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CONVEYANCING IN THE NATIONAL CAPITAL REGION: LOCAL REFORM WITH NATIONAL IMPLICATIONS

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Our population is mobile, shifting, and accustomed to swift extensions of credit and speedy completion of transactions. Consequently, it comes as a shock to many entering into their first house purchase that cumbersome and lengthy procedures extend the executory period, incur mystifying expenses, and lack consumer rationale.[1] Homilies of the conveyancing bar to the effect that each parcel of land is unique or that every settlement is a time-consuming process will not long stand in the face of consumer unrest.[2] Nor is future reform likely to be thwarted by either the cries of scholars for more fact gathering and study, or the Bar's pleas for consideration of its expertise.[3] If that expertise is premised on an inefficient system, eventually it will become obsolete as the system is overhauled.

But all of these warnings have been given previously, by men who throughly know the subject. Professors Payne,[4] Fiflis,[5] Roberts[6] and others have for some time warned of a "crisis in conveyancing;" but they have not provided readers of their literature with any very precise definition of what it is they fear. Indeed, they clearly have different concerns. Payne decries the lack of lawyer involvement in the convey-

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1. For a recent review of the comparison between real and personal property financing, *see* Whitman, *Transferring North Carolina Real Estate* (pt. 1), 49 N.C.L. REV. 413 (1971).

2. Carberry, *Mortgagors Challenge Demand That Taxes Be Paid Into No-Interest Escrow Accounts*, Wall Street Journal, Oct. 26, 1971, at 40, col. 1; Paulson, *Kickbacks and Fees Raise Home Costs*, National Observer, Oct. 29, 1971, at 8, col. 1; Kessler, *The Settlement Squeeze*, Washington Post, Jan. 9-12, 1972, § A, at 1, col. 1.

3. *Hearings on S. 2775 before the Subcomm. on Housing of the Senate Comm. on Housing, Banking and Currency*, 92d Cong., 2d Sess., pt. 1, at 89, 213 (1972) (testimony of J.C. Payne).

4. Payne, *The Crisis in Conveyancing*, 19 MO. L. REV. 214 (1954).

5. Fiflis, *Land Transfer Improvement*, 38 U. COLO. L. REV. 431 (1967).

6. Roberts, *A Eulogy for the Old Property*, 20 ME. L. REV. 15, 42 (1968).

ancing process;[7] Roberts, the inability of courts to recognize the changing status of real property in our society;[8] and Fiflis, most comprehensively of all, sees the problem as one of an inability of our legal system to respond with institutions and administrative devices suitable to the task of conveyancing improvement.[9]

All of these authors expose pressing problems. The present writer, however, prefers to view the problem as multi-dimensional, encompassing all these expressions of concern. There is a devoted coterie of law professors in this country who doggedly and continuously, but unfortunately without as much fanfare as their work merits, have pursued the trail of conveyancing reform and improvement over the last twenty years.[10] The present author owes much to these writers. The objective herein is to continue their work and to suggest some new methods of approaching old problems.[11]

Indeed, one of the problems with title and conveyancing work is that the process is now so ancient, the system so hoary with dust and age, that reform appears to be a staggering task. Further, in many areas of the country it is a task of immense political difficulty since interests have vested around present inefficiencies. Title insurers have taken confused and disorganized public land records and have reorganized them into working systems for title assurance. The Bar, through firms and cooperative organizations of lawyers for issuing title insurance, have also invested professional time and money into making the present system work. In some western parts of this country, settlement services have become so complex that specialized supervision, provided by escrow agents, is required. Other interests grew because of lending requirements. Appraisers, credit reporting agencies, and surveyors have created whole businesses and livelihoods around the bankers' quest for secure investments. Closing and settlement work grosses 1 1/2 to 2 billion dollars a year.[12] The list of participants in the process could be extended,

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7. Payne, *supra* note 4, at 217, where the author deals at length with a lawyer's title search problem.

8. Roberts, *supra* note 6, at 42.

9. Fiflis, *supra* note 5, at 454, 471.

10. Payne, *Ancillary Costs in the Purchase of Homes*, 35 MO. L. REV. 455 (1970), represents the most comprehensive quest for empirical data in this area.

11. B. BURKE & N. KITTRIE, REPORT TO FEDERAL HOUSING ADMINISTRATION OF DEP'T OF HOUSING AND URBAN DEV. & THE VETERANS ADMINISTRATION, REPORT ON MORTGAGE SETTLEMENT COSTS ch. II (1972), republished in *Hearings on H.R. 13337 Before the Subcomm. on Housing of the House Comm. on Banking & Currency*, 92d Cong., 2d Sess., pt. 2 (1972).

12. Roberts, *supra* note 6, at 44 n.102.

depending on the area of the country under consideration. But nevertheless, one essential point remains: although many personal fortunes have been created since World War II in the development of realty, far more money has been made by those who service the title needs of the actors involved in the development and ownership of land. The real money is not in the thing itself, but in its servicing.

Those who possess these interests, in what was until only recently a low-profile business, together constitute a chain of actors and institutions that guide the purchasers of homes through real-estate transactions. The chain begins with the real estate broker—the first link—and then leads to the lenders, the attorneys, and the builders. The work then passes to appraisers, surveyors, credit checkers, escrow and settlement agencies, who in turn provide information that permits the buyer to finally take possession; that is, if all goes smoothly.

In the past, the vested interest problem has led to several reform efforts. One was the "if you can't fight 'em, join 'em" reform. The Bar in some areas, threatened by the growth of title companies, formed companies of their own.[13] In doing so, they disregarded the adage, "when tempted to fight fire with fire, remember that the fire company uses water." Lawyers were thus put in the position of insurance agents—a position potentially in conflict with their role as counsel for a client.

Another type of reform was aimed at simplification of the present system. A change in the system of assuring titles, through marketable title and curative legislation, is one example. The overall aim was to preserve the role of the lawyer and ameliorate the inefficiency of the system without basically changing it.[14] This tactic has met with fair success, partially because vested interests benefit up to a point.

Still, a third suggestion thought by many to be a preferable scheme was to revitalize and modify old solutions such as the land registration or Torrens systems. Although this is often thought to be a dead issue for political reasons, Professor Fiflis has argued this case well, and there is no need to repeat the arguments contained in his persuasive articles.[15]

Needless to say, all these strategies have failed to affect the conveyancing system in any fundamental way. The need now is to ask why.

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13. Payne, *Title Guaranty Funds: Symptom, Cure or Nostrum*, 46 IND. L.J. 208 (1971).

14. L. SIMES & J. TAYLOR, IMPROVEMENT OF CONVEYANCING BY LEGISLATION: A TREATISE WITH MODEL ACTS (1960); P. BAYSE, CLEARING LAND TITLES (2d ed. 1970).

15. Fiflis, *English Registered Conveyancing: A Study in Effective Land Transfer*, 59 NW. U.L. REV. 468 (1965).

The answer is both complex and simple, because it depends not on the extent of present knowledge but on the assumptions one is prepared to make about the acceptability and feasibility of reform. While it is true that we do not know enough about the context within which reform must proceed, this only means that we do not know *all* the facts. The question remains, do we nevertheless know enough? This article presents the case for an affirmative answer, in the context of one particular metropolitan area.

What follows is a case study of the Washington, D.C. Standard Metropolitan Statistical Area (SMSA). The case law and statutory framework surrounding conveyancing in this area is, of course, unique to it; but many of the problems involved in the process are not. Indeed, they are generalizable to many other areas of the country. Legal technicalities do not affect conveyancing patterns and cost very much; but the reader must, for the time being, take this as a given in the present discussion.

The underlying purpose of the analysis herein is to provide a description of the work involved in conveyancing, the interrelationships that exist between the various personnel, and a survey of some costs. This is a large order for an impressionistic study such as this, and has necessitated that different phases and institutions be emphasized in each of the three jurisdictions discussed.

The Washington, D.C. SMSA is unique in that it comprises a federal-state area. There were obvious alternatives to the present organization: the writer could have presented the material on a center city-suburban basis, or discussed the conveyancing process of all three jurisdictions at once. I have chosen a more traditional method, presenting each jurisdiction separately, in the hope of holding the reader's interest and inviting response from readers in each. In addition to serving the aforementioned function, this method also facilitates the presentation of distinctions between the statutory and legal framework surrounding transactions in each state. The overall intent is not to produce a grand scheme for reform, but to show where and how the existing process might profitably be modified. In the process, individual homebuyers will find out what costs are negotiable, a subject about which the present writer has rendered much free advice recently.

I. The Environment of Conveyancing

In discussing the conveyancing environment of the Washington, D.C. SMSA, one should note several developmental characteristics. It is the fourth largest metropolis in the Northeast Corridor; it has a larger

population than Baltimore, but smaller than Boston, New York City, and Philadelphia. Since World War II, however, the Washington area has been the fastest growing SMSA in the Northeast.[16]

The rapid growth has been achieved by building at increasingly lower population densities. This phenomenon indicates a long-term predominance of single family construction. Within the SMSA, the overall density is two families per acre. Since 1961, this area has, along with many other regions, experienced a sharp rise in newer forms of ownership such as condominium units, which at the time of closing, require all of the services of a single family detached house.

With all this growth much land is by-passed and left vacant as a reserve for later development. Of the fifty-one tracts added to the category of urbanized land in half-urbanized, fast-growing Fairfax County, Virginia, during the years 1960-65, twenty-three of the tracts had as much as two-thirds of their acreage vacant and unused. Substantial amounts of land then remain for future development. Much of this land will be developed speculatively—that is, without the builder first obtaining a buyer for his housing.

The buyer is likely to be a head of household, between twenty-five and forty-five years old, and have children under fifteen years of age. In the Washington area, new house prices average $37,000. Closing costs can average between 1-3% of that price, often requiring supplemental loans to meet this additional expense, and total cash outlays required at settlement average 10-12%.[17] As a consequence, the homebuyer, with family obligations and commitments to expensive housing, discovers that closing the transaction becomes a real problem.

The mechanics of settlement procedures vary in the District, Maryland, and Northern Virginia. The variations are most easily discernible by examining the roles of the broker, title insurer, attorney, lender and escrow company in each area. Consequently, this methodology has been adopted.

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16. M. CLAWSON, SUBURBAN LAND USE CONVERSION 224 (1971).

17. Closing costs are all items paid at the closing, not including pre-paid items for escrowing taxes, insurance premiums, and the payment of the brokerage fee. Settlement costs include closing costs, plus pre-paid items and the broker's commission. REPORT OF THE FEDERAL HOUSING ADMINISTRATION OF DEP'T OF HOUSING AND URBAN DEV. & THE VETERANS ADMINISTRATION, REPORT ON MORTGAGE SETTLEMENT COSTS appendix E, table II (1972) [hereinafter cited as HUD-VA REPORT], republished in *Hearings on H.R. 13337 Before the Subcomm. on Housing of the House Comm. on Banking & Currency*, 92d Cong., 2d Sess., pt. 2, at 735 (1972); REPORT OF THE FEDERAL HOUSING ADMINISTRATION OF DEP'T OF HOUSING AND URBAN DEV. & THE VETERANS ADMINISTRATION, PRELIMINARY REPORT ON MORTGAGE SETTLEMENT COSTS appendix B, table IV (1971) [hereinafter cited as PRELIMINARY REPORT].

A. *The District of Columbia*

The federal enclave encompasses, for title search purposes (but virtually no other), the federal city and Washington County.[18] Most of the land has been developed since the 1930's and 1940's, but redevelopment has uncovered much close-in vacant land; and as the District redevelops vacant low-income areas, still more will be found.[19] In 1970, the District had a population of 750,000—down 1% from 1960.[20] The median value of housing has been rising rapidly, particularly since 1960.[21]

Brokers: In the District of Columbia, it is the broker who organizes the closing and arranges for financing.[22] He will also recommend a title insurance company if the buyer has no preferences. Most independent brokers use only one company. The only document that the broker prepares is the contract of sale. Since there is no pertinent case law on unauthorized practice of law in the District, he could perhaps legally do more.[23] As a matter of practicality, however, brokers feel well advised

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18. D.C. CODE tit. 1, §§ 101, 106, 107, 625 (1967); *id.* tit. 49, § 302 (1967).

19. M. CLAWSON, *supra* note 16, at 306.

20. N.Y. TIMES ENCYCLOPEDIA ALMANAC 9 (Supp. 1971).

21. The SMSA median new house price was $35,500 in January, 1972. Bredemeir, *Housing Costs in Area Jump by Over $1000*, Washington Post, April 3, 1972, § C, at 1, col. 6. Since 1950, the District's share of new housing starts in the D.C. SMSA has declined drastically, from about 2,000 per year to less than 100. Overall, however, the metropolitan area is still one of the strongest single family markets in the country, and in the decade 1960-70 produced an average of 14,000 units per year. Sumichrast, *New Housing May Set Mark*, Washington Post, July 31, 1971, § D, at 1, col. 1.

22. Much of the following case study on the District of Columbia is taken from B. BURKE & N. KITTRIE, *supra* note 11, at III-B-34. As to brokers, *see* Stambler & Stein, *The Real Estate Broker—Schizophrenia or Conflict of Interests*, 28 D.C. BUS. ASS'N J. 16, 19 (1961).

23. The typical contract will protect the brokerage commission at the same time that it binds the parties. *See, e.g.*, Sales Contract—District of Columbia (Lerner Law Book Co., Washington, D.C. Form 3063). This form calls on the buyer to produce a title "good of record and in fact." The seller undertakes to cure promptly all defects in title, pay for the title examination if title should prove defective, and render a special warranty deed to the buyer at closing. The closing may take place at either the title company or the broker's office, as designated in the contract. *Id.* A broker may negotiate for financing by statute. D.C. CODE tit. 45, § 1402 (1967).

No District of Columbia cases hold that the broker is practicing law when doing this, although many attorneys interviewed seemed to assume such matters had been judicially determined. The courts of the District seem to have adopted a rule that where preparation of papers is "primary" (as opposed to "incidental") to its business, preparation will not constitute the unauthorized practice of law. *See* Merrick v. American Security & Trust Co., 107 F.2d 271 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 625 (1940) (involving a trust company). *See* note 55 *infra* (Virginia unauthorized practice laws); text accompanying note 39 *infra* (Maryland unauthorized practice law).

to limit themselves to preparation of the contract.[24] The broker may, however, review the documents before closing, particularly if there is no attorney involved. Few transactions today do involve attorneys except those employed by the title companies.[25]

The preeminence of the broker is perhaps a function of the presence in the District of large brokerage houses which often have "Exclusive Right to Sell Contracts" signed by sellers.[26] Reportedly, many of these firms also maintain an unsold inventory of houses which they have accepted in trade from owners moving into new premises.

Currently brokers are under a permanent restraining order prohibiting them from divulging their fees to one another. This was obtained by the Antitrust Division of the Department of Justice.[27] Nonetheless, the standard fee is 6% paid by the seller and only rarely negotiated. The effect of the decree has been to freeze past collusion into silence. Incredibly, the local Board of Realtors has expressed reluctance to collect information from their members for fear of charges of anti-competitive acts. Consequently, little is known about the practical side of the brokerage business.

Lawyers: Attorneys are seldom involved in the residential purchase and sale today. Where they are, their practices are highly specialized. If retained, their fees for preparing a deed are generally $20, and $25 for a deed of trust, the latter being the predominant form of security instrument in the District since the early 1960's. The deed of trust has judicial sanction for use in the District's housing market and is the unquestioned form of security agreement today.[28] Buyers do not get a choice as to

24. This is done as a matter of custom and specialization of labor, however, for if the broker does not attend to the specifics of the closing, it is put in the hands of another layman, either in the title company or broker's office. D.C. CODE tit. 45, § 1401 (1967).

25. Some District lawyers still maintain themselves on an approved list of attorneys found capable by title companies of performing title searches. *See* Lawyers' Title Ins. Corp. v. Edmar Constr. Co., Civil Action No. G.S. 22904-67 (Super. Ct. D.C., filed July 20, 1971), wherein a title insurance company was held liable for funds required to procure a deed of release, where an attorney on its approved list failed to do so.

26. There is also a Multiple Listing Service, run by brokers in the District which has spurred the use of Exclusive Right to Sell contracts, signed by a member broker on behalf of all other participating brokers.

27. B. BURKE & N. KITTRIE, *supra* note 11, at II-B-24.

28. D.C. CODE tit. 45, § 601 (1967). Litigation settled the matter under the D.C. Code. Young v. Ridley, 309 F. Supp. 1308 (D.D.C. 1970). Corporate officers of the lender may, in addition, act as trustee. Admiral Co. v. Thomas, 164 F. Supp. 569 (D.D.C. 1958), *rev'd on other grounds*, 271 F.2d 849 (D.C. Cir. 1959). The borrower may, however, have lost important rights in this transaction. *See* Deed of Trust (Lerner Law Book Co., Washington, D.C. Forms 2022, 5002).

whether they prefer to finance through a mortgage or deed of trust. Attorneys work to prepare for a settlement at an hourly rate. This means that for all practical purposes, most of them have priced themselves out of the conveyancing industry.

Where the attorney conducts the title search or hires an abstractor to do it for him, he normally acts as an agent for a national title insurance company.[29] In this capacity, he receives a commission for the insurance policy sold. This commission is roughly 35% of the insurance premium. Yet the number of attorneys doing this type of work is very small in comparison to the total number of attorneys licensed in the District.

Title Insurers: Title insurance is the only method of title assurance in the District today. All institutional lenders require it. Moreover, abstracts of title have been replaced by title insurance policies as comprehensive title evidence. The inception of title insurance is traced by many to an inconclusive 1957 reform of the dower law, raising the possibility that unrecognized or fraudulent dower claims might cloud many titles.[30] A decade of uncertainty, created by legislative action, necessitated the change from abstracting to title insurance.

There are five large insurance companies servicing the bulk of realty transfers in the District. In addition, there are four smaller firms. Generally, such companies perform the title search, review the abstract, underwrite the transaction, and hold the closing.[31] The five large companies all have their own title plants. Four of these have records dating back to 1792, while the fifth has records from around 1912.[32] This does not mean that such plants are duplicates of the public records. Rather, they contain a digest of each document filed prior to 1968, arranged and bound chronologically, and indexed by lot and square. From such records, a chain of title can be run. If, however, the exact wording of an instrument is required, then the searcher must go to the courthouse.

In 1968, "hard copies" were first taken off, using a joint procedure

29. This term is used to distinguish national title insurance companies from insurers with local title plants. A national company maintains no local plant, but relies on local attorneys to search a title, and writes a policy from its national office based on his findings.

30. *See* D.C. CODE tit. 19, § 102 (1967) (Revision Notes).

31. Although many of these companies have names inherited from local companies, most are subsidiaries of nation-wide insurers.

32. The District of Columbia has no marketable title act, and indeed, nothing in the way of curative legislation. *But see* D.C. CODE tit. 45, §§ 802, 817 (1967) (abolition in 1901 of estates tail and co-parcenary estates). Statutes of limitations must, therefore, suffice to help limit durations of interests.

serving the five large companies. One is responsible for take-offs from the recorder's office while another digests the courthouse records. This latter take-off is a digest of the case put on index cards and filed alphabetically. When, however, a judgment includes a direct lien on a parcel, it is indexed by lot and square. All five companies receive these copies and digests and share the expense of this procedure. The take-off is in the form of a photocopy of the entire instrument which is made in the recorder's office. Filings of deeds, deeds of trust, and deeds of release are made at the rate of 125 daily. Upon receipt of these copies, four of the five users file them in folders by lot number. The fifth files them by date, and indexes them by lot and square.

Once a request for service is logged, the title company will first order a report on the taxes due from the appropriate governmental agency. As this is done, two folders are generally prepared for each case: one for its title examiners, and another for its escrow department. After receipt of the title folder, a clerk will check to see if previously the company has issued insurance on that parcel. If so, then the search period will commence from the date of that last issuance. If not, a "chain clerk" will compile a chain of title, *i.e.*, a list of all past owners and interest holders of that parcel. This chain of names will be taken from indices in the title plant. If the digested version suffices, then the title plant files can be used. If a document is dated after 1968, then hard copies are available in the title plant. A third employee will search for names of owners in an alphabetical judgment index at the plant, and refer matters found to employees at the courthouse as it becomes appropriate.[33]

The period searched varies from company to company. Two of the five large title insurers claim to search back to 1792; two more say sixty years; the fifth boasts an eighty year period. The work requires the cooperation of personnel stationed in the courthouse and the title plant—so no one person completely "searches" a title. The jobs are specialized by tasks which involve "chaining," running down transfer records, and running name judgments or searches on all parties named in the chain. All are basically clerical in nature.

Companies admit that handling the operation in this way induces employee tedium but claim that lack of trained personnel makes it

33. The five large title insurers have discussed the possibility of combining their title plants, but as yet no definitive action has been taken. Most managers argue that the plant costs cause their District of Columbia business to operate in the red when taken alone, but that profit margins from their suburban business make up for this loss and puts the companies in the black.

necessary. They maintain that few workers can understand the whole of a title search and admit that the possibility for error rises under their present mode of operation. As a result, at least two companies are trying to change their search operations.

Following the search, the materials are assembled and then referred to an attorney working for the title insurer who writes a "title opinion." This is a letter or memorandum both stating the extent to which the company will extend title insurance on the property and listing any exceptions to the coverage which the company may want to insert in the policy. This opinion becomes the basis of an interim title binder which is a commitment to extend indemnity to the customer. Once the customer of the title company is in receipt of the interim title binder, he will know (1) the legal description of the property usable on the loan documents; (2) imperfections in title that must be cured before closing; and (3) any exceptions or clouds on the fee.

Fees for the services described above do not vary between the five large companies. The charge is $75.00 for the search, plus $2.50 per thousand dollars of sale price. Title insurance (indemnity) is extra: $2.50 per thousand of mortgage insurance ($3.50 for owners' policies). In addition, there is a $2.50 fee for a tax certificate and $5.00 for an interim title binder. If simultaneous issuance is made of an owner's and mortgagee's policies, the rate for both is based upon the cost of the owner's policy plus an additional fee of $7.50-$10.00.[34]

Lenders: The majority of residential purchase loans in the District are extended by Savings and Loan Associations.[35] Commercial banks

34. The majority of homebuyers (estimates range between 80-95%) in the District do not procure owners' insurance, but many companies will issue "record policies," certifying that their search has been competent and workmanlike. They assume basic common law liability as abstractors.

Rate schedules are complicated documents for the average homebuyer, and the rates given may always be increased for more than normally difficult searches and certifications. On new construction, for instance, mechanic's liens constitute a source of many claims on title policies. Companies in the District of Columbia handle this problem differently. For some, mechanic's liens constitute a "Schedule B" exemption to the policy coverage; however, one company will not exempt the lien if found, but will not disburse funds in escrow to the seller in the amount of the lien until a release is filed. The Insurance Code [D.C. CODE tit. 35, § 1302 (1967)] exempts title insurance from rate setting procedures applicable to other types of insurance.

35. Private mortgage bankers extend a substantial portion of the credit for housing, and also act as brokers for savings and loan associations in the national secondary mortgage market. *In re* Parkwood, Inc., 461 F.2d 158 (D.C. Cir. 1971), involving the District of Columbia Loan Shark Act [D.C. CODE tit. 26, § 601 (1967)], revealed the extend of this involvement. The case held up millions of dollars of mortgage sales from the District of Columbia area into the secondary market.

rarely extend these loans except to established customers, and even then at high (25%) down payment rates. All Savings and Loans charge a 1% (of the loan amount) application and processing fee, paid by the borrower-buyer. They also charge the borrower for preparing loan documents ($10-$20), an appraisal fee ($20-$50), and a credit report ($6).

Escrow Companies: Implicit in this description of the title company's operations is the expectation that the escrow department of the insurer will hold the closing. Therefore, another copy of the interim binder is sent to its escrow department. In addition, several independent settlement or escrow companies in D.C. may hold the settlement, particularly in poor areas of the District. Fees for escrowing the sale include, in the case of one title company $16 for the first thousand of the sale price, $1 for each additional thousand up to $25,000, and $.50 per $1000 thereafter. Preparation of forms will cost $15-$25 (if the deed and deed of trust are indeed prepared by the title company) with "noting fees" of $3-$4 completing this list.

Closings held in the offices of the title company will not finalize the transaction since the papers are subsequently referred to the lender for review. Only after that process is complete does the sale become final.[36]

B. The Maryland Suburbs

Closing a house purchase in the D.C. SMSA is most expensive in the suburban counties of Maryland. This is in part due to the high transfer taxes levied by the state and county. The cost is not solely due to this factor, however, since compared to the Virginia costs, the expenses for private services are also greater. The present discussion is based on the conveyancing process in Montgomery and Prince Georges Counties, Maryland.

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36. The title or settlement company will, at the closing, also collect the recordation fees. The recordation tax in the District of Columbia is one-half of one percent of the consideration for the deed. There is no tax on the deed of trust. When no consideration or only nominal consideration is recited, the tax is then levied on the fair market value of the property. Grantor and grantee are jointly and severally liable for the tax. D.C. CODE tit. 45, §§ 723, 724 (Supp. I 1968).

The recordation tax or similarly imposed tax varies according to jurisdiction. *See, e.g.*, FLA. STAT. ANN. § 201.02 (1969) (tax of thirty cents on every one hundred dollars consideration given); REV. CODE WASH. ANN. tit. 82, § 20.010 (1962) (tax of fity cents for each five hundred dollars of value of property conveyed); ANN. LAWS OF MASS. ch. 64D, § 1 (1971) (tax of one dollar for each five hundred dollars of consideration); NEV. REV. STAT. tit. 32, § 375.020 (1967) (tax rate of fifty-five cents for each five hundred dollars of value—either amount of consideration or in the case of a gift, fair market value).

Brokers: Brokers in these counties commonly prepare the contract of sale, receive a 6% commission for their services, and, as elsewhere, refer the buyer to a title company, a lender and a lawyer whenever appropriate.[37] Brokers in the counties have been restricted in their businesses to the unsold inventory of existing housing stock. The majority of the developments in Prince Georges County, for example, have been handled by large developers with their own salesmen. Consequently, in the face of a wave of urbanization and large tract development, brokers have sometimes been reduced to the role of appraisers, forced to earn their living from a deteriorating supply of housing. The efforts of brokers to do just this have churned the market, and resulted in charges of blockbusting which is now prohibited by state law.[38]

Attorneys: Lawyers dominate the conveyancing process in suburban Maryland. A state law requires that "any written instrument affecting title to real estate" be prepared by an attorney licensed to practice law in Maryland.[39] Whether sales contracts, deeds and security intruments so "affect title" has not been judicially determined. But brokers do prepare contracts and title companies do prepare deeds and security instruments (the latter employing and using Maryland attorneys).[40] The conveyancing attorney's business comes from both lenders[41] and builders. Five firms dominate conveyancing in Prince Georges County; some of these firms also operate in Montgomery County where the pattern reflects more competition. Prince Georges' firms write title insurance binders, required by the two largest lenders in the county, and issue policies of one title company which operates from a home office in the

37. Interview with attorney, in Rockville, Maryland, March 24, 1972; interview with attorney, in Silver Spring, Maryland, March 24, 1972; interview with executive of title insurance company, in Arlington, Va., March 29, 1972; interview with executive of title insurance company, in Washington, D.C., Nov. 8, 1972; interview with attorney, in Washington, D.C., Nov. 15, 1972. *See generally* COMMITTEE ON HOME PURCHASE COSTS (1972).

38. ANN. CODE OF MD. 1957 art. 56, § 230A (1972). *See generally* ANN. CODE OF MD. 1957 art. 56, §§ 212—231 (Supp. 1972), for regulations governing realty brokerage.

39. ANN. CODE OF MD. 1957 art. 10, § 1 (1972). *See also* note 23 *supra* (District of Columbia); note 55 *infra* (Virginia).

40. Early in 1972, a Montgomery County attorney filed suit charging that since 1969 one Maryland savings bank has insisted upon settlement with one of its two attorneys.

41. J. Catterton, Closing Costs in the Metropolitan Washington Area, April, 1972 (unpublished). One title company was sued for the unauthorized practice of law in 1965 while conducting its home office business in that county. The Montgomery County Circuit Court ruled in favor of the defendant title company, but the decree was vacated as moot when the company was dissolved; actually, it changed its name and relocated in the District of Columbia.

District of Columbia. This company alone has over 300 agents in the Maryland suburbs.

Buyers are increasingly referred to title attorneys by large builders, for even more than in the Virginia suburbs of the metropolis, housing starts are accounted for by large, well-capitalized builders. This, combined with the relatively small geographic area to which independent realtors confine their activity, accounts in part for the fact that lawyers dominate the conveyancing process here.

Attorney's fees are calculated differently in these suburban counties. In Prince Georges County, attorneys charge a $150 minimum flat fee, plus the recommended .5% of the loan price. The $150 is just for the title search and the conduct of the settlement.[42] In Montgomery County, the fee is $100 for the first $1,000 of the sales price, and $2.50 per $1,000 thereafter.[43] On the average, for a $40,000 house purchase, this title examination fee amounts to $198. This figure does not include costs incurred for insurance premiums, which would add another $165, and the preparation of documents, which costs $65 for a deed, deed of trust, and truth in lending statement. In addition, it does not include a settlement fee of $40-$50.[44] Some attorneys charge $15 for a deed with a block and lot description, and $25 for one with a metes and bounds description.[45]

Lenders: The lender's charges will vary with the price of the home since a loan application fee of 1% is charged. Other charges incurred with mortgage applications include: (1) an appraisal—a $30 to $90 range, averaging $35, unless the developer is known in the bank, at which time the bank may forego this altogether; (2) a credit report, ranging from $10 to $15; (3) a house location survey, costing $55, with a formal survey running up to $200 (Princes Georges and Montgomery Counties have an elected county surveyor whose duty it is to prepare recordable surveys; but he is a hard man to find in the county courthouse); and (4) a termite inspection, usually $15.[46]

A deed of trust is used as a matter of custom in Maryland. Its form does not stem from statutory construction as is the case in Virginia.[47]

42. PRINCE GEORGES COUNTY BAR ASS'N, MINIMUM FEE SCHEDULE (undated).

43. MONTGOMERY CO. BAR ASS'N, MINIMUM FEE SCHEDULE 4 (undated).

44. MONTGOMERY COUNTY BD. OF REALTORS, FACTS YOU SHOULD KNOW ABOUT THE COST OF SETTLEMENTS (1972).

45. J. Catterton, *supra* note 41.

46. MONTGOMERY COUNTY BD. OF REALTORS, *supra* note 44. In each case, ranges of costs are taken from interview memoranda, on file with author.

47. ANN. CODE OF MD. 1957 art. 49 §§ 1—11 (1968) (usury law), is discussed in B. F. Saul Co. v. West End Park N., Inc., 250 Md. 707, 246 A.2d 591 (1968). Also,

A sixty year title search is standard, and a few curative statutes exist to aid the title attorney.[48] In addition, considerable funds must be escrowed. Lenders demand one-sixth of the upcoming state, county and local taxes in escrow, plus a $5 insurance and handling fee. Prepayment of a year's premium and two months prepayment on the following year's hazard insurance ($112 on a $40,000 home) is also required. The seller must, by statute, escrow such funds in a separate account.[49] Few firms (the author knows of only one) even attempt to explain all the services rendered and the charges made to buyers.

Title insurance is required in all of the areas in the Maryland suburbs, and although there are local abstracting companies, most of the policies are written by one company in Prince Georges County. That company assumes primary liability even though relying on the binder written by a local attorney.[50] The companies always have the option of receiving subrogation rights and suing the attorney, but this seldom happens because of the business policy which all companies have of encouraging attorneys to refer them business.

As in the other jurisdictions involved in this study, title insurance is not strictly regulated in Maryland;[51] but some unusual statutes are worth noting. First, the buyer must be informed in this state of his privilege of obtaining owners title insurance at an additional cost.[52] The buyer also has the right to review a sample form of the policy. Several regulatory bills failed in the Maryland legislature over the last two years.[53] The most important of these attempted to prohibit attorneys

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specially excluded from the usury law are attorneys' services in connection with the loan closing, insurance premiums, and property taxes. ANN. CODE OF MD. 1957 art. 49, § 1 (1972).

48. ANN. CODE OF MD. 1957 art. 17, § 63 (1970).

49. *But see* ANN. CODE OF MD. 1957 art. 21, §§ 96—99 (1966) (validating certain acknowledgements); *id.* art. 66, §§ 24, 30 (1972) (mortgage validation); *id.* art. 22, §§ 143—46 (1966) (limiting rights of entry and possibilities of reverter to a thirty year life).

50. Lawyers' Title Ins. Corp. v. Edmar Constr. Co., Civil Action No. G.S. 22904-67 (Super. Ct. D.C., filed July 20, 1971), confirms this to be the practice. *See* note 25 *supra.*

51. ANN. CODE OF MD. 1957 art. 48A, § 486 (1972): "Premiums for title insurance shall be clearly set out and subject to the approval of the Commissioner." The regulation of title insurance and the extent thereof varies from state to state. *See, e.g.,* ARIZ. REV. STAT. ANN. §§ 20-1561 to -1592 (Supp. 1972); CAL. INS. CODE §§ 12340—12417 (West 1972); CONN. GEN. STAT. ANN. § 38-29 (1969); ILL. ANN. STAT. ch. 73, §§ 478—487 (Smith-Hurd 1965); TEX. INS. CODE art. 9.01—.27 (Vernon Supp. 1972).

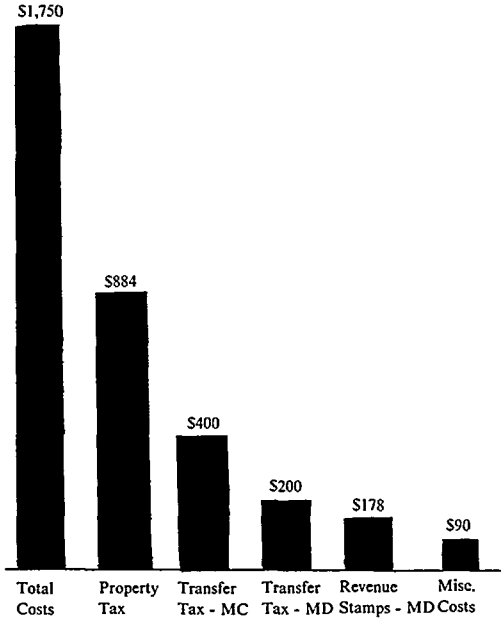
52. ANN. CODE OF MD. 1957 art. 48A, § 486-1(a) (1972).

53. Md. House of Delegates, Bill Nos. 612, 613, 740 (1972).

from participating in title insurance agency agreements by making such arrangements illegal.

Recording: The high level of Maryland state and county taxes, and recording fees is indicated by the following chart:[54]

SETTLEMENT COSTS DUE TO GOVERNMENT TAXES ON A $40,000 HOME PURCHASE, MONTGOMERY COUNTY, MARYLAND:



GOVERNMENT TAXES

$ 176 — Maryland State Revenue Stamps
200 — Maryland Transfer Tax — ½ of 1%
400 — Montgomery County Transfer Tax — 1%
884 — Montgomery County Property Tax (13 months)
90 — Miscellaneous Government Costs
$64 — WSSC Front Foot Benefit Charge
$26 — Recording Fees and Tax Certificate

$1750 — Settlement Costs Due to Taxes

C. Northern Virginia

The following discussion is generally applicable to the counties of Arlington, Fairfax, Loudoun, and the City of Alexandria. Patterns differ little between these jurisdictions, and individual attorneys and others may operate in several of them simultaneously.

54. *See also* ANN. CODE OF MD. 1957 art. 21, § 109 (1966).

Brokers: The Virginia Supreme Court has empowered real estate brokers in that state to prepare standardized contracts of sale for the parties.[55] The most commonly used form in the Northern Virginia counties contains printed authorization for the broker to "order down" the title—that is, the broker may, in his own discretion, receive the last prior abstract or title insurance policy from the seller and give it to an attorney of his choice for up-dating.[56] Standardized contracts of sale for realty most commonly provide that if, due to the fault of the buyer, a default occurs during the executory period, the deposit shall be split evenly between the broker and the seller.[57]

Many law firms perform initial settlement or title work at a nominal fee or even gratis for brokers in order to obtain later settlement fees from the broker's continuing referrals. Local lawyers report that this practice is prevalent where the broker takes a home in trade for another, and becomes the owner of the premises until he finds a buyer.[58] In this

55. Commonwealth of Virginia & The Virginia State Bar Ass'n v. Jones & Robbins, Inc., 186 Va. 30, 41 S.E.2d 720 (1947), *noted in* 5 WASH. & LEE L. REV. 294 (1948); according to the same opinion, brokers may not prepare "complex" contracts, deeds of trust, or deeds. *See generally* Spies, *A Critique of Conveyancing*, 38 VA. L. REV. 245, 247—48, 253, 257 (1952), on Virginia conveyancing practice. For the legality of such a practice in other jurisdictions, *see, e.g.*, N.J. STAT. ANN. tit. 2A, § 170-81 (1971) (brokers are authorized to prepare contracts of sale for the parties); TENN. CODE ANN. tit. 62, § 1325 (1955) (brokers are empowered to so act); MINN. STAT. ANN. § 481.02 (1965) (a fee may not be charged by a broker for such work). *See also* Payne, *Title Insurance and the Unauthorized Practice of Law Controversy*, 53 MINN. L. REV. 423 (1969); Note, *Unauthorized Practice of Law by Real Estate Brokers in New Jersey: A Call for Compromise*, 2 RUTGERS CAMDEN L.J. 322 (1970); Note, *Standard for Determining Unauthorized Practices of Law by Real Estate Brokers in Ohio*, 40 U. CIN. L. REV. 319 (1971); Comment, *Unauthorized Practice of Law in Conveyancing: A Modest Proposal*, 22 AM. U.L. REV. 409 (1973). For unauthorized practice in the District of Columbia, *see* note 23 *supra*; for Maryland law on the subject, *see* note 39 *supra* and accompanying text.

56. *See, e.g.*, Real Estate Purchase Contract (Virginia Ass'n of Realtors Form VAR-600 Rev), which is drafted in the light of VIRGINIA STATE BAR, OPINIONS, NO. 111 (1962), which states the prevailing practice, and seemingly, ten years after its issuance, provides no cure. N. Clifton, Memorandum to Members of Va. State Bar, March, 1972 (unpublished); up-dates and cross-references this opinion.

57. Real Estate Purchase Contract, *supra* note 56, provides that the "defaulting party" pay the whole of the broker's fee.

58. The regulations of the Virginia Real Estate Commission would permit this. Enacted under CODE OF VA. 1950, § 54-730 (1972), Virginia Real Estate Comm'n, Rules and Regulations (1969), contains a prescription on broker advertising and a proviso

> [t]hat a broker, if he is an owner of an interest in the property which he is advertising, has all the rights of the non-broker owner.

Id. § II, at 10.

situation, one might argue that the broker, who has previously become a client of the lawyer, may, as a party to the later sale, refer his buyer to his settlement attorney for the closing. It is not known whether this practice is, in fact, widespread.

In other situations, little in the way of previously existing attorney-client relationship exists except that the name of the broker and his commission may be mentioned in the contract. For example, a recent Bar Association report on settlement practices in Northern Virginia states that many real estate brokers select from "one to five" law firms.[59] These firms handle most of the settlements whose executory periods commence in the course of the broker's business. Further interviews indicate frequent regroupings take place among the lawyers who handle broker referrals. In addition, brokers are more likely to refer business to the smaller local law offices in these counties. The larger firms, with regional practices, are more apt to deal directly with lenders as clients.[60] Arguments advanced by brokers for such exclusive arrangements are that they want to use nearby attorneys so that their salesmen can attend the closing, and they need control over the competence of the attorney for business reasons.[61] The difficulty with such arrangements is that there may not be any pre-existing attorney-client relationship between the settlement lawyer and either the buyer or the seller. Consequently, neither party chooses the attorney.[62]

Brokers in the counties seem accustomed to "work for" the buyer in two ways: first, they select the closing attorney; and second, they search for a loan for the buyer.[63] This they describe as a hand-holding function, which must be performed if the deal is to close with reasonable speed. In slightly more than half of the sales, the broker will only make a referral to the lender. Subsequently, the lender will designate a lawyer

59. VIRGINIA STATE BAR ASS'N, REPORT OF THE NORTHERN VIRGINIA SUBCOMM. ON REAL ESTATE PRACTICES 3 (1971) [hereinafter cited as WOODWARD REPORT].

60. Lawyers for such firms indicate that this makes title work more difficult, because title search expenses rise more steeply when working for lenders. The reason is that lenders are more likely to receive business from a widely dispersed area, whereas builders as clients, permit a firm to work from a narrower base of abstracts. Only the firms with the most complete abstract files can service the needs of lenders.

61. *Hearings before the Temporary Housing Settlement Review Council of Fairfax County, Virginia* (April 15, 1972) (unpublished) [hereinafter cited as *Temporary Housing Hearings*].

62. Real Estate Purchase Contract, *supra* note 56, is silent on this matter of who selects the settlement attorney. Consequently, current practice continues unabated.

63. Legally, of course, the broker is the agent of the seller. *See* Note, *Virginia Brokerage Contracts*, 43 VA. L. REV. 775 (1957).

for closing the loan. In most cases this is tantamount to a designation of the title closing lawyer. A few lenders will give the broker a commission for referring business. However, not many do this. Use of the lender's attorney for all purposes occurs for economic reasons—if the buyer selects his own attorney, he will pay two legal fees, the lender's as well as his own lawyer's.[64]

Where the real estate is sold by a salesman working for a builder or developer, the developer will often specify the closing attorney to be used. Recently, the practice of some has been to allow the buyer to choose among a list of three or so attorneys. Currently, however, the majority of developers send their buyers to the lawyers who have already performed title work for the developer.[65] In Northern Virginia, the residential brokerage commission is 6% and is paid by the seller. It is rarely negotiated.[66]

Lenders: When a broker approaches the lender, he must usually bring a signed contract of sale with him. Lenders require this to prevent recriminations among all parties at a later date.

The Virginia Code establishes an 8% usury ceiling on residential loans in the state, but exempts FHA and VA loans and other fees spelled out on the deed of trust form.[67] The Code also provides a statutory form of deed of trust and note, and provides for its enforceability.[68] Master recordings of trust deeds are premissible, and widely used.[69] The lender may make numerous charges for ancillary duties. The statute provides that charges for title examination, title insurance, appraisals, credit reports, surveying, recording fees, taxes, insurance, and attorney's fees are "reasonable and necessary charges."[70] Thus, the Code of this state adopts the common rule for allowing a lender to pass on to the buyer "reasonable" charges for expenses incurred in the processing of the loan.[71]

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64. The broker has a continuing duty to provide both parties with a "complete, detailed closing statement" "within a reasonable time" after the closing. Virginia Real Estate Comm'n, Rules and Regulations, *supra* note 58, § II(5) at 17. There is no duty on the broker to warn the parties of the monies needed in order to close.

65. WOODWARD REPORT, *supra* note 59, at 2, 5.

66. Real Estate Purchase Contract, *supra* note 56, contains a blank, where the rating is to be written in.

67. CODE OF VA. 1950, § 6.1-319 (Supp. 1972).

68. *Id.* § 55-58 (1969).

69. *Id.* § 17-83.2 (1960).

70. *Id.* § 6.1-320 (Supp. 1972).

71. *See also* B. F. Saul Co. v. West End Park N., 250 Md. 707, 717, 246 A.2d 591, 602 (1968); Vee Bee Serv. Co. v. Household Fin. Co., 51 N.Y.S.2d 590 (Sup. Ct. 1944), *aff'd*, 269 App. Div. 772, 55 N.Y.S.2d 570 (1945).

As previously noted, some lenders require that their closings be held in a particular law office. Others merely require that their attorney review the documents and the transaction generally for a fee which is paid by the borrower. Where the first pattern holds true, there is usually a link between the board of directors of the lender and the law firm.[72]

Closing fees charged by the lenders in the Northern Virginia counties, and generally collected by the settlement attorney involved in the transaction, are as follows: (1) a 1% loan application fee; (2) a $35 appraisal fee; and (3) a credit report fee of $10. Also paid through the attorney at closing are funds escrowed for payment of local taxes and hazard insurance. Fire insurance premiums are sometimes escrowed at closing, and sometimes paid in a lump sum, but always through the attorney. Additionally, a "loan commission" of 1% of the buyer's loan amount may be charged to the seller.[73]

Title Insurers: There is a great deal of interest in the title industry with regard to the establishment of title plants in the Northern Virginia counties; as yet, no action has been taken.[74] Industry spokesmen say that the opening of plants is not far away; but resistance by the local Bar is formidable.[75]

Virginia is the home state of Lawyer's Title Insurance Corporation of Richmond, which is the largest title insurer in the country. Insurers of this type must, by law, confine their insuring functions to title risks,[76] and further, may not place more than 50% of their corporate assets on any single risk.[77] Several sections of the state unfair trade practices law apply to them,[78] but until 1972, insurers were exempted from the rate-setting provisions of the state insurance code.[79] The effect of the repeal of this exemption is not yet ascertainable.

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72. WOODWARD REPORT, *supra* note 59, at 4, 8.

73. *Temporary Housing Hearings, supra* note 61.

74. Most of the industry representatives indicated that many of the northern counties had reached a point where the volume of transfers warranted the creation of title plants.

75. Under Virginia Law, the Virginia State Bar would clearly have standing in this matter. Button v. Day, 204 Va. 547, 132 S.E.2d 292, 300 (1963). Moreover, on the merits, the legal basis for this resistance is slight at this time. An opinion of the Circuit Court of Arlington County, in the 1940's, enjoined a subsidiary of Lawyers' Title of Richmond from practicing law as a corporation while using attorneys to certify titles. Consequently, there is no holding that abstracting titles constitutes the practice of law.

76. CODE OF VA. 1950 § 38.1-25 (1970).

77. *Id.* §§ 38.1-32, 1-727.

78. *Id.* §§ 38.1-52(8), (9), define unfair trade practices applied to realty. It prohibits rebates on insurance procured from designated by lender or vendor.

79. *Id.* § 38.1-221, *repealed*, ch. 836, [1972] Va. Acts.

In Northern Virginia, title insurance is only written after an attorney has abstracted the title and written a title opinion.[80] It is usually sold through agency arrangements with local attorneys.[81] Many national insurers are represented in the area under local names. They restrict themselves to underwriting and policy servicing functions; that is, they perform no title searches (which in this state remain nominally lawyer's work) and provide no escrow services.[82] Only when a specific request is made will a closing actually take place in a title insurance company office. All of these functions are left to local attorneys, who sometimes maintain themselves (as was previously noted) on an approved list of one or more insurers. It is not known exactly what degree of control this gives the insurers; but it is commonly supposed that no attorney could long practice conveyancing without the ability to obtain title insurance from some source.

The use of title insurance follows the urbanizing edge of the metropolis. On the outskirts of the SMSA's Virginia suburbs, for example, in Loudoun County, title insurance was not generally required before 1965.

Title insurance costs—on a $25,000 house—are $62.50 for a mortgagee's policy and $87.50 for owner protection. If the mortgage policy is issued simultaneously with an owner's policy, then the rate is $10.00 more than the normal owner's rate—or $97.50[83] (the discount does not seem to work the other way).

Title companies' fee schedules are comparable in every respect.[84] As a result, it does not pay to "shop around." Indeed, lower reissue rates encourage a company once "on" the land to stay there. Such rates are $37.50 and $52.50 for a $25,000 mortgagee and owners policy respectively.[85] Insurance rate schedules are generally confusing documents and companies involved would do well to clarify them. Reissue rates, for example, are not particularly well publicized and it is questionable whether broad sections of the homebuying public know of their availability.

Title Attorneys: When compared to other areas of the country, the

80. *See* note 75 *supra*.

81. Currently, VIRGINIA STATE BAR, OPINIONS, No. 93 (1959), permits this, but that opinion is presently under review.

82. CODE OF VA. 1950 § 38.1-728 (1970).

83. Title Insurance Rates 6 (Lawyer's Title Insurance Corp. Form 91-46).

84. Title insurers may exchange information on rates and loss experience. CODE OF VA. 1950 § 38.1-734 (1970).

85. Title Insurance Rates, *supra* note 83, at 6, 13.

lawyer in Northern Virginia (and Maryland, also) is still involved in many aspects of residential real property sales that the legal profession in other regions has relegated to other functionaries. This is so partly for artificial reasons having to do with judicial opinions concerning the unauthorized practice of law, and because of the belligerence and raw political and economic power of the Bar in Virginia. More precisely, the courts have mandated at least a formal role for attorneys in all sales, and as a consequence no sale is completely free of the effects of this type of decision.

Increasingly, lawyers are seen as the lender's attorney—that is, their presence in the settlement process is rationalized as counsel for a party to the *loan* closing. This is so for several reasons. First, the representation of the bank provides the lawyer with a pre-existing attorney-client relationship that survives the Virginia statutory criminal prohibitions on "running and capping"[86] and the canons of ethics.[87] Second, the larger law offices, with consequently greater influence, predominantly represent lenders as opposed to brokers. Since this is a lucrative source of income, they are loath to give it up. Third, the role of the lawyer, defined narrowly as title work, is primarily performed for the economic benefit of the lender—in order to make the loan secure—since at the outset of the buyer's tenure, the lender has more equity in the property than the buyer-borrower.

When a lawyer receives an order from a lender for settlement services, he does several things almost simultaneously. He is first likely to order a survey of the lot. Regardless of the lot size or the difficulty of the survey, these uniformly cost $60, leave no markers on the land, and have as their work product a blown-up version of the filed plat plan for that particular parcel. Obviously, the surveyor is averaging his costs over all customers. The consumer never receives any communication from the surveyor. In fact the surveyor is preselected by the lawyer or builder. Moreover, a different procedure would probably increase the costs involved.

Title search "bring-downs" are also ordered at this early stage. These are often ordered from lay abstractors. Most lenders in the Northern Virginia counties require title insurance as a precondition for making the loan. Some require policies issued by the three largest insurers. However, no title companies have plants in this area of the state. Instead, title companies rely on attorneys for title searches. It is unclear

86. CODE OF VA. 1950 §§ 54-78, 54-83.1 (1972). An "ambulance chaser," working for an attorney, is an instance of a "runner and capper."

87. VIRGINIA STATE BAR, OPINIONS, NO. 111 (1962).

at this time whether the presence of title plants operated by non-lawyers would be legal; but the sentiment of the Bar is certainly towards banning such facilities.

Some law firms employ lay or young lawyer abstractors and maintain extensive abstract files.[88] The firm that performed the original title search for Reston, Virginia, for example, is now able to charge $100 for a certification that its prior search was competently performed. This is a so-called "back title letter." The larger firms in the counties have recently been pushing the county Bar associations to formalize a back title letter system. Its informal use is now referenced locally as the practice of "farming titles." The argument for formalizing it is that it would allow more lawyers to compete for settlement work and thus open up the process to more attorneys. It would also allow attorneys already in the system to benefit from its continued growth, but would do nothing to reform its inefficiencies.

A sixty-year title search is common practice in this area;[89] but if a title insurance policy is found in the chain of title, a 20-40 year search may suffice. This is particularly true if a unitary owner is found in the chain at some point. The lender's (or buyer's) lawyer then prepares a title letter, certifying that the title he has searched, up to the date of the letter, is "reasonably clear" of clouds. In other words, the lawyer is predicting that courts later would so find. Although some lawyers do perform the sixty-year search themselves, they may instead hire a free-lance abstractor to do the work, paying him between $50-$60 for the service.

Law firms dealing in title searches vary in size and method of operation. The largest firm in the county does settlement work, primarily for builders and lenders as clients. The firm has four to six abstractors, employed full time at salaries around $12,000 per year. Some are laymen and some lawyers. Other firms are not as efficiently organized for courthouse search work; but they do not have to be. Some perform these services out of filing cabinets. Without ever checking courthouse records, they can prepare the documents for a closing, certify the title, and delegate the survey and appraisal functions to others in less than an hour. The work is performed by clerks and overseen by one attorney. Clients for such firms are reportedly small builders or independent brokers.

88. The following paragraphs are based upon the *Temporary Housing Hearings*, *supra* note 61.

89. There is no marketable title act or Uniform Title Standards for the State of Virginia. Statutes relevant to title search in Virginia are cited in P. BAYSE, CLEARING LAND TITLES 816-17 (2d ed. 1970).

A local Bar report states: "[a]t almost all settlements the buyer, seller, and lender, in a single transaction, are represented by one attorney."[90] At some law offices, the closing may be conducted by laymen.[91] If present, the attorney will normally ask the buyer if he wishes to purchase title insurance to protect his own interest.[92] Lawyers report that one half of the buyers so questioned answer in the negative. This questioning is the closest that the lawyer comes to an affirmative statement of his position at the closing. One attorney has said that this is tantamount to a declaration of willingness, on the part of the attorney, to review the title documents for the buyer's benefit. But this interpretation raises the improbable picture of the closing being postponed at this point while the attorney reviews his own work anew. That is so unrealistic that the whole notion becomes not only a fantasy but impractical as well.

Many closings occur at the broker or lender's place of business. Currently, the extent of the title settlement attorney's involvement in the actual closing varies widely. Some attorneys attend all their closings, while others are rarely present. Still others are available for consultation but do not personally attend.

Overall, lawyers charge for the following services: (1) the title search (1% of sales price up to $50,000); (2) the application for title insurance ($25-30 being the going rate); and (3) holding the closing ceremony (a closing and settlement fee, $35.00).[93]

The minimum fee schedule is seldom followed in computing charges for this work. Actual charges are somewhat higher. Where a builder is selling, the schedule is seldom used; when a transaction for existing housing is consummated the fee schedule is "sometimes followed."[94] One charge commonly made but nowhere referred to in the minimum fee schedule is a $25-30 charge for preparing the title insurance application.

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90. WOODWARD REPORT, *supra* note 59, at 4.

91. *Id.* at 9. VIRGINIA STATE BAR, UNAUTHORIZED PRACTICE OF LAW, OPINIONS, No. 21 (1965), permits this, as long as an attorney is available for consultation.

92. Some northern Virginia county lawyers use a form, which the buyer signs, informing him of this privilege.

93. ALEXANDRIA, ARLINGTON & FAIRFAX BAR ASS'NS, MINIMUM FEE SCHEDULE (1969), applies to Arlington, Fairfax and Loudoun Counties, and the City of Alexandria. *Id.* at 25-28. The fee schedule is reprinted in *Hearings on H.R. 13337 Before the Subcomm. on Housing of the House Comm. on Banking and Currency*, 92d Cong., 2d Sess., pt. 1, at 659 (1972).

94. This, and the information in the paragraph following, were developed by the *Temporary Housing Hearings, supra* note 61.

Currently, three developer-builders advertise that they will "absorb" closing costs. These corporations have numerous common features. First, they are large builders. Second, they commonly use governmental underwriting on their take-out financing, and as a related matter, normally sell first homes to young families who would not otherwise be able to buy a house. Third, and perhaps most important, they have subsidiaries or close corporations providing internal financing for their buyers. They are, in other words, able to finance their own sales and thus, to a degree, insure a demand for their housing. Such builders are charged by attorneys with fees set on a volume basis. In the alternative, a law firm is kept on retainer by the builder. In such a situation, minimum fee schedule suggested levels of fees will not be applied.

There is some indication that where extra settlement services are obtained by the buyer from a builder who absorbs closing costs, they are available only at rates that are higher than the market rate.[95] The reason for this merits further research. Additionally, attorneys may charge for obtaining "deeds of release" of the land from prior deeds of trust, security liens, etc. The charge in the northern counties is normally $15.00 for each such release. These charges are paid by the seller.

Recording: General warranty deeds are normally used in Virginia transfers. The county recorder of deeds in Virginia "shall admit to record any such writing as to any person whose name is signed thereto,"[96] without specifying what types of documents are recordable. The majority of the sections of the Virginia Code dealing with recordation have to do with the types of acknowledgements acceptable in the clerk's office.[97] Virginia has a Torrens system of land registration,[98] but it is not used in Northern Virginia. The state also has a non-compulsory coordinate system for parcel identification.[99]

In one county, Fairfax—certainly the fastest growing in this part of the state—the office of the recorder has 3500 record books. About 50-70 abstractors are found at work in the office on any working day, and about 40 law firms are engaged in abstract work. Transfer taxes, charged by the recorder and paid by the buyer, are as follows: (1) State

95. These conclusions are based on a 1972 American University Law School student survey of thirty-five homeowners in one large Virginia subdivision.

96. CODE OF VA. 1950 § 55-106 (Supp. 1972).

97. *Id.* §§ 55-113 to -142 (Supp. 1972).

98. *See* CODE OF VA. 1950 § 55-112 (1969).

99. *Id.* § 55-287 (1969). Land descriptions in deeds presented for recordation are not recordable unless the land lies within one half mile of a monument tied into this system. *Id.* § 55-294 (1969).

fee—recording a deed—$2.50/$1,000;[100] (2) State fee—deed of trust or mortgage—$1.50/$1,000;[101] (3) City or County fee—up to 1/3 of the state fees.[102]

II. Case Study Analysis

Two dominant themes emerge from the preceding description of the conveyancing process in the D.C. SMSA. First, there is a wide variance in the costs in D.C. SMSA real property settlements. Second, there is a proliferation of poorly justified charges. These themes indicate that conveyancing personnel have an unrealistically limited liability to the homebuyer.

The emphasis now switches to highlighting these disparities with a view towards reform. By contrasting selected costs charged for otherwise comparable services in each jurisdiction, one can ascertain where the homebuying public is best served at the lowest rates, and at the same time determinine which costs are least justifiable in the city and surrounding suburbs. This latter determination is significant for two reasons: (1) it can show individuals where and when to negotiate over particular charges; and (2) it exposes whatever "fat" permeates the system. Moreover, while the inter-jurisdictional comparisons highlight these structural inefficiencies in the land transfer system as a whole, they also lay bare its pressure points—charges which, being weakly justified, will respond to public pressure and debate. They also serve as a foundation for the suggested changes, modifications and role reformations of many conveyancing personnel and of the system as a whole which will be dealt with in this article's closing sections.

A. Disparate Cost Structure In Real Property Settlements

The title proof systems in each of the jurisdictions discussed revolve around different personnel—the lawyer and title insurer in Virginia, the title insurance company alone in the District, and the attorney acting as a title insurance company agent in the suburbs of Maryland.

1. Title Examination Fees

There is a noticeable disparity in charges for title examinations between the District and its suburbs. What costs the D.C. buyer $137-140 costs the Virginia resident 1% of the sales price, or $250 on the $25,000

100. *Id.* §§ 58-54, -54.1 (Supp. 1972).
101. *Id.* § 58-55.
102. *Id.* § 58-65.1.

house—and housing for that price is rare in those suburbs. Title attorneys might argue that the standards governing title searches differ as between jurisdictions; but such arguments are largely irrelevant. They ignore the fact that the lenders and buyers on both sides of the Potomac bear the same risks and receive the same protection (of a "bring down" or, at most, a sixty year search). It is clear that title insurers could achieve economies of scale and pass savings on to consumers if they were allowed to search land titles in the suburbs. While there is no legal impediment today which precludes them from assuming this task, "business reasons" and established relationships with the suburban Bar Associations effectively prevent this expansion.

Yet to permit title insurers to abstract titles in the suburban markets on a free and competitive basis with lawyers would not signal the end of local conveyancing problems. Comparable, lower rates alone do not represent a talismanic solution. The situation in the District illustrates the need for more and effective regulation of title insurers when such companies perform both underwriting and abstracting roles. In general, changes such as publication of rates, simplified rate schedules, rate-setting hearings and procedures, and maximum single risk laws are needed everywhere in this metropolitan area.[103] The District could be served by a comprehensive, well-regulated records system if the title companies would integrate or combine their abstracting services. The companies have been discussing such a move and should probably be permitted to do so in order to provide greater efficiency.

In the suburbs, the public sector should be encouraged to institute similar reforms. We have seen that most title searches are "bring down" or "up dates," so that marketable title and curative laws would little affect this growing, rapid-turnover market. Still, mapping the suburbs, creating parcel identifiers for each lot, and cleansing public records by enacting such legislation would be a pre-condition to automating title searches.[104] This type of work should be undertaken now, in order to render future reform more effective and less costly.

Suburban title searches have no uniform fee schedules and fees are usually unrealistically calculated. As urbanization advances to the borders of the metropolis, the case-studies make it clear that the developer-builder represents a new type of client for an attorney in an urbanizing county. Lawyers, in fact, seek him out. To be in his employ and have

103. B. BURKE & N. KITTRIE, *supra* note 11, at V-A-18 to -24; Roberts, *Title Insurance: State Regulation and Public Perspective*, 39 IND. L.J. 1 (1963).

104. B. BURKE & N. KITTRIE, *supra* note 11, at V-A-24 to -28.

the abstract of title for his land in one's files is to assure a steady income and professional success. Unlike prior purchasers of the same land, he can afford the cost of a rigorous title examination. Builder-developers are increasingly well capitalized today. Therefore, the traditional notion, underlying in the minimum fee schedule, that the cost of title work should "average out" over all searches if the fee is set as a percent of sales price, no longer pertains.[105] Builder and homeowner use land differently, the former as an income-producing asset, the latter as a residence—part consumer good and part capital asset. Since the liabilities of the title searcher and insurer increase as urbanization intensifies land use, the title examination fee, which takes account of the searcher's many possible liabilities, should increase in direct proportion with the increase in risk in each and every situation. Presently, builder and homeowner are lumped together so as to create a clearly incompatible and unreasonable category of rate-payer.

2. Transfer Taxes

Variance in local transfer taxes, most pronounced between the District of Columbia and Maryland, needs a thorough impact analysis; 70% of the cost of closing a house in Maryland's Montgomery County (excluding the broker's fee) involves such taxes. A comparable figure for the District is 20%.[106] The Maryland rates are the highest in the country, and serve many revenue producing ends of state and county governments which, for governmentally underwritten loans at least, may be impermissible.[107] There is a developing area of law requiring a reasonable balance between a tax levy and the benefits conferred by use of the revenue, as well as some reasonable nexus between the tax and services provided. The broader issue involves a denial of access to suburban housing markets and whether one should have to prove one's tax-paying ability as a condition of entry.[108]

105. Note, *A Critical Analysis of Bar Association Minimum Fee Schedules*, 85 HARV. L. REV. 971 (1972).

106. Montgomery County Bd. of Realtors, *supra* note 44; PRELIMINARY REPORT, *supra* note 17, at appendix C, table XVc.

107. Federal Land Bank v. Crosland, 261 U.S. 374 (1923); *See also* F. Michelman & T. Sandalow, Government in Urban Areas 533 (1970).

108. A related problem was litigated in the fall of 1971, when the Justice Department challenged the closing practices in Tuscaloosa and Birmingham, Alabama as violations of the civil rights of Blacks seeking homeownership. Buyers paid most closing costs in one town while the sellers paid these same costs in the other.

3. Other Costs

Other costs are also worth comparing: the cost of a credit report varies from $6 in the District to $15 in the suburbs; an appraisal varies from $20 to $100, and often the cost is greatest where the builder is most familiar with the lender; survey costs in Maryland are particularly high—a formal survey is often required and costs over $100; truth in lending statements are sometimes prepared gratis and sometimes for a $15 extra charge. Yet, one must know a great deal about local practice to bargain over these costs.

The reason for these variations is difficult to comprehend, particularly since the region as a whole constitutes one basic housing market. Local custom and the relationships between the various servicers of title transfers account for much of the available explanation. Although rationales for many of these charges are advanced by conveyancing personnel, the next section will attempt to expose many of the weakly-justified ones.

B. Negotiable Costs

Negotiability in costs may signify a soft spot in the conveyancing process. Where knowledgeable homebuyers can have costs waived through negotiation, those charges by their very nature indicate "fat" in the system. Isolating these costs therefore has significance both for the individual homebuyer seeking to reduce his expenses, and reformers interested in changing the system.

1. Back-Title Search Charges

In the District several title companies now issue back-title letters to each other with and without indemnity arrangements. As a result, the searching process is simplified and costs to the title companies decrease. This is, however, done without re-issue rate benefits for those insured. Homebuyers should be aware of this practice and demand decreased searching fees where it is used.

2. Document Preparation Charges

From their haven in the District, the title companies often extend their business practices into the suburbs. This is increasingly the case as a result of recent criticism leveled at suburban attorneys. The result, it is suggested, is that suburban practices have colored District transfers and District offices have performed services unauthorized in the suburbs. For example, the District homebuyer may be offered his own title insurance in conformance with Maryland practice and statutes, but is

not told that there is no need to buy it.[109] Conversely, when preparation of papers which are unauthorized in the suburbs is requested from a title company, the matter is often handled by the D.C. office. Deeds are very often prepared in this way and where this is done, real costs may be lower than the standard charges since they are prepared en masse. This practice should be reflected in lower document costs.

Most negotiability in costs, however, is found in the suburbs, where potential business competition is the keenest. For this reason the major portion of this section is devoted to suburban practice.

3. Lawyers' Fees

Since the attorney dominates the conveyancing process in the Maryland suburbs, his fees should be examined first. As we have seen, there is no uniform fee schedule applicable to both counties involved;[110] this necessitates the discovery of some rationale to explain rates when reviewing the services which are performed. Interviews indicated that one factor is a shortage of trained personnel in Maryland—abstractors are scarce, and good abstractors are even scarcer.[111] A second factor is that although search fees are lower in the District, the title companies extending their operations into the suburbs from the center city are forced to work under competitive conditions which lend themselves to referrals, kickbacks, and commissions not found elsewhere in the metropolitan area. These conditions result in an elevation of rates. Title companies are in effect buying their way into the suburban market as it urbanizes. Title insurance is another contributing factor. Reports indicate that from 20 to 40% of the premium is a commission to the examining attorney.[112] It is a fair assumption to say that the title insurance fee could be cut by an equivalent amount and still provide adequate protection.

The title search fee is also too high: the work is often done by skilled secretaries, and although there is little in the way of curative legislation, there are statutes of limitations which effectively limit the risk exposure of the attorney endorsing the work of his abstractor. On this basis,

109. ANN. CODE OF MD. 1957 art. 48A, § 486-1(a) (1972).

110. MONTGOMERY COUNTY BAR ASS'N, MINIMUM FEE SCHEDULE (undated); PRINCE GEORGES COUNTY BAR ASS'N, MINIMUM FEE SCHEDULE (undated).

111. J. Catterton, *supra* note 41.

112. Kessler, *The Settlement Squeeze*, Washington Post, Jan. 11, 1972, § A, at 1, col. 1. A Maryland criminal statute apparently unenforced and too generally worded, makes rebates in connection with real estate sales a misdemeanor. ANN. CODE OF MD. 1957 art. 27, § 465A (1971).

hourly charges would be more appropriate, and in the case of firms maintaining extensive title files, the fee could be halved.

Maryland is the domain of the large builder: he is protected initially by a comprehensive title search, the benefits of which are seldom passed on to buyers. Hence, it is reasonable to require that a detailed check of the title evidence be made and paid for by him. If full payment is not made by the developer at this point, further title search charges are hard to calculate and justify on any economic basis. Thereafter, title examinations should "bring-down" or "up-date" title abstracts commensurate with the developer's payment schedule. In this way economic benefits will be passed on to subsequent purchasers by eliminating duplicate detailed searches.

Lawyers' fees contain a further weakness which relates to the professional ethics of the Bar. Although the focal point in the settlement process, the suburban attorney is not its starting point. Here, as elsewhere, the start of the process lies in a buyer finding a home to his liking. By signing the contract of sale, the builder or the broker is therein empowered to order down a title search, and therefore is authorized to employ the named attorney on the buyer's behalf or use his own discretion in hiring one.[113] Particularly in Virginia, attorneys sensitive to ethical considerations have indicated that being counsel to a builder during planning and construction phases does not, nor should it, prohibit the builder from referring buyers to the same attorney later.[114] A client of an attorney, they argue, can freely refer other people to his attorney. In effect, the builders dictate the forum for the closing and prescribe the rules to be followed. Homebuyers have little recourse in a seller's market; noncompliance could mean loss of the home to a more receptive buyer.[115]

Where new housing is involved, the lawyer's argument that the builder should be able to prescribe the situs and the lawyer handling the closing is two-pronged: (1) the builder, as a satisfied client, may recommend his lawyer to others; and (2) the builder, as a party to the sale, can dictate the terms under which he will sell. This argument is defective on several counts. First, the lawyer's primary function is to serve the lender. After all, the lender is the one holding the permanent financing on the housing. He is protected by the new title search, and, in many sales, the buyer does not purchase title insurance. Moreover, the buyer

113. WOODWARD REPORT, *supra* note 59, at 4.

114. *Id.*

115. *See* note 95 *supra.*

is only indirectly (albeit effectively) protected by the search process. Furthermore, the buyer is, at this point, always either directly or indirectly paying the lawyer's fee. For this very reason he is entitled to be represented in name as well as in fact.

As noted in the opening narrative, other attorneys counsel lenders. This is the relationship that local lawyers appear to want to defend most. Most lenders in this area require title insurance, and some even insist that loans be closed and title be passed in the office of the attorney. It is argued that the lender has the right to choose the settlement attorney since he has a greater financial commitment in the house than does the buyer. And this debt-equity ratio, the attorneys argue, will remain the same for many years until the homeowner builds up his own equity in the property.

This, however, is rather narrow reasoning. If suburban lawyers function to protect lender interests, then all of them should do their work directly and exclusively for the lenders. But, few laywers support so constricted a view of their role. Since homebuying involves the assumption of responsibilities and liabilities by the buyer who is not often legally sophisticated, the lawyer recognizes a duty to protect the buyer's interests. The buyer bears two burdens—the responsibility of ownership and the financial liability for the loan. The problem is that both the lender's money and the buyer's duties require legal counsel. Yet to minimize the costs involved, both must usually be provided by the same lawyer, who, in effect, is serving two masters.

There are, however, some lawyers who contend that, when they act for the lender, they are not liable to the owner if a defect in title later appears which should have been discovered in the process of title search. Their reliance here is on a body of case law which will be discussed in the next section. In practice, they claim that they have not acted for the buyer (although he pays for their work). For this reason, lawyers offer the buyer a certificate of title at closing. If it is refused (and that is akin to signing a refusal to take title insurance in Maryland, as required by statute), then the attorney argues that his liability will not run to the owner, but merely to the lender. This argument is fallacious.[116] The attorney, by not certifying the buyer's title, has in effect limited his liability as an abstractor of title. In Virginia, this practice may still give rise to a cause of action in tort for negligence. The rule that no one may remove his own negligence by contract is clear and well established.[117]

116. *See* notes 127-143 *supra*.

117. W. PROSSER, TORTS 442 (4th ed. 1971); *see* notes 127-143 *infra*.

The attorney is evading liability for incompetent work against one who relies on it and to whom consequent injury runs; this cannot be done.[118]

Moreover, in offering to serve the buyer at closing, the title attorney, who also represents the lender offers the buyer insurance only (a certification of title and insurance). He does not offer legal counsel in the professional sense, since that would call for a postponement of the closing at the point of acceptance and re-examination of the title evidence from the buyer's point of view. Since this is unrealistic, the lawyer is placed in a situation replete with conflict of interest. Attorneys cannot change clients in mid-transaction this way. The better rule is to have the attorney's abstracting liability run to all parties involved in or injured by the realty transaction. In this construct, the buyer becomes a third party beneficiary of the lender-attorney contractual relationship, since without the loan he could not take possession of the house.

Virginia law practice is particularly full of dry distinctions and useless logic in this area. Some lawyers in Virginia advocate back-title letters, which would allow one attorney to rely on the work of his colleagues for a fee, and require in effect, merely updating a prior title search. They have recently trimmed this proposal, however, to eliminate lawyer-to-lawyer letters in favor of a scheme allowing only title insurers to issue back-title letters to attorneys. One must ask why an attorney should not be able to purchase a back-title letter from another attorney when he can purchase the same from a lay abstractor. In addition, query why attorneys argue that the running and capping statute does not apply where a client referral is made en masse for work different from the tasks performed for the client.

4. Other Questionable Charges

Several line items on suburban settlement sheets merit closer scrutiny. It may be argued that builders and lenders would merely increase sale price and interest rates if these items were not charged, at least with respect to lenders; however, usury laws may prevent this. In any case, the consumer is always well advised to ask about items he does not understand.[119]

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118. *See* note 117 *supra.*

119. Some lenders' charges, particularly points (or in Virginia, loan commissions, as they are there called) were first charged in the 1965-66 period of tight credit. This sequence of events is in itself, some indication that these charges are assessed in order to circumvent the usury laws of the three jurisdictions concerned here. Further research is necessary to determine whether or not this is so and perhaps federal housing finance agencies (HUD, FHLBB, etc.) are in the best position to undertake such work.

The first item that the buyer should inquire about is the cost of a survey. On some settlement sheets, this item will appear disguised as a "plat location plan." This indicates a certain sheepishness on the part of surveyors who now hesitate to call this work-product a survey in the full-blown meaning of the term.[120] Often it is no more than a magnified photocopy of the plat plan. Seldom will there be any markers on the land. Indeed, if such are desired, the buyer should specifically ask for them. For in the event that he later wants to install a fence on his boundary, he will find the fence company unwilling to move without guidance from stakes in the ground. Since installation of these will cost the buyer forty or more dollars at that time, the buyer should make sure that the survey has left its mark. Repetitious surveying of land which is resold only a few years after a survey is another reason why surveyors should be forced to leave marks. With clearer markings of exact boundaries, lender and title insurance requirements as to frequency of surveys might be reduced and eventually costs would drop.

The second item that the buyer should inquire about is the cost of submitting a title insurance application. Lawyers often make this charge, for work which entails only a telephone call to the insurer who gives him basic information necessary to fill in forms. This fee can usually be eliminated in such instances.

A third item warranting the buyer's scrutiny is the loan application fee and the loan commission. These charges overlap, particularly where prepayment penalties are charged for releasing the prior mortgage debt. Negotiation should bring some reduction if a rationale for all of these fees is requested. Additional items warranting scrutiny are charges for preparing and filing deeds of release. These charges are incurred when a deed of trust is satisfied. Such satisfaction must be memorialized on the public record, and separate documents, known as deeds of release, are often prepared. Preparation charges could be reduced by utilizing alternative forms of release (*i.e.*, marginal notations in the public records in Virginia).

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120. Land Surveys Division, American Congress on Surveying and Mapping, Resolution of March 14, 1969, reads:

> WHEREAS, it has come to the attention of the Land Surveys Division of the American Congress on Surveying and Mapping, that in many localities Banks and other Mortgagees, in dealing with homeowners who are applying for Mortgage Loans, charge said owners sums in the range of $30 to $50 for what they refer to as "Surveys"; and
>
> WHEREAS, these so-called "Surveys" are, at the best, merely cursory inspections to verify the identification of the building used as security for the loan by a procedure of little engineering merit;

A final point in the process which should be examined stems from the fact that conveyancing personnel usually hold the escrow money during the interval after settlement, but before the lender's final review. As a result, payment checks are often made out to the settlement attorney, escrow agent, or settlement company. The interval—ten days— represents little lost interest to the parties, but if the interim payee holds many such checks, the time can be of tremendous value to him. The funds in such an account may turn over fast, but the account level may still be sizeable, and so yield significant dividends to the holder of its pass-book. This final item relates to the possibility of increased services, often foregone by the buyer, rather than the possibility of decreased costs. The concept of an opportunity-cost can be found in title insurance-related negotiations, too. Knowing when to negotiate and what to bargain for can relieve the buyer of mortgage loan requirements and title insurance exemptions. It is, however, difficult to generalize about this subject. Suffice it to say that such knowledge is at a premium and is used today only by insiders. This in itself constitutes an appropriate final comment on negotiable charges.

III. The Quest For Necessary And Feasible Changes

The previous two sections of this article have been written with minimal but increasing editorial comment. The first was intended to be narrative only and was aimed at describing the conveyancing process as it exists in one city (the District of Columbia) and its suburbs in two states. The intent thereafter was to highlight, through a discussion of comparable costs in each jurisdiction, the different problems arising in each setting, and to ascertain the questionable costs which could be negotiated by the buyer. The focus of this final section is upon substantive changes which may be developed for these conveyancing systems.

A. Redefining Roles and Functions

The thrust of reform should be directed at the individual whom the conveyancing system is designed to benefit. The aforegoing case analyses suggest that all participants, except the buyer, profit from its operation in the D.C. SMSA. Yet, in the last analysis, few would disagree that the ultimate beneficiary is intended to be the buyer. The disservice to the buyer manifests itself in two ways, characterizable as (1) the documentary, and (2) the functional. More particularly, the buyer is not well served by existing documents, particularly the contract of sale, and often no one in the conveyancing process is responsible to him if the system malfunctions. The broker, lender, and lawyer all work for

the buyer, yet all are often only indirectly responsible to him. Their nonliability to the buyer is reflected in the law, which often disserves the buyer by failing to take account of the real source of the employment of many conveyancing personnel.

A discussion of some gaps in existing contracts of sale—cases in which the contract fails to consider frequently arising problems—followed by a discussion of local case law relevant to brokers and lawyer-abstractors, will highlight the ambiguous relationships with the buyer. As the discussion focuses more on reform, no attempt will be made to separate this review from the pressing need for judicial and legislative redefinition of the roles, functions, and liabilities of conveyancing actors who figured prominently in the case studies.

1. Disserving Documents

The buyer is poorly served by present contracts of sale. Many of the documents involved in the closing process, being standardized and printed forms, are unresponsive to his individualized needs. This fact dictates that the forms be frequently reviewed and improved. Moreover, this task must be performed in light of the needs of all parties to the contracts. As they presently exist, many documents serve to interlock components of the conveyancing industry while being unresponsive to the problems that arise most often in real estate transfers. Form sales contracts, for example, do not address the problem of non-completion, or temporary inability on the part of the seller to close the transaction. There are seldom damages available to the buyer if the house is not ready for occupancy as promised. In addition, such contracts fail to delineate whether abatement of the sales price can be recovered and whether specific performance is available as a remedy. Brokers might favor this scheme but few others would.[121]

House hunters would be well advised to consult a lawyer before signing any sales contract since that signing tends, in the D.C. area at least, to fix the form and services of the closing and define the rights of the parties before they arrive at the settlement table. In the alternative, it might be wise to have already consulted one's attorney and have one's own sales contract, ready to be presented to a broker who is either pressing for a signature, or, as many buyers indicate, is alleging that some other party is eager for the same home.[122]

121. The Virginia Realtors and the Bar are just starting to cooperate on ethical matters, and clearly should join in a review of the sales contracts used throughout the Commonwealth as well.

122. *See* note 95 *supra*.

2. Serving The Buyer: Who's Responsible?

Several additional conclusions may usefully be drawn from the three narrative case studies. First, the process described is little controlled by statutes or case law. Indeed, much of it is the product of local custom and tradition. So this area of law can best be described as "lawless," not in the pejorative sense, but in the sense that lawmakers and judges have seldom turned their decision-making skills to it.

Second, several parties are put in tenuous and delicate positions, with a possibility arising that they will serve two masters with opposing interests. Brokers are legally the agent of the seller,[123] but must convince the buyer to purchase. Consequently, the broker is often in the position of puffing the house to the buyer. The buyer should be wary of this since *caveat emptor* is still the rule of law and reason as to many conveyancing services. Once the contract of sale is signed, the broker is placed in the further position of giving advice to the buyer on procuring a loan, and up-dating the title.[124] The broker has a considerable economic incentive to do this since it helps assure that his commission will be forthcoming. This commission is secure for him only after settlement, no matter what his legal right to it may be in a sales or listing contract.[125]

The suburban lawyer who often serves lenders and buyers at the same time is also in the position of serving two masters with opposing interests. Of course it would be desirable to have everyone provided with legal counsel, but that would drastically increase costs. Alternative solutions, perhaps mutually exclusive, suggest themselves. First, the lawyer could be prohibited from serving both lender and buyer; brokers, after all, do not formally serve both buyer and seller. But a solution along these lines would only increase the number of personnel, which again tends to raise costs. A second method which includes both a recognition of the present responsibilities of the attorney and a change in his function from that of counsel to that of Master suggests itself. This new status would carry recognized duties and liabilities to all parties. Adoption of this proposal would not require new legislation. It could be done,

123. Aler v. Plowman, 190 Md. 631, 59 A.2d 196 (1948).

124. *Cf.* Only under an express sales contract does a broker become the buyer's agent. *See* Keith v. Berry, 64 A.2d 300 (D.C. Mun. Ct. App. 1949); Stambler & Stein, *supra* note 22, at 16. *See also* D.C. CODE tit. 45, § 1408(d) (1967), which among other things, forbids realty brokers from representing more than one party unless all know of his actions.

125. Buckner v. Tweed, 44 A.2d 224 (D.C. Mun. Ct. App. 1945), *aff'd*, 157 F.2d 211 (D.C. Cir.), *cert. denied*, 330 U.S. 825 (1946).

in part, by judicial extension of the title searcher's liability to all persons injured by his provision of professional services; yet legislation might achieve the same end more comprehensively by enabling the appointment of Masters by a court administrator.[126]

Such legislation could effect a change to a role which is well-recognized in other professions. Accountants, for example, have recently been held to have duties to corporate management, shareholders, and government officials when preparing a corporate balance sheet.[127] The analogy to lawyers is almost complete; settlement attorneys in the D.C. suburbs are functioning in an environment where the parties sitting at the settlement table often have conflicting interests. The attorney must examine the title, close the loan, and pass the deed while using professional uniform title standards and pursuing a policy of openness and full disclosure toward everyone.

Moreover, in the housing field, architects,[128] appraisers,[129] surveyers,[130] and lay abstractors[131] often incur tort liability for negligence to employers and in some instances to third parties relying on their services.[132] The general rule is that:

> One who undertakes to examine a title for compensation is bound to exercise a reasonable degree of skill and diligence in the conduct of the transaction.[133]

Most authorities who have passed on the question, presently acknowledge that the liability of lenders' attorneys to buyers is quite similar. Liability does extent to third parties when the title attorney or abstractor knows that reliance will be forthcoming and he makes a direct representation of fitness of work to these parties.[134]

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126. This concept of the notary is grounded in civil law. B. BURKE & N. KITTRIE, *supra* note 11.

127. *See* notes 141-143 *infra*.

128. Steelworkers Holding Co. v. Menefee, 255 Md. 440, 258 A.2d 177 (1969). *See also* AMERICAN INSTITUTE OF ARCHITECTS, HANDBOOK OF PROFESSIONAL PRACTICE 5-6 (1969).

129. United States v. Neustadt, 281 F.2d 596 (4th Cir. 1960), *rev'd on other grounds*, 366 U.S. 696 (1961).

130. Reighard v. Downs, 261 Md. 26, 273 A.2d 109 (1971); Mattingly v. Hopkins, 254 Md. 88, 253 A.2d 904 (1969).

131. Corcoran v. Abstract & Title Co. of Md., 217 Md. 633, 143 A.2d 808 (1958).

132. *See generally* W. PROSSER, *supra* note 117; Annot., 34 A.L.R. 3d 1124 (1970).

133. Corcoran v. Abstract & Title Co. of Md., 217 Md. 633, 637, 143 A.2d 808, 810 (1958). *Accord*, Doonis v. Mutual Title Co., 196 A.2d 480, 481 (D.C. Ct. App. 1964).

134. *Id.* at 482; Long v. American Sav. & Loan Ass'n, 151 A.2d 770, 773 (D.C. Mun. Ct. App. 1959).

Professor Prosser states this as an exception to the general rule of no liability to those not a party to the employment contract:

> When the representation is made directly to the plaintiff, in the course of his dealings with the defendant, or is exhibited to him by the defendant with knowledge that he intends to rely on it . . . there has been no difficulty in finding a duty of reasonable care. . . . This has been held to be true as to the certifications of . . . abstractors of title, an appraiser . . . and an architect.[135]

Courts have been drawing the line at this point, holding that a reasonable anticipation that the certification will be communicated is not a sufficient basis to predicate third party liability.[136] Prosser asserts that the "spectre of unlimited liability" haunts the courts.[137] This rationale is inapposite where the question of liability for title settlement work is at issue. More than a mere anticipation of reliance is present. In addition, the buyer is sitting at the settlement table watching the lawyer deal for the lender, the attorney knows a loan commitment is delivered to the buyer as the result of his work, and the spectre of unlimited claims is absent since the buyer alone is claiming the right to a judgment for himself on that one title search and settlement.

In both the District of Columbia and Maryland, case law stands much as Prosser sees it nationally with liability for third parties left unresolved. There are strong indications, however, that future courts will decide in favor of liability. This cause of action, in both jurisdictions, "sounds" in tort, but actually rests on an employment contract.[138] It follows from this that, as a general rule, liability will not extend to third parties, except in cases where direct representation and knowledge of reliance exist.[139] One District of Columbia case expressly reserved this decision for the future.[140] What Prosser says of the national trends then, applies with great force to these jurisdictions:

> Other cases will no doubt have to resolve the problem: but where the group affected is a sufficiently small one, and particularly, . . . only one

135. W. PROSSER, *supra* note 117, at 708.

136. *Id.*

137. *Id.*

138. Long v. American Sav. & Loan Ass'n, 157 A.2d 770, 772 (D.C. Mun. Ct. App. 1959); Corcoran v. Abstract & Title Co. of Md., 217 Md. 633, 637, 143 A.2d 808, 810 (1958).

139. Reamer v. Kessler, 233 Md. 311, 316, 196 A.2d 896, 899 (1964).

140. 157 A.2d at 773; D.C. CODE tit. 49, § 301 (1972) controls use of Maryland law by District of Columbia Courts. The latter state's law is to be looked to, but need not be taken as precedent by District of Columbia judges.

> person can be expected to suffer loss, the guess may be hazarded that the recovery will be allowed. Certificates of expert examination are intended to be exhibited, not hidden under a bushel; and a rule which denies recovery . . . has a very artificial aspect.[141]

Nowhere is this statement more apt than in the title settlement field. The buyer alone is involved in a third party classification, the representation is made for the direct benefit of the buyer-borrower, and the lawyer knows that he would not be hired to do the title work were it not for the application for a loan filed by the buyer pending the outcome of his work. It is hard to imagine a more direct form of representation and reliance.

Further authorities, aside from Prosser, come down against third party liability. When Judge Cardozo, in the leading case of *Ultramares Corporation v. Touche, Niven and Co.*,[142] refused to extend the liability of an accounting firm negligently filing a certified balance sheet to a third party who later relied upon it to decide whether the corporation should be granted a loan, he nonetheless gave great weight in his opinion to the business practices involving the certification of the sheet and its use for corporate business in general.[143] English courts have extended the same rule to benefit future investors in a corporation.[144]

Moreover, in the real estate field, liability to third parties may exist on information which brokers provide to a multiple listing service on exterminators' certificates.[145] Appraisers, surveyors and architects are similarly liable. To shield attorneys from third party liability is to single them out for special treatment. If the attorney was engaged in a difficult and unchartered area of the law, then there would be good cause for confining liability to the attorney client circle. But such is not the case here since lawyers conduct settlement work much the same as any other businessmen would and his profit is dependent on volume and production. Further, the buyer is apt, in many situations, to decline to purchase an owner's title insurance policy or an owner's certificate of title on the basis of his observations at closing that the lenders were willing to place their reliance on the lawyer's work. The buyer's actions are not tanta-

141. W. PROSSER, *supra* note 117, at 709.

142. 243 N.Y.S. 179, *rev'd*, 255 N.Y. 170, 174 N.E. 441 (1931).

143. *Id.* at 188, 174 N.E. at 448, holding a title company liable to third party bidders of an auction.

144. Candler v. Crane, Christmas & Co., [1951] 2 K.B. 164.

145. Granberg v. Turnham, 166 Cal. App. 2d 390, 333 P.2d 423 (1958) (information given to real estate board); Wice v. Schilling, 124 Cal. App. 2d 735, 269 P.2d 231 (1954). *See generally* W. PROSSER, *supra* note 117, at 699.

mount to a rejection of the lawyer's work. Rather, when contemplating the purchase of such protection for his own interest, it is logical for the buyer to believe that the lender's requirements will provide sufficient protection for him. One sample of consumers indicates that this is precisely the reason why owner's certificates and title insurance are continuously refused.[146]

From this narrative of one metropolitan area, it is clear that lawyers are becoming the principal apologists for the conveyancing system; they are the ones who must explain it to the parties. Their presentations are often unconvincing even to themselves. Conveyancing work is one of the few contacts which many laymen have with the legal system and the Bar—many leave it disgruntled. Moreover, title attorneys bear much of the consumerist criticism leveled at the conveyancing process as a whole. They have allowed their role to become static and frozen into a set of relationships from which they cannot escape without financial injury to their law practices. On the other hand, the injury they do to the Bar and the public's esteem for lawyers, while admittedly hard to measure, seems great indeed.

B. State Legislative Reform

The functional redefinition sought for brokers and abstractor-attorneys in the last section could be achieved by legislative as well as judicial reform. The regulation of both brokers and abstractors is customarily a state matter and the previous case analysis is similar in many ways to the study required of a legislative drafter.

On the state level, this drafting could involve three types of legislation: (1) new regulatory laws and regulations; (2) laws legitimating back-title letters and other Bar-instigated reforms; and (3) laws mandating public disclosure of past appraisals, surveys, and title abstracts. Legislation establishing non-profit corporations to perform title services completes this short proposal for state action. Local Bar Associations, acting as incorporators, could provide initial impetus, much the same as the Bars in some states have responded with cooperative abstracting companies and lawyer title insurance funds. Finally, the operation of these corporations might be facilitated by the passage of new marketable title laws which are needed to minimize start-up problems.

Many of the requirements and costs incurred by buyers seeking financing and homeownership are imposed by lenders. Consequently, we

146. *See* note 95 *supra*.

must first look to banking regulations of the state governments for reform in this area. In this vein, one might argue that state banking audits conducted by authorities are short-circuited by the presence of title insurance in an individual loan folder.[147] Upon seeing that a loan is insured, the bank examiner is seldom required to look further into the costs involved in its processing.

The result is that banking authorities have never studied the problem of closing costs in any meaningful way.[148] One must ask, for example, why interviews conducted for this study indicate that charges in the form of points, loan commissions and prepayment penalties last arose just as the interest rates on residential loans approached the usury ceiling?[149] The proliferation of such charges in this time frame deserves further investigation.[150]

In addition, bank examinations need more substantive standards to guide evaluation of the charges imposed. Surveys should be required only where affidavits of no change are unavailable to the buyer.[151] In addition, perhaps a ten year legal life should be given to all surveys. Statutory deed of trust forms should be more detailed and should enumerate the costs that actually confront the financing consumer who seeks the most competitive terms.[152] The forms which were recently promulgated by the Federal National Mortgage Association may serve as a model for some of this work.[153]

Other more substantive, incremental reforms may be available for the future purchaser. As indicated earlier, area attorneys are discussing several ideas. Among these are the prohibition of title insurance agency contracts with law firms and the possibility of back-title letters.[154] Attorneys are also talking of negotiable or assignable title insurance policies,

147. Many of these conclusions have been drawn elsewhere. *See* B. BURKE & N. KITTRIE, *supra* note 11, at ch. V.

148. *Hearings on H.R. 13337 Before the Subcomm. on Housing of the House Comm. on Banking and Currency*, 92d Cong., 2d Sess., pt. 1, at 340, 385, 391 (1972).

149. B. BURKE & N. KITTRIE, *supra* note 11, at V-A-2, -4.

150. This allegation was encountered, particularly in the Virginia counties of the D.C. SMSA, where the lenders are permitted by law to pass on "reasonable charges" to the borrower. *See* text accompanying note 71 *supra*.

151. HUD-VA REPORT, *supra* note 17, at 134-35.

152. *Id.* at 121-22.

153. Virginia-Federal National Mortgage Ass'n (FNMA) (Form Nos. 1030.45, 1031.45 (1972)).

154. The principal backer of this proposal is F.S. McCandlish, Esq. of the Fairfax County, Virginia, Bar.

recording the title abstract or evidence with the transaction documents[155] or even filing a certification of title with the plat plan.[156] These activities indicate that the Bar is clearly looking for ways to reduce the costs of searching title; all of these proposals could be legitimized by state law.

Survey and appraisal costs might be reduced in much the same way.[157] Appraisals might be filed centrally with local government for a five or ten year period and updated by a statutorily required index.[158] Surveys should be incorporated into the loan and title documents and recorded in the same way that plat map references are presently recorded in many other parts of the country.[159]

Statewide enabling legislation might permit title searches to be performed by non-profit corporations on a county-wide basis. Suburban counties particularly could utilize such entities, established by the Bar. Curative statutes or a marketable title act would be an aid in such an undertaking. A bill should be drafted to legitimize a twenty or thirty year title search period to establish marketability of a title.[160] This period would outlast most mortgages and, at the same time, provide for a search going back to a prior insurance policy. Search standards could arguably be made more rigorous for raw and undeveloped land. Since all marketable title acts currently fail to make this distinction, such a state law would provide a unique model for other states.[161] Searches done on large suburban tracts would, under this plan, have to be recorded.

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155. Leary & Blake, *Twentieth Century Real Estate and Eighteenth Century Recording*, 22 AM. U.L. REV. 275 (1973); Comment, *A Facelifting for the Recorder of Deeds: Tendering a Calumet to Real Estate Reformers*, 22 AM. U.L. REV. 639 (1973).

156. Under authority of several state Subdivided Lands Acts, some states already have the power to compel submission of such documents to state officials. *E.g.*, N.Y. REAL PROP. LAW § 337-a(9) (McKinney 1968); CAL. BUS. & PROF. CODE § 11010(d) (West 1964).

157. HUD-VA REPORT, *supra* note 17, at 135; B. BURKE & N. KITTRIE, *supra* note 11, at V-A-9-10.

158. Lenders could save much overhead time by relying on land-use information collected by local governments; the separation of land use and title data leads to artificial results. *Cf.* Doonis v. Mutual Title Co., 196 A.2d 480, 482 (D.C. Ct. App. 1969).

159. P. Bayse, Official Legal Significance of the Parcel Identifier 6-7 (background paper for the American Bar Foundation Conference on Compatible Land Identifiers—The Problems, Prospects and Payoffs, in Atlanta, Georgia, Jan. 20-22, 1972; the Conference papers are scheduled for publication in 1973).

160. This is the English period of search today. Cretney, *Land Law and Conveyancing Reforms*, 32 REAL PROPERTY PROBATE & TRUST J. 477, 480, 492 (1969).

161. For a recently drafted proposal for a marketable title act drafted to take account of specific conveyancing problems in one state, *see* Payne, *The Alabama Law Institute's Land Title Acts Project* (pts. 1-2), 24 ALA. L. REV. 175, 186, 208 (1972). A similar piece

C. *Federal Statutory And Regulatory Reform*

This discussion of one metropolitan conveyancing system has tended to show that there is "fat" in the system and a diversity of practice within a relatively small geographic area. This compact multiplicity dictates that a panoply of solutions be pursued. No one change would provide a panacea,[162] particularly if it is instituted without broadly based statistical surveys.[163]

Currently, the Federal Home Loan Bank Board, the national regulatory body with jurisdiction over the major lenders in the District and its suburbs, has regulations, adopted in 1969, which require that federally insured Savings and Loan institutions may not refer borrowers to specific brokers, insurance agents, or attorneys.[164] Although the extent to which this regulation is enforced is unclear, broader knowledge of it may aid the buyer in dealing with lenders. In addition, the Board has regulations, dating from 1958, which limit "initial loan charges" to the actual costs of title examination, appraisal, credit report, survey, drawing of papers, loan closings, and other such necessary incidental costs.[165] Discounts, rebates, or commissions on any such charge are prohibited, whether they be given to an association employee or its attorney, except when received as compensation and retained by the association. Detailed, itemized closing statements are also required, but only after the fact. Under these rules, associations may require escrows of taxes and insurance to the extent of one-twelfth of the estimated annual payments for such items.[166]

The Federal Truth in Lending Act is also quite explicit in its call for prior disclosure of all the terms and fees in connection with loans on real property.[167] Such is the import of a recent case applying the Federal Act to the District of Columbia, holding that borrowers must receive prior disclosure of loan charges so they can effectively shop around for the best overall terms.[168]

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of legislation, drafted to reflect the problems of urbanizing the titles to raw land, might include rigorous standards for such title searches, tract indices for large tract subdivisions, and requirements for filing the abstract in the public records.

162. *Hearings on S.2775 Before the Subcomm. on Housing of the Senate Comm. on Housing, Banking and Urban Affairs*, 92d Cong., 2d Sess., pt. 1, at 213 (1972) (testimony of J.C. Payne).

163. However, the remainder of this paper is designed to demonstrate that future changes need not await completion of such surveys.

164. 12 C.F.R. § 563.35 (1972).

165. 12 C.F.R. § 545.6-.10 (1958).

166. 12 C.F.R. § 545.6-.11 (1958).

167. 15 U.S.C. §§ 1639(a), (b) (1972).

168. Bissette v. Colonial Mortgage Co., 340 F. Supp. 1191 (D.D.C. 1972).

It can be seen therefore that statutory or regulatory reform has some precedent in this area of endeavor, and in particular can act as a catalyst for other reforms.

Such a start has been made by HUD. When the federal government surveyed mortgage settlement costs in the spring of 1971, it found Washington, D.C., (not the entire metropolitan area) to be among the highest-cost areas in the country.[169] Thus it was chosen as one of six metropolitan areas in which maximum rates were to be imposed on HUD underwritten mortgages.[170] Inserted for public and industry comment in the Federal Register on July 4, 1972, these proposals were intended to set rate levels for less than one-half of the charges customarily levied in the region. The following were regulated:

WASHINGTON, D.C. SMSA

(1) Credit report	The charges for a credit report are to be in accordance with the HUD contracts in the SMSA covering credit report fees.
(2) Field survey	$55.
(3) Title examination	
District of Columbia ...	$90.
Maryland & Virginia ..	$130.
(4) Title insurance	$2 per $1,000 of coverage for lenders policy. $3 per $1,000 of coverage for owners policy. $3 per $1,000 plus $10 for a lenders and owners policy issued simultaneously.[171]
(5) Closing fee	$50.
(6) Pest and fungus inspection .	$15.

The title examination rates comport with the levels which some attorneys, in highly efficient conveyancing firms, indicate as reasonable. On the other hand, $50 is permitted for the preparation of documents, which is a figure many attorneys perceive as very liberal for the ordinary transaction.[172]

169. HUD-VA PRELIMINARY REPORT, *supra* note 17.

170. 37 Fed. Reg. 13186 (1972).

171. *Id.* at 13187.

172. The agency had prepared these regulations between February and June of 1972

Though the survey of mortgage settlement costs is significant, at least to the extent that it represents a recognition that reform is necessary, it is now unlikely that the regulations will be promulgated. Moreover, even assuming that they will be adopted, the regulations themselves have limitations. At most, they only implicitly deal with issues which, if procedural due process is to be complied with, must be expressly treated. In addition, the proposed regulations do not go far enough in their reforms.

In apprehension of the failure or limited success of the regulations, further treatment of the problems of the conveyancing process is necessary. Numerous possible reforms warrant future congressional or administrative consideration: (1) prescribing a particular mode of title insurance; (2) limiting fee schedules; (3) initiating a review of charges levied by those in the conveyancing industry who benefit from federal mortgage underwriting; (4) providing for review of conveyancers' abstract files and a federal incentive for the construction of title plants; and (5) some additional reforms relating to fees and services.

1. Prescribing A Particular Mode Of Title Assurance

The many National Housing Acts, enacted since 1937, have never legislated any particular mode of title assurance for governmentally-related mortgage loans. Similarly, HUD is now "neutral" as to the type of title assurance underlying its mortgages: it professes by regulation to follow local custom in this matter.[173] As a matter of practice, however, title insurance is most often used. Statutory authorization, overriding state law for federally related mortgages, is needed for performance of conveyancing and title assuring services by many types of personnel: title insurers, lawyers, abstracting companies, and banks. Such authorization would go far to promote competition and perhaps lower costs. Since the Department of Housing and Urban Development has maintained agency neutrality in determining who may levy charges,[174] this proposal would require a departure from present practice.

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and officials had expected that the comment period would initially last forty-five days. This was extended by the Secretary for thirty additional days, however, since flow of comments into the HUD Docket Clerk's Office was unusually high. Through Nov. 11, 1972, 854 responses had been received from around the country, mainly from attorneys. Responses ranged from sheet letters to fully prepared briefs. Letters came mainly from concerned industry personnel, principally attorneys, and most noticeably from the Washington, D.C. area.

173. 24 C.F.R. § 203.387 (1972).

174. *See, e.g.*, 37 Fed. Reg. 13186 (1972).

2. Limiting Fee Schedules

Recent interviews have indiciated that the $130 HUD search fee is reasonable only for the most efficient conveyancing firms, and should be raised to $160-$190 levels.[175] The fee for preparing documentation for the ordinary real estate sale can, on the other hand, be cut back, from $50 to $15-$25 unless extraordinary problems arise during preparation.[176]

These fee-levels are only suggestions. They are based on only the roughest of economic study and data. Reading the comments on these regulations, one thing does become clear: the regulated firms and businesses did not respond, as many had promised, to HUD with data from which rational decisions could be made.[177] Hence, when and if the Department is to proceed, it will have to negotiate away its differences with its regulated clientele before finally promulgating these rate regulations. "Harder" data than is now available from the industry should be the basis of such a process, and perhaps the industry should have the burden of proof.[178] Some recently published studies which amply support the conclusions already drawn here make analysis possible.[179]

These maximum rates raise another issue as well. They must be structured in a way which takes account of the need of any conveyancing system for increased efficiency and reasonable rates. The regulations for the conveyancing industry are unlike those of the Price Commission's Economic Stabilization Program.[180] HUD and the VA are vitally interested in the efficiency of the mortgage system which they underwrite

175. Interview with Fairfax County Attorney, April, 1972.

176. *Id.*

177. This doesn't mean that the government lacks adequate information on which to proceed in making rational choices. Rather, it merely suggests that with industry help the government could regulate only those aspects of the businesses which require it. Without such cooperation, the industry risks imposition of excessive regulation. Opponents, probably calculating the odds, have thus taken an "all-or-nothing" approach to these regulations.

178. Local bar associations raised due process and statutory objections to this regulatory proposal. *See* Comments of the Prince Georges County, Maryland, Bar Ass'n, Dep't HUD Docket Item No. 829 (filed Oct. 17, 1972); Comments of the Montgomery County, Maryland Lawyers Ass'n on Proposed Settlement Cost Regulations, HUD Docket Item No. 830 (filed Oct. 15, 1972). In short, they argued that HUD had statutory authority to set "standards" but such a phrase did not permit maximum fee schedules, and that the Department proceeds without adequate data, notice, and hearings for interested parties.

179. G. WUNDERLICH, TITLE EXAMINATION IN VIRGINIA (Virginia Polytechnic Inst. and State University, Agricultural Economic Research Rep. No. 10, 1972).

180. Economic Stabilization Act Amendments of 1971, 85 Stat. 743, *amending* 12 U.S.C. § 1904 (1970).

because its poor performance increases governmental liabilities. Perhaps a case can be made that the "scavenger" abstractor or attorney will and should be forced into another line of business.[181] This writer prefers another tack and would argue that any maxima must be predicated on pre-defined standards of efficiency. The Department need not heed the witness of every conveyancing lawyer protesting imposition of its regulations. It should heed only those who have, by its standards, efficient firms. In setting its rates for areas such as the Washington, D.C., area, with many conveyancing patterns, the Department will inevitably be forced to make some judgment as to the optimum size of conveyancing businesses and firms. It is best to have such judgments openly recognized and reached. This is a proper subject for future debate and supportive legislation at both federal (for HUD-VA mortgages) and state levels.[182] Indeed, one could argue that if rate regulation is to have any impact on the cost problem there must be an overriding standard from which rates can be judged. The controversy raised by these regulatory proposals thus highlights some issues for future debate and suggests the outline of future regulatory efforts.

3. Initiating A Federal Review Of Charges And Fees Levied

To make judgments about efficiency in conveyancing, federal officials must undertake a continuous, two-pronged review of the various charges and fees levied by the system they oversee.[183] Such review is necessary because the establishment of any maximum rate levels carries an inherent tendency toward cost standardization across all sectors of the housing market being regulated. HUD should take steps to monitor the marketplace to prevent government maxima from becoming marketplace minima. This danger is slight, however, if the Department has truly and accurately defined a discrete housing market over which costs were already uniform.[184]

More important perhaps is the advantage of being able to regulate

181. G. WUNDERLICH, *supra* note 179.

182. Abstract company licensing laws provide a precedent, but they are, by most accounts, a failure. Echardt, *Abstractor's Licensing Law*, 28 MO. L. REV. 1 (1963).

183. Even opponents would not argue governmental authority to do this. *See, e.g.*, Comments of the Northern Virginia Attorney's Ass'n on Proposed HUD Regulation: Revision of 24 C.F.R. Part 203 § 203.27, at 10-11, 23 Dep't HUD Docket Item No. 815 (filed Oct. 16, 1972).

184. Some would argue that the Maryland and Virginia counties within the District of Columbia SMSA have such divergent practices that comparison is fruitless. That is wide of the mark since differences exist, which can be related to costs showing that lawyers' services are more expensive than other title assurers.

work performed for different client groups with different needs. Thus far the regulations do not single out title work done in new subdivision titles where the title has recently been searched once for the developer. As has been pointed out, work required for the new homeowner involves only a title update. Realistically, however, the developers' financial backers will require that the title be "debugged" before the construction loan is granted. Optimally, later title work charges should be prorated according to the length of the search and the number of "shows" or problems uncovered. Such a schedule might be cumbersome to administer, but is a solution which roughly approximates the problems perceived by the public.

Department statutes and/or regulations should probably first require those parties receiving the service to pay the fees. Otherwise, the Department will have no way of determinining if the charge is for work previously performed or for services now rendered. For those developers dealing with the federal government, this analysis is necessary to determine whether only direct costs are being charged. The federal government, in the setting of its regulations, is concerned with who is paying.

4. Providing a Federal Review of Conveyancers' Abstract Files and an Incentive for the Construction of Title Plants.

Since HUD and the VA have an interest in the industrys' efficiency, conveyancers' abstract files should be subject to periodic review and inspection by federal authorities applying state title search standards. A competently prepared and permanently kept abstract of title should stand behind each opinion. While the length of the search of course depends on state laws, regulations, and Bar standards, it is subject to minimal federal guidance. However, appropriate penalties and sanctions for an inability to produce these should be a matter of federal law.

Along this same line, the federal government should license title plants and provide grants and loans for their establishment and maintenance.[185] The Washington, D.C. area provides a good case-study of the need for such a program. A federal interest in uniformly negotiable mortgages, asserted through the commerce clause, might spur the establishment of title plant operations in the Maryland and Virginia suburbs. This federal interest is too apparent to dispute, particularly for those mortgages about to move in the national mortgage market. This second

185. Grants to local governments, and loans (perhaps, even from the Small Business Administration) could be operationalized within existing governmental programs, yet devised so as to fit into local patterns of conveyancing.

proposal, to license and provide maintenance grants for title plants, might involve little in the way of start-up costs, since such money could be used to pay for the assembly of future records only.

Similarly, the Washington, D.C. area also provides an excellent forum in which to test these federal reforms since there are a multiplicity of conveyancing patterns within one housing market. Further, the institution of such efforts would encourage the standardization of title search practices, through the encouragement of marketable title acts, curative statutes, and uniform Bar-promulgated title standards which might come from state and congressional legislators as a response to federal activity.

5. Additional Reforms

The factual description of the attorney's role in the conveyancing industry with which we began highlights several other specifications which are necessary for any future regulations. First, allowable rates should reduce or disallow charges for preparation of documents. Study interviews show this routine work to be the most profitable of all operations for title insurers and lawyers. Second, the rates should abolish application fees for title insurance; only a telephone call is usually involved. Third, the rates should define and specify the services to be performed by surveyors, and the charges which are permissible for these services. Today great confusion prevails in this field of conveyancing services. Clarity of function and delineation of consequent liability for poor surveying is as greatly needed as stable fee schedules themselves. Fourth, the rates should abolish "closing fees" paid for the rental of an office for the actual settlement. These charges should become a part of the hourly charge for a lender's, insurer's, or attorney's services.

Additionally, selected fees can be absorbed by lending institutions and passed on to borrowers.[186] Appraisals, credit reports, and loan application fees are uniquely within the purview of lenders. Not all of these fees should be subject to federal regulation at this time. Application fees should be left uncontrolled, since the lenders can best determine these overhead costs. Lenders can contract for appraisals, credit reports, and surveys (when they are lender-required) in large quantities. Such lenders do have a bargaining power superior to that of the individual con-

186. *Hearings on S.2275, Before the Subcomm. on Housing of the Senate Comm. on Housing, Banking and Currency*, 92d Cong., 2d Sess., pt. 1, at 116, 130 (1972). This bill proposed this sort of approach but was too broadly worded to do much good in the Washington, D.C. area. What follows is an attempt to pare down its approach into a usable form.

sumer, to allow them to bargain over these rates will, in this and many other geographic areas, produce the lowest possible rates.[187] The Senate considered legislation of this type last year and should do so again on a more selective basis[188] as part of a future Omnibus Housing Bill.

One other feature of such legislation should concern the use of local property tax escrow accounts maintained by lenders for taxpayers.[189] In the past, these were interest-bearing accounts for borrowers in Washington area banks. The mortgage credit squeeze of 1965-66 changed all this and today such accounts bear no interest for the benefit of these borrowers. The sums involved are relatively small as far as each borrower is concerned—$12-$14 a year. Nonetheless, a bank's computer could easily be programed to take account of such sums.

Several other rights should also accrue to borrower-escrowers: (1) the right to withdraw funds deposited in escrow which are no longer necessary; (2) the establishment of notice-periods for increases in tax escrows; and (3) the right to pay one's own taxes if the borrower can sufficiently establish his own credit rating. As things now stand, mortgage loans are tied to tax payments. For convenience sake local governments appear to prefer dealing with a few banks as opposed to many individuals. Assessor's computer records are now coded by the name of the lender in this area, but without some knowledge of the increased costs involved in individual billing reformers are unable to determine whether there are any real savings for consumers. Reforms in this area are needed: computer-programed credits for interest should apply to all escrows involved in a conveyance, whether they are maintained by a lawyer, escrow agent, or other stakeholder.

In the Maryland counties, much of the cost of settlement involves these escrowed taxes and other pre-paid items.[190] The Department of Housing and Urban Development has regulations on these escrows which the state could well adopt.[191] Reduction of taxes is a political and administrative matter, but then so is nearly everything else in this area. As discussed in the next section, these high tax levels might be the subject of legal challenge. If, however, reduction proves impractical, for whatever reason, then county governments might be asked to provide more services, or facilities (particularly parks), in return for these taxes.

187. *Id.* at 130.

188. *Id.* at 3.

189. HUD-VA REPORT, *supra* note 17.

190. MONTGOMERY CO. BD. OF REALTORS, *supra* note 44.

191. HUD-VA REPORT, *supra* note 17, at 126. *See* text accompanying note 107 *supra.*

D. Changes Possible Through Litigation

1. Transfer Tax Reduction:

As much as 70% of closing and settlement charges are accounted for by local property and transfer tax prorations and payments in the Maryland counties of this metropolis. The onerousness of such taxes, however, is an issue which federal officials are not inclined to deal with since the problem is a local one. Moreover, the political realities of federal power re-enforce the reluctance of officials to deal with local problems. Since local government operates from a limited source of direct taxation, basically property and sales taxes, litigation to reduce settlement-related taxes (*i.e.*, recording and transfer taxes on deeds in Maryland) seems the likeliest route for reform.

A constitutional basis is available for this attack which is aimed at reducing taxes on HUD-VA mortgages and related deeds to levels which are reasonably related to administrative costs. This basis is in part well-established. Justice Holmes, in the 1930's, held that a federally-underwritten farmer's home loan program need not pay local recording taxes beyond the level needed to pay the reasonable administrative expenses of the recording itself.[192] He said in part:

> The State is not bound to furnish a registry, but if it sees fit to do so it cannot use its control as a means to impose a liability that it cannot impose directly, any more than it can escape its constitutional obligations by denying jurisdiction to its Courts in cases which those Courts are otherwise competent to entertain. * * *
>
> Of course the State is not bound to furnish its registry for nothing. It may charge a reasonable fee to meet the expenses of the institution. But in this case the Legislature has honestly distinguished between the fee and the additional requirement that it frankly recognizes as a tax. If it attempted to disguise the tax by confounding the two, the Courts would be called upon to consider how far the charge exceeded the requirement of support, as when an excessive charge is made for inspecting articles in interstate commerce.[193]

More recently, it has been agreed that the right of a federal citizen to travel interstate is infringed when, at the end of the journey, unjustifiably onerous conditions are put upon the ability of the traveller to

192. Federal Land Bank of New Orleans v. Crosland, 261 U.S. 374 (1923).

193. *Id.* at 378. This law is acceptable to the Maryland Court of Appeals. Pittman v. Home Owners' Loan Corp. of Washington, D.C., 175 Md. 512, 2 A.2d 689 (1938). *But see* Tawes v. Home Owners' Loan Corp. of Washington, D.C., 180 Md. 401, 24 A.2d 781 (1942) (tax on deeds upheld). Willmann, *Those Transfer Taxes Turn Off Home Buyers*, Washington Post, Feb. 3, 1973, § D, at 1, col. 5.

establish a residence.[194] This right first arose in the context of the right to welfare payments without first having been resident in the state for a statutorily required period.[195] It has been argued that this "right to travel" is more properly termed a "right to migrate and settle."[196] This is not to be interpreted as just a broad reading of the right. It is only a necessary reading in order to effectuate the right itself. There is a limitation on state action where federal programs are involved. It should make no difference whether such programs involve direct payments to citizens—as with welfare—or, as here, payments in the form of indirect subsidies to bolster mortgage credit or enable the passage of title deeds. Where HUD mortgage insurance or VA underwriting is involved, the right of a citizen to utilize governmental programs for his own benefit should not be de facto limited by the situs of his house. The supremacy clause and the equal protection clause alike forbid such a limitation.

2. Minimum Fee Schedule Cost

A second type of litigation is possible where local Bar Associations maintain a minimum fee schedule which is applicable to real estate closings. The fee is often determined as a coefficient of loan amount or sales price. Antitrust laws, particularly section one of the Sherman Act,[197] are a statutory vehicle for attack. Under this section, proof must first establish a link with interstate commerce—1970 Census figures do this.[198] In addition, a survey of the recorder of deeds office's indicates that mortgage or trust deed indexes for out-of-state mortgagees or beneficiaries will probably show a substantial number of loans involving out-of-state lenders.[199] The number of loans, or lenders, should provide a substantial link to the interstate movement of mortgage capital. If this fails, the possibility that funds are moving interstate *after* the loan is

194. Shapiro v. Thompson, 394 U.S. 618 (1967).

195. *Id.*

196. Brief for National Urban Coalition as Amicus Curiae at 47, 52, James v. Valtierra, 402 U.S. 137 (1971).

197. Sherman Act, 15 U.S.C. § 1 (1970). *See* Ferren & Snyder, *Antitrust and Ethical Aspects of Lawyers' Minimum Fee Schedules*, 7 REAL PROP., PROB. & TRUST J. 726 (1972); Love, *Title Fee Testimony Concluded*, Richmond Times Dispatch, Dec. 14, 1972, § 1, at 1, col. 8.

198. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, POPULATION TABLES BY STATE: RESIDENTS FIVE YEARS OF AGE OR OLDER, tables 28-29 (1970).

199. Goldfarb v. Virginia State Bar, 41 U.S.L.W. 2369 (E.D.V.A. Jan. 5, 1973). At the trial of this case, the testimony of R. McKenna, witness for the plaintiff, established this figure at roughly thirty percent of the loans randomly surveyed in Fairfax County, Virginia.

extended provides another link, to be established by research.[200] The movement of mortgage payments into mortgage service pools, for transfer by the mortgage servicers, can be established by (a) the existence of the service contracts themselves, (b) the creation of brokerage arrangements for initiating the flow, and (c) receipt of the flow or the out-of-state end of the line. Discovery and depositions taken from the large insurance companies, New York City law firms dealing in this service, or large mutual savings banks or saving and loan companies in capital-rich (mortgage-buying) sections of the country, will establish this last link.[201]

Once a link to interstate commerce is proven, the restraint of trade must be shown and any increase in price will suffice. It need not be to a reasonable level in terms of lawyers' overhead costs. Antitrust law is oblivious to the question of who profits or whether a particular group (*i.e.*, lawyers) should be involved in title searches. It looks only for economic impact. Therefore any substantial increase in fees, when others (*i.e.*, title insurers) could provide searches at a lower cost, will become a restraint on trade and a violation of the act.[202] This is known to antitrust lawyers as a per se violation. Many today think that a minimum fee schedule which sets attorney's fees at a percent of loan amount or purchase price is a per se violation.[203]

If a court will not accept this theory, then the reasonableness of the fee is called into question. Here the attorney must establish that fees are reasonable in light of his overhead costs. In evaluating the attorney's contention, the court must first decide what type of law firm—as to size, number of lay personnel, clients, amount of business, quality of abstract records, etc.—it will take as its prototype. That decision will probably be avoided by an implicit decision to take the center of gravity of the local Bar as its guide on these matters. Consequently, the "typical conveyancer" will become the norm, lying somewhere between "scavenger" and "flyspecker." Such decisions are admittedly hard to make and will perhaps force the court to utilize local title standards and state ethics opinions as a guide. One suit has recently been litigated, at the United States District Court level, in Virginia[204] and is presently pending on appeal.[205]

200. Bartke, *Home Financing at the Crossroads—A Study of the Federal Home Loan Mortgage Corporation*, 48 IND. L.J. 1 (1972).

201. Q. JOHNSTONE & D. HOPSON, LAWYERS AND THEIR WORK 243-271 (1967).

202. Comment, *Minimum Fee Schedules as Price Fixing: A Per Se Violation of the Sherman Act*, 22 AM. U.L. REV. 439 (1973).

203. 41 U.S.L.W. 2369 (E.D.V.A. Jan. 5, 1973).

204. *Id.*

205. Appellate arguments should take place in the Fall of 1973.

When the reasonableness of an attorney's operation is at issue, there is a harder question of proof to establish a link between the "unreasonably" high fee level and a restraint on interstate trade. One must ask whether home-buyers in the state are subjected to higher interest rates, fees, and commissions because fewer national investors place their funds in a particular jurisdiction. The answer is probably that investment levels are constant, but that costs borne by the borrower go up in order to bring local loans up to national levels of liquidity and negotiability. Letters to local counsel for first-time investor information tend to show that the investors are not concerned with local obstacles so long as they can be adequately indemnified.[206]

IV. CONCLUSION

A diversity of conveyancing patterns requires a multidimensional solution in the National Capital region. This entails both a legislative and judicial redefinition of the roles and functions of the personnel involved in addition to specific precisely-aimed legislative reform. A major theme in the latter sections of this paper has been that initial and long run alterations in the conveyancing patterns of one area are most easily and appropriately facilitated through specific legislative reform. Close attention and study, as opposed to rhetoric, is needed as a catalyst to change; no neatly packaged solution promulgated by any one level of government would be sufficient even if one were available. However, as a result of recent studies and increased public interest, many questions have been posed that will require future governmental decisions. Some answers have already been found. In addition, much has been learned about the strengths and weaknesses of government data-gathering and social science as they relate to conveyancing problems. The lack of meaningful industry response has also been instructive. But, thus far, the failure of many components of the conveyancing industry to join forces in confronting the problem of closing and settlement costs has only raised other more basic issues relating to the need for some services which are now rendered as a matter of custom. The failure of such economic discussions has only served to politicize the problem.

206. Cardinali, *First Letter to Local Counsel 'Clearing' a New State*, in REAL ESTATE FINANCING 205 (K. Lore ed. 1971).