or by improving coverage or services.[127] Instead, the companies' competitive efforts have been channeled toward those individuals or institutions who would be advising the purchaser at the closing stages of the transaction: the brokers, the bankers, and the attorneys.[128] The result is a system of "reverse competition," whereby the insurance companies compete for the recommendations of real estate professionals rather than for the business of the actual consumer.[129] "Reverse competition" has often taken the form of payments to the real estate professional, in the form of rebates, commissions, fees, or kickbacks, and are *far in excess* of the payment justified by the work performed.[130] As a result, the consumer pays a much higher premium than he would pay in a purely competitive situation.[131]

These real estate professionals are, at least theoretically, in the best possible position to seek out the best policy at the best price, since they are constantly in the market for title insurance and have the business knowledge and facilities to investigate available policies.[132] But because the title insurance companies solicit the real estate professional's referrals by providing him with more benefits or compensation than their competitors, "reverse competition" raises rather than lowers the premium price.[133] The

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lists 87 members. Telephone interview with Deb Wallower, American Land Title Association (Sept. 29, 1983).

122. Rooney, *supra* note 120, at 266 n. 21 (citations omitted).

123. *See infra* text accompanying note 126.

124. Rooney, *supra* note 122, at 265. *See, e.g., id.* n. 13.

125. For a summary of state rating and form approval requirements, see *Exhibit Q - Title Policy Approval of Forms and Rates Before Use*, in TITLE INSURANCE AND YOU: WHAT EVERY LAWYER SHOULD KNOW! 229, 229-236 (A.B.A. Sec. Real Prop. Prob. & Tr. 1979).

126. U.S. DEPT. OF JUSTICE, *supra* note 70, at 262.

127. *Id.* at 256.

128. *Id.*

129. Roussel & Rosenberg, *Lawyer-Controlled Title Insurance Companies: Legal Ethics and the Need for Insurance Department Regulation*, 48 FORDHAM L. REV. 25, 25 (1979). *See, e.g., infra* text accompanying note 168.

130. Roussel & Rosenberg, *supra* note 129, at 25.

131. Quiner, *supra* note 52, at 725.

132. U.S. DEPT. OF JUSTICE, *supra* note 70, at 261.

133. Roussel, Pera, & Rosenberg, *Bar-Related Title Insurance Companies: An Antitrust*

concern of the real estate professional is shifted thereby from looking after the best interests of the real estate purchaser he is advising to finding the title insurance company who will provide him the best return for his referral.[134] When lenders receive a commission for referring a customer to a title insurance company, the incentive is strong to recommend its purchase even in cases where no title defect is suspected.[135] Eventually, title insurance becomes a virtual requirement to obtaining a mortgage.[136] In many parts of the country, lending institutions will no longer rely on the title opinions of local attorneys, and title insurance has become a necessity.[137]

Perhaps the biggest controversy with regard to title insurance centers on the premium charged. The premium is typically derived by estimating the allowance needed by the company to cover the costs of operation, the required statutory reserves, the insured risks, and the property needs of the insurer.[138] Title insurance rate structures, however, lack uniformity, and make evaluation and comparison difficult.[139] Nevertheless, it is obvious to most commentators that the title insurance industry is making very large profits, which are far in excess of the profits allowed by the Iowa Insurance Department's regulations for property and casualty insurance companies.[140]

Title insurance premiums vary from state to state, and from locale to locale.[141] This variance is the result of several factors, including the urban or rural character of the locality, the number of title information sources to be examined, and state and local regulations.[142] An overwhelming portion of premium costs is expended by the title insurance companies for expenses, overhead and commissions.[143] The agent, for example, may retain as much as fifty percent of the premium as his commission for soliciting and processing the order and issuing the policy.[144] The costs of the title search and examination, if done by the title insurer, also make up a large part of the company's operating expenses.[145]

Only a small portion of the premium is actually used to pay for losses

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Analysis, 24 VILL. L. REV. 639, 644 (1979).

134. U.S. DEPT. OF JUSTICE, *supra* note 70, at 261.

135. Chicago Title Ins. Co. v. Huff, 256 N.W.2d 17, 27 (Iowa 1977).

136. *Id.*

137. TITLE INSURANCE AND YOU: WHAT EVERY LAWYER SHOULD KNOW! 83, 99 app. (1979).

138. Kelley, *supra* note 3, at 638.

139. Quiner, *supra* note 52, at 718.

140. *Id.* at 727. It has been noted, however, that bar-related companies have not been performing as well as commercial title insurers. *Id.*

141. U.S. DEPT. OF JUSTICE, *supra* note 70, at 264.

142. *Id.*

143. Quiner, *supra* note 52, at 718. "[A]pproximately eighty percent of its income is absorbed by operating expenses such as employee salaries and the cost of maintaining its title plant." U.S. DEPT. OF JUSTICE, *supra* note 70, at 253-54 (citing P. SMITH, TITLE INS. CO. 22 (rev. ed. 1971)).

144. Appendix at 7, Chicago Title Ins. Co. v. Huff, 256 N.W.2d 17 (Iowa 1973).

145. U.S. DEPT. OF JUSTICE, *supra* note 70, at 354.

due to risks insured by the policy.[146] Estimates of this "loss ratio" industry-wide are generally between five and ten percent.[147] If the title has been thoroughly searched prior to issuance of the policy, however, and no human error has occurred, the loss ratio can be zero.[148] In fact, this was true of Chicago Title's experience for title insurance written on Iowa property from 1969 to 1972.[149] During this period, Chicago Title collected approximately $370,000 in premiums, and paid out nothing in claims.[150] This loss experience led the court to conclude that title insurance "presents a potentially lucrative source of revenue . . . for which . . . there is little need."[151]

Every time the property is transferred, the new owner must purchase his own policy of title insurance because transfer of policies is rarely permitted.[152] In fact, if a property owner renews an old mortgage, it is considered a "new transaction" which creates a new liability, and the mortgagor must purchase a new loan policy of title insurance.[153] The new policy insures the identical risks covered by the previous policy, so that the risk of loss to the company is not increased, but an additional premium is received.[154]

The face amount of a title insurance policy is the maximum amount payable under the policy.[155] Whenever a claim is paid under a title insurance policy, the amount paid is deducted from the face amount of the policy, thereby reducing the amount of future coverage available to the insured.[156] Legal expenses, however, are not deducted.[157] The payment of a claim on a loan policy may be made to the lender without consent from or notice to the property owner.[158] When the policy's face value has been decreased, an additional premium must be paid by the insured in order to maintain full coverage.[159]

A similar problem occurs because of the effects of inflation. With property values increasing, the size of possible losses caused by title defects increase, but since few title insurance policies have built-in inflation clauses, the coverage under the policy does not keep pace,[160] and the amount of coverage erodes. Consequently, to counter inflation, additional premiums must

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146. Quiner, *supra* note 52, at 718.
147. *See* U.S. DEPT. OF JUSTICE, *supra* note 70, at 253. *But see* 9 APPLEMAN, INSURANCE LAW AND PRACTICE § 5201 at 16.
148. 9 APPLEMAN, INSURANCE LAW AND PRACTICE § 5201 at 13.
149. Chicago Title Ins. Co. v. Huff, 256 N.W.2d 17, 27 (Iowa 1977).
150. *Id.*
151. *Id.*
152. Kelley, *supra* note 3, at 640.
153. *Exhibit R, supra* note 80, at 237.
154. *Kicking Back on Title Insurance*, 2326 BUS. WK. 97, 99 (1974).
155. *The Ins and Outs of Title Insurance*, 30 CHANGING TIMES, 41, 44 (Oct. 1977).
156. *Id.*
157. *Id.*
158. Appendix at 7, Chicago Title Ins. Co. v. Huff, 256 N.W.2d 17 (Iowa 1977).
159. *The Ins and Outs of Title Insurance*, *supra* note 155, at 44.
160. Kulkin, *supra* note 1, at 54.

be purchased periodically.[161] This is a trap that an unwary homeowner could easily fall into.[162]

Another common criticism of the title insurance industry is that a lender's policy does not protect the interests of the purchaser/borrower, even though in most areas he is the party who is required to pay the premium.[163] "While a lender's title insurance policy relates both to the lien of the mortgage and to the quality of the landowner's title, it does not do so for the benefit of the landowner."[164] The argument is often made that if the lender wishes to protect its interest with title insurance, then it should pay the premium.[165] Even in areas where the lender does assume the cost of the loan policy, however, the charges are usually passed on to the borrower.[166] A bill introduced in the United States Senate in 1971 by Senator Proxmire, called the Title Charge Reduction Act,[167] would have required a lender, who required the purchase of lender's title insurance as a prerequisite to making a mortgage loan, to assume the cost itself, and would have prohibited the lender from passing that premium cost on to the buyer or seller of the property.[168] The bill did not pass, however, and in most states, the borrower still assumes the cost of the premium.[169] The property owner not only ends up paying both the premium for his owner's policy *and* for the loan policy,[170] but his owner's policy actually affords him less coverage than the loan policy provides the lender.[171]

Title insurance seeks to insure against only a limited number of title risks.[172] The extensive exclusions and exceptions dilute considerably the coverage actually received.[173] In fact, the biggest single danger causing loss due to title defects is the mechanic's lien,[174] which is excluded from coverage under most title insurance policies.[175] Mechanic's liens attach to a property if any debts arising out of the construction of the property are not satisfied,

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161. *Id.*

162. *See* Silber, *Title Insurance*, 64 CONSUMER'S RESEARCH MAG. 41 (Mar. 1981).

163. Rooney, *supra* note 4, at 612.

164. *Id.*

165. Quiner, *supra* note 52, at 717.

166. Appendix at 8, Chicago Title Ins., 256 N.W.2d 17.

167. S. 2775, 92d Cong., 1st Sess. (1971).

168. *Id.*

169. Quiner, *supra* note 52, at 717.

170. *Id.* "Local custom seems to determine who pays the fees for a given [title insurance] policy. In some localities, the current owner of the property pays the fee for the owner's policy, and the prospective buyer pays the fee for the mortgage policy." *Id.*

171. *Compare supra* text accompanying note 87 *with supra* text accompanying notes 104-05.

172. *See supra* text accompanying notes 87, 104-05.

173. *See supra* text accompanying notes 89-100, 102, 106-09.

174. Appendix at 17, Chicago Title Ins. Co. v. Huff, 256 N.W.2d 17.

175. *See id.* at 16-17, Chicago Title Ins., 256 N.W.2d 17. *See supra* note 96 and accompanying text.

and they remain attached to the title even when the property is sold.[176] Lawsuits in which a judgment attaches to the property have a similar effect, for responsibility for payment of the debt runs with the title, becoming the responsibility of any new owner.[177]

V. The Benefits of Title Insurance

Despite the problems caused by the inadequacies of title insurance coverage, however, the industry continues to expand because it does provide a very useful service to consumers. For a one-time premium, which is nominal when compared with the loss that the insured *could* sustain, the insured purchases "peace of mind". Since public records have become more complex, and the frequency of property transfers has greatly increased, the possibilities that the title search might overlook a cloud on the title, or that hidden defects might exist, have increased dramatically.[178] Recovery against the title searcher, abstract company, or the attorney who gave the title opinion for loss of title due to defects is possible only when negligence can be proven, and even then, is limited by the financial situation of the negligent party.[179] Title insurance provides "greater and longer economic accountability than the individual lawyer . . . and covers a number of risks which a search does not disclose and which therefore are excluded from the attorney's liability."[180] Immediate or remote grantors also may desire protection since recovery may be sought from them based on the covenants of title contained in the purchaser's warranty deed, although such recovery may be barred, or may be subject to severe limitations.[181]

The cost of the policy would be easily recaptured by the insured if the company defends him in a single title challenge action, and if the defense is unsuccessful, the title insurance company, not the insured, must suffer the loss, if it is covered under the policy.[182] Without title insurance protection, the property owner must pay the expenses for defending his title whether he is successful or not, and additionally, must sustain the financial loss caused by the loss of title.[183]

Title losses tend to occur without the regularity experienced in other types of insurance, making it difficult to evaluate the actual financial condi-

176. Quiner, *supra* note 52, at 712.

177. *Id. See* text accompanying notes 156-62.

178. *See* Quiner, *supra* note 52.

179. Kelley, *supra* note 3, at 634. The attorney's errors and omissions insurance may provide some relief when loss of title results after the attorney has given an erroneous title opinion. "[T]he purchaser's financial protection is limited by the Lawyer's lifetime, by his personal wealth (or lack thereof) and by his errors and omissions insurance (or lack thereof) . . . ." Rooney, *supra* note 120, at 263-64.

180. Kulkin, *supra* note 1, at 49.

181. *See* Gaudio, *supra* note 2.

182. Rooney, *supra* note 4, at 615.

183. *Id.*

tion of a title insurance company.[184] In order to truly understand the profit situation of a title insurance company, it has been suggested that the entire business cycle of approximately seventeen years must be considered.[185] Perhaps the exorbitant profits attributed to the title insurance industry are really the result of a failure to consider the proper time frame.

Title insurance companies also tend to give the consumer a break when it appears that charging a full premium would be a windfall for the company.[186] Discounted rates are often available when the company issues a new policy after an interest has been transferred or refinanced,[187] and also when an abstract of the title has been previously compiled.[188] Also, the problem caused by underinsurance[189] tends to be greatly mitigated by the fact that "title losses rarely amount to more than a fraction of the coverage."[190]

VI. The Arguments Relevant to Title Insurance in Iowa

Weighing these various criticisms, praises, and mitigating factors, Iowa must decide whether to continue or to change its present policy. One factor that should weigh heavily in that decision is the utility of title insurance in Iowa. The original objective of title insurance was to supplement the attorney's title opinion, which "can be no better than the abstract or the public records."[191] Hence, the efficiency of Iowa's title examination standards should affect the need for title insurance. One litigant in *Chicago Title Insurance Co. v. Huff*[192] summarized the efficiency of those standards:

> [t]he evidence shows without dispute that land titles in Iowa are among the most stable, if not the most stable, in the United States. Iowa has been a pioneer and a model State in development of land title examination standards. The Title Standards Committee of the Iowa State Bar Association has for many years periodically prepared and disseminated its land title examination standards book. [The Iowa Land Title Association has developed stringent abstracting standards, and] [t]he Iowa State Bar Association, Iowa Land Title Association and other interested parties have sought and secured remedial and curative legislation over the years which has substantially increased the stability of titles in Iowa.

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184. Quiner, *supra* note 52, at 723-24.

185. *Id.* at 726.

186. *See, e.g., Exhibit R, supra* note 80, at 237-38.

187. *Id.* at 238. These discounted rates, however, apply only to the same amount of title insurance previously held on the property. *Id.* Therefore, title insurance on appreciated property will be available only at full premium for the amount of the appreciation since the last purchase of coverage.

188. *See, e.g.*, Kelley, *supra* note 3, at 639.

189. *See supra* notes 160-62 and accompanying text.

190. Kulkin, *supra* note 1, at 49.

191. Rooney, *supra* note 120, at 264 n. 6 (citing Raushenbush, *Who Helps the Home Buyer?*, 1979 Ariz. St. L. J. 203, 208, 210 (1979)).

192. 256 N.W.2d 17 (Iowa 1977).

> Thus § 614.24, which bars stale reversions, has been on the Iowa statute books for many years. More recently the Forty-Year Marketable Title Act, §§ 614.29-.38, was passed . . . . This important legislation has further increased the stability of titles in this State.[193]

Further protection has been provided by section 614.17, which cuts off unpreserved claims antedating 1970, and by section 614.21, which precludes the enforcement of ancient mortgages.[194]

In *Chicago Title Insurance Co. v. Huff*, a study conducted by the Iowa Bar Association was referred to which came to the following conclusions:

> the system of land conveyancing in Iowa [i]s far superior to the system in any other states [sic.] that had title insurance. Particularly . . . this [is] true from the matter of economics. It [is] less expensive . . . for persons to buy and sell property in Iowa than in any other state . . . . We actually made a diligent search for cases in which persons might have sustained a loss because of a title failure or resulting out of the system of abstract examination, and we didn't find a solitary loss that any buyer or seller has sustained under the system.[195]

Thus, if Iowa titles are as stable as asserted, and losses due to defective titles are extremely rare, the Iowa legislature, by allowing the sale of title insurance in Iowa, would enable title insurance companies to make huge profits for insuring Iowa titles while taking virtually no risk of loss.[196] "[I]t is small wonder . . . that title insurance companies . . . wish to begin doing business in the State of Iowa."[197]

Iowa purchasers who fear loss due to title defect, or who are required by their participation in a federal project to purchase title insurance,[198] are not prohibited from doing so by section 515.48(10).[199] What is prohibited by section 515.48(10) is marketing activities by title insurers within the state of Iowa, which effectively precludes such insurers from using those activities which tend to make title insurance mandatory.[200] It is when the purchase of title insurance becomes "mandatory" that the greatest abuses occur,[201] forc-

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193. Brief of Intervenors-Appellees at 27, Chicago Title Ins., 256 N.W.2d 17. *See* IOWA LAND TITLE EXAMINATION STANDARDS (1974); IOWA CODE §§ 614.24, .29-.38 (1983).

194. IOWA CODE §§ 614.17, .21 (1983).

195. Appendix at 27, Chicago Title Ins., 256 N.W.2d 17. Apparently, if such loss did occur, it was always covered by the abstracter's or the attorney's insurance. *Id.* at 19, Chicago Title Ins., 256 N.W.2d 17. *But see* Gaudio, *supra* note 2. "The cases are legion in which some title defect, which was not discovered at the time of conveyance, came back to haunt the purchaser." *Id.* at 2.

196. Brief of Intervenors-Appellees at 29, Chicago Title Ins., 256 N.W.2d 17.

197. *Id.*, Chicago Title Ins., 256 N.W.2d 17.

198. *See supra* text accompanying note 6.

199. *See* Op. Iowa Att'y Gen. (Dec. 5, 1979).

200. Brief of Intervenors-Appellees at 18, Chicago Title Ins., 256 N.W.2d 17.

201. In no state is the purchase of title insurance required by statute. *See supra* text accompanying notes 120-37.

ing real estate purchasers to incur greater costs than may be necessary to insure a title which has no potential for causing loss due to defect. This gravest of dangers associated with title insurance is eliminated by section 515.48(10), but other problems remain.

One question which must be asked is whether it is sufficient for Iowa statutes to protect only that group of Iowans who do not purchase title insurance because it is not "mandatory," while leaving those purchasers of Iowa property who feel that they require title insurance protection to fend for themselves in an industry which Iowa generally regulates vigorously in order to protect its residents.

VII. Proposed Solutions in Iowa

In determining which direction to lean when reconsidering their stand on title insurance, the Iowa legislature will have to determine whether this dichotomy should be allowed to continue. There are several alternatives which should be evaluated.

First, the choice could be made to continue the status quo, essentially to continue to allow the doctrine of *caveat emptor* to apply to those who choose to deal with foreign title insurance companies. Purchasers are now forced to rely on the regulation provided by the state in which the purchase is made, without being involved in selecting the legislators/regulators. Since most noncommercial real estate purchasers are even less acquainted with the regulatory provisions of a foreign state than they are with the general nature of title insurance, they are forced to rely even more heavily upon the advice of real estate professionals who assist them with the transaction to guide them to a title insurance company.[202] The potential that kickbacks, inordinate commissions and fees may be used to solicit these professionals' referrals should not be overlooked.[203] Without provisions to regulate such purchases, Iowa simply cannot protect its citizens from unscrupulous practices by foreign title insurers, or prevent abuses by Iowa real estate professionals who might offer guidance "with strings attached" to unknowledgeable purchasers.

A second solution might be to prohibit the purchase of title insurance on Iowa property in all circumstances, except when required by a federal loan program.[204] This type of provision, however, would leave a potential purchaser who feels that the property he is interested in purchasing may have a potential title problem without a way to protect himself. This situation could easily lead the purchaser to back out of the sale, and the title could become virtually inalienable. Foreign purchasers, particularly large commercial purchasers, accustomed to purchasing title insurance on all the

202. *See supra* text accompanying notes 110-37.
203. *See supra* text accompanying notes 128-31.
204. *See supra* text accompanying note 6.

property that they purchase, could elect not to deal with such a system, and Iowa's further industrial development could be impaired. Also, Iowa lending institutions which presently purchase title insurance on titles with potential problems could simply refuse to make the loan necessary for a purchaser to buy such property. To adopt such a statute, therefore, would be to contravene the general intent of ease of alienability which has been carefully built into Iowa property law.

Another potential alternative might be for Iowa to regulate the sale by foreign title insurers of title insurance sold to insure Iowa titles. The potential problems which would have to be surmounted for this alternative, however, may be too staggering to make it feasible. At present, the Iowa Insurance Commission has no way of knowing which foreign insurers are providing title insurance coverage to Iowa residents, or how many policies are being written. Testimony given in *Chicago Title Insurance Company v. Huff* indicated that in 1973, five or six companies were known by Chicago Title to be writing title insurance in Iowa,[205] and today that estimate is probably conservative. Since the contact between the purchaser and the title insurer must be made out of the state, the opportunity for involvement by the State of Iowa would be severely restricted.[206]

A bill before the Iowa House of Representatives during the 1983 Session, House File 483,[207] presented another possible alternative, with the potential to solve at least part of the problem presented by the present dichotomy of treatment. The Act would have amended section 515.48(10) to provide for "the sale of title insurance for real property to a bank, savings and loan association, credit union, or industrial loan company on property for which the institution has made a loan and retains a mortgage."[208] This bill would not have allowed the sale of owner's title insurance policies in Iowa, nor would a company have been allowed to sell any type of insurance other than lender's policies.[209] The lender would not have been allowed to pass the cost of the policy on to the borrower, nor would an officer, director,

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205. Appendix at 15, Chicago Title Ins., 256 N.W.2d 17. "[M]y best guess is that probably one [title insurance company] writes more [title insurance policies than does Chicago Title] and one other writes about the same and two or three may write less." *Id.*, Chicago Title Ins., 256 N.W.2d 17.

206. In fact, regulation of extraterritorial activities by the States has been prohibited. *See, e.g.*, F.T.C. v. Travelers Health Ass'n, 362 U.S. 293 (1960). In *F.T.C. v. Travelers Health Association*, the United States Supreme Court summarized the state's lack of power to regulate such transactions: "[A] State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way." *Id.* at 301 (citing Connecticut Gen. Ins. Co. v. Johnson, 303 U.S. 77 (1938); St. Louis Cotton Compress Co. v. Arkansas, 260 U.S. 346 (1922); Allgeyer v. Louisiana, 165 U.S. 578 (1897)). Also, *see supra* text accompanying notes 16-26.

207. H.F. 483, 70th Iowa G.A., 1983 Sess.

208. *Id.*

209. *Id.*

or employee of the lender have been permitted to receive a commission on title insurance covering the title of property mortgaged by the lender.[210] The bill also provided authority for the insurance commissioner to adopt rules regulating capital requirements, reporting requirements, premium rates, minimum reserves, retained liability, licensing of agents, investments, and approval of policy forms.[211]

This bill was obviously constructed with the goal in mind of obviating the most frequently leveled criticisms of the title insurance industry, and it might have gone a long way toward achieving that goal. Regulatory protection, however, would have been extended only to lending institutions purchasing loan policies, and the real estate purchaser desiring the protection of title insurance would have remained unprotected by Iowa statute. Inevitably, mortgagors would have been forced to pay indirectly for such policies, probably through increased interest rates, to compensate for such expenses, even though direct collection of the cost from the borrowers would be prohibited.[212]

Additionally, this bill would have placed an enormous burden on the Commissioner of Insurance to research, adopt, and implement the rules required to effectuate the bill,[213] as would any bill allowing for the sale of title insurance in Iowa. Iowa has not endeavored to regulate the title insurance industry for over thirty-six years,[214] and the business has evolved in that period, making any past Iowa experience virtually useless. Because of the many aspects of title insurance which differentiate it from other types of property or casualty insurance, Iowa's experience with those lines of insurance would unfortunately be of limited usefulness in the regulation of title insurance.[215] Iowa would, however, be able to profit from the experience of the other forty-nine states in their attempts to control the relationship between title insurer, solicitor, and insured. Certainly, many varying approaches are currently in force, with differing degrees of success.[216] Iowa is in a unique position to evaluate regulations being used by other states and to adopt rules designed to avoid the pitfalls faced by other states.[217]

Another bill introduced during 1983, Senate File 98, "relat[ed] to the terms and conditions of transactions involving the sale, financing, and mortgaging of real property."[218] This bill would have allowed "[a]ny company

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210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. The sale of title insurance was prohibited in 1947. *Insurance Risks Acts*, ch. 258, § 5, 1947 Iowa Acts 333-34 (codified at IOWA CODE § 515.48(10) (1983)).

215. *See supra* text accompanying notes 61-75, 184-85.

216. *See* Quiner, *supra* note 52, at 723-26.

217. *See id.*

218. S.F. 98, 70th Iowa G.A., 1983 Sess. (introduced by Senator Hulse).

organized under . . . chapter [515] or authorized to do business in"[219] Iowa to

> [i]nsure against loss or damage by reason of defects in or liens or encumbrances on the title of real property of *ten acres or less*; or the unmarketability of the title to real property of ten acres or less; or the invalidity or unenforceability of liens or encumbrances upon real property of ten acres or less, to the extent permitted by, and subject to, rules adopted by the commissioner.[220]

Unlike House File 483,[221] which provided for the sale of loan policies of title insurance, this bill provided for the sale of owner's policies of title insurance to purchasers of small tracts of Iowa property.[222] Both bills would have prohibited a company authorized to sell title insurance policies thereunder from selling any other type of insurance, and would have authorized the Commissioner of Insurance to adopt regulations necessary to implement the bill.[223]

Under Senate File 98, the sale of owner's policies would have been restricted to "title[s] of real property of ten acres or less."[224] Apparently the intention of this provision was to allow the average homeowner or small business concern to obtain title insurance for their isolated purchases.[225] Several groups of real estate purchasers, however, would have been left unprotected by such restrictions. Perhaps it was thought that large commercial investors or real estate developers (also, institutional lenders) are fully capable of protecting their own interests, as their constant presence in the real estate market should keep them well informed of the relative merits of various title insurers and available policies.[226] But another group of Iowans would have also been unable to purchase Iowa-regulated title insurance under such a provision: Iowa farmers. To leave such a substantial group, which essentially forms the backbone of the Iowa economy, unable to take advantage of protection extended to much of the rest of the population, in this decade which has provided such financial insecurity for the family farm, seems unconscionable.[227]

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219. IOWA CODE § 515.48 (1983).

220. S.F. 98, 70th Iowa G.A., 1983 Sess. (emphasis added).

221. H.F. 483, 70th Iowa G.A., 1983 Sess. *See supra* text accompanying notes 200-04.

222. S.F. 98, 70th Iowa G.A., 1983 Sess.

223. *Id.*; H.F. 483, 70th Iowa G.A., 1983 Sess. The rules to be promulgated by the insurance commissioner under S.F. 98, 70th Iowa G.A., 1983 Sess. were identical to those to be adopted under H.F. 483, 70th Iowa G.A., 1983 Sess. *See supra* text accompanying notes 211-12.

224. S.F. 98, 70th Iowa G.A., 1983 Sess.

225. *See supra* text accompanying note 2.

226. *See supra* text accompanying note 132.

227. The stricken portions of the proposed amendment to S.F. 223 relating to the sale and regulation of title insurance would have provided no protection for farmers, either. *See* amends. H-3578 and H-3661 to S.F. 223, 70th Iowa G.A., 1983 Sess.; 70 IOWA HOUSE JOURNAL 1263-86. These provisions would not have allowed title insurance to "be issued on real estate of ten acres or more which will be primarily used for agricultural production purposes by the

In a consolidated form, Senate File 98 and House File 483 would have provided for the sale and regulation of title insurance to a substantial portion of Iowa's potential real estate purchasers, both owner's policies for titles to property of ten acres or less and loan policies to institutional lenders.[228] Purchasers of larger tracts of land, including commercial enterprises, real estate developers, and farmers, would not have been able to purchase owner's policies from title insurers authorized to write title insurance in Iowa, but neither would they have been prohibited from purchasing title insurance outside of Iowa, as is currently their option under section 515.48(10).[229]

A more far-reaching alternative, however, was presented by House File 374.[230] This bill would have simply allowed "[a]ny company organized under . . . chapter [515] or authorized to do business in"[231] Iowa to

> [i]nsure against loss or damage by reason of defects in liens or encumbrances on the title of real property, or the unmarketability of the title to real property, or the invalidity or unenforceability of liens or encumbrances upon real property, to the extent permitted by, and subject to, rules adopted by the commissioner.[232]

This bill appears to have provided for the sale of both owner's and loan policies, without restricting in any way the size of the property or the interest in the property whose title is to be insured.[233] The rules prescribed by the bill to be adopted by the Insurance Commissioner are identical to those that would have been adopted under Senate File 98 and under House File 483.[234] Subject to such regulations, House File 374 would have opened Iowa to the title insurance industry.[235] Title insurers would then have been in a position to pursue Chicago Title's stated goal to "ultimately convert all sales transactions of real estate to involve title insurance."[236] The regulations in most areas have not been able to prevent the achievement of such a goal.[237] Consequently, the purchase of at least loan policies has become nearly universal, and real estate transaction costs have been thereby increased.[238]

Of course, there are many who feel that the protection afforded by title insurance is well worth the small one-time premium when the alternative is

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owner of the property would be protected by the policy." Amend. H-3578 to S.F. 223, 70th Iowa G.A., 1983 Sess.; 70 IOWA HOUSE JOURNAL 1263.

228. *See supra* text accompanying notes 254 and 238.

229. Op. Iowa Att'y Gen. (Dec. 5, 1979).

230. H.F. 374, 70th Iowa G.A., 1983 Sess. (introduced by Representatives Skow and Halvorson).

231. IOWA CODE § 515.48(10) (1983).

232. H.F. 374, 70th Iowa G.A., 1983 Sess.

233. *Id.*

234. *Id.*; S.F. 98, 70th Iowa G.A., 1983 Sess.; H.F. 483, 70th Iowa G.A., 1983 Sess.

235. H.F. 374, 70th Iowa G.A., 1983 Sess.

236. Appendix at 17, Chicago Title Ins. Co. v. Huff, 256 N.W.2d 17 (Iowa 1977).

237. *See* Quiner, *supra* note 52, at 723-26.

238. *See supra* text accompanying notes 135-37.

to lose title to one's home, and that little solace is provided to the uninsured person who loses his home and his life savings by the knowledge that such loss occurs only rarely in Iowa.[239] By seeking to protect those few who would suffer a catastrophic loss, the system of "mandatory" title insurance which has evolved in most states allows the large losses of the few to be spread over the entire property-purchasing population, resulting in only a nominal cost for each purchaser.[240] This is the essence of the risk assumption and risk spreading that characterizes all types of property and casualty insurance.[241] This is thought to be a truly desirable goal, for it provides peace of mind and financial security, and has been the primary reason that the insurance industry has become so enormous in America.

On the other hand, the purchase of all other types of property and casualty insurance has not become mandatory. Even in states where motorists or operators of premises open to the public are required to carry a minimum of liability insurance, the requirement is not designed for the protection of the insured, but for the protection of innocent third parties who may be injured by the insured's actions or neglect.[242] When the purchase of title insurance becomes "mandatory", however, the insured is required not to provide protection for others, but for himself. The State has a legitimate purpose in protecting its residents from losses caused by others, but it is difficult to conclude that the State has any legitimate interest in forcing, or allowing the title insurance industry to force,[243] real estate purchasers to protect themselves from the slight possibility that they may sustain a monetary loss due to title defect.[244]

The Iowa legislature, in deciding whether to pass any of the bills now pending before it, or to adopt another alternative, must carefully balance the advantages and disadvantages of altering Iowa's current, efficient title system by allowing title insurance companies to return to Iowa. The most desirable goal, of course, would be for no purchaser of Iowa property to ever have to sustain a loss due to defective title. If the legislature concludes that under the current system of conveyancing sufficient indemnification is not available from the abstracter, the attorney, or the purchaser's grantors,[245] then they must decide whether some provision should be made to protect purchasers from loss. If that question is answered in the affirmative, then it must be determined whether allowing the sale of title insurance in Iowa would help to provide that protection. With careful regulation of title insur-

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239. *See* Gaudio, *supra* note 2.

240. *See supra* text accompanying note 63.

241. *See supra* text accompanying notes 62-65.

242. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 90, §§ 34A-340 (West 1969 & Supp. 1983-84)(Cumpulsory Motor Vehicle Liability Insurance).

243. *See supra* text accompanying notes 135-37.

244. *See supra* text accompanying notes 146-51.

245. *See supra* text accompanying notes 179-81.

ance companies, it might be possible for Iowa to offer protection to those who seek it, and at the same time prevent the purchase of title insurance from becoming mandatory for those purchasers who determine that they have no need for it.

VIII. Challenge For the Iowa Legislature

The Iowa legislature should realistically face the situation before it. Iowa has been all alone in their prohibition of the sale of title insurance since 1947.[246] After the passage of thirty-six years, it is apparent that such "innovation" will never be followed by other states. After one hundred years of dependency on title insurance protection for title problems, other states have been far less motivated than Iowa to establish, maintain, and improve their systems of title records, abstracting, and title opinions.[247] Consequently, title records in most areas are less than adequate, and the real estate transaction system depends more and more upon the title plants of the title insurers engaged in writing title insurance in the area.[248] This deterioration, (or at least the failure to sufficiently improve the public system), coupled with the lack of effective statutes of limitation in many states, and the growing apathy seen in the legal profession toward practicing in an area which has become overly complicated, or is seen as not sufficiently remunerative, would make the adoption of Iowa's prohibition against the sale of title insurance disastrous in most states.[249]

The title insurance issue has come before the Iowa legislature in four of the last five sessions.[250] It is time for bills relating solely to title insurance to get out of committee in the next legislative session so that the entire governing body of Iowa will be encouraged to re-evaluate the situation. Title insurance has the potential to become a useful tool for Iowa real estate purchasers if properly regulated, but it also has the potential to become a means of exploitive profiteering for title insurance companies if uncontrolled. The use of extreme caution cannot be urged strongly enough.

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246. Chicago Title Ins. Co. v. Huff, 256 N.W.2d 17, 20 (Iowa 1977).
247. *See supra* text accompanying notes 193-94.
248. *See* Quiner, *supra* note 52, at 717.
249. Quiner, *supra* note 52, at 720.
250. *See supra* note 14 and accompanying text.