

ARTICLES

LAND TRANSFERS: PROCESS AND PROCESSORS

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The buying and selling of land is a complex process that normally involves a series of procedures and the assistance of service specialists skilled in implementing these procedures. This article, that in substance comprised the Seegers lectures for 1988, considers the land transfer process by focusing on the principal service specialists who operate the process and who in large measure are responsible for how well it functions. The principal service specialists in the land transfer field are real estate brokers, lawyers, title companies, and lenders.¹

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In preparing these remarks, I have benefited from discussions with a number of knowledgeable persons engaged in land transfer servicing. For this help, I am most appreciative. I am particularly grateful for the information and insights obtained from discussions with Richard Pollay of the Chicago Title Insurance Company, Leonard Donohoe of the Chicago Title and Trust Company, and Stewart Bohan and Richard Patterson of the Connecticut Attorneys Title Insurance Company. However, not only am I solely responsible for what appears herein but I am certain that my most helpful informants disagree with some of my conclusions.

1. Other generally less important specialists may also become involved in land transfer servicing, including such groups as appraisers, escrow agents, surveyors, contractors, land planners, and termite inspectors. Some of the principal service specialists may themselves act as these ancillary servicers. In the western United States, escrow agents have become particularly common participants in servicing real estate sale transactions. On escrows, see D. BURKE, *LAW OF TITLE INSURANCE* ch. 15 (1986); Walker & Eshee, *The Safeguards and Dilemmas of*

As is true of many social processes, the transfer of land interests cannot be fully understood without an understanding of the service specialists who make the process work. Service specialists carry out the process, are crucial to how it is shaped, and are the focus of legal controls over the process. Structural and operational changes in service specialists, whether the result of market forces or government regulation, can have major consequences for those the process is designed to serve — mostly buyers and sellers of land in the case of land transfers. Changes in land transfer servicers can also have repercussions on the entire economy due to the massive size of the American land market and its extension into every local community.

In the four sections that follow, services provided by the principal land transfer service groups are first described, followed by a discussion of important new developments involving these servicers. Section III presents a consideration of deficiencies in land transfer servicing, and finally observations are made in Section IV about adaptations of land transfer servicing to the future, including some suggestions for change. Land transfer servicers are operating in a period of unusual volatility and changes are underway seriously undercutting some firms in each servicing group, substantially favoring others, and blurring somewhat the distinctions among groups as integration efforts take place. New entrants with tremendous financial resources are moving into the field aiming to take over from well-established servicers. Foresight, willingness to innovate, and large capital resources will be important in determining who survives and prospers and who disappears. Also important will be legal changes in how the servicers are regulated, whether by additional regulation or deregulation; but it is inevitable that important legal changes will take place in the near term.

I. THE SERVICE GROUPS

A. Real Estate Brokers

The major services provided by real estate brokers are bringing buyers and sellers together, assisting them to make informed decisions on whether or not to enter into sales contracts, and assisting them with the terms of any such agreements.² Most brokered real estate sales are of single family resi-

Escrows, 16 REAL EST. L.J. 45 (1987).

2. On real estate brokers and their work, see D. BURKE, LAW OF REAL ESTATE BROKERS ch. 1 (1982); P. ROHAN, B. GOLDSTEIN & C. BOBIS, REAL ESTATE BROKERAGE LAW AND PRACTICE (1985); U.S. FED. TRADE COMM'N, THE REAL ESTATE BROKERAGE INDUSTRY (1983); Currier, *Finding the Broker's Place in the Typical Residential Real Estate Transaction*, 33 U. FLA. L. REV. 655 (1981). Functions of industrial real estate brokers are discussed in SOCIETY OF INDUSTRIAL REAL ESTATE BROKERS, INDUSTRIAL REAL ESTATE chs. 6-7 (4th ed. 1984).

dences and one or both parties to these sales agreements usually know little about land transfer procedures and often know little about the housing market. Furthermore, the buyers usually have a limited capacity to evaluate the merits of the properties being purchased. Thus, in these residential transactions, brokers commonly assume important educational and advisory roles in relation to the parties. In sales of commercial, industrial, large multi-unit residential, and most large agricultural land parcels, the parties normally are far more knowledgeable. While brokers in these transactions also may have educational and advisory roles, they operate in a context of far greater buyer and seller expertise. Although most real estate sales are made with the assistance of brokers, a small, but possibly growing minority are made by owners without the participation of brokers.

Many real estate brokers long have supplemented their land sales with one or more other business activities related to land; activities that provide added income and that draw on their land market expertise and customer contacts. Among these supplemental business activities are sales of property and casualty insurance as agents of insurance companies, real estate appraisal, leasing and management of rental properties, and the closing of real estate sales transactions. Brokers also commonly perform the service of referring their customers to other land transfer specialists, such as lenders and lawyers, as needed.

Real estate brokers for their sales work almost universally are paid on a commission basis, commonly six percent of the contract price, and estimates indicate that gross commissions nationally can total as much as \$10 billion per year.³ The commission is earned only if a willing buyer is found, a contract to purchase is entered into, or the sales transaction is closed and a deed delivered. The broker's contract with his principal, usually the seller, often expressly states how far the transaction must proceed before the broker's commission is earned. Irrespective of how much time and money the broker invests in trying to effectuate a sale, the broker normally receives nothing for his efforts unless a qualified buyer is produced and a sale is made or some other specified stage in the transaction is reached. Real estate brokers' commission rates are not set by statute or government regulation, but by contract between brokers and their principals.

Broker-principal contracts vary as to the exclusiveness of the broker's right to sell. What brokers prefer and often obtain from their principals is an exclusive right-to-sell listing, one in which only the broker may attempt to sell the property. If another broker or the seller arranges for the sale, the

3. This estimate is for the year 1979. Erxleben, *In Search of Price and Service Competition in Residential Real Estate Brokerage: Breaking the Cartel*, 56 WASH. L. REV. 179, 180 (1981). Obviously, this amount will vary from year to year depending on activity in the real estate sales market and overall shifts in the dollar value of land and land improvements.

exclusive right-to-sell broker is entitled to the contracted for commission. Another listing format is the exclusive agency, under which the broker receives a commission if another broker sells, but not if the sale is effectuated by the seller. Still another format is the open listing, one entitling the broker to a commission only if he makes the sale, not if it is made by another broker or by the seller's efforts. Listing agreements often expressly set an expiration date for the listing, and if no such date appears in the agreement, a reasonable time is usually implied.

The typical real estate brokerage firm is a small, local operation serving primarily the small town or section of the metropolitan area in which its office is located. A minority of firms in metropolitan areas expand their effective service coverage by maintaining two or more offices, each in a different suburban or central city area. Almost all communities are served by conveniently located real estate brokers' offices, and a considerable number of competing offices exist in most areas.

In most communities, marketing of single-family residences is greatly enhanced by a form of cooperative venture among brokers, the multiple listing service (MLS). The MLS device, well-established in the United States since at least the 1920s, is a pooled marketing arrangement, functioning somewhat like a stock or commodities exchange, in which listings of properties for sale made with any participating broker are circulated to all other brokers participating in the scheme. Prospective buyers who contact any participating broker then are informed of the types of available properties that are listed through the exchange. If a listed property is sold, the sales commission is split between the listing broker, the one with whom the property was originally listed, and the so-called selling broker, the one who finds a buyer. The split often is even, half to each. Commonly, participating MLS brokers require exclusive right-to-sell listings from their clients with the further understanding that the exclusive right extends to sales efforts by all other brokers participating in the MLS scheme. In many communities, most brokers operating in an area are members of a multiple listing service and each service usually covers a substantial local area, such as an entire trading area or a large section of one. Some brokers belong to more than one MLS, thereby attaining even more expansive coverage.

Real estate brokers have a powerful trade association network of local and state boards affiliated with the National Association of Realtors (NAR). The NAR has approximately 700,000 members, including both brokers and sales persons. Realtors, a copyrighted term, are broker-members of the NAR. About one-third of the NAR members are realtors; the others, mostly salespersons, are realtor-associates.⁴ Many multiple listing services are administered by local real estate boards and the trade associa-

4. D. BURKE, *supra* note 2, at 4.

tion network is active in educating members, developing ethical standards for the occupation, lobbying, and litigating regulatory issues.

Sales of industrial and commercial properties are a specialty and most individuals doing this kind of work devote all their time to either the commercial or industrial side of the business with some specializing in a particular subcategory of one of these types of properties.⁵ Other brokerage firms concentrate exclusively on industrial or commercial properties, and many larger brokerage firms have a separate commercial or industrial department. Customers of commercial and industrial brokers include both prospective users and equity investors. Many customers are also interested in long-term leasing as a possible alternative to purchasing. The amount of background knowledge and experience required in commercial or industrial brokerage generally is greater than that required for the residential side of the business. This is because commercial and industrial properties are more varied, with more diverse use possibilities, and because transactions transferring interests in these properties are more complex and less standardized than is typical of residential properties. Among other significant respects in which commercial and industrial brokerage differs from residential brokerage are that in the former the percentage of part-time sales personnel is far smaller. Moreover, commission rates are usually lower, but commission payments usually higher, because property values typically are higher. Finally, individual brokerage firms tend to operate over larger geographic areas because their markets tend to be spread out more; multiple listing services are much less frequently relied on although interfirm cooperation and resultant commission splits commonly do take place.

Compared to many occupations, real estate brokers are not extensively regulated by government.⁶ Real estate brokers are licensed, although license acquisition is relatively easy to obtain; and real estate brokers are, of course, subject to the limitations of antitrust law and to laws restricting performance of many law-related services to lawyers. There are few other significant regulatory restrictions on them of much significance.⁷ Every state licenses brokers, but the requirements vary somewhat from state to state. Generally, an examination is required along with evidence of good moral character. Licenses are subject to revocation for improper conduct. Some classes of persons may engage in real estate brokerage activities with-

5. A helpful source on the practice of industrial real estate brokerage is SOCIETY OF INDUSTRIAL REALTORS, *INDUSTRIAL REAL ESTATE*, *supra* note 2.

6. On regulation of real estate brokers, see generally D. BURKE, *supra* note 2, chs. 5-7.

7. Federal and state fair housing laws, although difficult to enforce, also impose major restrictions on residential real estate brokers in many communities by prohibiting discrimination on such grounds as race, sex, and national origin in the marketing of housing. On these laws see D. BURKE, *supra* note 2, ch. 6; Note, *Racial Steering: The Real Estate Broker and Title VIII*, 85 YALE L.J. 808 (1976).

out being licensed; commonly, persons selling properties they own, lawyers, and financial institutions acting as fiduciaries. Salespersons, those persons working for a broker as employees or independent contractors, are separately licensed, although the examination and other prerequisites for these licenses ordinarily are less demanding than for broker licenses. A high percentage of licensed salespersons work only part-time at selling real estate. Many hold other jobs full-time and moonlight at selling real estate. Some are housewives or retired persons without other employment. In periods when sales activity is slow, there is a tendency for the part-timers to put in less effort on their real estate work or to withdraw entirely pending market revival. The usual compensation of salespersons, both full- and part-time, is a portion of the sales commission going to the broker.

Over the years, real estate brokers have become embroiled in serious controversies over their alleged violations of antitrust laws and the proscriptions on unauthorized practice of law. In each of these regulatory spheres, there has been considerable litigation involving real estate brokers, and judicial opinions have resolved some of the troublesome questions as to what is permissible and what is not. Most of the antitrust cases have focused on uniformity of commission rates or limiting access to multiple listing services. Agreements to fix commission rates are illegal under the antitrust laws whether express or implied from conduct of the parties, but the fact that brokers in a community charge uniform rates is not by itself sufficient to show illegal collusion. Additional evidence of collusion is necessary, and without evidence of an express agreement, this collusion can be difficult to prove no matter how suspicious one may be that collusion is contributing to the uniformity. A recent report asserts that the uniformity may be noncollusive and may result from a holdover of rates prevalent prior to 1950 when express rate-fixing arrangements were common and thought legal. The report also asserts that the uniformity may result from the belief of brokers that rate cutting would be pointless as rival firms would promptly respond by cutting their rates in order to maintain market share.⁸ These arguments are unconvincing, but fully adequate explanations for the uniformity are not apparent. In addition, the multiple listing service has allegedly been used as a contributing device for illegal price fixing by such means as refusing MLS access to brokers who might cut prices, threatening MLS expulsion of brokers who depart from fixed prices, boycotting by selling brokers of cut-rate

8. Phillips & Butler, *The Law and Economics of Residential Real Estate Markets in Texas: Regulation and Antitrust Implications*, 36 BAYLOR L. REV. 623, 640-41 (1984). The general belief that real estate brokers were not covered by the Sherman Act was dispelled in 1950 by *United States v. National Ass'n of Real Estate Boards*, 339 U.S. 485 (1950), which stated that brokerage was not considered a trade within the meaning of the Act. Since a 1980 decision of the Court, however, it has been clear that most real estate broker transactions are sufficiently involved in interstate commerce to be subject to the Sherman Act. *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232 (1980).

listing brokers, and exchanging price information with the objective of freezing prices generally. Courts have held blatant instances of this sort to be in violation of the antitrust laws, mostly state laws, but distinguishing legitimate from illegitimate conduct can be difficult.⁹ This results in considerable inconsistency in the caselaw, particularly as to what conditions may validly be imposed on broker access to multiple listing services.¹⁰

On unauthorized practice of law issues, the brokers have been somewhat more successful against their opponents, usually bar associations.¹¹ Conflict has centered on which land transfer documents, if any, brokers may draft. This is a matter of state law and courts have quite universally held that brokers may fill in standard form sales contracts for the parties because this type of activity is incidental to the brokers' primary function of bringing buyers and sellers together. There is less consensus among the states as to the right of brokers to draft post-contract-of-sale documents, such as deeds, purchase money mortgages, and instruments curing title defects. Some states permit brokers to prepare these documents, others do not.¹² Even though they usually make no separate charge for instrument preparation, brokers commonly desire to do this type of work because their customers look favorably on what is seen as a free accommodation service. The practice saves time and parties are often in a hurry, and broker instrument preparation eliminates the risk that if lawyers become involved they may upset the deal by finding fault with the business merits of the transaction. However, even if they are legally authorized to do so, brokers are chary of preparing complicated conveyancing instruments, especially those requiring considerable original phrasing by the drafter, due to risks of liability for drafting defective or ill-suited documents.

The response of real estate brokers to criticisms of how they operate has been defensive, aggressively so on issues threatening their profitability.

9. On MLS practices and the antitrust laws see D. BURKE, *supra* note 2, at 340-52; Chang, *Multiple Listing Services: The Antitrust Issues*, 10 REAL EST. L.J. 228 (1982); Erxleben, *supra* note 3, at 189-211.

10. The access cases are considered in Miller & Shedd, *Do Antitrust Laws Apply to the Real Estate Brokerage Industry?*, 17 AM. BUS. L.J. 313, 315-18 (1979); Malin, *Real Estate Multiple Listing Services and the Sherman Act: A Response to Miller and Shedd*, 18 AM. BUS. L.J. 77 (1980); Trombetta, *A Response to Malin's Response to Miller and Shedd's Real Estate Multiple Listing Services and the Sherman Act*, 19 AM. BUS. L.J. 370 (1981).

11. On unauthorized practice of law by real estate brokers, see D. BURKE, *supra* note 2, ch. 8; Shedd, *Real Estate Agents and the Unauthorized Practice of Law*, 10 REAL EST. L.J. 135 (1981). Two recent cases on the subject are *Cultum v. Heritage House Realtors, Inc.*, 103 Wash. 2d 623, 694 P.2d 630 (1985) (licensed real estate brokers and salespersons may complete form earnest money agreements), and *New Jersey State Bar Ass'n v. New Jersey Ass'n of Realtor Bds.*, 93 N.J. 470, 461 A.2d 1112 (1983) (consent judgment approved permitting real estate brokers and salespersons to prepare contracts for the sale of one- to four-unit residential real estate).

12. Shedd, *supra* note 11, at 139-41.

This is characteristic of trade groups when under attack. Charges of illegal conduct have generally been denied and antitrust and unauthorized practice cases often vigorously defended, with broker trade associations commonly taking over responsibility for representing broker interests.

B. Lawyers

Historically, land transfer servicing was one of the principal types of work performed by American lawyers, and although of less overall significance to contemporary lawyers than to their predecessors, it is still of tremendous importance to many in practice today. This phase of the practice also is referred to as conveyancing, settlement, or closing work. Small private law firms and solo practitioners in the general practice of law are particularly active in sales of single-family residences and family farms, with larger law firms concentrating on sales of more expensive properties, such as large apartment buildings, hotels, office buildings, and industrial properties. Legal work required in connection with the ordinary single-family home sale tends to be a routine procedure including preparation of the contract of sale; title search, title examination, and perhaps clearing of title defects; drafting or review of a mortgage; drafting of a deed; preparation of a closing statement showing expenses and receipts; and a final closing session in which the seller is paid and the deed delivered to the buyer. Supplemental steps often are involved, such as ordering a survey and reviewing the surveyor's report, and ordering and approving a title insurance policy. The period between the contract of sale and closing usually is eight or ten weeks, during which time the buyer ordinarily arranges for financing and the necessary title work is performed. Added problems, of course, may emerge in connection with the sale transaction which lawyers may be asked to resolve, such as controversies over the broker's commission or deed covenant compliance. In sales of properties for large sums of money, a much wider range of legal problems typically exists, including intricate financing arrangements, complicated income tax considerations, zoning and other land use control issues, and frequently construction problems, as these sales often are tied into major development projects.

In the sale of a single-family residence, the buyer and seller each may be represented by a different lawyer; or to save expense, the same lawyer may represent both, only one may be represented by a lawyer, or neither may be represented. Also, in single family residence sales, there are considerable variations in lawyers' roles depending on the geographic area.¹³ In

13. Closing customs, including the allocation of functions among such service specialists as buyer's lawyer, seller's lawyer, and the real estate broker, vary not only among states but within states. For example, closing customs in Connecticut vary considerably among counties, and in some instances among towns within counties as well. A detailed description of these

many places, lawyers do not become involved in such sale transactions until after the contract of sale has been signed because brokers commonly prepare the sales contracts. In some areas, lawyers in private practice do little or no title work unless title curing litigation is necessary; title insurers, relying on their private title plants and their own staff, perform the requisite search and examination tasks. In still other areas, lay abstracters do most of the title searching, and lawyers' title work is restricted largely to legal evaluation of titles based on summaries of public title records prepared by the abstracters. Similarly, lawyers do not have a monopoly on final closings in many regions. In many communities, title companies, lenders, brokers, or escrow companies have taken over much of the final closing or settlement work. Lawyers in larger firms often refuse to do single-family residence closings or will do them only as an accommodation for their better clients. Overhead of these firms is such that they claim closing work of this kind is unprofitable. Title companies, too, frequently assert that closings are unprofitable. However, for title companies, as well as for real estate brokers, performing this service, even at a loss, can presumably pay off in competitive advantage.

Mortgage lenders are usually represented by lawyers who make certain that in individual transactions the lenders' interests are adequately protected. Some home buyers do not retain their own counsel because they are willing to gamble that transaction approval by the lenders' lawyers sufficiently protects the buyers' generally similar, but in some respects quite different, interests.

Whatever the type of land parcel being sold — big or small, residential or nonresidential — the buyer's lawyer may perform the added service of referring the buyer to other needed service specialists with referrals to a title insurer being particularly common. Lawyers involved at the early stages in sale transactions, at the contract of sale stage, for example, are more likely to provide referral services. Referrals may be part of the role lawyers do not infrequently perform in coordinating the entire sale transaction, especially for less knowledgeable clients. However, even in big deals involving well-informed clients, a lawyer may serve as transaction coordinator.

Compared to most occupations, lawyers are extensively regulated with the focus heavily on the individual lawyer. Licensing requirements are demanding in their education and bar examination prerequisites, and professional behavior after licensing is subject to comprehensive controls, principally by the courts. The most detailed postadmission regulations are two sets of ethical standards of conduct, the Model Code of Professional Re-

variations appears in *CONNECTICUT ATTORNEYS TITLE INSURANCE COMPANY, A GUIDE TO CLOSING CUSTOMS IN CONNECTICUT* (1986).

sponsibility and the more recent Model Rules of Professional Conduct. These standards were drafted and approved by the American Bar Association, and, with the exception of California, one or the other set is in effect in every state.¹⁴ Violations can subject lawyers to disciplinary sanctions, imposed generally by the courts, varying from judicial censure to disbarment. Relative to land transfer servicing, there are several respects in which the standards are of particular importance: in particular, they severely restrict the conflict of interest situations in which an individual lawyer or law firm may become involved,¹⁵ and they permit lawyer advertising but prohibit in-person solicitation of prospective clients.¹⁶ The conflict of interest proscriptions do not prevent a lawyer from representing both the buyer and seller or borrower and lender in the same real estate sale transaction, provided that neither party is likely to be harmed thereby and both parties consent. However, some lawyers consider the possibilities of conflict so serious that they will never represent both parties to a real estate transaction; and there is case law which indicates that when such dual representation occurs the consents must be knowing and based on full and timely disclosure.¹⁷ Lawyers may, and a considerable number do, advertise that they will perform land transfer services, but questions have arisen about the validity of direct mail advertising of such services.¹⁸ The prohibition of in-person solicitation of potential clients outlaws such possible means of generating land transfer legal work as lawyers or their agents making solicitation calls in person or by telephone on persons who are actively seeking to buy a home or who have contracted to do so.

For many years, lawyers and their professional associations were generally believed to be exempt from the federal antitrust laws, but in a 1975

14. California has its own set of rules that in many respects resembles the ABA Model Code or Model Rules. In most states, the ABA Model Code or Model Rules have been adopted as rules of court; and in some states, the ABA version has been somewhat modified. Approximately half the states have now adopted the Model Rules, and within a few years quite probably at least two-thirds will have done so.

15. MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7-1.9 (1980) [hereinafter MODEL RULES]; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR5-101 to -106 (1980) [hereinafter MODEL CODE].

16. MODEL RULES, *supra* note 15, Rules 7.1-7.5; MODEL CODE, *supra* note 15, DR2-101 to -106.

17. Two cases in which lawyers were sanctioned for inadequate client disclosure when simultaneously representing buyers and sellers in real estate transactions are *In re Dolan*, 76 N.J. 1, 384 A.2d 1076 (1978), and *In re Robertson*, 290 Or. 639, 624 P.2d 603 (1981).

18. Lawyers seeking closing work by mass mailings to property owners held permissible in *Koffler v. Joint Bar Ass'n*, 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980), *cert. denied*, 450 U.S. 1026 (1981). *But see* *State v. Moses*, 231 Kan. 243, 642 P.2d 1004 (1982). However, mass mailings by a law firm to real estate brokers in effect seeking referrals of closings have been held improper because conflict of interest between the referring broker and any referred client could adversely affect law firm representation of the client. *In re Alessi*, 60 N.Y.2d 229, 457 N.E.2d 682, 469 N.Y.S.2d 577 (1983), *cert. denied*, 465 U.S. 1102 (1984).

opinion, *Goldfarb v. Virginia State Bar*,¹⁹ the United States Supreme Court corrected this view. In the *Goldfarb* case, the Court held that bar association minimum fee schedules and their implementation violated the Sherman Act. The complained-of fee fixing in the *Goldfarb* case pertained to real property title examinations, but the *Goldfarb* opinion obviously applies to most services the prices of which are set by bar association minimum fee schedules. Such schedules, at the time of the Supreme Court ruling, were in effect in much of the United States and set extensively adhered-to prices for many services performed by lawyers for their clients. *Goldfarb* ended the bar association practice of adopting or enforcing fee schedules and the opinion indicates that the federal antitrust laws would be applicable as well to other anticompetitive practices of the organized bar. However, sufficiently direct state government intervention, as by statute or rule of court mandating particular professional behavior, would clearly result in immunity from federal antitrust restraints under the *Parker v. Brown*²⁰ state action exemption. The states have not backed bar association-sponsored minimum fee schedules with the requisite exempting state action, but wide-spread state court adoption of the ABA-sponsored Model Code and Model Rules as rules of court presumably is reflective of willingness by states to try and immunize these standards from the federal antitrust laws.

Another important federal enactment of importance regulating certain aspects of the land transfer servicing work of lawyers is the Real Estate Settlement Procedures Act (RESPA).²¹ The act followed a comprehensive congressionally authorized study of settlement costs carried out over several years by the Department of Housing and Urban Development and the Veterans Administration. As amended, RESPA is considerably less inclusive than its proponents favored, particularly as to disclosures to borrowers,²² but it has had an appreciable impact on the land transfer process, including its restrictions on fees for referrals, a subject of particular relevance to lawyers. RESPA applies to settlement services pertaining to mortgage loans and covers the vast majority of mortgage loans made in the United States. Settlement services include most types of work performed by lawyers in relation to loans covered by the Act. Some examples are title search and examination, document preparation, and final closing.²³ Lawyers, of course, can be compensated for this work, but only for services actually performed. Referrals are not compensable services under the Act. Thus, RESPA outlaws fees, commissions, kickbacks, rebates, or fee splits to lawyers for referring settlement work to others, including the referring of work to title com-

19. 421 U.S. 773 (1975).

20. 317 U.S. 341 (1943).

21. 12 U.S.C. §§ 2601-2617 (1982).

22. See *infra* note 88.

23. The term settlement services as used in the Act is defined in RESPA, 12 U.S.C. § 2602(3) (1982).

panies and real estate brokers.²⁴ The prohibition of referral fees has proven especially troublesome in relations between lawyers and title insurers. Lawyers are strategically placed to determine which title insurers are asked to issue policies if the lawyers are doing the title or other legal work in connection with land sale and mortgage transactions. Clients needing title insurance commonly rely on their lawyers for recommendations as to which insurer to use and follow these recommendations. In addition to work for buyers or lenders, lawyers may perform services for title insurers in the same transactions, such as certifying the titles for insurance purposes, collecting and forwarding policy premiums, and even issuing policies as agents of the insurers in many instances. This dual representation by a lawyer of a buyer or lender and a title insurer generally is permissible without violating conflict of interest proscriptions if full disclosure is made to the clients.²⁵ Although dual representation can be permissible, collecting a fee from insurers for referring work to them is not allowed, and charging both clients for the identical service may constitute an excessive and improper fee.²⁶

To circumvent the prohibition on referral fees, some title insurers are presumably paying excessive amounts to lawyers for legitimate services so as to conceal what in effect are illegal referral fees.²⁷ For example, fees paid by insurers to lawyers ostensibly for policy issuance and necessary background title work are commonly forty percent of the premiums according to one source²⁸ and typically range from sixty to ninety percent according to another.²⁹ Not only may these payments violate RESPA, but they may also

24. The section of RESPA prohibiting referral fees and fee-splitting is 12 U.S.C. § 2607 (1982).

25. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 331 (1972).

26. N.Y. State Bar Ass'n Committee on Professional Ethics, Opinion 576 (1985).

27. A recent Federal Trade Commission opinion describes this situation as follows:

The relationship between agents (especially attorney-agents) and title insurers is fraught with opportunities for directing the placement of title insurance business. While ostensibly acting as independent legal counsel to a usually uninformed buyer, the attorney-agent is in a position to channel the consumer's title insurance business to the agent's insurer-principal in exchange for commissions, commonly referred to in the title insurance business as "agent's retention" since the agent collects and transmits the premium less his "retention" to the insurer. The agent's retention, however, includes not only the actual cost of conducting the search and examination, but may also reflect his ability to negotiate for a large part of the total insurance premium (as much as 90 percent) on the basis of his strategic position in the real estate transaction. In point of fact, the growth of a title insurer is largely tied to its ability to solicit and retain attorney-agents who can influence the placement of business.

In re Ticor Title Ins. Co., F.T.C. No. 9190, ¶ 44 (Dec. 22, 1986).

On alleged violations of RESPA in referral of mortgage loans to lenders by real estate brokers, lawyers, and others, see Levy, *RESPA: Referral Fees Yes or No?*, MORTGAGE BANKING, Feb. 1988, at 85.

28. Marcotte, *Kickbacks to Lawyers Rapped*, 72 A.B.A. J. 30 (1986).

29. Blyth, *Guidelines for the Practice of Splitting Title Insurance Premiums Between Title Insurance Companies and Attorneys in the State of New York*, N.Y. ST. B.J., Jan. 1987,

violate laws of some states against title insurance premium splits and rebates.³⁰ RESPA and the state prohibitions on referral fees are attempting to achieve reduction of title insurance costs to insureds while strengthening the financial condition of the insurers by eliminating intermediary fees based on control over work flow. Proving violations, however, can be difficult because of the uncertainty as to what constitutes reasonable charges for the legitimate services being provided and billed by lawyers, and therefore whether or not referral fees are being concealed in billings of legitimate services. The problem is not restricted to lawyer intermediaries, as the prohibitions on referral fees for channeling settlement service work also apply to real estate brokers and lenders.

With respect to unauthorized practice in providing land transfer services, lawyers are in a fairly favorable position, although subject to some significant restrictions. In every state, unauthorized practice of law prescriptions provide lawyers with a measure of protection against lay competition,³¹ although this protection is substantially qualified with respect to competition from real estate brokers³² and title insurance companies.³³ Furthermore, in some states, lawyers are permitted to perform one of the most important nonlegal land transfer services — brokerage, merely by being licensed to practice law. However, in other states, lawyers are exempt from real estate broker licensing requirements only when acting within the scope of their duties as lawyers.³⁴ There are also deterrents to integration of legal and brokerage aspects of land transfer servicing. These include restrictions on lawyers using another business as a front for attracting legal work,³⁵ and prohibitions against lawyers aiding in the unauthorized practice of law,³⁶ against sharing legal fees with nonlawyers, and against carrying on a law practice with lay co-owners.³⁷

at 46, 47-48. This article also discusses compensation arrangements between lawyers and title companies when the attorney's role is that of attorney closer, approved attorney, or examining counsel. In Texas, the usual insurance premium that agents legally may keep is 80%. Phillips & Butler, *supra* note 8, at 656.

30. Blyth, *supra* note 29, at 48; Marcotte, *supra* note 28.

31. On unauthorized practice of law, see C. WOLFRAM, MODERN LEGAL ETHICS 824-49 (1986); Payne, *Title Insurance and the Unauthorized Practice of Law Controversy*, 53 MINN. L. REV. 423 (1969).

32. See *supra* notes 11-12 and accompanying text.

33. See *infra* notes 61-62 and accompanying text.

34. See generally Annotation, *Right of Attorney as Such, to Act or Become Licensed to Act as Real Estate Broker*, 4 A.L.R. 4th 230 (1983).

35. These and other restrictions, particularly when lawyers conduct another occupation from their law offices, are discussed in ABA Comm. on Ethics and Professional Responsibility, Formal Op. 328 (1972), and Informal Op. 1482 (1982).

36. MODEL RULES, *supra* note 15, Rule 5.5(b); MODEL CODE, *supra* note 15, DR3-101(A).

37. MODEL RULES, *supra* note 15, Rule 5.4; MODEL CODE, *supra* note 15, DR3-102(A), 3-103(A), 5-107(B), 5-107(C).

C. Title Insurers

The principal service provided by title insurers is making title insurance coverage available to land owners and lenders.³⁸ Incidental to this service, insurers provide interested parties, in advance of coverage, with important information about title quality, including outstanding title defects of which the insurer is aware. Insurers may also provide information about the insurability of title and the terms for insuring title. Most title insurance is applied for during the process of selling land, and title quality information can be crucial in determining whether or not loans will be made and sales will take place. Loan commitments and sales contracts are normally conditioned on title to the property involved being marketable, insurable with only specified exceptions, or meeting some other quality standard. Furthermore, owners and contract buyers may want precise title quality information for reasons other than insurance, reasons such as estimating how much it will cost to clear any title defects or determining if the title is adequate to merit major physical improvements on the premises. Thus, providing information, in addition to providing insurance, is a major title insurer service. Further services that many title insurers have long performed are supervising closings and acting as escrow agents in real estate transactions. A few title insurers also act as trust companies and administer a considerable number of trust accounts.

Determining with accuracy the outstanding legal interests in any particular parcel of land, especially in the United States, usually is an onerous, expensive, and time-consuming process. There is also the possibility that even with a careful search some interests will not be discovered, either because they are undiscoverable by the searcher or because they cannot be found without a prohibitively expensive search. This inability-to-discover risk ordinarily is remote, yet troublesome, particularly to buyers and lenders. Negligence in the search and examination process also is a serious risk which title policies can protect against. Title insurance thus has made a cumbersome and somewhat chancy system of title protection, more viable by compensating insureds when and if insured-against losses are incurred. Title insurance also has provided, through standardized policy coverage, a substantial degree of national uniformity in title protection, a feature highly desirable to the increasingly significant national market in mortgages. Each land parcel has unique characteristics, the terms in mortgage often differ, and title and mortgage laws vary considerably among the states, but title insurance superimposes an element of fungibility to mortgages that is

38. On title insurance generally, see A.B.A. SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, *TITLE INSURANCE: THE LAWYER'S EXPANDING ROLE* (1985) [hereinafter *THE LAWYER'S EXPANDING ROLE*]; A. AXELROD, C. BERGER & Q. JOHNSTONE, *LAND TRANSFER AND FINANCE, CASES AND MATERIALS* 764-851 (3d ed. 1986); D. BURKE, *supra* note 1.

highly attractive to lenders. This helps explain why a major reason for the spread of title insurance in the United States has been the demand for this type of protection by mortgage lenders, particularly national mortgage lenders.

The recording acts are the foundation of American land title protection and, in one form or another, have long been in effect in each American state. These acts require that massive sets of land records be maintained at the county or equivalent level by local government officials throughout the United States. These records pertain to local land transactions going back to early settlement in the area. The rationale of the acts is simple: failure of a land interest holder to record in these public records evidence of his interest can result in subsequent takers of the same parcel acquiring their interests free of the prior interest holder's claims. The subsequent taker, to prevail against prior interest holders, normally must be a purchaser or lender, and when taking must have no actual or constructive notice of the predecessor's claimed interest. Subsequent takers are on constructive notice of prior recorded interests against the property, relevant claims disclosed by court or tax records, and information that a physical examination of the premises would disclose as to title claims. Any of the many kinds of legally recognized land interests such as fees, leases, mortgages, easements, profits, and liens, are affected by the recording acts. Public officials in whose offices public land records customarily are kept include county recorders of deeds, court clerks, and county tax collectors. These offices are open to the public for, among other purposes, land title searches. Obviously, the recording acts make it highly desirable for persons acquiring, for consideration, valuable interests in land to have a careful title search made before final acquisition, with the search data evaluated by a competent examiner. This provides substantial protection against acquiring a lesser title than anticipated or contracted for. Lenders ordinarily insist on title searches and examinations prior to making mortgage loans and usually such persons as fee buyers, long-term lessees, and those acquiring valuable mineral rights first have title searches and examinations made for them.

Public land title records in many counties, particularly in counties with large populations and many land parcels, are ill-suited to efficient title searches. Relevant records may be scattered in different locations, indexes needed to locate essential documents may be ineffectually organized, document retrieval can be a laborious manual process, and the tremendous volume of records adds to the search burden. To streamline searches, private so-called title plants have been set up in a minority of counties. These plants duplicate, centralize, and organize data from local public land title records in a manner far more conducive to rapid and accurate searches than when searches are made in the original public records. Title plants are kept up to date by the expensive procedure of making daily take-offs of all new additions to the public records and incorporating these additions into

the private plants. Each plant typically includes records on every land parcel in the county, and some plants cover all transactions back to the origin of recognized titles in the county. Some plants are extensively automated.³⁹ Most large title plants are owned and operated by title insurers and are used for making searches on parcels for which title insurance orders have been received. Some plants are now shared by more than one title insurer, either as joint ventures or by the owner selling access to other insurers.

Most title insurers operate in part through agents that take orders for title insurance. The agents may be authorized to search and evaluate title data and issue commitments to insure. Lawyers and abstracters often act as agents of title insurers and some agents represent more than one insurer. In addition to their agents, most title insurers have branch offices that issue policies in the areas they are responsible for and provide the preliminary work required in determining insurability. Some branches and some agents operate their own title plants. Each of the large national title insurers has much of the nation blanketed with a network of branches and agents, and the trend is toward greater reliance on agents.⁴⁰

To the extent that title insurers or their agents do not make title searches and examinations, title insurance policies are issued in reliance on opinions of nonagent lawyers as to title quality of the parcels in question. The underlying title searches for these opinions are in some places customarily made in the public records by the lawyers who provide title opinions. In other places, the searches customarily are made by abstracters who prepare written reports of their searches, and lawyers' title opinions are then based on data in the abstracts. Each abstract summarizes every public record entry that has been located pertaining to the parcel being searched. The abstract usually includes entries dating back to origin of the title, and the summaries are sufficiently detailed so that the examining lawyer can give an adequate opinion on present ownership and outstanding encumbrances. In some parts of the country, buyers and lenders, in acquiring their interests, still commonly rely solely on lawyers' opinions and do not obtain the added protection of title insurance.⁴¹ However, title insurance has become

39. On title plant automation, see Dunin, *The Automated Title Plant*, TITLE NEWS, Jan. 1984, at 12; Morgan, *Workshop: Automation in the Local Title Office*, TITLE NEWS, Jan. 1984, at 7; Toft, *Outlook for Title Industry Automation*, TITLE NEWS, Jan.-Feb. 1986, at 16.

40. See Currier, *The Future of the Title Insurance Agent*, TITLE NEWS, June-July 1983, at 10. On lawyers as agents of title insurers, see Travaskis, *The Role of the Lawyer as an Agent or Approved Attorney*, in THE LAWYER'S EXPANDING ROLE, *supra* note 38, at 299.

41. The practice of relying on lawyers' title opinions without title insurance is still fairly frequent in Midwestern and Southeastern small towns and in New England, but title insurance based on a lawyer's opinion has become much more common even in these areas. In many smaller Midwestern counties, lawyers' opinions are based on abstracts prepared by local abstract companies. Title insurers do most of the title search and examination work, relying usually on their own title plants, in the Far West and in many larger urban areas elsewhere in

so widely accepted that the number of areas in which it is customary to rely only on lawyers' opinions are far fewer than thirty or forty years ago. The spread of title insurance is now so extensive that further expansion possibilities through movement into areas with little or no title insurance coverage are fairly modest.

Compared to most forms of insurance, title coverage premiums are low.⁴² Whether title insurance premiums are low in relation to the actual risks underwritten, however, is a separate question. An important reason for comparatively low title insurance premiums is the scope and character of coverage. A title policy covers the state of the title as of the time the policy is taken out and does not protect against subsequently-created defects. Also, title policies are issued only after a search is made for title defects, and known material defects are then excepted from coverage. In addition, some types of risks are usually excluded or excepted as standard provisions, including risks arising from building or zoning ordinances; government eminent domain or police power rights unless apparent in the public records; and mechanics liens which are not of public record. For an added premium, some standard exclusions or exceptions will be covered. In effect, the principal risks insured against are negligence in search, examination, and private plant maintenance; and off-record risks or those that might be located only by an unduly onerous and costly search of the public records. As a result, in comparison to most types of insurance, title insurance losses are low.⁴³

Apart from exclusions and exceptions, the existence of marketable title is usually covered in title insurance policies. Important differences, however, exist between lenders' policies and owners' policies, including the greater number of standard exceptions in most owners' policies and the right usually granted lenders to assign their policies to mortgage assignees. The effect of this latter difference between policies is that if owners sell their properties, the buyers must take out new policies if they want coverage; but if mortgagees sell their mortgages, as is common, the transferees normally

the United States. An appreciable percentage of land parcels are registered under the Torrens system of registration in a few small counties plus a few major urban areas: Boston, Chicago (Cook County), Honolulu, and Minneapolis-St. Paul. In Chicago, however, it is not uncommon for Torrens titles to be insured by commercial title insurers in addition to the insurance provided by the Torrens system.

42. "Title insurance premiums," as used here, refers only to charges for risk coverage, not charges for other services such as title search and examination that may be billed by some companies under the heading of "premiums."

43. Only about five to ten percent of a title insurer's gross premium income is used to pay actual losses while over 90 percent is absorbed by operating expenses, mainly the cost of searching and examining title. In contrast, the average loss ratio for homeowner's multiple peril insurance is approximately 65 percent, and the ratio for other lines of casualty insurance is still higher.

In re Ticor Title Ins. Co., F.T.C. No. 9190, ¶ 99 (Dec. 22, 1986).

are covered by the original policies. Under both types of policies, however, the insurer agrees to defend the insured in litigation that may arise involving allegations that the title as insured is defective.

Title insurance is a one premium type of insurance, the premium paid when the policy becomes effective and usually paid by the buyer.⁴⁴ Rate schedules vary considerably in different regions, but rates for risk coverage may be as low as \$2.50 per thousand dollars of coverage for a mortgagee's policy and \$3.50 per thousand dollars of coverage for an owner's policy. Rates per thousand usually decline for upper limits of more valuable land parcels, and rates also may be lower if an owner's policy is issued simultaneously with a mortgagee's policy or if the insurer has recently issued a policy on the same property. Charges are substantially higher if the insurer does the title searching and examining.⁴⁵ When this occurs, some companies quote a combined rate for risk coverage and title search and examination work, while others quote a separate rate for each component. If policies are written through agents, lawyers or nonlawyers, the agents are paid a substantial portion of the premium payments as commissions. These commissions often include background title work.⁴⁶ When a policy is written for a very large amount, for instance, in excess of twenty-five million dollars, part of the coverage is normally reinsured or coinsured with other companies in order to spread the risk.⁴⁷

Title insurance has been labeled as an oligopoly because of the dominance by a small number of large companies⁴⁸ that operate nationwide or in large regions. There has been a long-term trend toward increased market concentration, mostly through larger companies buying up smaller ones. As of recent date, the four largest insurers had slightly over half the market and the eight largest had slightly over three-fourths of the market.⁴⁹ Never-

44. The buyer usually pays for both the owner's policy and mortgagee's policy if both are issued. In some areas, however, it is customary for the seller to pay for them.

45. For example, Chicago Title Insurance Company, in the greater Chicago area, for insurance coverage, search, and examination, charges for an owner's policy \$422.50 for \$50 thousand of coverage, \$597.50 for \$100 thousand of coverage, \$2.50 per thousand for over \$100 thousand to \$500 thousand, and \$2.25 per thousand for over \$500 thousand to \$1 million. The charge for a simultaneously issued mortgagee's policy is \$90. Owner's policies are issued for only the full value of the property. Chicago Title Insurance Company, rate schedule effective February 1, 1986.

46. See *supra* note 27 and accompanying text.

47. On title policy reinsurance and coinsurance, see Bowling, *Reinsurance Coverage Panel Presentation*, TITLE NEWS, Jan.-Feb. 1986, at 27. Individual policies occasionally are written for very large amounts of money. One recently was written for \$1.35 billion. *Id.* at 30.

48. Owen, *Kickbacks, Specialization, Price Fixing, and Efficiency in Residential Real Estate Markets*, 29 STAN. L. REV. 931, 939 (1977); Uri, *Injecting Competition Into the Title Insurance Industry*, REAL EST. REV., Fall, 1985, at 91, 94.

49. Uri, *supra* note 48, at 93-94. In 1987, market concentration was increased by Chicago Title, which was until then the nation's second largest title insurer, purchasing Safeco

theless, there is in most places a considerable measure of competition among title insurers. Certainly, in some large cities, such as Chicago, Los Angeles, Minneapolis, and Kansas City, where one company had a near-monopoly years ago, a number of companies are now aggressively competing.

One group of title insurers that nationally have only a small fraction of the title insurance market,⁵⁰ and yet as competitors have been feared and bitterly opposed by other title insurers, is the bar-related title insurance companies which are also known as lawyers' title guaranty funds. There are nine of these companies and most of them write policies in only one state.⁵¹ These companies are a response of the bar to the other insurers, usually referred to as commercial companies, that have been influential in taking away title search and examination work from lawyers in many places. The commercial companies have also developed a profit potential that lawyers consider worth competing for with their own collective organizations. Each bar-related company provides similar title insurance coverage to that written by commercial insurers, but only to clients of practicing lawyers who are members of the bar-related insurer. To become a member, a lawyer generally must show experience and competence in real estate matters and may be required to become a stockholder in the company. The member lawyers ordinarily do the title examinations and often the searches in transactions that the bar-related company is underwriting, but only the Florida and Indiana funds have any title plants. Most bar-related companies pay commissions to members insuring through them, and some companies pay dividends to their stockholders. The cost to insureds of coverage through a bar-related company is, in some places, lower than equivalent protection provided through a commercial company. Some bar-related companies, partly as marketing devices, provide a variety of helpful services to lawyers

Title, another very large insurer. Chicago Title now has over 5,000 policy-issuing agents nationwide and over 100 full-service branch offices. *TITLE NEWS*, Mar.-Apr. 1987, at 24-25.

50. In some individual states, however, there are bar-related companies that are writing a very sizable percentage of all title insurance written in the state. For example, the Connecticut Attorneys Title Insurance Company in 1987 had one-fourth of the market in terms of premiums written for title insurance in Connecticut, more than any of its eleven commercial title underwriting competitors.

51. For a listing of companies and their activities, see *NAT'L ASS'N OF BAR-RELATED TITLE INSURERS, BAR-RELATED TITLE INSURANCE* (1986). On bar-related title insurers see also Jackson, *The Saga of the Bar Funds*, *TITLE NEWS*, Jan. 1981, at 18; Miles, *Bar-Related Title Insurers: Their Benefits to the Bar and the Public*, in *A.B.A. SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, TITLE INSURANCE AND YOU: WHAT EVERY LAWYER SHOULD KNOW!* 45 (1979); Payne, *Title Guaranty Funds: Symptom, Cure or Nostrum?*, 46 *IND. L.J.* 208 (1971); Rooney, *Bar-Related Title Insurance: The Positive Perspective*, 1980 *S. ILL. U.L.J.* 263; Roussel, Pera & Rosenberg, *Bar-Related Title Insurance Companies: An Antitrust Analysis*, 24 *VILL. L. REV.* 639 (1979).

doing title work.⁵²

The national trade association of title insurers is the American Land Title Association (ALTA), of which abstracters and agents of title insurers are also members. ALTA performs the typical trade association functions of lobbying, educating members, shaping views on problems facing the occupation, and strengthening a sense of occupational identity.⁵³ An association forms committee has been tremendously important in preparing and periodically revising standard title insurance policy and policy endorsement forms widely used in the United States. Affiliated with ALTA are state and regional land title associations. Bar-related companies have recently been accepted as ALTA members, but also have their own trade organization, the National Association of Bar-Related Title Insurers.

Title insurers are subject to government regulation, largely at the state level, but this control generally is less restrictive than that pertaining to most other kinds of insurers.⁵⁴ One set of insurer regulations is designed to protect policy holders by safeguarding company solvency and the ability to pay insured losses that may occur. Nearly all states have one or more statutes directed at protecting the solvency of title insurers by such means as reserve or guaranty funds for paying policy claims, minimum paid-in capital requirements, and reinsurance or coinsurance requirements for coverage of single large risks. Even without these statutory forms of protection, one powerful title insurance customer group, the large lenders, would probably force a considerable degree of insurer solvency protection for policy holders. Another form of government control of title insurers is rate regulation, and about half the states impose some kind of control over premium rates charged by title insurers,⁵⁵ although rate requests are rarely denied. Other types of title insurer regulations imposed by some states are a requirement that policy forms be approved by a state agency; prohibitions on writing other kinds of insurance including mortgage insurance; and in one state,

52. The Connecticut Attorneys Title Insurance Company, for example, offers these services directed particularly at their agent lawyers: a continuing legal education program on conveyancing matters; newsletters and monographs on real property law; a staff of in-house lawyers to answer troublesome legal questions; paralegals who will come to the private lawyers' offices and aid in staff training; and available back title records. These types of services are not only effective in attracting business but they also tend to avert problems that could lead to insured loss claims.

53. ALTA's activities and its positions on occupational issues are well-reflected in *Title News*, its periodical for members, published bimonthly.

54. On regulation of title insurance companies generally, see D. BURKE, *supra* note 1, chs. 5-8 (1986); Phillips & Butler, *supra* note 8; Quiner, *Title Insurance and the Title Insurance Industry*, 22 DRAKE L. REV. 721, 723-26 (1973); Uri, *supra* note 48, at 92-93.

55. D. BURKE, *supra* note 1, at 139. On the effects of rate regulation in one state, Texas, see Phillips & Butler, *supra* note 8, at 652-53. States in which title insurance companies are more rigorously regulated than most of the others include Texas, New York, and Pennsylvania.

Iowa, prohibition on private companies writing title insurance in the state.⁵⁶ Prevailing state regulation of title insurance is sufficient for the federal McCarran-Ferguson Act to apply and exempt this form of insurance from the federal antitrust laws, but ancillary activities of title insurers, such as escrow services,⁵⁷ title searches and examinations,⁵⁸ and presumably operation of joint title plants, are subject to the federal antitrust laws.⁵⁹

Another federal statute of relevance to title insurers is the previously discussed provision of the Real Estate Settlement Procedures Act prohibiting referral fees and fee splitting in real estate settlement service transactions.⁶⁰ This provision, although favored by many title insurers, is a major competitive restriction on the insurers' efforts to attract referral business. Unauthorized practice of law proscriptions also have been held applicable to title companies in the drafting of legal documents, providing title opinions when insurance has not been applied for, and providing escrow and closing services.⁶¹ In recent years, however, there have been very few reported unauthorized practice cases involving title companies,⁶² which indicates greater forbearance by both the bar and the courts, and probably, as well, some reluctance by title insurers and their agents to perform tasks they believe would be contested as illegal behavior. Unauthorized practice relative to title companies has become, if not a dead issue, a quiescent one.

56. Iowa has long prohibited the writing of title insurance in the state. IOWA CODE ANN. § 515.48(10) (West 1949). On the Iowa prohibition, see Note, *Iowa's Prohibition of Title Insurance — Leadership or Folly?*, 33 DRAKE L. REV. 683 (1983-84). In 1985, the Iowa Housing Financing Authority, a state agency, was authorized to offer and operate a financially self-sustaining program of title guaranties on Iowa real property, in effect a form of title insurance, no title to be guaranteed prior to 1987. IOWA CODE ANN. § 220.91 (Supp. 1987).

57. *United States v. Title Ins. Rating Bureau of Ariz.*, 700 F.2d 1247 (9th Cir. 1983).

58. In 1985 the Federal Trade Commission alleged illegal activity in thirteen states by six title insurance companies in combining to fix prices, through state authorized rating bureaus, for title search and examination services. An FTC judge found five companies in violation in only two states, Connecticut and Wisconsin. Title search and examination services were held not to constitute the business of insurance so as to qualify for exemption under the McCarran-Ferguson Act. *In re Ticor Title Ins. Co.*, F.T.C. No. 9190 (Dec. 22, 1986). On this case, see Uri, *supra* note 48; Christie, *Competition and the Title Insurance Industry*, REAL EST. REV., Summer 1986, at 62 (response to Uri).

59. On applicability of the federal antitrust laws to the activities of title insurers, see D. BURKE, *supra* note 1, at ch. 7; Mascari, Rove & Christie, *Antitrust Exemption and Risk*, TITLE NEWS, Aug.-Sept. 1983, at 11; Uri, *supra* note 48.

60. See *supra* note 24 and accompanying text.

61. Cases are cited and discussed in D. BURKE, *supra* note 1, ch. 8, and Payne, *supra* note 31.

62. Two recent cases are *Coffee County Abstract & Title Co. v. State ex rel. Norwood*, 445 So. 2d 852 (Ala. 1984) (title company and its agent prohibited from filling out deed forms or conducting real estate closings at which they or their employees give legal advice or express legal opinions), and *Blodinger v. Broker's Title, Inc.*, 224 Va. 201, 294 S.E.2d 876 (1982) (justiciable controversy held to exist in attorneys' declaratory judgment proceeding against title insurance company agent alleging unauthorized practice of law).

D. Lenders

Most land purchases are financed in substantial part with borrowed money, the land serving as security for the loan. The lenders' service of making loan funds available is usually crucial to land sales taking place, and closings of sales contracts are often contingent on the arrangement of adequate secured funding. In most places, the mortgage is the customary form of security used in financing land sales, but credit extensions are often statistically categorized under the heading of mortgage loans whether the underlying security is a mortgage, a trust deed, or some other close-variant of a mortgage. Mortgage loans are regularly made to finance land purchases and can therefore become an essential step in the land transfer process. But it is common, as well, for owners to borrow on the security of their land for other purposes. Land is such a valuable asset that its owners can use it to borrow funds for an endless variety of purposes, on-site construction being one of the most frequent.

The overwhelming proportion of mortgage loans is held by institutional lenders that specialize in this form of finance. These lenders fall into a number of well-recognized sub-groups. Fragmentation is typically sharper and distinctions generally more important than among subsets of brokers, lawyers, or title insurers involved in the land transfer process. The major private institutional mortgage lenders, in order of the total amount of outstanding real estate mortgage loans they hold, are savings and loan associations, commercial banks, life insurance companies, and savings banks. The total amount of real estate mortgage loans held by these institutions in 1985 was about one and a half trillion dollars, up from less than half a trillion dollars in 1970.⁶³ The principal outlet for savings and loan association funds is real estate mortgage loans, and in many periods this has been true of savings bank funds as well. Commercial banks and life insurance companies, although allocating large sums to mortgage loans on real estate, channel most of their funds into other kinds of loans and investments. In addition to the four major types of private institutional mortgage lenders, large volumes of mortgage loans are held by federally-chartered credit agencies and mortgage pools.⁶⁴ Also, individuals, particularly sellers who are financing buyers by means of purchase-money mortgages, hold a sizable

63. As of 1985, these institutions held a total of \$1,337 billion in construction, long-term mortgage, and land loans, allocated as follows: savings and loan associations, \$658 billion; commercial banks, \$401 billion; life insurance companies, \$168 billion; and savings banks, \$110 billion. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1987, at 488, table 820 (1986) [hereinafter STATISTICAL ABSTRACT]. Total real estate secured mortgage debt outstanding in the United States as of 1985 was \$2,250 billion. *Id.* at 489, table 822.

64. As of 1985, these agencies held \$189 billion in real estate mortgage debt, and mortgage pools held \$392 billion. *Id.* at 488, table 820.

volume of mortgage loans. The various subgroups of mortgage lenders are specialized to some extent in the types of properties on which they hold mortgage loans; although all the major subgroups, except life insurance companies, are concentrated most heavily in mortgages on one to four-unit family homes. Life insurance companies' principal mortgage holdings are of commercial and industrial properties, with commercial banks and savings and loans having large mortgage holdings on these types of properties as well. The federally-chartered credit agencies hold the most farm mortgages, and savings and loans hold the most apartment house mortgages. Commercial banks and savings and loans dominate construction lending.⁶⁵

In terms of relevance to the land transfer process, originators of mortgage loans should be distinguished from those who later purchase this form of debt. Originators make the decisions as to whether or not to loan, negotiate loan terms, and advance loan funds on the security of land interests. In many instances, the originators continue to hold the mortgage loans they originate until the loans are paid off or otherwise terminated, but increasingly, originators are selling their loans in the secondary market. A vast secondary market in mortgages has developed in the United States with federally-chartered credit agencies contributing greatly to its successful operation.⁶⁶ These agencies buy already-originated mortgages from institutional lenders, often at prices and on terms fixed in advance. Mortgage acquisitions by these agencies have had a variety of favorable results, including increasing loan funds available for mortgages and increasing mortgage liquidity. The federally-chartered agencies most involved in secondary market operations have been the Federal National Mortgage Association (FNMA), the Federal Home Loan Mortgage Corporation (FHLMC), and the Government National Mortgage Association (GNMA). Many of the mortgages acquired by these institutions have been insured or guaranteed by either the Federal Housing Administration (FHA) or the Veterans Administration (VA), both of which are federal agencies.

It is estimated that recently as high as sixty-five to seventy percent of all new mortgage loans annually have been sold in the secondary market.⁶⁷

65. On various types of institutions' holdings of different kinds of loans as of 1985, see *id.*

66. Except peripherally, the secondary mortgage market and the federally chartered agencies operating in this market are beyond the scope of this article. On this market and these agencies, see A. DOWNS, *THE REVOLUTION IN REAL ESTATE FINANCE* chs. 12 & 13 (1985); J. TUCCILLO, *HOUSING FINANCE, A CHANGING SYSTEM IN THE REAGAN ERA* 35-43, 75-79 (1983); Malloy, *The Secondary Mortgage Market — A Catalyst for Change in Real Estate Transactions*, 39 SW. L.J. 991 (1986). For an introductory description of this market, see R. JOHNSON & T. HENDERSON, *REAL ESTATE FINANCE* 263-68 (1985).

67. Malloy, *supra* note 66, at 1003. In 1987, the percentage of new mortgage loans being absorbed by the secondary market dropped substantially because of the high percentage of new adjustable rate mortgages in 1987, a type of mortgage less attractive in the secondary

Persons who have acquired mortgages and wish to sell them are provided, by the secondary market, with a ready outlet in which there are purchasers willing to buy. Many institutional lenders shift their mortgage holdings by buying or selling in the secondary market and operate in this market to further perceived investment opportunities, to avoid excessive holdings of long-term loans, to keep their asset allocations within legal limits, or because they need cash. Also, some mortgage lenders do not have the organization or staff to originate mortgages effectively or in markets that they want to tap outside areas where they maintain offices. Therefore, some lenders must rely on the secondary market for some or all of the mortgages they acquire. Although mortgage loan originators, as direct participants, are tremendously important to the land transfer process, secondary market purchasers are important influences on this process as well. To the extent that originators expect that the mortgage loans they are making will, or quite possibly may, be sold in the secondary market, the preferences of buyers in that market will be taken into consideration in determining which loans to make, the terms, and the form. Thus, resale marketability is usually a consideration during the mortgage loan origination stage. Large volumes of real estate mortgages are originated by savings and loans, savings banks, commercial banks, and to a much lesser extent by life insurance companies.⁶⁸ Each of these categories of lenders also buys and sells extensively in the secondary mortgage market, although some individual institutions are far more active in this market than others.

Many lenders also rely on mortgage banks, also known as mortgage companies, to originate mortgages for them. Mortgage banks are in the business of originating mortgages for others, ordinarily for regular customers who are expected to take the loans.⁶⁹ The major customers of mortgage banks are life insurance companies,⁷⁰ but all types of mortgage lenders acquire mortgages through these intermediaries to some extent. Most mortgages originated by mortgage banks are on single-family dwellings, but

market. *The Secondary Market for Mortgages*, N.Y. Times, Jan. 31, 1988, at F11, col. 1.

68. See *infra* note 71.

69. On mortgage banks, see Downs, *An Encompassing View of the World of Real Estate Finance*, MORTGAGE BANKING, April 1987, at 25; H. HOAGLAND & L. STONE, REAL ESTATE FINANCE ch. 15 (5th ed. 1973); M. MADISON & J. DWYER, THE LAW OF REAL ESTATE FINANCING § 2.03 (1981). Mortgage brokers are usually distinguished from mortgage bankers, the brokers being intermediaries in placing loans who do not risk their own capital. H. HOAGLAND & L. STONE, *supra*, at 282-83. On mortgage brokers also see D. BURKE, *supra* note 2, ch. 9.

70. In placing and servicing mortgage loans on commercial properties in major markets, some large life insurance companies are increasingly bypassing mortgage banks and relying instead on the insurers' regional offices. This direct action may be cheaper and increase market share. It also avoids the need to rely on the mixed loyalties of those mortgage banks that act as correspondents for more than one lender. Oharenko & Kolomayets, *Mortgage Correspondents, Local Eyes and Ears*, MORTGAGE BANKING, Sept. 1987, at 65.

these institutions also do a smaller volume of commercial, apartment house, and construction loan origination. In recent years, in dollar volume, mortgage banks have been originating about one-fourth of all mortgages on one to four-unit family dwellings, commercial and savings banks about one-fourth of all mortgages, and savings and loans almost one-half of all mortgages.⁷¹ To generate business, mortgage bankers maintain close ties with real estate brokers and developers as well as with lenders. During the short period of time between mortgage origination and disposal, mortgage banks usually finance their mortgage holdings with bank credit lines. This temporary holding of mortgages is known as warehousing. Mortgage banks receive modest fees for originations but it is mortgage servicing that generally makes them profitable, origination feeding the servicing work. When mortgages are disposed of by mortgage banks, the mortgage banks usually retain the servicing. Servicing is the collection from mortgagors of interest and principal installment payments, remittance of proceeds to the lenders, making certain that insurance and property taxes on the mortgaged property have been paid, and taking corrective action when borrowers are delinquent in their payments. Payment for servicing is a small percentage of the outstanding loan balance, typically one-quarter to one-half of one percent per year. There are substantial economies of scale to mortgage servicing and it can be very profitable if a sufficient volume of mortgages is being serviced. Most mortgage banks are small local businesses, but a few are large organizations operating in many states. Other institutions, particularly some savings and loans, operate quite similarly to mortgage banks in that they originate mortgages for prompt resale and also do mortgage servicing.

Tremendous sums of money are required to satisfy demands made on the real estate mortgage market. Where do lenders acquire the funds they loan on the security of real estate? Sources vary among different types of lenders. Savings and loan associations and savings banks rely primarily on depositors for their mortgage loan funds. Most of these depositors are individuals who place their savings, generally rather small amounts of money, in interest-bearing accounts with these institutions. Because of the nature of their depositors and their depositors' accounts, savings and loan associations

71. Downs, *supra* note 69, at 26. In 1986, of \$438 billion in mortgage loans originated by institutions on one- to four-unit family dwellings, mortgage banks originated 30%, savings and loans 40%, commercial and savings banks 29%, and life insurance companies 1%. MORTGAGE BANKING, July 1987, at 121. Of the \$604 billion in all types of long-term real estate mortgage loans originated in 1986 by institutions, mortgage banks originated 24%, savings and loans originated 36%, commercial and savings banks originated 34%, and life insurance companies originated 6%. *Id.* An indication of how extensively mortgage market volume can fluctuate in a short period is that in dollar volume total institutional originations of real estate mortgages on one- to four-unit family dwellings increased by 82% in 1986 over 1985, and on all types of real estate mortgage loans the increase in 1986 over 1985 was 64%. *Id.*

and savings banks are often referred to as thrifts.⁷² Commercial banks' major sources of funds are deposits by many individuals in small accounts, large deposits mostly by businesses, and trust assets of trusts administered by bank trust departments. Life insurance companies acquire their mortgage investment funds mostly from policy premiums, although they now manage massive amounts of pension fund moneys, some of which go into mortgage loans. Simply put, the thrifts and commercial banks seek to make a profit on their mortgage loans by borrowing money from depositors and relending at higher rates than their borrowing costs. Life insurance companies seek a similar profit spread between the cost of money to them as insurers and the money they receive on the mortgage loans they make. The institutional lenders also impose administrative and management fees in connection with their mortgage loans that contribute to the institutions' profitability.

Mortgage-backed securities provide an added source of funding for mortgages primarily through secondary market transactions, and have brought an enormous amount of money into mortgage finance, much of it from investors who previously had little or no interest in mortgages as an investment outlet.⁷³ Since 1970, when these types of securities were first supported on a large scale by federal agency guarantees, a vast market in them has developed, with over one-fourth of the nearly three trillion dollars in real estate mortgages outstanding in the United States having been securitized.⁷⁴ Securitized mortgages usually are backed by pools of mortgages; the securities are issued in bond, note, or certificate form; and their principal and interest commonly are guaranteed by a public or private institution. Their attractions over most unsecuritized mortgages include greater marketability, risk reduction through guarantees and pooling, and a variety of offerings appealing to a wide range of investors.⁷⁵ Initially, most mortgages that were securitized were on residential properties, mostly single family homes, but recently a substantial volume of mortgages have been securitized on such commercial properties as office buildings, hotels, and

72. Credit unions also are sometimes referred to as thrifts.

73. On mortgage-backed securities, see A. DOWNS, *supra* note 66, at 249-62; Heller, *Securitization*, NAT'L REAL EST. INVESTOR, Aug. 1984, at 76; Malloy, *supra* note 66, at 1003-10; Strine, *New Commercial Devices — Mortgage-Backed Securities*, 13 REAL PROP., PROB. & TR. J. 1011 (1978); Comment, *The Secondary Mortgage Market and State Regulation of Real Estate Financing*, 36 EMORY L.J. 971 (1987).

74. As of late 1987, outstanding real estate mortgage debt was \$2.8 billion, of which \$641 million was in mortgage-pooled securities insured or guaranteed by federally chartered agencies. FEDERAL RESERVE BULL., Jan. 1988, at A39. In addition, there is a substantial volume of real estate mortgage securities not backed by these agencies.

75. New forms of mortgage-backed securities keep coming onto the market in efforts to increase investor appeal. Some of these are discussed in Hu, *Proliferation of Mortgage-Backed Securities*, MORTGAGE BANKING, Sept. 1985, at 24, and Kirschner, *MBSs Made Simple*, MORTGAGE BANKING, May 1987, at 67, 74.

shopping centers.⁷⁶ In most instances, the securities are backed by previously originated mortgages assembled by the issuer and therefore are secondary mortgage market instruments; but in the occasional very large mortgage transaction, the securities are issued when the mortgage is originated and are part of the initial mortgage financing arrangement.⁷⁷

Through the years, the principal issuers of mortgage-backed securities have been the three federal government-chartered agencies that are most active in the secondary mortgage market: FNMA, FHLMC, and GNMA. Securities issued by these agencies are often purchased by investment banks for resale to a broader market, and the investment banks have also acted as placement agents for private issuers as well as issuing their own mortgage-backed securities. Other private issuers typically have been insurance companies, commercial banks, savings and loans, and large home builder companies. A wide range of investors purchase mortgage-backed securities, including many institutional lenders and pension funds. The thrifts have been purchasing at least thirty percent of all new mortgage-backed securities,⁷⁸ and many individual investors also are finding these securities attractive.

The mortgage market is highly sensitive to interest rates and prevailing market interest rates frequently change, consequently affecting who can qualify for mortgage loans and terms of those mortgages. The mortgage market is also competitive, and within narrow limits mortgage lenders compete with one another for borrowers by offering various interest rates and points,⁷⁹ as well as providing options for other terms such as length of the mortgage, acceptable loan-to-value ratio, amortization method, and prepayment privileges. A variety of alternative mortgage instruments has emerged, among the most important of which are adjustable or variable-rate mortgages. These instruments provide interest rates that periodically vary in accord with some index of inflation and deflation, thereby requiring borrowers and lenders to share the risks of market volatility in interest rates.⁸⁰ Lend-

76. On securitization of commercial real estate mortgages, see Richards, "Gradable and Tradable": *The Securitization of Commercial Real Estate Mortgages*, 16 REAL EST. L.J. 99 (1987). Richards expresses doubts as to whether or not the market for securitized mortgages on commercial properties will expand rapidly in the near future for offerings other than on large projects in known real estate centers such as Manhattan.

77. For a list of large securitized mortgage originations between 1983 and 1986, see Stevenson, *Turning the Pieces into Securities*, MORTGAGE BANKING, Oct. 1986, at 68, 73. Each of the 17 originations appearing on this list is in excess of \$100 million; the largest is for \$1.3 billion and was issued by Rockefeller Center Properties, Inc. for office buildings in New York City.

78. See generally A. DOWNS, *supra* note 66, at 33.

79. Points refer to lender payment discounts, an added form of lender remuneration for making loans. It is common practice for a lender to pay over to the borrower less than what the borrower promises to pay back. This discounted amount is measured in terms of points, each point being one percent of the face amount of the borrower's repayment obligation.

80. On alternative mortgage instruments, see Levin & Roberts, *Future Forms of Fi-*

ers also offer mortgages tailored to the special needs of particular classes of borrowers, such as graduated payment mortgages which are attractive to young persons with increased earning potential⁸¹ and others with low present income, but whose income is expected to rise in a few years, and annuity mortgages which are attractive to retired persons.⁸² Although real estate mortgage lenders compete for borrowers, the risks of making unsatisfactory loans are so great that lenders are generally cautious in their lending practices and commonly insist on loan terms, such as due-on-sale clauses and stiff prepayment penalties, that tend to limit their risks. Mortgage loans can turn out to be unsatisfactory because of such occurrences as borrower default, security depreciation, and escalating market interest rates. Mortgage lending is a balance between keeping competitive and keeping profitable, and it is conducted in a fluctuating interest rate market that requires regular reconsideration of lending criteria.

An important means of reducing risks to mortgage lenders is by shifting risks to third parties through mortgage insurance or guarantees. Such shifts long have been significant in expanding the housing market and increasing the number of persons who can qualify for financing to purchase their own homes. In many instances, lenders are more willing to make mortgage loans on more favorable terms if a financially responsible third party is underwriting some or all of the loan. Since the Depression of the 1930s, the federal government has been the principal underwriter of real estate mortgages, although coverage is also available through private companies. Federal government underwriting has been handled almost entirely by two agencies, the Federal Housing Administration (FHA), that insures — charges premiums to borrowers, and the Veterans Administration (VA), that guarantees — charges no premiums.⁸³ The two federal agencies place restrictions on the coverage they provide by restricting the amounts and kinds of mortgage loans that they will underwrite. They have had a major impact on the residential mortgage market, including the secondary market. As of 1985, twenty-four percent of the long-term real estate mortgage loans outstanding on one to four-unit family homes were federally insured or

nancing — Lending Devices Addressed to Inflation and Tight Money, in A.B.A. SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, FINANCING REAL ESTATE DURING THE INFLATIONARY 80s 31 (B. Strum ed. 1981). FEDERAL HOME LOAN BANK BOARD, ALTERNATIVE MORTGAGE INSTRUMENTS RESEARCH STUDY (1977); Lea, *The Margin of Success*, SECONDARY MORTGAGE MARKETS, Spring 1986, at 22 (recent declining market share of adjustable rate mortgages).

81. FEDERAL HOME LOAN BANK BOARD, *supra* note 80, at 23.

82. *Id.* chs. 18 & 19.

83. On FHA and VA coverage, see G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW 754-64 (2d ed. 1985); Foster & Herzog, *Mortgage Insurance: The Role of FHA*, MORTGAGE BANKING, Nov. 1981, at 29; Waldo, *The Role of Private Mortgage Insurance*, MORTGAGE BANKING, Feb. 1982, at 31.

guaranteed.⁸⁴ This percentage has been considerably higher in some previous years.⁸⁵ Mortgage insurance by private companies has expanded rapidly and in some recent years new private underwriting of mortgage loans has exceeded new coverage by FHA and VA combined.⁸⁶

Government regulation of most mortgage lending institutions is substantial, despite recent deregulatory moves.⁸⁷ To a considerable extent, each lender subgroup has been separately regulated with separate statutes, administrative codes, and regulatory agencies for each major type of mortgage lender such as savings and loans, savings banks, commercial banks, and insurance companies. Extensive legal controls over lenders have been imposed by both state and federal governments, and the principal regulatory objective generally has been to protect lender solvency. Lender insolvency can result in severe losses to large numbers of depositors and insureds who provide much of the lender funding and, if on a large enough scale, can also have severe negative economic repercussions locally, regionally, and even nationally. Protection of depositors and insureds is a high government priority, especially protection of the millions of persons whose savings and premiums are entrusted to lending institutions. The regulatory approach to protecting lender solvency has been to impose controls over such business considerations as entry qualifications, reserves, borrowing limits, types of loans that can be made, nonloan investments, interest rates and other prices that can be paid or charged, geographical areas in which branches or subsidiaries may be located, and the range of businesses that lenders may operate or own. Depository institutions — principally savings and loans, savings banks, and commercial banks — have been subject to particularly rigorous government regulation with a miscellany of federal statutes serving as the

84. STATISTICAL ABSTRACT, *supra* note 63, at 488, table 820.

85. E.g., 37% of these loans were federally insured in 1970. *Id.*

86. In 1986, the total of new mortgage insurance coverage was \$128 billion, \$46 billion by private companies, and \$82 billion by FHA and VA. In 1985, the totals were \$87 billion, \$50 billion by private companies and \$37 billion by FHA and VA. MORTGAGE BANKING, Feb. 1988, at 108. On private mortgage insurance, see G. NELSON & D. WHITMAN, REAL ESTATE TRANSFER, FINANCE AND DEVELOPMENT 828-41 (3d ed. 1987); Mulherin, *Private Mortgage Insurers*, SECONDARY MORTGAGE MARKETS, Feb. 1985, at 11; Pope, *Private Mortgage Insurers Stake New Claims*, SECONDARY MORTGAGE MARKETS, Feb. 1984, at 18; Pollack & Steinbach, *Mortgage Guarantee Insurance Risk Management in the 1980s*, 3 HOUSING FIN. REV. 209 (1984). Private mortgage insurance typically covers only the top 20% to 25% of the amount owed the lender, with premiums varying from 1.5% to .9% at closing, plus .7% to .55% annually thereafter. Most mortgages insured have high loan to value ratios. On the relative attractiveness of government and private mortgage insurance, see *How Are Today's Lenders Choosing Mortgage Insurance*, MORTGAGE BANKING, Feb. 1988, at 35.

87. On government regulation of mortgage lending institutions generally, see 19 J. APPLEMAN, INSURANCE LAW AND PRACTICE §§ 10321-10620 (1982) (insurance company regulation only); W. LOVETT, BANKING AND FINANCIAL INSTITUTIONS LAW (1984); Benston, *The Regulation of Financial Services*, in FINANCIAL SERVICES: CHANGING INSTITUTIONS AND GOVERNMENT POLICY 28 (G. Benston ed. 1983) [hereinafter FINANCIAL SERVICES].

principal legal basis of this control.⁸⁸ Most types of insurance companies also have been closely regulated, but their regulation has been more heavily concentrated at the state level than that of depository institutions. Mortgage banks and investment banks have been subject to less regulation than most other institutions involved in mortgage lending.

It has long been recognized that politically acceptable government regulation could reduce, but not eliminate, risks of depository institution insolvency and that serious incidents of insolvency inevitably would occur. To protect depositors when banks and savings and loans do become insolvent and to discourage runs on such institutions when perceived to be in financial trouble, the government has since the Depression of the 1930s provided deposit insurance as an added means of protection.⁸⁹ Today, most all depository

88. The following very limited sampling of important federal regulatory enactments pertaining to depository institutions illustrates the range of government intervention in the affairs of these institutions: The Home Owners' Loan Act of 1933, 12 U.S.C. §§ 1461-1468 (1982) (authorizing the chartering of savings and loan associations); Title IV of the National Housing Act, 12 U.S.C. § 1725 (1982) (establishing the Federal Savings and Loan Insurance Corporation); Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (codified as amended mostly in scattered sections of 12 U.S.C.) (financially bolstering depository institutions and broadening their source of funds and range of permissible loans); Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841-1846, 1849 (1982) (giving the Federal Reserve Board extensive control over bank holding companies); Glass-Steagall Act, ch. 89, 48 Stat. 162 (1933) (codified as amended in 12 U.S.C. §§ 347(a), 347(b), 412 (1982)) (prohibiting national banks from engaging in the brokerage and underwriting of securities); McFadden Act, ch. 191, 44 Stat. 1224 (1927) (codified as amended in scattered sections of 12 U.S.C.) (limiting interstate banking); Truth in Lending Act, 15 U.S.C. §§ 1601-1667e (1982) (requiring lender disclosures to borrowers when making residential mortgage and other consumer loans); Home Mortgage Disclosure Act of 1975, 12 U.S.C. §§ 2801-2809 (1982) (imposing obligations on depository institutions to make available for public inspection information on mortgage lending in particular areas as a means of discouraging redlining). The Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. §§ 2603, 2604 (1982), also imposes obligations on depository institutions as well as on other mortgage lenders, including the obligation of making a specified settlement statement and settlement procedures booklet available to most residential real estate mortgage borrowers. The Act's disclosure requirements are of interest more for what they no longer include than for what they now require. Due to lender and lawyer objections, more stringent disclosure requirements in earlier versions of the Act were repealed. On the evolution of RESPA disclosure objectives and requirements, see D. BURKE, *AMERICAN CONVEYANCING PATTERNS* ch. 6 (1978); Stoppello, *Federal Regulation of Home Mortgage Settlement Costs: RESPA and Its Alternatives*, 63 MINN. L. REV. 367 (1979).

The federal statutory control pattern for depository institutions is fragmented and extremely complex, as the above examples indicate. The fragmentation and complexity is enhanced by extensive amendments to many of the statutes after their original enactment and by a vast body of supplemental federal administrative regulations. The states, of course, also have promulgated a substantial body of statutes and regulations imposing added controls on depository institutions.

89. On deposit insurance, see Edmister, *Bank Deregulation and Deposit Reform: Some Hard Questions for Congress*, 104 BANKING L.J. 42 (1987); Fischel, Rosenfield & Stillman, *The Regulation of Banks and Bank Holding Companies*, 73 VA. L. REV. 301, 312-18 (1987); Isaac, *The Role of Deposit Insurance in the Emerging Financial Services Industry*, 1 YALE J.

tory institutions have deposit insurance coverage. Top legal coverage of each depositor in each institution is \$100,000, and insurance premiums are paid by the depository institution. The major insurers are two federal government agencies, the Federal Deposit Insurance Corporation (FDIC), which insures deposit accounts of commercial banks, and the Federal Savings and Loan Insurance Corporation (FSLIC), which insures savings and loan accounts. The insuring agencies have three alternatives in case an institution fails or is in imminent danger of failing. They can pay off insured depositors, provide financial assistance to the institution, or arrange for the assets and liabilities of the failing institution to be taken over by another institution with supplemental funding aid from the insurer. This latter remedy has been the usual course pursued and generally has protected all creditors including those with over \$100,000 in deposits. Deposit insurance, despite recent severe loss problems, is generally considered a major success because of the depositor protection and enhanced depository institution stability it has provided.

Deregulation of government control of business has been a major movement over the past decade or so and has received strong support from within the Reagan Administration and from many business interests. Substantial legal deregulation of the financial services segment of the economy, especially of the depository institutions, has been one of the principal objectives of the movement. A few highly significant steps have been taken to deregulate banks and thrifts, and more deregulation of these institutions may be forthcoming although an acceleration in bank and thrift failures and the Federal Savings and Loan Insurance Corporation operating seriously in the red have precipitated something of a reregulation backlash.⁹⁰ The deregulation movement has generated many reform proposals and substantial debate as to how extensively, and in what manner, financial services should be deregulated. The most important recent accomplishments in deregulating depository institutions are two federal statutes, the Monetary Control Act of 1980⁹¹ and the Garn-St. Germain Depository Institutions Act of 1982.⁹² Both Acts deal with a number of problems, but are particularly concerned with trying to bolster financially the savings and loans.

ON REG. 195 (1984).

90. See, e.g., conference proceedings, *The Challenges of Increased Regulatory Supervision*, 6 ANN. REV. OF BANKING LAW 221, 223-313 (1987). Pressure for reregulation is evident in the Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, 101 Stat. 552 (1987), that includes a \$10.8 billion bailout of the Federal Savings and Loan Insurance Corporation's insurance fund through authorization of FSLIC bond sales, prohibits creation of new nonbank banks, and places a temporary freeze on further bank expansion into insurance, securities underwriting, and real estate brokerage and development.

91. 12 U.S.C. §§ 226 note, 248, 461 (1982).

92. Pub. L. No. 97-320, 96 Stat. 1469 (codified as amended mostly in scattered sections of 12 U.S.C. (1982)). For a consideration of bank deregulation back to the 1960s, see R. LITAN, WHAT SHOULD BANKS DO? 33-59 (1987).

These institutions have serious financial troubles that the Acts are aimed at alleviating by allowing more freedom of action. The 1980 Act, among other provisions, authorizes most depository institutions to offer interest bearing checking accounts (NOW accounts), provides for a phase-out of interest rate ceilings on depository institutions' time and savings accounts, and gives savings and loans the right to invest up to twenty percent of their assets in consumer loans.

The Garn-St. Germaine Act, passed two years later, goes much further.⁹³ Among its many provisions are those enabling federal deposit insuring agencies to offer increased assistance to depository institutions in financial distress, making short-term capital assistance available to depository institutions with low net worth, and expanding substantially the range of deposit accounts that savings and loans and other thrifts can offer and the types of loans they can make, including commercial loans and an expanded volume of consumer loans. The Act also permits depository institutions to offer money market deposit accounts, a tremendous source of new funding. The Act also makes due-on-sale clauses in real estate mortgage loans more enforceable, which particularly helps the thrifts by allowing them to terminate many unfavorable long-term loans. In effect, the two Acts seek to revitalize depository institutions, especially the savings and loans. In the course of doing so, many of the legal distinctions between thrifts and commercial banks have been eroded, and the thrifts have been made less dependent on real estate mortgage lending as the basis of their business.

II. NEW DEVELOPMENTS

Until quite recently, land transfer servicing was characterized by groups of specialty firms each with its own niche or business preserve and with little or no interest by one group in invading the functional sphere of the other. Each group was relatively autonomous. Residential land sale contract and closing work was something of an exception to this, as in many

93. Helpful summations of this very complex Act appear in NEW YORK UNIVERSITY SCHOOL OF LAW, 1983 ANN. SURV. OF AM. LAW 757-70 (1984), and Gorinson & Manishin, *Garn-St. Germaine: A Harbinger of Change*, 40 WASH. & LEE L. REV. 1313 (1983). There have, of course, also been important deregulatory actions by administrative bodies, for example, the Federal Reserve Board's 1983 revision of a bank holding company regulation, Regulation Y, 12 C.F.R. § 225 (1983), and the 1983 Federal Home Loan Bank Board's easing of permissible terms for mortgage loans made by savings and loans and savings banks, 12 C.F.R. §§ 545.32-45 (1984). The states, too, have been active in deregulation of financial institutions. An example is the interstate banking permitted by some of the New England states. The New England experience is discussed in Eagan, *The Constitutionality of the New England Interstate Banking Experiment*, 4 ANN. REV. OF BANKING LAW 213 (1985). Over thirty states now permit some out-of-state banks to enter and provide a full array of banking services but with substantial restrictions on entry. See Simonson, *Full-Service Interstate Banking Statutes: The Conditions of Entry*, 11 OKLA. CITY L. REV. 723 (1986).

communities private law firms shared the market for this work with other service groups, each group performing much the same tasks. For the most part, firms doing land transfer servicing work were local in character, locally owned and operated, and perceived land to be a highly localized commodity. There were some exceptions, however. Life insurance companies and some of the big urban banks made real estate mortgage loans in different sections of the country and the federal government operated nationally in mortgage lending and underwriting. Also, most title and mortgage insurance coverage had become centralized in underwriters that did business nationally or in large multistate regions. But overwhelmingly, land transfer servicers were local enterprises conducted by firms operating in but one locality. Apart from some of the big lenders, these firms were small to moderate in size, not part of American big business.

Over the past decade or so, significant changes have occurred in land transfer servicing and in many of the firms performing this servicing work. Indications are that further important changes will occur in the near future. Among the most striking changes are that some of the nation's largest corporations have entered the land transfer servicing field in a major way and others with a record of some activity in the field have vastly accelerated their participation and planned participation. In addition, some of the established moderate-sized firms in the field have expanded considerably. The obvious goal of each of these firms is to capture a substantial share of the land transfer services market, and greater big-firm market concentration already is apparent. Small local firms remain important but many are losing ground to large firms, including the new entrants onto the land transfer servicing scene. The large firms almost universally are expanding their land transfer operations geographically, many of them operating or planning to operate nationally. Innovative and aggressive marketing of land transfer services also has marked some of these expanded ventures. The usual expansion is by company owned outlets; however, in real estate brokerage, franchising has been one form of growth, the franchisers being large companies and the franchise outlets mostly small locally owned firms. Franchising can bring advertising, training, and more efficient management benefits to those owning franchised outlets.

A well-publicized effort at big firm expansion is the push by the large commercial banks to extend their interstate operations,⁹⁴ with the eventual goal, it seems, of a small number of giant banks having nationwide networks of branches. Although real estate mortgage lending is not the principal business of commercial banks, overall they are important real estate mortgage lenders, and the increased market concentration that interstate

94. On interstate banking, see Morin Center for Banking Law Studies, *Interstate Expansion: An Industry Banking On Change*, 4 ANN. REV. OF BANKING LAW 95 (1985); R. LITAN, *supra* note 92, at 35-41.

banking will bring can have important consequences for land transfer servicing. It can be argued that full-service interstate banking on a large scale will reduce risks of bank failure and increase competition in some localities, but it could also decrease the sense of lender responsibility for local development and local prosperity. In addition, it is ultimately likely to create individual banks unprecedented in the United States for their wealth and influence. Limited interstate banking already is a reality through such means as nonbank banks: bank holding-company subsidiaries that make commercial loans or accept demand deposits but not both, and regional banking arrangements of the kind authorized in much of New England. Further extensions of interstate banking seem probable.

Still another striking change taking place in land transfer servicing is that the relatively autonomous business preserves of major land transfer servicing groups are being invaded. Serious efforts are being made to integrate vertically some steps in the land transfer process. Through marketing and referral linkages, still further consolidation of land transfer functions is being attempted. There is even talk, however improbable the prospect, of one-stop arrangements in which consumers could obtain all financial services, including land transfer services, from one all-purpose firm.⁹⁵ Clearly, the fragmentation of land transfer service groupings is giving way to pressures for overlapping and combining. This integration push by financial services firms extends well beyond land transfer services. Among commercial banks in particular there is a strong move to permit these institutions much broader securities underwriting powers and the right to offer mutual funds, sell insurance, and invest in real estate.⁹⁶

Which large corporations are seeking major shares of the land transfer servicing market? A recent study lists fifteen giant corporations that are new or vastly expanding providers of land transfer services.⁹⁷ These compa-

95. Roulac, *Should Real Estate Brokerages Be Supermarkets or Corner Groceries?*, REAL EST. REV., Winter 1985, at 78; Whitman, *Bundling and Settlement Service Costs*, TITLE NEWS, July-Aug. 1985, at 32, 70. An argument for one-stop service is that consumers might shop much more vigorously for a single package of services with a single price attached than for separate services separately priced, and that prices would thereby be forced down. Whitman, *supra*, at 70. At present, home buyers do little if any comparative price shopping for land transfer services, except perhaps for mortgage loans. But for the view that the integration of lending, title insurance, and escrow services would induce higher rather than lower prices, see Owen, *supra* note 48, at 956.

96. On bank financial product diversification, see R. LITAN, *supra* note 92.

97. SMR RESEARCH CORPORATION, *THE CONSOLIDATION OF THE U.S. MORTGAGE INDUSTRY* (1986). This excellent study describes the activities of the 15 selected corporations in mortgage and related fields and analyzes their strategies and prospects for success in acquiring market share. SMR Research Corporation is a private business research firm that has specialized in study of the financial services industry. It is located in Budd Lake, New Jersey. A summary of the mortgage research study appears in Feldstein, *Invasion of the Mortgage Snatchers*, MORTGAGE BANKING, Dec. 1986, at 10.

nies differ considerably in their primary businesses. Two are principally retailers, Sears and K Mart; two automobile manufacturers, General Motors and Ford; two container manufacturers, American Can (now Primerica)⁹⁸ and Owens-Illinois; one securities broker, Merrill Lynch; two consumer finance companies, Household International and Beneficial; one bank, Citicorp; and five insurance companies, Metropolitan Life, Prudential, Travelers, John Hancock, and Fireman's Fund. The fifteen were selected because of their aggressive efforts to penetrate and expand their positions in the real estate mortgage market and frequently, as well, real estate brokerage. Most of the fifteen are new to land transfer servicing. Some, including Citicorp, Metropolitan Life, and Prudential, have a long history of mortgage lending but recently have diversified and greatly expanded their land transfer servicing efforts.⁹⁹ Other big corporations could be added to the list of fifteen, including J.C. Penney, Equitable Insurance, and Weyerhaeuser, although less aggressively expansive in their plans.¹⁰⁰ In addition, most of the major title insurance underwriters are now owned by large corporate parents.¹⁰¹

Purchase of existing established companies or their assets has been a frequent means by which large corporations have moved into land transfer servicing or have quickly expanded in this type of work. Most of these acquisitions have been sizable and costly but have resulted in the acquirers' immediate ascendancy in the field. For example, General Motors, through a subsidiary, moved in one month from zero activity in mortgage servicing to the second largest such servicer in the United States by acquiring the servicing portfolios of two companies.¹⁰² Also, Metropolitan Life spent almost half a billion dollars to purchase both a mortgage banking firm and Cen-

98. Primerica has disposed of its manufacturing operations and is now principally a financial services company.

99. As to Citicorp, the SMR Research Corporation study states:

[T]he nature of Citicorp's approach to, and interest in, the mortgage business has changed radically. Citicorp now approaches the mortgage business as a bank, but also as a thrift, as a mortgage banker, and a consumer finance company. Citicorp is, indeed, no longer a bank, but a financial services company. Its unique institutional form, its great geographic spread, and its recently formed, unparalleled ambitions in the mortgage business (which go beyond those of any bank) make it fit naturally into the "newcomers" group.

SMR RESEARCH CORPORATION, *supra* note 97, at 68.

100. *Id.* at 16-17. The recent movement of large nonfinancial enterprises into financial services, particularly banking, is noted by R. LITAN, *supra* note 92, at 46-47. Litan also lists the varied financial services activities of some of these firms, including mortgage banking. *Id.* at 79, 114-17.

101. For example, Chicago Title is owned by Allegheny Corporation, Lawyers Title by Universal Leaf Tobacco, Commonwealth Land Title by Reliance Insurance, and American Title by Meridian Bank.

102. SMR RESEARCH CORPORATION, *supra* note 97, at 24.

ture 21, the big franchise real estate broker,¹⁰³ and Ford paid half a billion dollars for the nation's eighth largest thrift, an important mortgage originator and servicer.¹⁰⁴ All of these transactions occurred in the mid-1980s, and the buyers expect to expand each of their acquisitions. Expansion through acquisition usually has involved purchase of successful going businesses, but some important expansion moves have been acquisitions of financially troubled savings and loans and banks by large private financial institutions. Some of these latter takeovers have been made possible by large capital contributions from the federal agencies that insure the deposits of insolvent thrifts and banks, the resuscitation avoiding complete liquidation of the failed entities and reducing outlays by the federal agencies under their insurance agreements.¹⁰⁵ One to-be-expected result of expansionary moves of big companies in land transfer servicing is that the largest firms in the field have an increasingly large market share. This has been particularly noticeable in residential mortgage lending, in which the twenty-five largest originators among the 15,000 companies in this phase of land transfer servicing now have an unprecedented twenty-five percent of the origination market.¹⁰⁶

The obvious motives behind big corporations' moves into land transfer servicing operations or dramatic expansions in this field obviously are to increase profits and be more successful in this respect than if they allocated their resources elsewhere. Cost cutting, economies of scale that may come from increased volume, and improved marketing are part of these calculations as to profit prospects. Particularly significant are the possibilities of enhanced profits by vertical integration and other forms of production or distribution linkage.¹⁰⁷ The land transfer process consists of a succession of operations, and controlling work flow between operations can be very profitable, especially when done on a large scale. This control can come by one firm itself being a multiservice provider and making package offers to customers or by influencing customers of one service to purchase another ser-

103. *Id.* at 81.

104. *Id.* at 77.

105. One much publicized expansion in real estate mortgage and related activities, based largely on acquisition of troubled savings and loans, is that of a group headed by former U.S. Treasury Secretary William E. Simon. See Stevenson, *Simon's Blossoming Empire*, N.Y. Times, Aug. 18, 1987, at D1, col. 3; Hilder, *Simon's Group Finds Building S&L Empire Harder Than Expected*, Wall St. J., Aug. 26, 1987, at 1, col. 1.

106. Feldstein, *The Emerging Giants in Mortgage Finance*, MORTGAGE BANKING, Nov. 1987, at 114, 117. Citicorp in 1986 was the largest originator, with \$13.4 billion in residential mortgage loans, followed by H.F. Ahmanson with \$9.3 billion, and GMAC Mortgage Corp. with \$7.3 billion. *Id.* at 114. Although there have been some disappointments, most of the large originators have been highly profitable. *Id.* at 119-20.

107. On the nature of vertical integration, see O. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* chs. 4 & 5 (1985). Williamson contends that transaction cost economizing is the principal reason for decisions to integrate. *Id.* at 103.

vice from the same firm. In residential land transfers, channeling ties between real estate brokers and lenders are close since as many as 80% of the buyers ask their brokers for advice on which lender to use and most follow the advice given.¹⁰⁸ The financial benefits of such control or influence are one reason for some of the large corporations now operating in the land transfer servicing field owning both real estate brokerage and mortgage origination operations.¹⁰⁹ Real estate brokerage is expected to feed the mortgage origination side of the business. Close broker-lender ties may in addition reduce transaction costs and also the delays which irritate borrowers, such as the time and effort required to process buyer loan applications.

Another feeder possibility, highly valued by some of the big new businesses in land transfer servicing, as it long has been to mortgage banks and thrifts generally, is that between mortgage origination and mortgage servicing. The originator normally can be and often is the servicer, and mortgage servicing is financially attractive. So an important inducement to doing origination work is acquiring the servicing that inevitably follows. Still another feeder arrangement that some firms have been experimenting with is for broker outlets to offer their home buyers discounts on items such as home furnishings and rental moving vans, which are sold or rented by other businesses that the parent company owns. In all of these feeder schemes, care normally is taken not to make the tie-ins coercive so as to violate the antitrust laws.

Diversification of services offered by an individual firm can enhance profitability whether or not one kind of service is a feeder for another kind. Separate and unrelated services can each be profitable. Increasing firm diversification is particularly pronounced in the financial services field, including real estate mortgage lending. With increased diversification has come a fading and shifting of traditional boundaries between lender subgroups, mergers of different types of firms, and new kinds of competitors moving into the field. Illustrative developments are some savings and loans becom-

108. SMR RESEARCH CORPORATION, *supra* note 97, at 114. Another recent study disclosed that nearly 90% of real estate brokers recommend one or more sources of financing to their homebuying customers and 81% felt that their recommendations were always followed. McFall, *Outdo Your Competition*, MORTGAGE BANKING, Dec. 1986, at 67. As to broker influence on prospective borrowers, also see Hobbs, *Fifty Ways to Please Your Market*, MORTGAGE BANKING, Dec. 1986, at 44, 54.

109. Examples of corporations with both substantial real estate brokerage and mortgage operations are Sears, Metropolitan Life, and Prudential Insurance. How extensive the real estate mortgage and brokerage overlap has become is indicated by the following:

In total, we believe that right now, out of all homes sold in the U.S., well over 40% and possibly more than 50%, are being sold by real estate agents whose firms either own, or are owned or franchised by, mortgage companies. This means nothing less than a real merging of the two industries

SMR RESEARCH CORPORATION, *supra* note 97, at 108.

ing full-service financial institutions; some commercial banks taking over savings and loans; some savings and loans operating much like mortgage banks, in certain instances establishing mortgage bank subsidiaries; and nonbank banks spreading across the nation. In addition to the miscellany of giant corporations, such as Sears and General Motors, that have been moving into mortgage lending, investment banks are becoming increasingly significant, especially in the secondary market. However, they are also of importance in the primary market, notably as intermediaries placing large residential and commercial project mortgage loans.¹¹⁰ Thus the former exclusive preserves within real estate mortgage lending, as well as in financial services generally, are being infiltrated and distinctions among lending subgroups are becoming blurred.

Innovative and aggressive marketing typifies land transfer activities of many big firms now operating in the field.¹¹¹ Massive customer bases established for other products are being targeted for sale of land transfer services. General Motors Acceptance Corporation, for example, has done direct mail mortgage solicitation of some of its automobile loan customers.¹¹² K Mart, the big chain retailer, has taken a different approach, renting mortgage booth space in its stores to mortgage originators on a percentage lease basis.¹¹³ Other companies with a large number of chain or branch outlets are adding real estate mortgage origination to the non-real estate land transfer services they sell. Beneficial at its consumer loan offices¹¹⁴ and Merrill Lynch at its securities brokerage offices exemplify this change.¹¹⁵ Prequalification of residential mortgage borrowers is another marketing device being tried. Persons interested in purchasing a home may in advance obtain an evaluation of their mortgage credit potential, including how much they may be able to borrow on the security of a home they may purchase, what down payment will be needed, and what monthly payments will be required. This evaluation is given by a lender but with no final commitment to loan on the terms indicated. It is, however, helpful to buyers by showing what they probably can afford and on what terms. Prequalification analyses can be provided from distant locations by computer.¹¹⁶ Real estate broker loan originations by computer hookups with lenders are another innovation, and one recent study indicates that about five percent of real estate brokers

110. A. DOWNS, *supra* note 66, at 226-29; Heller, *supra* note 73, at 80.

111. Established smaller firms are under pressure to improve their marketing in response to the innovative marketing of their large new competitors. *See, e.g.*, Hobbs, *supra* note 108, at 44.

112. SMR RESEARCH CORPORATION, *supra* note 97, at 117.

113. *Id.* at 13.

114. *Id.* at 14.

115. *Id.* at 89.

116. On mortgage prequalification, see Downs, *supra* note 69, at 38; Dailey, *K-Mart/Margaretten Special*, MORTGAGE BANKING, Dec. 1986, at 61.

are originating mortgages in this way, most of them apparently chain brokerage outlets.¹¹⁷ Telephone mortgage origination, with mortgage applicants contacting the lender by telephone using an 800 number, is being utilized by Prudential, with the company's insurance agents often advising their customers on pursuing this course. Much of the mortgage business generated in this way has been refinancing.¹¹⁸

The obvious objective of all these computer and telephone mortgage origination schemes is to cut costs by eliminating field office expense and in some instances agent commissions. Advertising can also cut marketing costs by reaching consumers directly and reducing the number of needed sales staff personnel. A number of the large real estate brokerage and mortgage origination companies are advertising extensively, including national print and television advertising. Sears includes mortgage advertising in its store catalogs and has developed the first brand name mortgage loan, the Sears Home Mortgage, as a further effort at direct consumer appeal.

As is readily apparent, changes among firms and groupings of firms engaged in land transfer servicing have been substantial, even dramatic, and change patterns are likely to continue. Why these changes? What pressures and inducements are causing such unusually acute modifications in how these firms and groupings are structured and operated?¹¹⁹ There is no single overriding cause, but rather a variety of conditions and events are having an influence. Three factors are of major underlying importance: volatile interest rates, especially the high rates of the early 1980s; enhanced support for deregulation, particularly at the federal level; and advances in computer and related electronic communication technology.

These three factors have had the greatest impact on the lending group of land transfer servicing firms and it is lending that is generally the driving force for change throughout the land transfer process. Interest rates are the principal determinants of lenders' charges and these charges are the primary influence on the volume of activity in the real estate market. The cycle of real estate activity is largely a function of interest rates. Deregulation, over the past decade, has acquired tremendous support as an ideology

117. McFall, *supra* note 108, at 69. This same study showed that about 11% of real estate brokers were originating mortgages by computer or other means. On computer loan origination networks, see also Anderman, *CLOs, MORTGAGE BANKING*, April 1985, at 79; Guttentag, *Recent Changes in the Primary Home Mortgage Market*, 3 *HOUSING FINANCE REV.* 221, 245 (describing the Shelternet system, affiliated with First Boston Corporation).

118. SMR RESEARCH CORPORATION, *supra* note 97, at 85-86.

119. On change causation in land transfer servicing operations, with special reference to mortgage lending, see A. DOWNS, *supra* note 66, ch. 2; Guttentag, *supra* note 117, at 221; Kane, *Change and Progress in Contemporary Mortgage Markets*, 3 *HOUSING FINANCE REV.* 257 (1984); Lasko, *The Future of Mortgage Banking. A Window on the World*, *MORTGAGE BANKING*, Dec. 1986, at 79-82; SMR RESEARCH CORPORATION, *supra* note 97, at 28-29.

and political agenda item, support that has produced substantial lessening of government controls over a number of segments of the economy. Most notably in the real estate lending field, moderation of controls over thrifts in efforts to save them financially has had a pronounced ripple effect throughout land transfer servicing. Important bank decontrol steps also have been taken, with more expected. Computer systems, in their vast storage capacity, rapid retrieval, easy document preparation, and extensive information networking over widely separated geographic locations have made possible many recent improvements in land transfer servicing. Transaction volume, speed, and accuracy are increased, and often at lower cost. In mortgage lending, computer systems are essential to some of the new marketing techniques, the increased efficiency of contemporary large scale mortgage origination and servicing, and operation of the modern secondary mortgage market.¹²⁰

Computer systems also are being extensively utilized by title insurance companies for title plant maintenance, title searches, and policy preparation.¹²¹ One reason that companies with large title plants are automating them is that it avoids the difficult personnel problem of finding enough qualified staff willing to perform the dull, tedious work required in maintaining manual plants and making searches in them. It also makes joint title plant usage by different companies more feasible by enabling plant access from different sites. Further, the percentage of errors by company personnel in maintaining and utilizing plants is less with automated than manual plants.

The giant companies that recently have entered the land transfer service field have no doubt taken the above three factors into consideration in making their moves. They also appear to have been influenced by the tremendous size of the markets, involving billions of dollars in transactions annually, with good profit prospects for those firms that can acquire a considerable proportion of one or more of these markets. Given the fragmented character of land transfer service markets and the tremendous resources of the big companies available for acquisition and expansion, the opportunities for acquiring favorable market shares have varied from good to assured. Possibilities for vertical integration, cross-selling, more aggressive marketing, and organizational streamlining seem to have increased still further the attractions of major moves into land transfer servicing. After all, big business is supposed to be adept at planning and carrying out efforts of these kinds. To companies such as General Motors and Sears, whose core businesses have been faced with stabilization or decline, land transfer servicing

120. The importance of computer systems to the secondary mortgage market is discussed in *Merrill Lynch's Richard Pratt Discusses the Secondary Mortgage Market*, TR. & EST., Feb. 1984, at 15.

121. On title company automation, see *supra* note 39.

also offers an attractive hedge, and one with little or no likelihood of serious foreign competition that has proven so troublesome to the automobile companies.

The recent entry, integration, and expansion moves of big corporations in land transfer servicing have met little resistance from government regulators and little in the way of new laws seeking to block or roll back these moves. Opposition to interstate banking and nonbank banks is an exception to the general lack of resistance to expansion moves of big corporations in land transfer servicing.¹²² As expected, the firms have structured their activities so as to avoid most threats from existing antitrust, conflict of interest, business preserve protection, and other laws that could cause them difficulties. Furthermore, the pro-free market, deregulatory mood of the times has been receptive to the market shakeups and business innovations that the big firms have attempted, especially when promising greater operational efficiency. It remains to be seen if the regulatory environment in land transfer servicing will remain as favorable to aggressive expansionary moves of big corporations, particularly if the companies keep reaching out in new directions, individual firms acquire very large market shares, or there is a severe slowdown in real estate activity that causes a general recession in real estate transfer servicing.

Although big companies have moved heavily into land transfer servicing, there is no certainty that they will all remain in the field. Divestment of company segments that have proven disappointing or seem necessary to sell off in order to protect against or pay for takeovers are commonplace in contemporary American business. Successful segments may even be available for sale if the seller thinks the sale price realized can earn more in a different venture. Large conglomerates are particularly prone to look at operational business units as massive commodities subject to sale as well as purchase if it makes good economic sense to follow this course. A few of the big new entrants into land transfer servicing already have sold some or all of their land transfer servicing units.¹²³ Additional divestments can be ex-

122. The banks have also faced stiff opposition in their efforts to shore up their weakened profit position by such means as greatly expanding their legal authorization to underwrite securities. Much of this controversy has centered on attempts to repeal the Glass-Steagall Act.

123. A widely publicized divestment transaction was Merrill Lynch's recent disposal of Merrill Lynch Realty through a public offering after a deal to sell this unit to a corporate buyer for a reported half-billion dollars or more fell through. Other relevant recent divestment examples are Lincoln National's sale of Chicago Title to Allegheny Corporation, Southern Pacific's sale of its substantial interest in Ticor Title Insurance, and a sale by Sears to Citicorp of fifty savings and loan branches. Some divestments apparently are the result of disappointment in earnings potential from what the corporate parents anticipated at the time of acquisition. As one of our informants stated during the course of an interview: "Buying a company in a business you previously have had no experience with is much like having your first child. You do not fully appreciate what all the problems will be until after the child arrives."

pected over the next few years or so.

In the above consideration of new developments among land transfer servicers, one servicing group — private law firms — is noticeably absent. The explanation for this is simple. In their scope and structure of operations these firms in their land transfer servicing work have not changed substantially in recent years. They have continued to lose some land transfer work to competitors: closing work to lenders, brokers, escrow agents, and title companies; some bank work to emerging in-house bank corporate law departments; and some deal making and mortgage securities' work to in-house staffs of investment banks. But generally, their land transfer roles have remained much the same. New legal problems have arisen to be dealt with and new legal instruments have been created to meet current demands, but this kind of novelty is standard lawyers' fare. Nor have private law firms in their land transfer work structurally changed much. The big law firms are growing but remain miniscule compared to the big corporations now active in land transfer servicing. Furthermore, real estate matters generally constitute a minor share of big law firm workload. Client representation in real estate transactions remains largely in the hands of smaller firms operating much as they have in the past.

III. DEFICIENCIES

Any major servicing process, and certainly any as massive and complex as land transfer servicing, is bound to have deficiencies. The land transfer servicing process discloses deficiencies in both services provided and in those firms and groups of firms offering services, the latter being crucial determinants of the former. With few exceptions, deficiencies are concentrated in segments of the process rather than being universal to all stages and types of providers, but the process has so many internal linkages that a deficiency in one segment can have an effect on others. As to what constitutes a deficiency or how serious a particular shortcoming may be, land transfer servicers may not always agree. The vantage point of the observer, including the observer's self-interest, can influence how a situation is viewed and how undesirable its consequences are. Nevertheless, widely shared perceptions do exist as to what are deficiencies in the process. Some of the more significant of these deficiencies are briefly summarized below.

Cyclical volume. Many businesses are subject to cyclical activity but businesses closely tied to real estate markets, including most particularly the servicing of real estate transfer transactions, are acutely affected by such activity. The real estate activity cycle, largely a function of interest rates, moves up and down over what can be relatively short but unpredictable periods, the upward or downward phase often lasting for only three or

four years.¹²⁴ High mortgage interest rates slow the volume of transactions, often drastically so, as during the early 1980s when interest rates on home mortgages peaked at over sixteen percent.¹²⁵ High interest rates deter real estate sales by substantially increasing financing costs and the amount that buyers must pay in monthly or other installment payments. Low volume can, of course, have serious negative consequences on the profits of land transfer servicers, although some considerably more than others. Not only can declines reduce or eliminate profits, but prolonged declines often necessitate personnel layoffs, and when volume revives it can be difficult to restaff with qualified personnel as rapidly as needed.

Title companies, mortgage banks, and thrifts suffer severely by sharp downward moves in the real estate cycle; lawyers and brokers may be less adversely affected. Lawyers are highly flexible in the work they can perform, so that when the real estate market is in protracted decline, many lawyers who specialize in land transfer servicing shift to handling other kinds of legal problems. Of course, too, lawyers' mortgage foreclosure practices are likely to expand in these periods of market decline. Most real estate brokerage firms are aided in riding out low periods in the real estate cycle because their sales personnel consist heavily of part-timers on commission, many of whom have ancillary sources of income or support. If these salespeople make no sales, the firms they are affiliated with need not pay them. Yet when the market comes alive again, most of these salespeople are readily available to assume a more active sales role.

Prices charged and services provided. It is at least arguable that some land transfer service prices charged consumers are higher than they should be.¹²⁶ Real estate brokers' commissions¹²⁷ and lawyers' fees are both vulnerable to this criticism; and title insurance rates, despite the modest profitability record of title insurance underwriting, could be reduced somewhat with more intense competition. Further, it has been claimed that title insurance rates fail adequately to reflect variations in risk and title evaluation costs among different categories of insureds.¹²⁸ Title insurers also have been faulted for price discrimination, charging different prices for substantially

124. Housing starts move in similar cycles. An Urban Institute study determined that between 1950 and 1980 there were six major housing start cycles. J. TUCCILLO, *supra* note 66, at 17-19.

125. In 1981, average home mortgage rates in the United States slightly exceeded 16%. STATISTICAL ABSTRACT, *supra* note 63, at 493, table 833.

126. An astute analysis of land transfer servicing costs, with an interesting statutory proposal, appears in Whitman, *Home Transfer Costs: An Economic and Legal Analysis*, 62 GEO. L.J. 1311 (1974).

127. For an attack on real estate brokerage commissions as exorbitant, see Grigsby, *Residential Brokerage Costs Are Too High*, REAL EST. REV., Summer 1984, at 109.

128. E.g., Uri, *supra* note 48, at 93-94. *But see* the response to Uri in Christie, *supra* note 58.

the same service.¹²⁹ Also, more efficient integration of steps in the housing finance transaction process could reduce the overall cost of financing a home, one eminent authority claims by as much as an entire percentage point.¹³⁰ Increased efficiencies at any other point in the transfer servicing process, if savings were passed back to consumers, could also have an effect in cutting or holding down prices.

A problem has developed in title insurance, worrisome to insurers, that is exerting price increase pressures on title insurance coverage. This problem is a drift toward higher loss ratios that a number of firms are experiencing.¹³¹ Title insurance, which has been a low loss form of essentially noncasualty insurance, now is faced with policy losses as a more significant expense item. A variety of reasons have been advanced for this increased loss trend, including inexperienced and dishonest agents; carelessness in title plant postings; negligent title searches and examinations; inadequate efforts at quality control by the insurers; and a tendency for some companies, pushed by competition including lenders' demands, to take greater chances in the coverage they provide.

Doubts, too, can be raised as to the quality of some land transfer services, especially those provided home buyers. Home buyers are usually in need of full and accurate outside advice about how the transfer process functions and what the merits and demerits are of the properties they contemplate purchasing, as their background knowledge ordinarily is skimpy or nonexistent. Many real estate agents are not sufficiently competent to perform this function as well as they should. Inadequate home buyer counseling on mortgage loans also can be a problem. The possibility of inadequate counseling is enhanced by the new electronic marketing schemes in which originations are arranged from real estate brokerage offices hooked up by computer with distant lenders. Greater efficiency of electronic communications can have serious quality costs. An added quality problem concerns residential land sale contracts. These contracts, if prepared by real estate brokers, as is often the case, frequently are inadequately tailored to the special needs of buyers or sellers or both. The same can be true of deeds and other conveyancing instruments prepared by brokers. Unauthorized practice cases brought against real estate brokers no doubt are prompted principally by lawyers' interests in preserving their conveyancing monopoly, such as it is. However, risks of inadequate and even seriously flawed instruments apparently are greater when drafting or form selection and completion are by brokers rather than lawyers. Delays in performing service work

129. Owen, *supra* note 48, at 941.

130. Downs, *supra* note 69, at 37.

131. This problem is discussed in AMERICAN LAND TITLE ASS'N, TITLE INSURANCE INDUSTRY STATISTICS 23-24 (1984); Little, Eljenholm, Burke, Pahl & Pollay, *Claims — A Crisis — What We Can Do About It*, TITLE NEWS, June-July 1983, at 7.

can be a troublesome service deficiency too. Delays can be damaging and very disconcerting to land buyers and sellers, and lenders and lawyers are too often dilatory in their processing of land transaction work such as lenders in passing on loan applications, and lawyers in contract of sale preparation and in performing requisite settlement procedures.¹³² Delays are usually most serious in peak periods of real estate activity, a good example being the surge of refinancings in 1986 that accompanied a sharp drop in real estate mortgage rates.

Another asserted real estate broker deficiency is that consumers are not offered enough variation in service packages. In particular, sellers cannot have their properties listed or buyers receive available listing data without advice, negotiation assistance, referral recommendations, and document preparation, even if they do not wish these added services.¹³³ In essence, this demand for less than full-service brokerage is a pricing complaint. What some critics quite properly want is an option, readily available to buyers and sellers, that for a price substantially below prevailing broker commissions, at least some brokers will act merely as information exchanges of what sellers are offering and buyers might be interested in acquiring. The information presumably would be more detailed than what typically appears in newspaper advertisements but responsibility for making further contacts, arranging site visits and open-houses, aiding in the negotiation of counter-offers, and working out contract terms would be up to the parties without further broker assistance.

Conflict of interest. Conflict of interest is inherent in many land transfer servicing situations and involves problems of choice facing servicers. These problems can entail the pull of diverse loyalties to different outsiders or the more common conflict between servicers' self-interests and the interests of others, such as service consumers. Real estate brokers frequently are involved in conflict of interest situations concerning diverse interests of outsiders. They seek to effectuate sales by appealing to and adjusting the interests of buyers and sellers, interests that in important respects are often inconsistent. Although legally representing the seller in most cases, individual brokers often tend to behave as representatives of both the buyer and the seller, particularly in non-multiple listing service transactions. The loyalty choice difficulties in such a situation are clear and the problem can be most acute when a typically uninformed residential buyer and seller are involved, persons likely to be unaware of the risks or how to deal with them. Lawyers

132. For lawyers' complaints that lenders are imposing unreasonable time and documentation demands on lawyers handling closings because of either pressures from the secondary market for mortgages or because lenders hope to avoid loan commitments made prior to a market increase in interest rates, see White, *A Simple Closing No Longer*, CONN. L. TRIB., June 8, 1987, at 1.

133. Erxleben, *supra* note 3, at 208-11.

also can become involved in a similar conflict of interest dilemma when representing both the buyer and seller.¹³⁴

More pervasive and often more subtle are the conflict problems that can arise when interests of the service provider and consumer conflict. An example is the conflict that can develop over the real estate broker's commission prospects. Should, for instance, the broker seek to influence the seller to accept an offer at a lower price, with an assured commission to the broker, rather than recommend that the seller seek a more tenuous sale prospect at a considerably higher price, with the chance that the broker will effectuate no sale and earn no commission? In this situation, a broker can be torn between what is best for the seller and what is best for the broker, and the seller who relies heavily on the broker's advice may be at risk that the broker's interest will predominate in resolving the issue. Lawyers can encounter similar ethical problems, including those resulting from referrals by mortgage lenders, frequent referral sources for many lawyers. Should a lawyer, for example, who represents a borrower referred to the lawyer by the lender, favor the referring lender over the borrower when a conflict of interest between the lender and borrower arises? Should the lawyer favor the lender out of concern that otherwise further referrals from the lender will not be forthcoming? The answer to the ethical problem posed is clear, but clients who rely on their lawyers still are at risk that the lawyers' self-interest will be the determining factor.

Common ownership of brokers and lenders also can raise conflict of interest issues. If a brokerage firm and lender are commonly owned and employees of the brokerage firm channel customers to the affiliated lender when other lenders could better accommodate the customers' needs, there is a strong likelihood that the referrers are consciously preferring the employer's interests to those of the customers. The conflict of interest is resolved against the customers. Integration of diverse land transfer services in the same firm can similarly lead to conflict of interest risks to customers.¹³⁵

Restrictions on competition. To those strongly favoring free markets and open competition, land transfer servicing can be seen as subject to more restraints on competition than is justifiable. Many of these restrictions are imposed by laws pertaining to entry into the servicing field, the range of services that some kinds of firms may offer, and price and other restraints on servicing operations. There also are practices engaged in by servicers that restrict competition or evidence such restriction, some of dubious legal-

134. Directives on permissible lawyer behavior in conflict of interest situations include MODEL RULES, *supra* note 15, Rule 1.7, and MODEL CODE, *supra* note 15, DR5-105. *See also supra* note 17 and accompanying text.

135. For a discussion of conflict of interest risks if bank activities are diversified, see R. LITAN, *supra* note 92, at 135-43.

ity, others not. One such practice is the previously discussed widespread adherence of real estate brokers to the same commission charge over long periods of time. Although there obviously is substantial competition among real estate brokers for listings and in making sales, consistency of commission charges in individual trading areas indicates lack of competition on the matter of price.¹³⁶ It is claimed, too, that the way multiple listing services are administered has contributed to brokers' commission rigidity as well as to standardization of their services and the usual practice of offering only full-service brokerage.¹³⁷ The MLS structure is well-suited to collusive price setting and to ostracizing brokers unwilling to cooperate with cartel-like arrangements. Title insurance rates also tend to be stable and noncompetitive¹³⁸ but to a considerable extent legally so, due to the insurance antitrust exemption under the McCarran-Ferguson Act.¹³⁹ In most states, however, lack of close insurance commission attention to premium rates has enabled insurers collectively to exert extensive control over rate fixing, although less over the search and examination charge than over the risk component.

Another practice that allegedly restricts competition is the referral of customers to a servicer when there is an ownership tie between referrer and servicer, for example, when one is owned in whole or in part by the other. The argument is that this so-called controlled business situation reduces competition by effectively eliminating other servicers from competing for the referred work, as generally the referrer will channel the work to its commonly owned affiliate. Lessened competition, it is then argued, adversely affects the price or quality of what consumers receive. This reduced competition also, of course, can seriously harm other servicers or their agents by cutting their market share. In addition, as has been seen, it can raise conflict of interest problems. Controlled business has been particularly controversial in the title insurance field, most notably when real estate brokers, lenders, or title insurance underwriters buy into or open title insurance agencies.¹⁴⁰ The brokers and lenders then channel customers to the agencies

136. The pricing of residential real estate brokers' services is discussed in Erxleben, *supra* note 3; Phillips & Butler, *supra* note 8, at 637-40; Yinger, *A Search Model of Real Estate Broker Behavior*, 71 AM. ECON. REV. 591 (1981). Phillips and Butler assert that in Texas the prevailing six percent commission rate charged by residential brokers belonging to real estate boards is resulting in these brokers losing some market share to homeowners who are selling on their own or to licensed brokers, not realty board or MLS members, who may be cutting commissions. Phillips & Butler, *supra*, at 642-44.

137. Erxleben, *supra* note 3, at 191-92, 208. However, Erxleben considers the MLS device so valuable in increasing efficiency of the real estate sales market that it should not be eliminated, although in need of reform. *Id.* at 192.

138. Owen, *supra* note 48, at 939-41.

139. See *supra* notes 57-59 and accompanying text.

140. On controlled business as it relates to title insurance, see Kennedy, Morrow, Toft & Woodward, *New Boys on the Block — A Look At Our Industry From Inside and Out*, TITLE NEWS, Jan. 1983, at 23, 27; Maher, Day, Plotkin & Little, *The Evils of Controlled*

they own and the underwriters' agencies channel customers to their parent underwriter. This channeling, it is asserted, has negative price and quality consequences for consumers, the insureds.¹⁴¹ Enough opposition to controlled business developed, particularly from title insurers, so that in 1983 the Real Estate Settlement Procedures Act was amended to apply expressly to controlled business and bar some referrals of real estate settlement service work if the referrer has more than a one percent ownership interest in the entity to which the referral is being made.¹⁴² The amendment is less restrictive than what many title insurers wanted and through disclosures and other exceptions is largely innocuous.

To some, controlled business is seen as a form of unproductive vertical integration, the exercise of market power without redeeming social value.¹⁴³ However, these attacks are based more on rhetoric than proof of antisocial

Business, TITLE NEWS, Jan. 1980, at 59; Plotkin, *The Economic Consequences of Controlled Business*, TITLE NEWS, Dec. 1981, at 8 [hereinafter Plotkin, *Economic Consequences*].

Those concerned with title insurance are not in full accord as to what is controlled business. Consider these two definitions given at the same American Land Title Association sponsored panel:

[C]ontrolled business [is] defined as the compensated referral of settlement services from one entity to another in which the referring entity has some ownership interest. The ownership may be a partnership interest or stock arrangement and the compensation may be in the form of a partnership profit distribution or stock dividend. But the essential aspect of this arrangement which sets it apart from the classic kickback or referral fee paid between independent actors is the ownership or controlling interest which the referrer has in the entity to which the referral is made. An example — one which is not uncommon — would be the creation of a title agency, underwritten and possibly staffed by a title insurance underwriter.

Maher, Day, Plotkin & Little, *supra*, at 60 (comment by Maher).

In my definition of controlled business I don't make any distinction between that which is owned and that which is steered, as long as there is tangible reward that goes to controlling the placement of business. I think it has the same effect whether it's paid in a dividend or a rebate or whatever.

Id. at 62 (comment by Day).

The commercial title insurers have attacked the bar-related companies on grounds, among others, that the bar-related companies are controlled businesses. See D. BURKE, *supra* note 1, at 15-16; Roussel & Rosenberg, *Lawyer-Controlled Title Insurance Companies: Legal Ethics and the Need for Insurance Department Regulation*, 48 FORDHAM L. REV. 25, 28-30, 51 (1979). The American Bar Association has taken the position that a lawyer having a financial interest in a bar-related company does not, on conflict of interest grounds, prevent the lawyer from channeling a client's title insurance work to that company, provided full disclosure of the interest is made to the client. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 331 (1972).

141. See Plotkin, *Economic Consequences*, *supra* note 140, at 9; statement by Day in Maher, Day, Plotkin & Little, *supra* note 140, at 62. Day is concerned that controlled business increases the casualty model of writing title insurance. *Id.*

142. 12 U.S.C. §§ 2602, 2607 (1982 & Supp. III 1985) (as amended). The 1983 amendment is discussed in D. BURKE, *supra* note 1, at 254-60.

143. Plotkin, *Economic Consequences*, *supra* note 140, at 9.

results. Since most controlled business opponents are servicers or their agents and are threatened by the integrative use of market power, some skepticism arises as to the validity of their arguments. Quite possibly, however, controlled business can be advantageous to some firms without any of the benefits accruing to consumers. Title insurers generally do not compete in the consumer market, or do not do so effectively, by direct approaches to home buyers.¹⁴⁴ They are more effective in competing directly for the business of lenders, developers, or large industrial or commercial property owners, but a high percentage of title insurance policies are issued to home buyers.

To acquire home buyer business, title underwriters must rely on referrals from agents or others that have direct home buyer contacts. Controlled business can enhance profits of some integrated operations, particularly if the financial benefits of integration are not passed back to consumers. Competition among referrers generally is not keen enough to force much sharing of these benefits. This enhancement of profits unshared with consumers can result not only from controlled business but also from incentive payments by title insurers to their referrers when there is no ownership tie between insurers and referrers.

Much of the marketing effort of title insurers is focused on referrers, many of them lawyers and other independent agents of the insurers. These marketing efforts are known as reverse competition,¹⁴⁵ a common phenomenon in American business. Due to competitive limitations of the insurers, they concentrate their marketing efforts on intermediaries rather than ultimate consumers. If the intermediaries are not subject to sufficient competitive pressure from consumers, they may pass little or none of their incentive payments back to consumers and these incentives paid by title insurers to agents are substantial.¹⁴⁶ Profiting by title insurance agents from referrals, except from services they provide other than recommending an insurer, is viewed in some quarters as undesirable because it not only tends to increase consumer prices but also to reduce insurer profits unduly. As discussed previously,¹⁴⁷ RESPA and some state statutes have sought to eliminate referral fees for most referrals of land transfer servicing work by title insurance company agents and others, but enforcement has proven difficult and extensive violations presumably are occurring. Eliminating such evils as may ex-

144. This lack of title insurer competition in the consumer market is discussed in Whiteman, *supra* note 95.

145. On reverse competition in the title insurance field, see D. BURKE, *supra* note 1, at 237-38; Quiner, *supra* note 54, at 722-23; Rooney, *supra* note 51, at 308-18; Roussel, Pera & Rosenberg, *supra* note 51, at 643-45.

146. Phillips and Butler consider these substantial incentive payments as one reason for the relatively poor profit performance of title insurance compared to other forms of insurance. Phillips & Butler, *supra* note 8, at 660.

147. See *supra* note 24 and accompanying text.

ist from controlled business and referrals can be a formidable task, as the market on its own seems unlikely to provide corrections and more effective government regulation will be hard to achieve.

Financial viability of major servicers. In their basic mode of operation, the thrifts, particularly the savings and loan associations, are vulnerable to major losses during protracted high interest periods that can so undermine their profitability as to threaten their continued viability.¹⁴⁸ This vulnerability is related to the cyclical volume activity considered above, but is complicated by the interest rate squeeze thrifts face during high interest periods and the involvement of federal deposit insurance programs. High interest rates of the early 1980s were catastrophic for the thrifts as a group. In 1980 and 1981 alone, the thrift industry lost 750 institutions, fifteen percent of their total number, and from 1980 to 1982, the industry lost about half its net worth.¹⁴⁹

Contributing to problems of the savings and loans were accounting procedures approved by federal regulatory agencies that tended to conceal financial difficulties and far too prevalent poor quality loans. Even after interest rates receded markedly, many savings and loans remained in shaky condition. There is concern that with the next sharp rise in interest rates, the thrifts will again go into depression, with generalized losses and many new casualties, especially among savings and loans. This situation has tremendous significance for the mortgage market, as thrifts are by far the largest originators of home mortgages and most thrifts retain a high percentage of the mortgages they originate. If the thrifts' participation in the home mortgage market is drastically reduced, will other institutions as satisfactorily take over and fill the gap? Relevant to this question is will and should the federal government continue to provide deposit insurance to thrift depositors, a backup that has enabled many thrifts to stay in business during difficult high interest periods? And if this insurance is to be continued, will and should its premium terms be modified?

The underlying problem of the thrifts, simply stated, is that they lend long and borrow short. Their mortgage loans usually are for periods of ten years or more, whereas the money they loan comes principally from funds that they in effect are borrowing from their depositors on a short term or

148. On the financial problems of the thrifts, see A. DOWNS, *supra* note 66, at 175-215, 303-05; DOWNS, *supra* note 69, at 30-37; *The Thrift Industry at the Crossroads: A Panel Discussion*, 3 ANN. REV. OF BANKING LAW 149 (1984). Severe regional recession has accentuated the thrifts' problems in some states, Texas in particular, where speculative lending practices and inadequate monitoring have further contributed to the insolvency of many thrifts. Apar, *Texas S&L Disasters Are Blamed in Part on Freewheeling Style*, Wall St. J., July 13, 1987, at 1, col. 6.

149. Gray, *The Role of Regulation in the Thrift Industry*, 6 ANN. REV. BANKING LAW 235, 238 (1987).

demand return basis. In high interest periods, the thrifts must pay high interest rates or depositors will withdraw their moneys. Disintermediation, withdrawal, and investment elsewhere, are the less than helpful descriptive terms for what occurs if depositors are not offered high enough rates. Extensive disintermediation can lead to insolvency of the thrifts experiencing large withdrawals. However, if high enough interest rates are offered to prevent withdrawals, the thrifts may have difficulty paying the higher rates because of the low interest that they are receiving on their long-term mortgage loans.

One way that some thrifts have dealt with this profit squeeze situation is to make many new mortgage loans at very high rates. To do so they may have to make riskier loans and, as well, may need to pay more to depositors as incentives of one sort or another to attract sufficient loan moneys. Such loan expansion programs can be very precarious to the thrifts, particularly if sharp interest rate declines do not soon occur. But depositors, even if knowledgeable about the thrifts' precarious strategy, are unlikely to become apprehensive and withdraw, as their deposits are federally insured. Thus, the federal deposit insurance program has encouraged speculative behavior by some thrifts that has contributed greatly to the heavy losses that the insurance program has suffered, losses that federal taxpayers may ultimately be required to help pay for.

Legal responses in the early 1980s to the thrifts' profit-squeeze problem included deposit rate deregulation, authorization for the thrifts to broaden substantially the range of shorter-term non-real estate loans they could make, and providing means for thrifts to unload some of their unfavorable long-term loans. The previously discussed Garn-St.Germaine Act was the principal source of these significant deregulatory moves aimed at increasing the thrifts' loanable funds and decreasing their loan maturities. Following passage of the Garn-St.Germaine Act, thrift deposits expanded dramatically, but many thrifts allocated this flow of funds into an excessive percentage of risky loans and risky equity investments. The federal authorities responded to these developments with a measure of reregulation, including increased thrift capital requirements¹⁵⁰ and limitations on direct equity investment,¹⁵¹ with this latter type investment feared by many regulators as potentially more risky than mortgage loans.¹⁵²

It has been hoped that this mix of deregulation and reregulation would bring the thrifts to long-run profitability and eliminate the insolvency risk

150. 12 C.F.R. § 563.13 (1987).

151. 12 C.F.R. § 563.9-8 (1987).

152. On reregulation by the Federal Home Loan Bank Board, see Gray, *supra* note 149, at 240-42; Litan, *Evaluating and Controlling the Risks of Financial Product Deregulation*, 3 YALE J. ON REG. 1, 29-31 (1985).

faced by the Federal Savings and Loan Insurance Corporation, the federal agency that insures savings and loan deposits. It has also been hoped that thrifts moving heavily into adjustable rate mortgages, a loan form that greatly reduces risks from escalating market rates of interest, and operating more like mortgage banks by originating mortgages increasingly for resale¹⁵³ would further strengthen the thrifts and the FSLIC. However, it seems doubtful that the thrifts have changed sufficiently to remove the prospect of even more serious thrift losses and a much greater insolvency rate the next time there is another protracted period in which short-term interest rates remain considerably above the long-term interest rates on large amounts of real estate mortgage debt outstanding.¹⁵⁴ The current situation also remains grave, with nearly twenty percent of the savings and loan industry reputedly insolvent. Congress recently passed the Competitive Equality Banking Act of 1987 that made available to the FSLIC 10.8 billion dollars in desperately needed new funds.¹⁵⁵ However, even this sizable bailout apparently will be inadequate to pay all upcoming insured depositor losses.¹⁵⁶

Private mortgage insurers are another type of enterprise significant to the land transfer process whose financial viability has caused concern. Insurance of this sort was not written by private companies following the depression of the 1930s until 1957¹⁵⁷ but is now a common form of coverage and of particular importance to acceptability of many residential mortgages in the secondary market. For some years after private companies again entered the mortgage insurance market, this type of coverage was profitable but losses later mounted and several companies have recently failed, including one of the largest. The serious loss situation that developed has been attributed to declining home prices in overbuilt areas such as Texas, unreliable appraisals, inadequate premiums, and adjustable rate mortgages lead-

153. Thrifts are moving more toward the mortgage banking role of originating for sale. In 1986, thrift originations were up 35% over 1985 but loan sales in 1986 of \$169 billion were up 79% over 1985. For an analysis of this originate and sell role see Rosen, Youngblood, Hustick, Hopkins & Stepan, *Housing and Mortgage Market Review*, 6 HOUSING FIN. REV. 41, 67-69 (1987).

154. For amplification of this view, see A. DOWNS, *supra* note 66, at 304-05. For a study that also casts doubt on the new service options available to savings and loans as means of decreasing the risks faced by these institutions, see Joffrion & Rose, *Savings and Loans' Response to Deregulation: Evidence from Multivariate Models and a National Survey*, 6 HOUSING FIN. REV. 17 (1987).

155. On this act see *supra* note 90.

156. Isaac, *A Better Way to Save the Thrifts*, N.Y. Times, July 31, 1987, at A31, col. 1.

157. Mortgage insurance by private underwriters proved disastrous during the 1930s and caused the insolvency of a number of title insurers that also were writing mortgage insurance. On these financial disasters see D. GAGE, *LAND TITLE ASSURING AGENCIES IN THE UNITED STATES* 118-19 (1937); Pope, *supra* note 86, at 19-20.

ing to defaults when interest rates are increased.¹⁵⁸ The insurers are taking steps to reduce their losses,¹⁵⁹ but mortgage insurance remains an inherently risky type of venture.

Land title record keeping systems. These land title record keeping systems in the United States are inefficient in two significant respects as they affect land transfer servicing. The public records, especially in most larger urban counties, are too complicated and labor intensive to use efficiently for land title searches; and where private title plants exist, there is extensive duplication of public and private records. The private plants facilitate the title search process sufficiently to justify the expense of creating and maintaining them, provided that they are used for an adequate volume of searches. Title companies that own and operate the plants have a steady high volume flow of searches. If the public records were more efficiently organized, the private plants would be unnecessary. The inefficiencies in American land title record keeping systems have an appreciable effect in increasing land transfer costs to most consumers of such services.

Massive size of some servicing firms. There has been a long history in the United States of apprehension over the sheer bigness of big business and a distrust and fear of enormous corporations because of their size. There is concern that mammoth corporations, including the great conglomerates, tend to create monopolies and that through reciprocal dealing, cross-subsidizing, and mutual forbearing, economic control shifts from the market to the big corporations. Diversity of goods and services sold by any one megagiant can accentuate these adverse effects by more markets being invaded. Corporate bigness not only raises concerns about monopoly risks but also apprehensions as to the political consequences of such economic concentration. Are the corporate megagiants, with the tremendous political influence they exert, antithetical to a democratic order? This certainly is a question that merits being raised. Although the prevailing view today appears to be that corporate bigness qua bigness is not necessarily an evil,¹⁶⁰ there are contemporary economists, among others, who disagree.¹⁶¹ Given the increasing number of very large corporations now engaged in land transfer servicing, corporate size becomes a relevant issue and massive size an arguable deficiency in considerations of this type of servicing.

158. See Pollack & Steinbach, *supra* note 86.

159. *Id.*

160. See, e.g., Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696 (1986); Fischel, Rosenfield & Stillman, *supra* note 89, at 333.

161. See, e.g., Dugger, *The Shortcomings of Concentration Ratios in the Conglomerate Age: New Sources and Uses of Corporate Power*, 19 J. ECON. ISSUES 343 (1985); Gruchy, *Corporate Concentration and the Restructuring of the American Economy*, 19 J. ECON. ISSUES 429 (1985). See also C. LINDBLOM, *POLITICS AND MARKETS*, 161-233, 356 (1977); Adams, *Public Policy in a Free Enterprise Economy*, in *THE STRUCTURE OF AMERICAN INDUSTRY* 475 (W. Adams 6th ed. 1982).

IV. ADAPTING TO THE FUTURE

Many aspects of land transfer servicing are likely to remain much the same for a long time into the future, although further fundamental changes in the servicers seem probable. The volume of real estate sales and mortgage transactions will remain high and mortgage debt outstanding will be a major form of domestic debt and investment opportunity. It is obvious that there will continue to be a massive market in land and its improvements and that most land sales will be financed by some form of mortgage or comparable secured loan, the loans relatively long-term with principal amortized. The market in land and hence the market for land services will remain cyclical, with interest rates determining in large part the movement of the cycle.¹⁶² This means that most land servicers must adjust to periodic shifts in business volume, some of which may be sharply up or sharply down, with consequent implications for profitability. Submarkets for various types of land parcels will persist, with many servicers specializing by type of market, and single family residences being the largest submarket. A high percentage of buyers and sellers will, as at present, lack knowledge and information about land markets and land transfer service procedures, the incidence of ignorance being especially high among persons buying or selling their own homes.

The importance of the secondary mortgage market will continue to influence the primary market, including the terms of mortgages being originated, their standardization, and the practice of insuring mortgages. These are features of mortgages that can contribute to making mortgage debt instruments more fungible and thus more attractive to secondary market buyers, even though backed by unique and often highly diverse land parcels. Still another relative constant in land transfer servicing that can be expected to remain is the consumer need for a variety of services from outsiders, including the bringing together of buyers and sellers, advising them on transaction merits and transfer procedures, legal document preparation, title evaluation and protection, financing, specialist referrals, transaction coordination, and closing. This is not a field in which a great increase in consumer self-help is to be expected.

Along with these comparatively stable aspects of land transfer servicing are other relevant factors bearing on servicing that appear likely to change considerably. For example, it seems that a growing and unsolved federal deficit and debt problem will increasingly drain funds away from mortgage and other private capital markets, threatening ever-more-serious limitations on these markets and threatening to help push interest rates to

162. On the change in Federal Reserve Board policy, as of 1979, away from attempting to smooth out short-run business cycles by stimulating the economy toward long-run inflation control by limiting growth in the money supply, see A. DOWNS, *supra* note 66, at 37-39.

unprecedented heights at the top of interest rate cycles. Also, the secondary market, aided tremendously by increasingly varied types of mortgage-backed securities, probably will become even more important nationally and even internationally as the means of attracting available funds into the financing of American real estate. Further, the owner-occupied home market may decline relative to the rental market as rising home prices result in a growing percentage of Americans being permanently priced out of home ownership. A possible consequence of this could be, despite large federal budget deficits, massive new federal government subsidies of home purchasers intending owner occupancy.

But of particularly direct and crucial importance to the land transfer servicing process are the drastic changes that can be expected in how the servicers themselves are organized and operated. The restructuring now underway is certain to be projected into the future, with a great deal of doubt as to outcome. Presently unanswerable are questions such as: the extent to which land transfer services will be integrated in individual firms; the range of outside businesses that major land transfer servicers will be engaged in; the extent to which the nation's largest corporations will seek to enter the land transfer servicing field and which of the big corporations that recently entered will remain; whether private law firms will be increasingly unable or uninclined to compete in the restructured setting; and what the response will be if it appears that one or a few corporations are capturing a very high percentage of the market for particular land transfer services nationally, regionally, or in major local areas. Relative to secondary market institutions, there are doubts as to how extensively the federally chartered agencies will be changed and what the market consequences will be if these agencies are drastically modified or eliminated. Powerful political forces favor phasing out GNMA and making FNMA and FHLMC fully private bodies.¹⁶³

Many factors will influence how land transfer servicers will evolve, factors as varied as economies of scale possible in different forms of operation, the aggressiveness and ingenuity of management, and the progress made in electronic data storage and communication technology. However, one factor will be of paramount significance: the nature and extent of change in government intervention, most notably government regulation. Additionally, such change usually requires new or revised laws. Land transfer servicers are sufficiently controlled by law that most major restructuring efforts will necessitate legal change, with legislatures the principal instrumentalities of legal change. Even moves toward less government intervention through deregulation or reduced or abandoned subsidies or operational supports will

163. Possible changes in these agencies are considered in A. DOWNS, *supra* note 66, ch. 13; J. TUCCILLO, *supra* note 66, at 58-67; Maxwell, *Go Private: Fannie May?*, MORTGAGE BANKING, June 1987, at 51.

normally necessitate legislative action.

Existing laws controlling land transfer servicers reflect a variety of not always consistent government policies, among the more important of which are: protecting consumers, especially such consumers as home buyers and sellers; protecting depositors in thrifts and commercial banks, and insureds; protecting the economy generally by reducing risks of insolvency by major financial institutions; preventing collusive economic behavior that weakens competition and encourages inefficiencies; eliminating dysfunctional restraints on free market operations; assuring an adequate flow of funds into real estate markets, particularly into housing; and reducing government subsidies and operational costs.

Another common policy, often hidden behind some more idealistic objective, is favoring a politically powerful business or geographic area. Most individual laws pertaining to land transfer servicers expressly or impliedly seek to foster one or more of these policies. In the future, each of these policies will continue to have some influence, but priority shifts among policies will occur in the usual law making process of balancing and compromising demands and goals. For example, relative to land transfer servicing, it seems certain that protection of consumers will remain a very high priority.

Furthermore, there is considerable likelihood that before long the policy of deregulation to achieve a more open market will be given a lower priority. Whether declared or undeclared, the policy of aiding a particular business or geographic area, irrespective of the merits, will continue to be a persistent feature of legal change pertaining to land transfer servicers as it is in revisions of other fields of law.

Over time, the deficiencies considered in Section III should be and frequently will be of concern to those seeking to restructure land transfer servicing. All of the deficiencies there discussed have existed in the past and will continue into the future. Some, including conflict of interest and cyclical volume, are inherent in land transfer servicing and can be mitigated but not eliminated. Extensive attention is presently being focused on others, with resulting prospects of major law reform efforts to ease problems the deficiencies create.

Financial viability of the thrifts is illustrative of the latter. The thrifts' financial troubles and the related problem of federal deposit insurance solvency are issues of widespread concern today that have resulted in some legislative action and more may be forthcoming soon. When a deficiency is in the spotlight of attention, possibilities of important law reform or enforcement action to deal with it are considerably enhanced. Issue attention

tends to come and go,¹⁶⁴ but when attention is high, legal action is much more probable. Without the requisite attention, it may be difficult or impossible to prod legislatures, administrative agencies, or litigants into action or the action they take may be ineffectual. The Real Estate Settlement Procedures Act of 1974 is an example of a major piece of comprehensive legislation in the land transfer servicing field that largely failed because of insufficient popular and legislative concern over the problems the Act sought to deal with. Partial repeal seriously weakening the original Act was the result.¹⁶⁵

Leaving aside the question of when is an appropriate time to push for adoption of any particular change proposal, some suggestions of needed changes bearing on land transfer servicing that deserve serious consideration are briefly outlined below. Space is not available to develop these proposals more fully here or add to their number, but the ones covered indicate some of the possibilities for dealing with the deficiencies considered in Section III.

1. Both the conflict of interest and uniform pricing features of real estate brokerage need attention. One rather simple means of easing the conflict of interest problem would be to make selling brokers in multiple listing service situations legally the agents of buyers, with the selling brokers' fees or commissions set by agreement with their principals, the buyers. Antitrust proceedings are probably the best means of dealing with uniform pricing of real estate brokers' services. In recent years, a scattering of antitrust cases have been brought against real estate brokers and most have been settled by consent orders.¹⁶⁶ More active antitrust enforcement action

164. On fluctuations in issue attention, see Downs, *Issue-Attention Cycle*, in *THE POLITICAL ECONOMY OF ENVIRONMENTAL CONTROL* (J. Bain & W. Ilchman eds. 1972).

165. On the lack of congressional interest in controlling or making more competitive title insurance and other settlement service prices, see Whitman, *supra* note 95, at 70. Dean Whitman's views are particularly significant because as a former HUD staff member he was a significant figure in developing legislative proposals for controlling settlement service prices, including some provisions of what eventually became RESPA.

166. For a consideration of these cases, see Miller & Shedd, *supra* note 10, at 322-23. Among recent consent decrees are two related proceedings in Connecticut that merit being models for enforcement efforts in other states. The two cases are *Mehan v. National Ass'n of Realtors*, No. B74-332 (D. Conn.) (a Federal District Court class action), and *Connecticut v. National Ass'n of Realtors*, No. 03226005 (Hartford-New Britain) (a Connecticut Superior Court case). Settlements in these cases, that occurred in 1986, followed a three-year antitrust investigation by the Connecticut Attorney General's office. The federal consent decree ordered partial refunds of brokerage commissions to many sellers who paid six percent commissions. The state decree broadly enjoined the national, state, and all local Connecticut real estate boards and their multiple listing services from a broad range of price fixing activities, including use of commission price schedules and restricting board membership or multiple listing service participation because of pricing practices. Included in the 20-page federal injunction order also are these two provisions pertaining to matters that have caused concern in many states: "Defendants. . . shall not either unilaterally or in consent or agreement with others:

is needed and it would probably be helpful if a greater percentage of cases went to judgment without settlement in order to clarify more fully through judicial opinions just what constitutes broker violations.

A deterrent to more aggressive antitrust enforcement efforts against real estate brokers, of course, is the very considerable political power of the brokers at both the state and federal levels. An influx of new competitors might also help break the uniform brokerage pattern and reduce commissions. Permitting commercial banks to offer real estate brokerage services, at least for single family dwelling sales, could have a beneficial competitive impact on commissions.

2. Most notably in routine residential real estate transactions, private law firms in many parts of the nation have been losing out competitively to other kinds of land transfer servicers. Further weakening of unauthorized practice of law restraints, a real possibility, would further accentuate these market share losses. Law firm difficulties in this field often are that costs are too high and volume too low. Costs can be cut if paralegals are used more extensively by most firms in closing work.¹⁶⁷ Well-trained paralegals working for law offices can competently perform almost all routine residential closing tasks, and the usual requirement that such paralegals may not handle final settlements in real estate transactions on their own¹⁶⁸ seems competitively short-sighted. So long as the law firm is responsible for the paralegal's closing work, and this includes malpractice liability, a good argument can be made for permitting a competent paralegal employee to conduct routine final settlements without a firm lawyer being present.

Individual law firms can also increase their competitiveness in residential real estate transactions by increasing volume, as economies of scale normally accompany volume disposition of routine transactions. Advertising, reduced fees, and quality service should produce the needed volume for

. . . (r) prohibit any member from entering into any open listing or exclusive agency listing;" and all local and state defendants shall amend their rules and regulations to "[p]rovide that the listing information disseminated by a Local MLS shall not disclose the total commission payable on such listing." The Connecticut decrees have helped spawn at least two discount brokerage firms in the state. One provides limited listing services for which it charges a flat fee of \$250. The other offers full service at a 3.5% commission, and in addition will pay 1% of the purchase price to purchasers who buy through the firm. Sales agents are paid a modest salary plus a commission below what most brokers pay. The firm has multiple listing service membership and restricts itself to sales of residential properties.

167. On the cost-cutting potential of paralegals in law offices, see Q. JOHNSTONE & M. WENGLINSKY, *PARALEGALS: PROGRESS AND PROSPECTS OF A SATELLITE OCCUPATION* 204-06 (1985).

168. For a somewhat more detailed statement of this position, see *Paralegal Report: Lawyers Professional Responsibility Obligations Concerning Paralegals*, 59 CONN. BAR J. 425, 433-34 (1985).

many firms willing to engage in this kind of specialty. Even with lowered fees, the specialty should be profitable, given sufficient volume. In this, as well as most other relatively standardized fields of law practice, aggressive marketing and more efficient operations are going to be necessary for lawyers to survive. A more radical proposal involving lawyers that might also be worth implementing is conducting a full-scale residential real estate brokerage business out of a law office, the entire enterprise owned and operated by lawyers. Up to a point in many states, lawyers can legally act as real estate brokers, but it is doubtful that they can fully merge law practice and brokerage. Important efficiencies might be achieved by such a merger and prospects would be increased that clients would receive needed legal advice from the initial contract stage, something now often lacking. However, for such an arrangement to be legally acceptable, serious conflict of interest, solicitation, and tie-in problems would have to be resolved, problems more readily dealt with if the merged operation did not seek to serve both buyer and seller in the same transaction.

3. The problem of future viability of the thrifts is unresolved despite the mix of deregulation and reregulation that has occurred over the past decade. The next big move up in interest rates is likely to see most of the thrifts again in serious trouble, as the degree and kind of thrift diversification necessary to avoid ultimate disaster is not occurring extensively enough. An appealing solution in this volatile period is to encourage still further thrift diversity by removing most restraints on what thrifts can put their money into and who can own thrifts, but at the same time continuing to protect depositors through deposit insurance. The difficulty with this approach is working out an acceptable means of paying for the insurance premiums. The present payment scheme is unsatisfactory, and enhancing thrift diversity could increase the extent of high risk loan and investment activity of many thrifts with consequent added risk of collapse and even greater insurance claims. The advantage of the suggested approach, if the insurance premium problem could be resolved, is that further thrift diversity could greatly ease the thrifts' periodic profit squeeze from borrowing short and lending long.

One way of dealing with the insurance premium issue would be to vary premiums with the risk posed by the particular institution — the more risky the enterprise, the higher the premiums. Differences of opinion exist as to whether a fair system of risk-related deposit insurance premiums can be imposed on either thrifts or commercial banks without overly-burdensome regulation.¹⁶⁹ Calculating risk would be an onerous task requiring access to

169. For the position that a full-blown risk-related premium assessment program is not currently feasible, see Isaac, *supra* note 89, at 207-08. A contrary view is expressed in Gray, *Deposit Insurance Reform: The Special Status of the Thrift Industry*, 5 ANN. REV. OF BANKING LAW 125, 130-31 (1986); Kane, *The Role of Government in the Thrift Industry's Net-*

a great deal of data on each institution. As an alternative, more moderate changes in the present government deposit insurance program have been proposed. Among these proposals have been: providing expanded disclosure to the public of information about depository institutions' financial condition, thereby imposing market discipline on these institutions through their customers; restricting government insurance protection to smaller depositors; and encouraging private deposit insurance for larger depositors.¹⁷⁰ More effort should be made to develop a workable and politically acceptable risk-related deposit insurance program applicable to all depository institutions and one that is financially sound so that future congressional bailouts will not be needed. This may be the key to long-term viability of the thrifts. To the extent that thrifts are at risk from fraud and other illegal conduct by their managements, an obvious solution is stepped-up government regulatory enforcement action, including a sufficient staff of adequately paid field examiners to make inspections often enough so that chances of illegal conduct that could lead to institutional disaster are largely eliminated. Lax enforcement contributed to the recent collapse of speculatively oriented savings and loan associations in Texas and elsewhere.¹⁷¹ Although federal agency enforcement programs have since been strengthened, budgetary constraints and political pressures from the powerful financial services providers make maintaining a satisfactory enforcement effort a matter requiring continued diligence.¹⁷²

Ultimately, it is conceivable that the problem of the thrifts may largely be eliminated by a still further expanding and broadening of the market for securitized mortgages. This market may absorb most long-term mortgage

Worth Crisis, in FINANCIAL SERVICES, *supra* note 87, at 181-84. Problems involved in imposing alternative risk-based deposit insurance premiums are discussed in R. LITAN, *supra* note 92, at 154-56.

170. Isaac, *supra* note 89, at 208-12. For arguments that greater reliance on depositor imposition of market discipline is likely to prove counterproductive, see Garten, *Banking on the Market: Relying on Depositors to Control Bank Risks*, 4 YALE J. ON REG. 129 (1986). More recently, Mr. Isaac, former chairman of the Federal Deposit Insurance Corporation (FDIC), has recommended that by merging the financially sound FDIC, which insures mostly commercial bank deposits, with the financially unsound Federal Savings and Loan Insurance Corporation (FSLIC), the problem of failed and failing savings and loans would be solved. The merged entity would generate about \$23 billion over the next five years, enough to cover losses, Isaac argues. Commercial banks could be assuaged by a series of concessions, including repeal of the Glass-Steagall Act. Isaac, *supra* note 156. Mr. Isaac adds: "A merger of the FDIC and FSLIC is inevitable. If industry and political leaders would exhibit some courage and imagination, the funds could be combined sooner rather than later." *Id.* The FDIC is opposed to merger of the two funds and its chairman has taken the position that it is not an unlimited resource capable of handling all the financial problems of the FSLIC. Seidman, *FDIC & FSLIC, Two Parts of One Industry?*, MORTGAGE BANKING, Sept. 1987, at 31.

171. See, e.g., Apcar, *supra* note 148.

172. On the recent strengthening of the Federal Home Loan Bank Board's enforcement efforts, see Gray, *supra* note 149, at 243-44.

investment without extensive long-term holdings of mortgage interests by the thrifts. Relative to real estate mortgages, the thrifts may more and more resemble mortgage banks, originating but investing long-term far less heavily. With many thrifts this trend is already apparent and in the future may spread to most all thrifts. A wide range of other investors, attracted by the diversity and other advantages of securitized mortgages, conceivably may take over most of the thrifts' share of the long-term investment market in real estate mortgages. Many other types of investors are better able to assume the risks of long-term mortgage holdings than are the thrifts operating in their traditional manner of borrowing short and lending long with so much of their assets in real estate mortgages. In addition to their mortgage banking activities, the trend may also become more pronounced of thrifts diversifying their activities so as to resemble increasingly commercial banks. In effect, it is possible that the thrifts as we have known them may largely disappear. The difficulty with this scenario is finding enough other investors to absorb the bulk of the thrifts tremendous holdings of long-term mortgage interests.

4. The inefficiencies in American land title record keeping systems are explainable but inexcusable. A number of suggestions have merit for eventual improvement, with consequent benefit to land transfer consumers and most of the others who must resort to these records. One relatively simple suggestion is universally to set up tract indexes as the only public indexes to documents recorded pursuant to the recording acts. Some counties already maintain tract indexes, important time-savers in title searching, but this type of index should exist in all counties. Cost of system conversion can be greatly reduced by making the change prospective only, thereby making it unnecessary to re-index old records and gradually reducing the need to rely on the old grantor-grantee indexes.

Another relatively simple proposal is to automate the public records in all larger urban counties, at least prospectively, by computerizing indexes, centralizing as many records as possible, and using low-cost photocopy schemes for duplicating filed documents for examination. The Chicago Title Insurance Company's Cook County, Illinois, plant is a model of what can be done. Within a few years, it may even be financially feasible to store and retrieve recorded documents by computer. Automation of public records not only reduces costs and errors, but if properly organized could make private title plants unnecessary, thereby eliminating one of the most inefficient features of American land title protection, the duplication of public records for some counties in separate private plants.

Inefficiencies in American public land title records are due largely to the expense of making systemic changeovers and the frequent low-level of local government competence in program administration. Local government programs often are underfinanced, poorly managed, and staffed with per-

sonnel poorly qualified and inadequately motivated. There are two suggestions for possible long-term change that should be considered. One is for public land title record keeping in larger urban counties to be contracted out to the title companies that are experienced in creating and maintaining private title plants, thereby in effect merging the public and private systems in one privately operated public system. Even those large counties, for which duplicate private plants do not exist, might find that this contracting-out solution would provide better results for longer-term lower costs. Public access to the public record system would be what it is now, with perhaps a broader schedule of fees for access services.

The other suggestion for long-term consideration is that land title record keeping be made a state rather than local government responsibility and record-keeping be centralized statewide or in large regions within each state. With modern data processing technology and the possibility of geographically scattered computer input and retrieval access, state assumption of this function makes sense. The states tend to be more administratively efficient than the localities. Some economies of scale in larger record keeping operations would be possible and record keeping and data retrieval would become standardized statewide, thus eliminating problems caused title examiners from existing local variations.

A final reform proposal deserves mention at this point and it is Torrens registration, a traditional favorite of academics, a system long-feared and disparaged by the title companies.¹⁷³ This system of government approved titles has much to be said for it. In fact, Torrens registration, or some registration variant of it, is the method of title protection followed in most countries, including most common law countries, although with minor exceptions it has never caught hold in the United States.

At present in this country, there is little or no interest in expanding Torrens or any other form of land title registration. As a movement it is dormant. This may change, however. There are always the foreign examples of good, workable registration systems, and if concern of American consumers over title protection costs escalates, the appeal of a potentially cheaper system providing safer titles could ignite strong demand for substituting registration for the present recording act-private title insurance type of protection now prevailing in the United States. The system would work best if registration was mandatory and administration was at the state rather than local government level.

5. The expansion, integration, and new entrant developments in land title servicing considered in Section II, on balance, generally are desir-

173. On land title registration, see A. AXELROD, C. BERGER & Q. JOHNSTONE, *LAND TRANSFER AND FINANCE, CASES AND MATERIALS* 881-911 (3d ed. 1986), and books and articles cited therein.

able. They are increasing competition among land transfer servicers and should help achieve lower operational costs. They pose, of course, a threat to many established smaller firms unwilling or unable to sell out to the giants and incapable of adapting to change by becoming more innovative and efficient. If these firms lose out because they cannot compete, it is an unfortunate but legitimate consequence of our free market system. A more troubling aspect of the new developments is the extent to which they will benefit consumers through lower prices or improved services. Although generally not directed at improving services, cost reduction and greater profits are common objectives. However, it seems doubtful that consumers are sharing sufficiently, if at all, in cost reduction benefits. Lack of market sophistication by most consumers of land transfer services contributes to the problem. If it can be shown that the new developments are not producing adequate consumer benefits, regulation or regulation enforcement should be tightened as needed. To the extent that national or regional markets are involved, and increasingly land transfer servicing markets are multistate, renewed regulatory emphasis should be at the federal level. State by state efforts to control widespread markets are cumbersome to apply and enforce and tend to enhance market inefficiencies and inequities if meaningful results are attempted. Furthermore, meaningful results often are not intended when responsibility for control over widespread markets is allocated to the states. Advocacy of state responsibility for control often is a cover for advocacy of no effective government control.

V. CONCLUSION

There are many important processes in which law is highly relevant. Land transfer through purchase and sale is one of the most significant. Others, illustrative of the variety of settings in which such processes can develop, include medical malpractice claims, criminal law enforcement against drug traffickers, estate planning and administration, and income taxation. These processes are characterized by routine procedures or systems of action, and lawyers and other specialized groups are commonly involved as service intermediaries in operating therein. Effectiveness of the processes depends in large measure on how well these service specialists function. To understand law in settings in which processes are important, it is essential that the service specialists operating the processes be understood, including what they do, their structure, their relations to one another and to beneficiaries of their services, the controls they are subject to, and any other considerations that are major influences on their role in process implementation.

All of the important law-related processes exhibit deficiencies. Some of these deficiencies are due to shortcomings of the service specialists operating the particular process. The service specialists are not responsible for

other deficiencies yet these can have a tremendous impact on how well the specialists function. Deficiencies in important law-related processes can be difficult to remedy, as they normally are well-entrenched and favor powerful interest groups, and some are inherent in a particular process. Most deficiencies are amenable to being eased or resolved by changes in law or law enforcement, but formidable obstacles ordinarily stand in the way of achieving such change. Needed change may come slowly or not at all.

Not only should more attention be given to understanding the specialized groups that administer law-related processes, but there also should be more focus on process deficiencies, including deficiency identification and resolution and the extent to which service specialists are responsible for process weaknesses. Desirable change, both legal and nonlegal, can have a long incubation period but must start with deficiency recognition and suggestions for corrective action.

Among law-related processes, land transfers and their service specialists are particularly worthy subjects of study. The tremendous transaction volume they handle and the impact that these transactions have on the economy at large and on hundreds of thousands of buyers and sellers each year make the process and those who operate it of major significance. This significance is enhanced by recent developments that are changing how land transfer servicers are structured and how they do business. The land transfer process and its service specialists also exhibit serious deficiencies that merit careful attention in hopes of relieving current problems now and avoiding even more serious problems in the future. In addition, the deficiencies, the trend toward greater integration, and the occasional volatility of the process and its servicers may suggest useful approaches to the study of other law-related processes.