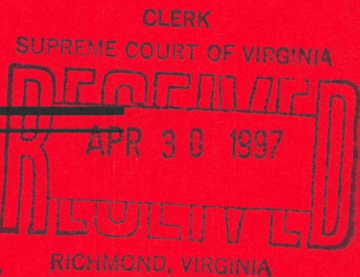


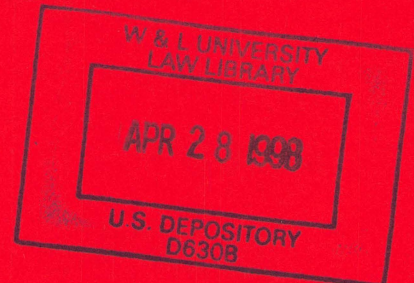
254Va388



IN THE
Supreme Court of Virginia

AT RICHMOND

RECORD NO. 970385



LAWYERS TITLE INSURANCE CORPORATION,

Appellant,

v.

NORWEST CORPORATION, et al.,

Appellee.

**JOINT APPENDIX
Volume I**

Howard W. Dobbins
Ralph L. "Bill" Axselle, Jr.
C. William Waechter, Jr.
Charles E. Wall
WILLIAMS, MULLEN,
CHRISTIAN & DOBBINS
Post Office Box 1320
Richmond, VA 23218
(804) 643-1991

Counsel for Appellant

David F. Peters
Louanna Godwin
HUNTON & WILLIAMS
Riverfront Plaza
East Tower
951 East Byrd Street
Richmond, VA 23219
(804) 788-8291

Counsel for Appellee

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STATE CORPORATION COMMISSION

DOCUMENT CONTROL

AT RICHMOND, JUNE 21, 1995

1995 JUN 21 PM 2:44

COMMONWEALTH OF VIRGINIA

At the relation of the

STATE CORPORATION COMMISSION

v.

CASE NO. INS950079

NORWEST CORPORATION,
NORWEST MORTGAGE, INC.

and

AMERICAN LAND TITLE COMPANY, INC.,
Defendants

RULE TO SHOW CAUSE

IT APPEARING from an investigation and subsequent allegations by the Bureau of Insurance that Norwest Corporation ("Norwest"), a bank holding company incorporated under the laws of Delaware, Norwest Mortgage, Inc. ("NMI"), a wholly-owned subsidiary of Norwest incorporated under the laws of Minnesota and engaged in the business of making residential mortgage loans in Virginia, and American Land Title Company, Inc. ("ALTC"), a wholly-owned subsidiary of NMI incorporated under the laws of Nebraska and licensed by the Commission to transact the business of a title insurance agency in Virginia, in at least one instance, violated Virginia Code § 38.2-1024 by transacting the business of title insurance without first obtaining a title insurance company license from the Commission; to wit: on or about October 3, 1994, Defendants issued Title Option Plus ("TOP") on a mortgage secured from NMI by Douglas C. Kline and Diane L. Kline, 10414 Hunter Ridge Drive, Oakton, Virginia, for which a fee or premium was paid by the Klines to ALTC;

THEREFORE, IT IS ORDERED:

(1) That Defendants appear before the Commission's Hearing Examiner, who is hereby appointed to conduct a hearing on behalf of the Commission pursuant to the authority granted the Commission in Virginia Code § 12.1-31, in the Commission's Courtroom, 2nd Floor, Tyler Building, 1300 East Main Street, Richmond, Virginia, at 10:00 a.m. on September 27, 1995, and show cause, if any, why the Commission should not, in addition to a penalty under Virginia Code § 38.2-218, order Defendants to cease and desist from any conduct which constitutes a violation of Virginia Code § 38.2-1024, or suspend or revoke ALTC's license to transact the business of a title insurance agency for Defendants' violations of Virginia Code § 38.2-1024;

(2) That, in accordance with § 12.1-31 of the Code of Virginia, a Hearing Examiner shall conduct all further proceedings in this matter on behalf of the Commission, concluding with the filing of the Examiner's final report to the Commission. In the discharge of such duties, the Hearing Examiner shall exercise all the inquisitorial powers possessed by the Commission, including, but not limited to, the power to administer oaths, require the appearance of witnesses and parties and the production of documents, schedule and conduct prehearing conferences, admit or exclude evidence, grant or deny continuances, and rule on motions, matters of law, and procedural questions. Any party objecting to any ruling or action of said Examiner shall make known its objection with reasonable certainty at the time of the ruling, and may argue such objections to the

Commission as part of its comments to the final report of said Examiner; provided, however, if any ruling by the Examiner denies further participation by any party in interest in a proceeding not thereby concluded, such party shall have the right to file a written motion with the Examiner for his immediate certification of such ruling to the Commission for its consideration. Pending resolution by the Commission of any ruling so certified, the Examiner shall retain procedural control of the proceeding; and

(3) That the Hearing Examiner hereinbefore appointed shall cause the testimony taken at such hearing to be reduced to writing and promptly deliver his written findings and recommendations together with the transcript of the hearing to the Commission for its consideration and judgment.

AN ATTESTED copy hereof shall be sent by the Clerk of the Commission by REGULAR AND CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to John P. Thornton, Chief Financial Officer, Norwest Corporation, 6th and Marquette, Minneapolis, Minnesota 55479-1052; Stephen D. Morrison, Senior Vice President, Secretary and General Counsel, Norwest Mortgage, Inc., 405 S.W. 5th Street, Des Moines, Iowa 50309-4626; Michael G. Fahey, President, American Land Title Company, Inc., 314 South 19th Street, Omaha, Nebraska 68102; Edward R. Parker, Esquire, 5511 Staples Mill Road, Richmond, Virginia 23228, Registered Agent for Norwest Mortgage, Inc. and American Land Title Company, Inc.; and deliver a copy to the Bureau of Insurance in care of Deputy Commissioner Mary M. Bannister.

**COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION**

**COMMONWEALTH OF VIRGINIA
At the relation of the
STATE CORPORATION COMMISSION**

Plaintiff,

v.

**NORWEST CORPORATION,
NORWEST MORTGAGE, INC.
and
AMERICAN LAND TITLE COMPANY, INC.,**

Defendants.

CASE NO. INS950079

**JOINT ANSWER TO RULE
TO SHOW CAUSE**

Norwest Corporation, Norwest Mortgage, Inc., and American Land Title Company, Inc., Defendants, for their answer to the Rule to Show Cause, and pursuant to Rule 5:16(c) of the Rules of Practice and Procedure of the State Corporation Commission, jointly state as follows:

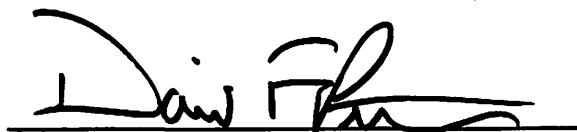
1. The Defendants deny that they have violated Virginia Code § 38.2-1024 by transacting the business of title insurance in Virginia.

2. The Defendants will show, on the evidence and the law, that Title Option Plus is not title insurance requiring the Defendants, or any one of them, to be licensed in Virginia as a title insurance company.

WHEREFORE, Norwest Corporation, Norwest Mortgage, Inc., and American Land Title Company, Inc. request the State Corporation Commission to find that the Defendants, and neither one of them, has violated Virginia Code § 38.2-1024, and dismiss this matter and place it among the ended causes.

Respectfully submitted,

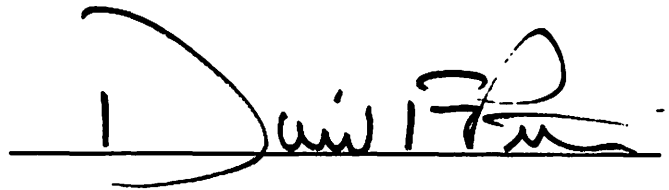
NORWEST CORPORATION
NORWEST MORTGAGE, INC.
and
AMERICAN LAND TITLE COMPANY, INC.

By 

David F. Peters
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
(804) 788-8291

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July, 1995, I caused a copy of the foregoing JOINT ANSWER TO RULE TO SHOW CAUSE to be forwarded by United States Mail, postage prepaid, to Michael D. Thomas, Esq., Associate General Counsel, Office of General Counsel, Virginia State Corporation Commission, P. O. Box 1197, Richmond, Virginia 23209 and to Glenn P. Richardson, Hearing Examiner, Virginia State Corporation Commission, P. O. Box 1197, Richmond, Virginia 23209.

A handwritten signature in dark ink, appearing to read "David F. Thomas", is written over a horizontal line.

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

COMMONWEALTH OF VIRGINIA

At the relation of the

STATE CORPORATION COMMISSION

v.

CASE NO. INS950079

NORWEST CORPORATION,
NORWEST MORTGAGE, INC.
and
AMERICAN LAND TITLE COMPANY, INC.,

Defendants

The complete transcript of the
testimony and other incidents of the above-captioned
matter when heard on November 15, 1995, before the
Honorable Glenn P. Richardson, Senior Hearing Examiner for
the State Corporation Commission, Richmond, Virginia.

Reported and transcribed
by: Karen Baxter Tubbs

APPEARANCES:

Honorable Glenn P. Richardson,
Senior Hearing Examiner

Michael D. Thomas, Esquire,
and
Peter B. Smith, Esquire,
Counsel to the Commission

C. William Waechter, Jr., Esquire,
and
Ralph L. "Bill" Axselle, Jr., Esquire,
Counsel for Virginia Land Title
Association and Lawyers Title
Insurance Corporation

David F. Peters, Esquire,
and
Louanna Godwin, Esquire,
Counsel for the Defendants

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1
2 NOTE: The matter is called to be
3 heard at 10:00 o'clock a.m., November 15, 1995,
4 and begins as follows, viz:

5
6 THE BAILIFF: Today's docket consists
7 of INS950079, Norwest Corporation, et al, for a
8 rule to show cause.

9 Louann Godwin and David Peters,
10 counsel for Applicant.

11 Michael Thomas and Peter B. Smith,
12 counsel for Commission.

13 Ralph L. Axselle, Jr. and C. William
14 Waechter, Jr., representing Lawyers Title
15 Insurance Corporation and Virginia Land Title
16 Association.

17 Glenn Richardson, Hearing Examiner,
18 presiding.

19 HEARING EXAMINER: Good morning,
20 ladies and gentlemen, counsel.

21 Are we ready to proceed?

22 MR. THOMAS: Your Honor, the Staff's
23 ready to proceed this morning. I just want to
24 clear up one item on the calling of the case.
25 In today's action, Norwest Corporation, Norwest

1 Mortgage, Inc. and American Land Title Company,
2 Inc., are appearing as Defendants in a rule to
3 show cause.

4 The Commission is prosecuting this
5 case. The Lawyers Title Insurance Company and
6 the Virginia Land Title Association have
7 previously filed a motion to appear in this case
8 as Petitioners under the Commission's Rules of
9 Practice and Procedure. So I just wanted to
10 clear that one item up on the appearance of the
11 parties.

12 HEARING EXAMINER: Well, I guess
13 technically Lawyers Title is a joint
14 Complainant, and Virginia Land Title is an
15 Intervenor.

16 MR. THOMAS: That's correct, Your
17 Honor.

18 First, some administrative matters,
19 Your Honor. I have the Rule to Show Cause and
20 the certified mail receipts where the Rule was
21 sent by certified mail to each of the Defendants
22 and received by the Defendants, and I would ask
23 that the notices be accepted into the record.

24 HEARING EXAMINER: All right.

25 The proof of service will be marked

1 and received as Exhibit A.

2 MR. THOMAS: Your Honor, the second
3 administrative letter I have is that the parties
4 have agreed to a supplemental joint stipulation
5 of fact, and I have that, and we are prepared to
6 admit that this morning. It includes the
7 submission of four additional exhibits with the
8 joint stipulation.

9 HEARING EXAMINER: All right.

10 If you would pass that forward, Mr.
11 Thomas.

12 (Pause)

13 I assume all other counsel have
14 reviewed these documents and agreed to submit
15 them along with the original joint stipulation?

16 MR. WAECHTER: Yes, sir, we have.
17 They have been signed by all counsel.

18 MR. PETERS: Yes, sir, Your Honor.

19 HEARING EXAMINER: All right.

20 MR. THOMAS: Your Honor, the third
21 administrative matter I have this morning is I
22 would, since this is a rule to show cause
23 proceeding before the Commission, I would ask
24 that the witnesses that are appearing on behalf
25 of all parties be recused from the hearing until

1 such time as they are to testify.

2 HEARING EXAMINER: All right.

3 I will go ahead and grant that motion.

4 MR. PETERS: Your Honor, I object to
5 that. I have one witness, Mr. Keller, who is a
6 representative of the clients, and I think he is
7 entitled to be in the hearing room during the
8 entire proceeding.

9 HEARING EXAMINER: I was going to give
10 each party the ability to keep one witness in
11 the hearing room. Would that satisfy your
12 concern, Mr. Peters?

13 MR. PETERS: Yes, sir.

14 HEARING EXAMINER: All right.

15 Very well, Mr. Thomas' motion to
16 sequester the witnesses will be granted. Each
17 party will be entitled to have one
18 representative in the courtroom, whether they
19 are going to testify or not. So I would ask if
20 the bailiff would locate acceptable
21 accommodations for the witnesses.

22 This is going to apply to any of the
23 witnesses who are going to testify in this
24 proceeding. Anyone who is in the courtroom who
25 is not going to testify, of course, can remain

1 here this morning. The witnesses who will
2 testify, who are going to be sequestered, I
3 would ask you not to discuss the nature of any
4 testimony that you give in this proceeding
5 amongst yourselves until this hearing is
6 concluded.

7
8 NOTE: The witnesses retire from the
9 courtroom, after which the hearing resumes as
10 follows, viz:

11
12 HEARING EXAMINER: Mr. Thomas, do you
13 want to go ahead and proceed with your opening
14 statement?

15 MR. THOMAS: Yes, Your Honor.

16 Your Honor, on June 21st, 1995, the
17 Commission issued a rule to show cause wherein
18 it is alleged that the Defendants, Norwest
19 Corporation, Norwest Mortgage, Inc., American
20 Land Title Company, Inc., have violated Virginia
21 Code Section 38.2-1024, by transacting the
22 business of title insurance without first
23 obtaining a title insurance company license from
24 the Commission.

25 It is alleged that on or about October

1 3rd, 1994, Defendants issued Title Option Plus
2 on a mortgage secured from Norwest Mortgage,
3 Inc., by Douglas C. Kline and Diane C. Kline,
4 residents of the Commonwealth of Virginia for
5 which a fee or premium was paid by the clients
6 to American Land Title Company.

7 Defendants were ordered to appear
8 before the Commission and show cause, if any,
9 why the Commission should not, in addition to a
10 penalty under Virginia Code Section 38.2-218
11 order Defendants to cease and desist from any
12 conduct which constitutes a violation of
13 Virginia Code Section 38.2-1024 or suspend or
14 revoke American Land Title Company's license to
15 transact the business of a title insurance
16 agency for Defendants' violation of Virginia
17 Code Section 38.2-1024.

18 There are two issues which are before
19 the Court this morning. The first of those
20 issues is whether TOP, Title Option Plus, is
21 insurance. Virginia Code Section 38.2-100
22 defines what an insurance company is, and that
23 definition is that, "It is any company engaged
24 in the business of making contracts of
25 insurance." The term "contract of insurance" is

1 not defined in the Code of Virginia.

2 This Court will have to look at
3 authority from the Virginia Supreme Court and
4 the seminal case on this point is American
5 Surety Company versus Commonwealth, cited at 180
6 Va. 97, and that's a 1942 case. In that case
7 the Virginia Supreme Court set forth a five-part
8 test to determine whether a contract of
9 insurance exists. The first of those
10 requirements, the subject matter to be insured;
11 secondly, the risk insured against; third, the
12 commencement and period of the risk undertaken
13 by the insurer; fourth, the amount of insurance;
14 fifth, the premium and time at which it is to be
15 paid. Each of these elements is present in this
16 case.

17 Applying this test to the TOP product,
18 the subject matter to be insured would be the
19 status of the first mortgage lien; the risk
20 insured against would be both on record and off
21 record title defects; the commencement and
22 period of the risk undertaken by the insurer
23 would commence on the date of issuance of the
24 final title certificate and would run for the
25 duration of the loan; the amount of insurance

1 would be Norwest or Norwest Mortgage, Inc.'s
2 interest in the collateral to the loan, which
3 would either be the loan amount or the purchase
4 price; the premium and time at which it is to be
5 paid would be the TOP fee charged the borrower
6 at the closing of the mortgage loan.

7 The test set forth in American Surety
8 has been followed by the Virginia Supreme Court
9 in one case, and that is Group Hospital Medical
10 Service, Inc. versus Smith, and that case is
11 cited at 236 Va. 228. It's a 1988 case.

12 In the Group Hospital case, the
13 Virginia Supreme Court found that Fairfax
14 County's self-funded employee health plan
15 constituted a contract of insurance.

16 The second issue before this Court is
17 whether TOP is title insurance. Virginia Code
18 Section 38.2-123 defines title insurance as
19 "insurance against loss by reason of liens and
20 encumbrances upon property, defects in the title
21 to the property, and other matters affecting the
22 title to the property or the right to the use
23 and enjoyment of property."

24 Title insurance includes insurance of
25 the condition of the title to the property and

1 the status of any lien on the property. I
2 believe it's the second full sentence in that
3 Code section that is applicable in this case.

4 Through the TOP product, Norwest
5 Mortgage, Inc. is insuring the first lien status
6 of the property securing its mortgages to any
7 subsequent purchaser of its mortgage loan.

8 Since the TOP product meets the
9 requirements set forth by the Virginia Supreme
10 Court for a contract of insurance and it meets
11 the statutory definition of title insurance in
12 order for such product to be sold in Virginia,
13 the company selling TOP would have to be
14 licensed as a title insurance company.

15 None of the Defendants are licensed as
16 title insurers. American Land Title Company is
17 licensed as a title insurance agency. They are
18 permitted, under the scope of their license, to
19 sell title products -- title policies issued by
20 licensed title insurance companies. They are,
21 in fact, appointed by Chicago Title and Stewart
22 Title.

23 Your Honor, I would like to take a
24 minute and just sort of give an overview of the
25 chart that I have placed before the Court. It's

1 my intention to move the admission of that chart
2 through one of my witnesses, but I think it's
3 important and would be beneficial to the Court
4 to have an understanding of the TOP product as
5 it's being sold and marketed in Virginia, and I
6 will attempt to do that in an impassionate
7 manner.

8 HEARING EXAMINER: Mr. Thomas, could I
9 have a copy of one of the smaller charts there?

10 MR. THOMAS: Certainly. I'm sorry,
11 Your Honor, I took care of the bench --

12 Sorry, Your Honor.

13 If I might step around. Essentially
14 if I'm a home buyer or if I'm interested in
15 refinancing my existing mortgage loan, and I
16 decide to use the services of Norwest Mortgage,
17 Inc., I would go into a Norwest Mortgage, Inc.
18 branch office, and at that time I would complete
19 the paperwork for the actual mortgage loan or
20 refinance, and at the Norwest Mortgage office, I
21 would be advised that in order to close on the
22 loan, I would either have to have a lender's
23 title insurance policy, an attorney's opinion of
24 title, or Norwest has a new product which is
25 called Title Option Plus, and Title Option Plus

1 satisfies Norwest's requirement for lender's
2 title insurance.

3 At this time I'm shown a consumer
4 title status election form where Norwest has
5 broken out the various fees charged for either a
6 lender's policy, an owner's and lender's policy
7 or the TOP product. And we have examples of the
8 Consumer Title Status Election are in the joint
9 stipulation of fact.

10 Essentially, the Consumer Title Status
11 Election is used to market the TOP product to
12 me. It breaks out the cost savings that I, as
13 the borrower, would benefit from if I selected
14 the TOP product. At the bottom of the Consumer
15 Title Status Election form, there are three
16 boxes that I could check off, either get me a
17 lender's policy, get me an owner's and lender's
18 policy or get me the TOP product.

19 When TOP was initially introduced in
20 Virginia, it was just lender's protection only.
21 If I selected TOP, I could not purchase an
22 owner's title insurance policy to protect my
23 interest in the property. Subsequent to the
24 introduction of TOP, approximately around
25 February of 1995, Norwest has amended its

1 operations where I, as the prospective home
2 purchaser, can now obtain an owner's title
3 insurance policy in conjunction with TOP.

4 In order to make the TOP product
5 viable, there is a two-tiered pricing structure.
6 If I select TOP by itself, the TOP fee bears a
7 relation to the amount of the loan, that as the
8 amount of the loan increases, the fee charged
9 for TOP increases.

10 The TOP product by itself was
11 designed, or the fees charged for the TOP
12 product by itself were designed to be at least
13 90 percent of the cost of a comparable lender's
14 policy. And this fee savings is used to market
15 the TOP product to consumers.

16 When Norwest developed TOP Plus, the
17 fee structure changed because the borrower has
18 to pay the premium for an owner's title
19 insurance policy. So in cases where TOP Plus is
20 selected, there is a flat \$10 charge for the TOP
21 product.

22 Now, if I decide I want to purchase
23 TOP, I complete the Consumer Title Status
24 Election form, and I elect to purchase TOP.
25 That form is provided to the Norwest Mortgage

1 Loan officer. At that point, Norwest orders
2 what is called an owners and encumbrance report
3 from their wholly-owned subsidiary, American
4 Land Title Company. This owners and encumbrance
5 report consists of two documents, primarily.
6 The first is a title condition report, and that
7 document essentially sets forth a description of
8 the property involved in the real estate
9 transaction. It basically summarizes what's on
10 file in the records of the local court, the land
11 records of the court.

12 The second document that's involved is
13 a final title certificate. I believe the timing
14 of these -- the title condition report is done
15 fairly quickly after the consumer title status
16 election, and that document is completely prior
17 to the loan closing. The final title
18 certificate is provided after the loan closing
19 and after Norwest has filed its deed of trust in
20 the land records at the local courthouse.

21 The home purchaser, from my
22 perspective, the fees and origination points of
23 my mortgage loan are paid to Norwest Mortgage,
24 Inc. In fact, those fees are deducted from the
25 amount of my loan prior to Norwest Mortgage

1 forwarding the loan proceeds to American Land
2 Title Company.

3 The TOP and TOP Plus fees are paid to
4 American Land Title Company, and as the
5 documents in the joint stipulation will reflect,
6 those -- the TOP fees are set forth on the HUD-
7 1. At the time of the closing, Norwest prepares
8 a disbursement worksheet, and, in effect, writes
9 a check payable to itself for the amount of the
10 TOP fee.

11 We have the owners and encumbrance
12 report provided to Norwest Mortgage, Inc., and
13 they use this report and provide it to the
14 secondary market lenders that purchase Norwest
15 Mortgages on the secondary market.

16 Now, the various positions of the
17 parties: Norwest's position essentially is that
18 the TOP product is either a warranty, it's
19 either a self-insurance, or that none of the
20 four transactions which make up TOP by itself is
21 not a contract of insurance. And let me just
22 explain those, essentially the four
23 transactions.

24 You have the home purchaser who elects
25 to purchase TOP from Norwest Mortgage, Inc.

1 That's transaction No. 1. Transaction No. 2 is
2 Norwest Mortgage, Inc. ordering the owners and
3 encumbrance report from American Land Title
4 Company. That's transaction No. 2. Transaction
5 No. 3 is when Norwest Mortgage, Inc. sells its
6 mortgage loans to the secondary market.

7 Now, with respect to the secondary
8 market, there is a master agreement between
9 Norwest Mortgage, Inc., Fannie Mae and Freddie
10 Mac, the Federal National Mortgage Association,
11 better known as Fannie Mae, and the Federal Home
12 Loan Mortgage Corporation, better known as
13 Freddie Mac. Now, under this master agreement,
14 those two secondary market lenders have agreed
15 to accept Norwest's mortgage loans that are
16 covered by a TOP product, in lieu of lender's
17 title insurance or in lieu of an attorney's
18 opinion of title.

19 If there are any defects in the first
20 lien position as affects these two secondary
21 market lenders, then Norwest Mortgage, Inc. has
22 agreed to indemnify those lenders, provide
23 defense costs, cure the defects or ultimately,
24 if they have to, repurchase the loan.

25 With respect to the Government

1 National Mortgage Association, or better known
2 as Ginnie Mae, Ginnie Mae does not require title
3 insurance, an attorney's title opinion or TOP on
4 the loans that it purchases. But they do have
5 an agreement to repurchase their loans if there
6 is a defect in the first lien position from
7 Ginnie Mae. That's the third transaction
8 involved in this arrangement.

9 The fourth is that there are guarantee
10 agreements that run from Norwest Corporation,
11 the ultimate parent of all of these entities.
12 Those guarantee agreements run to Fannie Mae and
13 Freddie Mac, and essentially Norwest
14 Corporation, the parent, is guaranteeing the
15 obligations of Norwest Mortgage, Inc. when
16 Norwest Mortgage, Inc. loans involve the TOP
17 product.

18 Our position is -- the Staff's
19 position in this case is that you cannot look at
20 each of these transactions separately. I hate
21 to use the analogy that this is a four-legged
22 stool, but TOP only exists by virtue of each of
23 these four transactions, and if you remove one
24 of the four transactions, you no longer have
25 TOP. I think that's the best way I can describe

1 the various transactions that are involved, the
2 parties, and the various positions of the
3 parties in this case.

4 Your Honor, with regard to penalties
5 in this case, it is the Staff's recommendation
6 that for Norwest, Norwest Mortgage, Inc., and
7 American Land Title Companies, violations of
8 Virginia Code Section 38.2-1024, that each of
9 the three entities be ordered to cease and
10 desist from any future violations of said
11 statute, that in the Joint Stipulation of Fact,
12 there is an exhibit that documents the
13 approximately 60 instances where TOP was sold to
14 residents of the Commonwealth of Virginia. We
15 would ask that a monetary penalty of \$5,000 for
16 each violation be assessed each party, and that
17 would total penalties in the amount of \$300,000.

18 Further, Your Honor, we would ask that
19 the license of American Land Title Company to
20 engage in the business of insurance in Virginia
21 as a title insurance agency be revoked.

22 Your Honor, that completes my opening
23 statement.

24 HEARING EXAMINER: All right. Thank
25 you very much, Mr. Thomas.

1 Mr. Waechter, Mr. Axselle?

2 MR. AXSELLE: May it please the court,
3 my name is Bill Axselle, and with Bill Waechter,
4 we are with Williams, Mullen, Christian &
5 Dobbins, and it's our pleasure to be
6 representing Lawyers Title Insurance
7 Corporation, which is a co-complainant in this
8 matter. And as you know from the stipulation,
9 Lawyers Title is a national title insurance
10 company, headquartered here in Virginia, and
11 operating basically throughout the United
12 States.

13 We also are working with an
14 Intervenor, Virginia Land Title Association,
15 which is an association of the title insurance
16 companies here in Virginia.

17 My comments will not be extensive. I
18 think you're very familiar with the issues
19 before you, from the pleadings, from the
20 pretrial conference, from the documents that are
21 in the record, and from Mr. Thomas' excellent
22 overview.

23 We will be offering one witness, John
24 Goode, who has 40 years of experience as an
25 expert in real estate transactions, title

1 insurance, financing, and has about seven years
2 in private practice, with heavy emphasis in real
3 estate, 33 years with Lawyers Title.

4 Our ultimate analysis will be set
5 forth in the post hearing brief that we will be
6 filing, but I will tell you that we have no
7 doubt that after all is said and done, that you
8 will conclude that the TOP product is title
9 insurance. I fully expect that you're going to
10 hear from Norwest a lot of explanations, what my
11 father used to refer to as "Who struck John?", a
12 lot of things today and in their briefs, but
13 quite frankly, after all is said and done, TOP
14 is title insurance.

15 So having said that TOP is the
16 functional equivalent of title insurance, and I
17 think that's true, but I think TOP truly is, by
18 itself, title insurance. It has all the
19 features, the components, all the provisions of
20 insurance, and that is insurance that is related
21 to the title of real estate. It has all the
22 provisions that the Virginia law says that a
23 contract of insurance should have, and it does
24 relate to the title of real estate: Thus, it is
25 title insurance.

1 They will talk a lot about the
2 different documents and agreements, and the
3 different forms, and the formats and all of
4 that, but at the end of the day, it's title
5 insurance. And no matter what the form is, the
6 substance is title insurance. And the
7 Commonwealth and this Commission have long had
8 the policy of not allowing people to avoid the
9 substance of regulation by deception and by
10 differences in form. This is a case of
11 substance, where we should not be and cannot be
12 diverted by the form, and we look forward to the
13 hearing.

14 HEARING EXAMINER: All right. Thank
15 you, sir.

16 Mr. Peters, good morning, sir.

17 MR. PETERS: Good morning.

18 Mr. Hearing Examiner, Ms. Godwin and I
19 represent the Defendants in this matter: Norwest
20 Corporation, Norwest Mortgage, Inc., and
21 American Land Title Company.

22 Until this morning, until the
23 presentation by Mr. Thomas, our clients did not
24 know what the legal analysis of the Bureau of
25 Insurance is on the question of whether TOP

1 constitutes insurance and title insurance.

2 I would like to start my opening
3 statement really jumping to the question of the
4 draconian penalties that Mr. Thomas has
5 suggested be assessed in this case. What he is
6 proposing is a penalty based on a knowing and
7 intentional violation of Virginia law. When, in
8 fact, Norwest, the Defendants, from the
9 beginning have sincerely and in good faith
10 believed that their product does not constitute
11 insurance, title insurance or insurance of any
12 nature.

13 Promptly after receipt of a copy of a
14 complaint letter that was filed with the Bureau
15 by Lawyers Title Insurance Corporation, Norwest
16 Mortgage, Inc. responded to that letter with a
17 direct letter of its own to the Commissioner of
18 Insurance, and laid out in full what the
19 position, legal analysis and factual analysis of
20 the Defendant's was. And that position was that
21 the product is not insurance. Over the course
22 of several months, from that point until May of
23 1995, Norwest continued to supply information
24 and analyses to the Bureau of Insurance.

25 In May of 1995, Mary Bannister, the

1 Deputy Commissioner of Insurance, advised
2 Norwest that the issue was being presented to
3 the general counsels' office of the State
4 Corporation Commission for an opinion as to
5 whether, in fact, the product constituted
6 insurance. Ms. Bannister's letter said that the
7 Bureau would then advise the Norwest companies
8 as to what the final position is. The next
9 Norwest knew about this proceeding was the
10 receipt of the service of the show cause order,
11 and that was when this proceeding began.

12 During all this time, until today, the
13 analysis that Mr. Thomas has provided has been a
14 mystery to our clients. And so necessarily,
15 what we, as Defendants, will ask is that we have
16 the opportunity, after the factual evidence is
17 in this proceeding, that we have an opportunity
18 to submit post hearing briefs providing our
19 analysis and how it will fit with the facts.

20 Now, really this is a very simple
21 case, whether the product constitutes insurance.
22 And our position is that it doesn't. If I may
23 use this chart to illustrate that. TOP relates
24 to a product that is created by Norwest
25 Mortgage, Inc. Norwest Mortgage, Inc. -- its

1 business is the making of real estate secured
2 loans, mortgage loans. It doesn't do anything
3 else. It makes first and second mortgage loans.
4 So it's product is a mortgage loan.

5 Now, any lender, whether it be Norwest
6 Mortgage, Inc., or any other lender, has an
7 inherent title risk when it makes a mortgage
8 loan, and that is that the title security that
9 it has is not good title security. If what they
10 thought they had was a first mortgage loan, but
11 it turns out to be a subordinate mortgage or
12 there is some other defect in the title, that's
13 a risk that Norwest Mortgage has from the
14 outset.

15 And what this case really is about is
16 whether through TOP, Norwest Mortgage, Inc.
17 shifts that risk to any other party. If Norwest
18 Mortgage, Inc. does not shift that risk, there
19 is not insurance. There is not title insurance;
20 there is not any other kind of insurance. And I
21 make that statement because the law is clear,
22 that insurance involves the shifting of risk.
23 And we're going to show by our witnesses and by
24 my cross-examination of their witnesses, that
25 the Bureau of Insurance knows that's the case

1 because there are examples in the history of the
2 Bureau's dealings businesses. But the Bureau
3 has advised and opined that unless there is a
4 shifting of a risk to a third party, the product
5 does not constitute insurance. And furthermore,
6 that's the case even if there's a fee paid by
7 the customer. So long as the risk stays with
8 Norwest Mortgage, Inc., there cannot be
9 insurance.

10 Mr. Thomas has advised in his
11 presentation this morning that there are some
12 Virginia case law that he is relying on, the
13 American Surety case, which set forth certain
14 tests for what constitutes an insurance
15 contract.

16 Well, implicit in the American Surety
17 case is the shifting of risk because American
18 Surety involved a surety company that was a
19 third party, another party, that assumed the
20 risk away from the protected party. There
21 necessarily in the Supreme Court's decision was
22 implicit the transferring of risk from what
23 happened to be the Clerk's Office of the
24 Virginia Supreme Court over to a surety company.

25 The same is true with regard to the

1 group hospitalization case which he cites.
2 Group hospitalization involved a question of an
3 employer that had assumed the risk of its
4 employees that they might get sick. Now, it's
5 true that the employer was referred to as self-
6 insurer, but if you understand health insurance,
7 group health insurance, the employer truly
8 assumes the risk of health-related expenses from
9 the employees over to itself, operating like an
10 insurance company.

11 Not one of these Virginia cases that
12 has been referenced defeats my argument, my
13 clients' position, that in order for their to be
14 insurance, there has to be a transfer of risk.

15 Now, Mr. Thomas has also explained the
16 theory of the Bureau is that there are four
17 transactions, and in his own words, he says that
18 if any one of those transactions is not present,
19 then the TOP program doesn't work. Well, you
20 notice that there are black arrows. These are
21 the guarantee agreements. They run from Norwest
22 Corporation, first of all, to Fannie Mae, and
23 then secondly, they run to Freddie Mac, but
24 there's no black arrow that runs from Norwest
25 Corporation to Ginnie Mae. And yet Top loans,

1 loans on which the customer has elected to have
2 TOP apply, are, in fact, sold by Norwest
3 Mortgage to Ginnie Mae. So there is the absence
4 of one of these very essential transactions in a
5 TOP context. So I will be interested to see in
6 the post hearing briefs how Mr. Thomas and the
7 Lawyers Title Insurance Corporation address the
8 absence of a guarantee from Norwest to Ginnie
9 May.

10 In the final analysis, Norwest
11 Mortgage, Inc. retains the risk throughout all
12 of these transactions. It's a risk that is
13 inherent in the product it creates, that is the
14 mortgage loan, and it never gets rid of that
15 risk. And it makes a charge to the customer for
16 the purpose of enabling it to retain that risk.
17 And as this hearing will demonstrate, when
18 that's the case, when a party retains the risk,
19 even though it charges for that retention of the
20 risk, it cannot constitute insurance.

21 Thank you.

22 HEARING EXAMINER: All right. Thank
23 you, Mr. Peters.

24 Mr. Thomas?

25 MR. THOMAS: Staff would like to call

1 its first witness, Mary Bannister.

2 Somebody will have to get her, she's
3 not here.

4 (Pause)

5 HEARING EXAMINER: Counsel, would it
6 be appropriate at this point to mark and receive
7 the Joint Stipulation of Fact into the record?

8 MR. THOMAS: Yes, Your Honor.

9 HEARING EXAMINER: All right.

10 I will go -- there's apparently a
11 couple of documents in here that are
12 confidential in the Joint Stipulation of Fact;
13 is that correct?

14 MR. THOMAS: That's correct, Your
15 Honor, and --

16 HEARING EXAMINER: If you could give
17 me the listing of those documents because I want
18 to --

19 MR. THOMAS: Those would appear -- let
20 me -- I can -- just a moment, Your Honor, and I
21 will give you -- it's Exhibit No. 2, Exhibit No.
22 3, Exhibit No. 4, Exhibit No. 5 are the
23 confidential documents. Your Honor, when the
24 Joint Stipulation was filed in the Clerk's
25 Office, those documents were not included in

1 that version. There was, however, a description
2 of the document placed behind each of the
3 exhibit tabs. But it's my understanding that
4 those documents will remain confidential
5 throughout this proceeding.

6 HEARING EXAMINER: All right.

7 I will go ahead and mark the Joint
8 Stipulation of Fact as Exhibit No. JSF-1, and
9 the separate exhibits identified as Exhibits 2,
10 3, 4 and 5 in that Joint Stipulation of Fact
11 will be held under seal until further order of
12 the Examiner or the Commissioners.

13 MR. PETERS: Your Honor, the
14 supplement to the Joint Stipulation of Fact
15 includes as exhibits, 23 and 24, which
16 constitute portions of master agreements between
17 Norwest Mortgage, Inc. and Freddie Mac and
18 Fannie Mae. Those, likewise, should be deemed
19 confidential, and I apologize for not having
20 thought of that previously. But what they are
21 are earlier versions of documents that were
22 previously designated as confidential. And so I
23 would move that the confidentiality status also
24 be extended to Exhibits 23 and 24.

25 MR. WAECHTER: Your Honor, I'm not

1 sure what difference it makes, but I would point
2 out to the Court that the documents referred to
3 by Mr. Peters that are in the Joint Stipulation
4 as 23 and 24 are documents that have been
5 introduced in legal proceedings of this nature
6 in other jurisdictions in the United States, and
7 indeed, that's where this copy of this very
8 document comes from. There is nothing
9 confidential about this. It's known far and
10 wide. There is nothing in these two documents
11 that applies to the Fannie Mae arrangement, and
12 indeed, when these documents were in force,
13 which is during the major portion of the time
14 covered by the events that Mr. Thomas has
15 referred to within the Commonwealth of Virginia,
16 that the Fannie Mae agreement was not in force,
17 and these documents in the supplemental
18 stipulation don't have anything to do with
19 Fannie May. They deal with the arrangement with
20 Freddie Mac.

21 I point out to the Court, I see no
22 need for the confidentiality. They are public
23 documents now, and I think it just encumbers the
24 proceeding somewhat.

25 MR. PETERS: Your Honor, if I may

1 respond to that. I appreciate Mr. Waechter
2 correcting me. These documents, 23 and 24, do
3 not apply to Fannie Mae. They do only apply to
4 Freddie Mac.

5 The only other legal proceeding that I
6 am aware of where these documents are in
7 evidence is in Nebraska, and I am advised by my
8 clients that those documents were admitted under
9 confidentiality status. Now, the fact that
10 Lawyers Title Insurance Corporation has them
11 must be a breach of the confidentiality status
12 that was applied in Nebraska. But that should
13 not excuse their -- should not waive their
14 confidentiality here. They are the same -- they
15 are simply the predecessor documents on the
16 Freddie Mac arrangements to documents that have
17 previously been declared confidential in this
18 proceeding.

19 HEARING EXAMINER: Mr. Peters, I will
20 accept you at your word, that Exhibit Nos. 23
21 and 24 were submitted in the Nebraska proceeding
22 as confidential documents and should not be made
23 public. And just as an aside, I don't think
24 it's going to affect my decision in this case
25 one way or the other. They are going to be

1 available to me. If they need to be released,
2 we can cross that bridge at some time in the
3 future.

4 So I'm going to go ahead and mark,
5 once again, 2, 3, 4 and 5 and also Exhibit Nos.
6 23 and 24 in this supplemental stipulation of
7 fact. They will be held as confidential
8 documents under seal at the Commission. And the
9 rest of the documents in the Joint Stipulation
10 of Fact, with the exception of those six
11 exhibits will be passed to the file as an
12 exhibit and available for public inspection.

13 All of the documents, once again, will
14 be marked collectively as JSF-1.

15 MR. THOMAS: I just want to make sure
16 that JSF-1 includes the documents that I
17 submitted in today's hearing.

18 HEARING EXAMINER: JSF-1 includes
19 documents 1 through 26, but once again, Exhibit
20 Nos. 2, 3, 4, 5, 23 and 24 will be held under
21 seal.

22 MR. THOMAS: Thank you, Your Honor.
23
24
25

1
2 MARY M. BANNISTER, a witness being
3 called by and on behalf of the Commission Staff, having
4 first been duly sworn, testifies as follows, viz:

5 DIRECT EXAMINATION

6 BY MR. THOMAS:

7 Q Ms. Bannister, would you please state
8 your name and your position with the State Corporation
9 Commission, Bureau of Insurance?

10 A Yes. My name is Mary Bannister. I'm
11 Deputy Insurance Commissioner for the Property and
12 Casualty Division of the Bureau of Insurance for the State
13 Corporation Commission. My office is located in the Tyler
14 Building, 1300 East Main Street, Richmond, Virginia.

15 Q And how long have you been in this
16 position?

17 A Three and a half years.

18 Q And what are your duties?

19 A I manage six separate property and
20 casualty units, and some of the duties -- some of the
21 examples of the type of work we do is approve policy
22 forms, rules and rates, conduct agency investigations,
23 conduct market conduct exams.

24 Q And what previous positions have you
25 held at the Bureau?

1 A Prior to being Deputy Insurance
2 Commissioner, I was a supervisor of the Rates and Forms
3 section of the Property/Casualty Division of the Bureau of
4 Insurance.

5 Q When did the Bureau first find out
6 that TOP was being offered or sold to residents of
7 Virginia?

8 A On August 22nd, 1994.

9 Q And how did they come to find this
10 out?

11 A Lawyers Title Insurance Corporation
12 sent a letter to Commissioner Foster giving an overview of
13 the TOP program, including some newspaper clippings and
14 asked the Commissioners' views if the TOP product was
15 insurance and should be regulated under Title 38.2 of the
16 Code of Virginia.

17 Q Subsequent to the filing of that
18 letter by the Lawyers Title Insurance Company, did the
19 Bureau engage in a series of correspondence with Norwest
20 Corporation?

21 A No. The first correspondence that the
22 Bureau received from Norwest Corporation was a letter
23 dated August 31st, 1994.

24 Q Okay.

25 (Pause)

1 Ms. Bannister, I have prepared for you
2 an exhibit which consists of a series of letters, the
3 first of which is dated August 31, 1994, and the last is
4 dated May 8th of 1995. I would ask you to identify those
5 documents, please.

6 A Yes. The first letter, dated August
7 31st, 1994, is from Norwest Mortgage to Commissioner
8 Foster, and in the letter Norwest Mortgage is explaining
9 why the TOP product is not insurance.

10 The second letter is dated September
11 1st. It is from Commissioner Foster to Norwest Mortgage,
12 acknowledging Norwest's letter of August 31st.

13 The third letter is from Norwest
14 Mortgage Corporation, dated September 1st, 1994, to
15 Commissioner Foster, explaining how the TOP program works,
16 and they enclose a copy of the TOP manual.

17 October 4th, 1994, JoAnne Scott of the
18 Bureau of Insurance wrote to Norwest Mortgage Corporation
19 requesting a copy of a HUD-1 form.

20 On October 13th, 1994, Norwest sent to
21 JoAnne Scott of the Bureau a copy of a HUD-1 form that one
22 of their borrowers had paid for.

23 Q Is this a HUD-1 where the borrower had
24 selected the TOP product?

25 A Yes, sir.

1 Q Please continue.

2 A December 7th, 1994, Norwest sent a
3 letter to JoAnne Scott that provided a copy of an
4 agreement with Freddie Mac and their parent company's
5 agreement also with Freddie Mac.

6 On May 8th, 1995, I wrote to Norwest
7 Mortgage asking information on what Norwest would do if
8 the superior title were found after selling the loan to
9 the secondary market.

10 And the last piece of correspondence
11 is dated -- is a letter from Norwest, directed to me,
12 dated May 8th, in response to our May 8th fax.

13 Q Ms. Bannister, do these various
14 letters constitute all of the correspondence between the
15 Bureau of Insurance and Norwest?

16 A Yes.

17 MR. THOMAS: Your Honor, I would ask
18 that the correspondence between the Bureau and
19 Norwest be admitted into the record. I will
20 point out that on December 7th, a letter dated
21 December 7th, 1994, from Norwest Mortgage to
22 JoAnne Scott of the Bureau of Insurance contains
23 the copy of the master agreement between Norwest
24 Mortgage and Freddie Mac.

25 HEARING EXAMINER: What date is that

1 letter again, Mr. Thomas?

2 MR. THOMAS: It's December 7th, 1994,
3 a letter from Harry Sandstrom, Deputy General
4 Counsel of Norwest Mortgage to Ms. JoAnne Scott.

5 HEARING EXAMINER: And I take it this
6 is one of the documents that has been marked
7 confidential.

8 MR. THOMAS: It's two of the documents
9 that have previously been marked confidential.

10 HEARING EXAMINER: Exhibits 23 and 24?

11 MR. THOMAS: Yes, Your Honor.

12 HEARING EXAMINER: All right.

13 Why don't we just go ahead and remove
14 those from the letter then?

15 MR. PETERS: Your Honor, I would like
16 to object to that. My understanding is that in
17 investigations, the matters of the documents and
18 records obtained by the Bureau of Insurance in
19 their investigations of violations of Virginia
20 law are not a matter of public record, and so
21 when Norwest Mortgage supplies a document that
22 may have had confidential status by virtue of
23 this agreement with Freddie Mac, that's for
24 purposes of its response to the investigators'
25 questions and inquiries. But that doesn't mean

1 that Norwest Mortgage has waived its right to
2 claim disclosure status for that document.

3 HEARING EXAMINER: Perhaps you
4 misunderstood me, Mr. Peters. I was not going
5 to admit those confidential documents --

6 MR. PETERS: I'm sorry.

7 HEARING EXAMINER: -- along with the
8 letter.

9 MR. PETERS: You're right, I did.

10 HEARING EXAMINER: I was going to
11 detach those documents, and they have already
12 been marked as sealed along with the Joint
13 Stipulation of Fact.

14 MR. PETERS: I apologize.

15 HEARING EXAMINER: I'm not going to
16 disclose any secrets, don't worry.

17 MR. THOMAS: Your Honor, I have asked
18 that the documents be admitted into the record,
19 and I need you to rule on that request.

20 HEARING EXAMINER: All right. Hold
21 on, Mr. Thomas.

22 (Pause)

23 I guess we have eight documents here?

24 MR. THOMAS: That's right, Your Honor.

25 HEARING EXAMINER: Any objections,

1 counsel?

2 MR. PETERS: No, Your Honor.

3 HEARING EXAMINER: All right.

4 We will go ahead and mark the eight
5 letters sponsored by Ms. Bannister collectively
6 as Exhibit No. MMB-2.

7 BY MR. THOMAS: (Continuing)

8 Q Ms. Bannister, prior to the TOP
9 product being marketed and sold in Virginia, did Norwest
10 Mortgage Corporation, Norwest Mortgage, Inc. or American
11 Land Title Company contact the Bureau of Insurance for a
12 determination whether or not the TOP product complied with
13 Virginia insurance laws?

14 A No, they did not. The first
15 correspondence from Norwest Mortgage, Inc., to the Bureau,
16 was dated August 31st, 1994, and they explained in that
17 letter why they did not believe the TOP product was
18 insurance.

19 Q Does the Bureau of Insurance routinely
20 provide determinations for companies or individuals on
21 whether a proposed product or service complies with
22 Virginia's insurance laws?

23 A Yes. Companies often ask us to review
24 their products to make this determination, and we make
25 this determination made on an administrative letter, No.

1 1982-10. This administrative letter was based on a legal
2 opinion received from our Office of General Counsel.

3 Q Now, this administrative letter
4 relates to whether or not something is a warranty versus
5 insurance?

6 A Yes, sir.

7 Q Is Norwest Corporation licensed as a
8 title insurance company in Virginia?

9 A No, they are not.

10 Q Is Norwest Mortgage, Inc. licensed as
11 a title insurance company in Virginia?

12 A No, they're not.

13 Q Is American Land Title Company
14 licensed as a title insurance company in Virginia?

15 A No, they're not.

16 Q Are any of the foregoing companies
17 licensed as a title insurance agency in Virginia?

18 A Yes. American Land Title Company is
19 licensed as a title agency in the Commonwealth.

20 Q As a licensed title agency, does
21 American Land Title Company have appointments with various
22 title insurance underwriters?

23 A Yes. American Land Title is appointed
24 by Chicago Title and Stewart Title Insurance Companies.

25 Q Would you please explain to the Court

1 the difference between a title insurance company and a
2 title insurance agency.

3 A Yes. A title insurance company
4 underwrites the risk. A title insurance agency is defined
5 in the Code under Section 38.2-4601.1. A title agency
6 evaluates the risk to determine its insurability,
7 determines whether or not there are underwriting
8 objections. If they have been cleared, they will issue
9 commitment binder papers and often will issue the title
10 policy itself.

11 Q Okay.
12 Ms. Bannister, based on a review of
13 the documents in the Joint Stipulation, did the Bureau
14 prepare the large exhibit which is on the easel today?

15 A Yes, we did.

16 MR. THOMAS: Your Honor, I would ask
17 that the previously supplied letter-sized
18 versions of the Norwest program be admitted into
19 the record.

20 HEARING EXAMINER: All right.

21 I will go ahead and mark the, I guess,
22 schematic diagram as Exhibit No. MMB-3.

23 MR. PETERS: Your Honor, there is one
24 discrepancy between the letter-sized handout and
25 the poster.

1 MR. THOMAS: I will point that out,
2 Your Honor. On the letter-size, if you will
3 look at the guarantee agreements, the guarantee
4 part of the agreement going to Freddie Mac,
5 which is the Federal Home Loan Mortgage
6 Corporation, in the letter-sized version, that
7 dropped out of the computer program that was
8 used to produce -- when we shrunk this thing
9 from four feet by three feet to eight and a half
10 by 11, that one word dropped out.

11 HEARING EXAMINER: So that one word, I
12 guess, is lost is cyberspace somewhere.

13 MR. THOMAS: Yes, it is, Your Honor.

14 HEARING EXAMINER: All right.

15 MR. THOMAS: We couldn't explain why,
16 but apparently the program hiccuped when it was
17 forced to shrink this thing.

18 (Continuing)

19 Q Ms. Bannister, does --

20 I'm sorry, Your Honor, I need --

21 HEARING EXAMINER: It's marked as MMB-

22 3.

23 MR. THOMAS: Thank you.

24 (Continuing)

25 Q Ms. Bannister, does this conclude your

1 testimony this morning?

2 A Yes, sir, it does.

3 MR. THOMAS: I will tender the witness
4 for cross-examination, and I will propose --
5 since Lawyers Title is a co-complainant, that
6 the procedure for this hearing should be the
7 Staff, Lawyers Title, and then Norwest, as far
8 as questioning of witnesses.

9 HEARING EXAMINER: All right.

10 Mr. Waechter?

11 MR. WAECHTER: No questions.

12 HEARING EXAMINER: Mr. Peters?

13 MR. PETERS: Good morning, Ms.

14 Bannister.

15 THE WITNESS: Good morning.

16
17 CROSS-EXAMINATION

18 BY MR. PETERS:

19 Q Ms. Bannister, during your direct
20 testimony, a number of pieces of correspondence between
21 you or members of your staff and the Norwest entities were
22 introduced as exhibits. I believe your testimony was that
23 those documents constituted the entire amount or the body
24 of correspondence between Norwest and the Bureau of
25 Insurance; is that correct?

1 A In that exhibit; however, in the Joint
2 Stipulation order, I believe there may be two additional
3 pieces of correspondence from the Bureau of Insurance to
4 Norwest.

5 Q All right.

6 If I may, I would like to show you
7 Joint Stipulation document No. 10

8 Your Honor, may I approach the
9 witness?

10 HEARING EXAMINER: Certainly.

11 BY MR. PETERS: (Continuing)

12 Q I will ask you if, in fact, this is a
13 letter from you addressed to Mr. Stephen Morrison, dated
14 March 20, 1995?

15 A Yes, it is.

16 Q And that is a part of your
17 correspondence file with the Norwest entities on the
18 subject of TOP; is that correct?

19 A That is correct.

20 Q Now, Ms. Bannister, in that letter,
21 does it not advise Mr. Morrison that the matter has been
22 referred to legal counsel? Is that the legal counsel of
23 the Bureau?

24 A The Office of General Counsel, not of
25 the Bureau, for the State Corporation Commission.

1 Q For the State Corporation Commission.
2 Does that office advise the Bureau on
3 legal issues?

4 A Yes, it does.

5 Q And the matter had been referred to
6 that office for an opinion as to whether TOP, offered by
7 Norwest Mortgage, constitutes the unauthorized business of
8 insurance; is that correct?

9 A That's correct.

10 Q And then the last sentence of the
11 paragraph that I have just been reading from, does it not
12 say that, "We will advise you of our legal counsel's
13 opinion as soon as we receive it."?

14 A That is correct.

15 Q Ms. Bannister, did your office advise
16 Mr. Morrison upon receipt of an opinion from the Office of
17 General Counsel on this question?

18 A No, we did not.

19 Q And why is that?

20 A After we completed our review, it
21 really started in 1994, we request (sic) documentation
22 from Norwest Mortgage on several occasions which they
23 furnished us. Later we tried -- we needed extra
24 documentation from Norwest. We sent investigators to
25 their office in Falls Church. We were denied entry into

1 that office. We researched the materials that we had, and
2 forwarded our research on to the Office of General
3 Counsel, to render a legal decision. That legal decision
4 was rendered in March of 1995, and it was -- we had a
5 meeting, and it was agreed that we would advise Norwest by
6 sending them the Order to Show Cause, that we would have a
7 hearing to make the determination.

8 Q All right.

9 Ms. Bannister, you just testified that
10 you had representatives of the Bureau visit the office of
11 American Land Title in Falls Church, and they were denied
12 -- denied access to those documents.

13 Do you recall, or does your file
14 indicate the date of that visit?

15 A I will say, I think it was in June of
16 '95.

17 Q All right.

18 Was that before or after the show
19 cause order had been issued?

20 A I will have to take a look.

21 I don't have the show cause with me.

22 HEARING EXAMINER: Maybe I
23 misunderstood your testimony. Did you say that
24 Norwest did or did not allow you entry?

25 THE WITNESS: They did not allow us

1 entry.

2 HEARING EXAMINER: Did not allow you

3 entry, okay.

4 BY MR. PETERS: (Continuing)

5 Q Ms. Bannister, perhaps this will
6 refresh your memory. Do you recall the Bureau obtaining a
7 subpoena for records?

8 A Yes.

9 Q Is this a copy of the subpoena that
10 was issued to the Norwest Companies to produce documents
11 and records for examination?

12 A Yes.

13 Q Does this indicate what the date of
14 the subpoena is?

15 A Yes, it was June 22nd, '95.

16 Q All right.

17 Ms. Bannister, does that refresh your
18 memory as to when representatives of the Bureau sought
19 entry and access to the documents?

20 A I believe it was in June.

21 Q Yes.

22 A Uh-huh.

23 Q But was it before or after the show
24 cause order?

25 A It was after the show cause.

1 Q So if I understand your testimony
2 then, representatives of the Bureau of Insurance were not
3 denied access to these documents until after the show
4 cause order was issued; is that correct?

5 A That's correct.

6 Q Now, another document that's been
7 stipulated is document No. 11. Will you confirm that this
8 is a letter of June 22, 1995, from Stephen Morrison of
9 Norwest Mortgage, Inc., addressed to you?

10 A Yes; that's correct.

11 Q And does this letter express
12 disappointment on the part of Mr. Morrison that you had
13 not advised him or anyone at Norwest as to the conclusion
14 of the opinion that you had sought?

15 A Yes, it does.

16 Q At any time have representatives, to
17 your knowledge, of the Bureau of Insurance advised any of
18 the Norwest Companies or their representatives as to the
19 legal position of the Bureau on this question?

20 A No, we have not.

21 Q Now, Ms. Bannister, is it your
22 understanding that the Virginia code itself does not
23 define the term "insurance"?

24 A Yes. It does not define the term of
25 insurance.

1 Q It defines "insurance company"; is
2 that correct?

3 A Yes, it does. I believe under Section
4 38.2-100, it defines an insurance company.

5 Q And does it define an insurance
6 company as a company that issues contracts of insurance?

7 A Yes, it does.

8 Q Does the Bureau of Insurance have a
9 regulation that defines what constitutes insurance?

10 A No, sir, we do not.

11 Q When your staff and others at the
12 Bureau were considering this question, were there
13 deliberations among the staff as to whether this
14 constitutes insurance?

15 A Yes.

16 Q Did your staff have input prior to
17 reaching the conclusion that this constituted insurance
18 from representatives of Lawyers Title Insurance
19 Corporation?

20 A Would you rephrase that question
21 again, please?

22 Q All right.

23 Were there meetings between
24 representatives of Lawyers Title Insurance Corporation and
25 representatives of you -- of your staff, prior to the

1 decision of your staff and yourself that there would be a
2 show cause order issued?

3 MR. THOMAS: Your Honor, I'm going to
4 object to the question. I think the record
5 already reflects that Lawyers Title Insurance
6 Company filed a complaint with the Bureau of
7 Insurance setting forth their reasons why --
8 Lawyers Title's reasons why they thought this
9 particular product was insurance, and that
10 complaint is already in the record.

11 MR. PETERS: Your Honor, I don't
12 believe Mr. Thomas' comment really speaks to the
13 question I've asked. I've asked if there were
14 meetings between representatives of Lawyers
15 Title and Ms. Bannister or members of the
16 Commission.

17 HEARING EXAMINER: I agree. The
18 objection is overruled.

19 THE WITNESS: Yes. We had meetings.

20 BY MR. PETERS: (Continuing)

21 Q And who were the representatives of
22 Lawyers Title that met with you?

23 A I can't remember.

24 Q How about representatives of the
25 Virginia Land Title Association? Did they meet with you?

1 A I believe they did, but also I don't
2 remember their names.

3 Q Did they meet with you personally?

4 A With me and staff members, yes.

5 Q Have you -- did you -- did either you
6 or your staff review a legal analysis document that had
7 been prepared by the American Land Title Association?

8 A Are you speaking of the white paper
9 that they --

10 Q Well, we can call it that.

11 A It was reviewed. It was looked at.

12 Q Was it reviewed by you personally?

13 A I've looked at it, yes.

14 Q Did you agree with everything that was
15 stated?

16 A I don't make -- I read it for
17 informational purposes and research purposes.

18 Q Let me ask you whether members of the
19 Virginia General Assembly corresponded, telephoned or met
20 with you or representatives of your staff on the question
21 of whether TOP constitutes title insurance.

22 A We had one delegate that wrote in,
23 concerned with this particular product and whether it
24 should be regulated, yes. We had one delegate.

25 Q And who was that delegate?

1 A I believe it was Delegate Watkins, I
2 believe.

3 Q Now, in your direct testimony under
4 Mr. Thomas' questioning, you referred to administrative
5 letters. Do you recall that?

6 A Yes, I do.

7 Q What is the purpose of an
8 administrative letter?

9 A It outlines the position of the Bureau
10 of Insurance on a particular matter. All administrative
11 letters are reviewed by the Office of General Counsel for
12 their legal content.

13 Q And are you personally generally
14 familiar with the administrative letters that have been
15 issued by the Bureau of Insurance?

16 A Yes, I am.

17 Q What is the effect of an
18 administrative letter?

19 MR. THOMAS: Your Honor, I'm going to
20 object to that question. It requires a legal
21 conclusion. I can vouch for the record that
22 administrative letters issued by the Bureau of
23 Insurance have no legal effect. They are
24 advisory.

25 MR. PETERS: Well, let me ask another

1 question.

2 (Continuing)

3 Q Ms. Bannister, is it your
4 understanding that an administrative letter represents the
5 official position of the Bureau on the question addressed
6 in the letter?

7 A Yes.

8 Q All right.

9 Now, you referred in your direct
10 testimony to an administrative letter, 1982-10, addressing
11 the issue of motor vehicle service contracts; is that
12 correct?

13 A That is correct.

14 (Pause)

15 Q Now, Ms. Bannister, I have just caused
16 to have handed to you an administrative letter, 1982-10.
17 Is that the letter that you were referring to?

18 A Yes.

19 Q Do you have any reason to believe that
20 this is not a true copy of that administrative letter?

21 A No.

22 MR. PETERS: Your Honor, I would like
23 to offer this as an exhibit on behalf of Norwest
24 Companies.

25 HEARING EXAMINER: All right.

1 I will mark the administrative letter,
2 MMB-4.

3 BY MR. PETERS: (Continuing)

4 Q Now, Ms. Bannister, I would like to
5 have another administrative letter shown to you.

6 (Pause)

7 Ms. Bannister, this particular
8 document is Administrative Letter 1995-10, and it has a
9 date, September 11, 1995. Do you confirm that?

10 A I will confirm that date, although it
11 has to do with health maintenance organizations, which is
12 completely out of my field of expertise.

13 Q Well, Ms. Bannister, do you have any
14 reason to believe that this is not an official
15 administrative letter of the Bureau of Insurance?

16 MR. THOMAS: Mr. Hearing Examiner, I
17 have to object. This administrative letter has
18 no relevance in this case. It's a -- it
19 involves health insurance, and we're before this
20 court today on a matter involving title
21 insurance.

22 Ms. Bannister is not qualified and was
23 not involved in the preparation of this
24 administrative letter. Her division is not
25 responsible for regulating health insurance in

1 the Commonwealth. This would not be the proper
2 witness to admit this administrative letter
3 through.

4 MR. PETERS: Your Honor, first of all,
5 as to the relevance. This letter does reference
6 the transfer of risk of loss, and, therefore, it
7 speaks to the question of whether the product
8 addressed by the letter constitutes insurance.
9 Therefore, it is very relevant to this
10 proceeding.

11 Secondly, the fact that Ms.
12 Bannister's department or section is not
13 directly responsible for this subject has
14 nothing to do with the question of whether it
15 constitutes an official administrative letter of
16 the Bureau of Insurance. And I think in the
17 interest of a full proceeding that addresses the
18 entire context of whether this product
19 constitutes insurance, it has to be admitted.

20 HEARING EXAMINER: On that basis, Mr.
21 Peters, I agree.

22 Mr. Thomas, this letter really relates
23 to the Defendants' entire theory of this case,
24 whether or not there is a transfer of risk, and
25 to the extent that there may be some

1 inconsistency with the Bureau's interpretation,
2 I think it's obviously --

3 MR. THOMAS: Your Honor --

4 HEARING EXAMINER: Let me finish. I
5 think it's relevant to this proceeding.

6 MR. THOMAS: That's correct, Your
7 Honor, but I would like to add that if the only
8 purpose is to admit the letter, I would have no
9 objection to that. If Mr. Peters intends to
10 question Ms. Bannister on the theories that are
11 set forth in the letter, I would object to that.
12 She was not involved in any of the preparation
13 of this letter, and we would object on those
14 grounds.

15 MR. PETERS: Your Honor, I'm happy to
16 limit my use of this document at this time to
17 its admission in the record.

18 HEARING EXAMINER: All right.

19 The September 11th, 1995 letter will
20 be marked as MMB-5.

21 MR. PETERS: All right.

22 (Continuing)

23 Q Ms. Bannister, do you know Gerald
24 Milsky?

25 A Yes, I do.

1 Q And who is Mr. Milsky?

2 A Mr. Milsky is the Deputy Insurance
3 Commissioner for the Life and Health Division of the
4 Bureau of Insurance.

5 Q Is Mr. Milsky one of your counterparts
6 at the Bureau?

7 A Yes.

8 Q Is Mr. Milsky currently serving in
9 that position?

10 A Yes.

11 Q Has he served in that position for
12 some time?

13 A Yes.

14 Q Ms. Bannister, I'm going to have a
15 document shown to you.

16 (Pause)

17 This is a document that has a date,
18 October 29, 1992. It's a letter from Gerald Milsky,
19 addressed to Mr. Douglas D. Monroe, Jr., of Chesapeake
20 National Bank, addressing the subject of debt cancellation
21 contracts; is that correct?

22 A Yes, it is.

23 Q Do you have any reason to believe that
24 this is not, in fact, a true copy of a letter sent by Mr.
25 Milsky sent to Mr. Monroe?

1 MR. THOMAS: Again, Your Honor, I have
2 to object. This is a letter from Mr. Milsky to
3 Chesapeake National Bank. If Mr. Peters wanted
4 to admit this letter into the record, he should
5 have subpoenaed Mr. Milsky and admitted the
6 document through Mr. Milsky. He is attempting
7 to admit it through Ms. Bannister. She has no
8 personal knowledge of this letter, has no
9 knowledge of the research that went behind this
10 letter, the preparation that went into the
11 letter. It's simply the wrong witness to
12 attempt to admit the document through.

13 MR. PETERS: Your Honor, I'm not going
14 to examine Ms. Bannister as to the research that
15 is behind the letter. I'm asking Ms. Bannister
16 whether, in fact, this is a copy -- appears to
17 be a copy of a letter sent by Mr. Milsky to
18 another party on the subject of debt
19 cancellation contracts.

20 HEARING EXAMINER: What relevancy does
21 this document have to this case, Mr. Peters?
22 The letter is very short. It's just two, three,
23 four sentences that debt cancellation contracts
24 are not insurance, and my question is what
25 relevancy does that have whatsoever to the TOP

1 program?

2 MR. PETERS: Your Honor, the debt
3 cancellation contracts work where the creditor
4 assumes, retains the risk and does not transfer
5 the risk, and a fee is charged for that. I'm
6 going to have another document that -- from Mr.
7 Milsky, that is going to make that clear in the
8 context of debt cancellation.

9 HEARING EXAMINER: Mr. Axselle?

10 MR. AXSELLE: Your Honor, I would
11 object on -- basically on the premise of your
12 inquiry. From this document we don't know what
13 debt cancellation contracts are. We don't know
14 what the issue that was presented to Mr. Milsky
15 (sic). We don't know what his logic or
16 rationale is. We just know what his conclusion
17 is.

18 Unlike the two previous exhibits, at
19 least they had a factual basis from which there
20 could be some judgment made as to their
21 relevancy and importance in this hearing. I do
22 not see that in this document, and on that
23 basis, I would object.

24 MR. PETERS: Your Honor, before you
25 rule on that, may I present the other document,

1 and perhaps that will help on the relevancy
2 question?

3 HEARING EXAMINER: I will take a look
4 at it.

5 (Pause)

6 BY MR. PETERS: (Continuing)

7 Q Ms. Bannister, I have had presented to
8 you a letter dated December 24, 1992, from Mr. Milsky
9 addressed to me, David Peters, on the subject of debt
10 cancellation contracts. Do you have any reason to believe
11 that this is not a true copy of a letter that Mr. Milsky
12 sent to me?

13 A I have no knowledge of the letter. I
14 can't answer the question.

15 MR. PETERS: Your Honor, I would like
16 to have this document, together with the one we
17 just referred to, entered into the record in
18 this proceeding. These are official pieces of
19 correspondence from the Bureau of Insurance.

20 MR. THOMAS: Again, Your Honor, I
21 renew my objection. Mr. Peters is trying to
22 backdoor these documents into the record, and
23 the proper witness to get these documents into
24 the record is Gerald Milsky. He had the
25 opportunity to subpoena Mr. Milsky. In fact, he

1 indicated that he wanted to subpoena Ms.
2 Bannister, and by agreement of counsel, I agreed
3 to provide Ms. Bannister without a subpoena.

4 Certainly we could have reached the
5 same arrangement as regards Mr. Milsky. It's
6 too late for him to try to admit these documents
7 in the record through the backdoor.

8 MR. AXSELLE: Your Honor, I would also
9 object on that basis, but also even if you look
10 at the third paragraph here, Mr. Milsky --
11 you're being asked to put into the record an
12 incomplete recitation of what these parties were
13 talking about. Even Mr. Milsky statements -- he
14 says he has "...no personal knowledge of the
15 automobile finance contracts to which you refer
16 in your letter," and then he goes on, "If" --

17 We're having Mr. Milsky state he does
18 not have any knowledge, but then he speculates,
19 and I don't think that that is, in fact, in any
20 way something on which this Court -- Commission
21 should rely, and I would object on the basis of
22 those --

23 HEARING EXAMINER: Is Mr. Milsky here
24 today, Mr. Thomas?

25 MR. THOMAS: I don't know, Your Honor.

1 HEARING EXAMINER: I'm a little
2 hesitant to exclude these letters simply because
3 they go to the theory that the Defendants have
4 of the case and whether or not this does
5 constitute insurance and whether or not the
6 Bureau of Insurance maintains that there must be
7 a transfer of risk, or a product will be
8 considered insurance.

9 My only concern is that we have a
10 witness on the stand who has no knowledge of
11 these letters whatsoever. I don't think it's
12 the proper witness to sponsor these letters.

13 If Mr. Milsky is here today, I will
14 certainly send someone up to obtain Mr. Milsky
15 and put him under oath, and we can get them
16 sponsored that way. But I feel very, very
17 hesitant about sponsoring documents through a
18 witness who has no knowledge of the documents
19 whatsoever and has never seen the documents
20 before. I think that foundation is very weak,
21 if nonexistent.

22 MR. PETERS: Your Honor, I would be
23 happy to have Mr. Milsky testify, and I will ask
24 Mr. Thomas to make him available as a witness,
25 just as he did with Ms. Bannister.

1 HEARING EXAMINER: All right.

2 We will go ahead and hold these
3 documents, and if Mr. Milsky is available today,
4 I will certainly direct the bailiff to bring him
5 to the courtroom.

6 (Pause)

7 BY MR. PETERS: (Continuing)

8 Q Ms. Bannister, are you familiar with
9 the subject of collision damage waiver?

10 A Vaguely.

11 Q What is your understanding of
12 collision damage waiver?

13 A Oftentimes when people go to rent a
14 vehicle, the company will try and attempt to sell a
15 collision damage waiver so that if there is an accident,
16 that the collision would be paid for. Usually you can --
17 if you have a family automobile policy, it covers it, and
18 you don't have to purchase a collision damage waiver.

19 Q Will you tell me whether my
20 characterization of collision damage waiver is correct?

21 A I'll try.

22 Q A car rental company owns a car that
23 it rents to the public. The member of the public that
24 rents that car may have an accident that he is responsible
25 for. He was the cause of the accident, and there is

1 collision damage to the vehicle.

2 A Uh-huh.

3 Q Collision damage waiver, in my
4 hypothetical to you, is where the rental company says to
5 the renter, the customer, "We will not hold you
6 responsible. We will waive your responsibility for
7 damage, collision damage if you pay us a fee. And you pay
8 us that fee, we will waive any action we have against you
9 for damage to that vehicle." Is that consistent with your
10 understanding of collision damage waiver?

11 A I would say basically, yes.

12 Q Now, Ms. Bannister, do you know
13 whether or not the Bureau of Insurance has ever addressed
14 the question of whether that collision damage waiver,
15 where a fee is charged the customer, constitutes
16 insurance?

17 A I can't recall that exact type of
18 example, no, not off the top of my head. I really cannot.

19 Q Do you recall anything remotely
20 relating to what I have described, being addressed by the
21 Bureau of Insurance?

22 A The collision damage waivers?

23 Q Yes.

24 A I don't recall.

25 Q Are you aware that there is a separate

1 section of the Virginia Code, entitled 59.1, that
2 addressed collision damage waivers?

3 A Very vaguely.

4 Q And what is the extent of your
5 knowledge of that?

6 A I said it's very vague.

7 Q Well, would it --

8 A I mean I'm aware that there is a
9 section in the Code regarding collision damage waivers,
10 and that's the extent of it. I mean it's just -- it's
11 extremely vague.

12 Q Is that section within Title 38.2?

13 A I believe so. I'm not -- well, I'm
14 really not sure.

15 MR. PETERS: I'm not going to offer
16 this. I'm simply going to try to refresh the
17 memory of the witness.

18 (Pause)

19 (Continuing)

20 Q Ms. Bannister, I'm handing you a copy
21 -- a photocopy of Section 59.1-207, and the following
22 sections. Do you see that?

23 A Yes, I do.

24 Q Does that address the subject of
25 collision damage waiver?

1 A Yes, it does.

2 Q Now, is that section within Title 38.2
3 of the Virginia Code?

4 A Yes, it is.

5 Q Title 38.2?

6 A Not within Title 38.2, no, it's not.

7 Q Why did you say yes, it is?

8 A I corrected myself.

9 Q Ms. Bannister, does the Bureau of
10 Insurance consider collision damage waiver insurance that
11 is subject to the Bureau of Insurance regulatory
12 jurisdiction?

13 MR. AXSELLE: Your Honor, if I may
14 object, this witness has indicated that her
15 knowledge of this subject matter is that there
16 is a code section dealing with it. Now she is
17 being asked what the policy of the Commission is
18 as to the regulation of that subject matter.
19 The sole knowledge of her knowledge (sic) is
20 that it's in a code section. I don't see how
21 she has any ability to say that by her own
22 testimony.

23 HEARING EXAMINER: Well, let's see.

24 Let him ask the question, and let's see.

25 BY MR. PETERS: (Continuing)

1 Q Ms. Bannister, does the Bureau of
2 Insurance, to your knowledge, have regulatory jurisdiction
3 over collision damage waivers?

4 A To my knowledge, the Bureau of
5 Insurance does not have authority over collision damage
6 waivers.

7 Q Are you aware of whether the National
8 Association of Insurance Commissioners has ever addressed
9 the question of whether collision damage waivers
10 constitute insurance?

11 A I don't have direct knowledge of that,
12 no.

13 Q Do you have indirect knowledge?

14 A I would only be speculating. I would
15 rather say I don't.

16 MR. PETERS: That's all I have. Thank
17 you.

18 THE WITNESS: Thank you.

19 HEARING EXAMINER: Redirect, Mr.
20 Thomas?

21 MR. THOMAS: None, Your Honor.

22 HEARING EXAMINER: Anything further of
23 this witness?

24 (No response).

25 Ms. Bannister, thank you very much.

1 You may stand down.

2 THE WITNESS: Thank you.

3 * * * * *

4 WITNESS STOOD ASIDE

5
6
7 MR. THOMAS: Your Honor, I would ask
8 that since Ms. Bannister has completed her
9 testimony that she be permitted to remain in the
10 courtroom.

11 MR. PETERS: That's fine.

12 HEARING EXAMINER: All right.

13 MR. PETERS: Ms. Bannister, if I can
14 retrieve my copy of the collision damage waiver.

15 MS. BANNISTER: Oh, I took it, didn't
16 I? I'm sorry. There you go.

17 HEARING EXAMINER: Why don't we take
18 about a ten minute recess, and we will reconvene
19 at 20 minutes to 12:00.

20
21 NOTE: A recess is taken at 11:28
22 a.m., after which the hearing resumes its
23 session at 11:44 a.m., as follows, viz:

24
25 HEARING EXAMINER: All right, Mr.

1 Thomas.

2 MR. THOMAS: Your Honor, the Staff has
3 -- Mr. Milsky is available and here and present
4 in the courtroom.

5 HEARING EXAMINER: Do you have any
6 additional witnesses, other than Mr. Milsky?

7 MR. THOMAS: I have one other witness.
8 I just -- you have directed that Mr. Milsky
9 appear in this courtroom, and he has other
10 duties to attend to today. He is available.
11 The Staff had not intended to call Mr. Milsky as
12 a witness.

13 HEARING EXAMINER: Obviously he is
14 going to be the Defendants' witness. If I hear
15 from him now it will be out of turn, if you have
16 other witnesses, so it's up to you, Mr. Thomas.
17 Do you have any additional witnesses?

18 MR. THOMAS: Yes, I do.

19 HEARING EXAMINER: Or do you want to
20 take this witness out of turn? I mean I'm open
21 to counsel, however you want to handle this.

22 MR. PETERS: Your Honor, I would be
23 happy to examine Mr. Milsky.

24 HEARING EXAMINER: All right.

25 Let's go ahead and take him out of

1 turn then.

2 Mr. Milsky, if you would come up to
3 the stand, please.

4

5

6

7

8

GERALD A. MILSKY, a witness being
called by and on behalf of the Defendants, having first
been duly sworn, testifies as follows, viz:

9

10

11

HEARING EXAMINER: Mr. Milsky, for the
record, please give us your full name and
address.

12

13

14

THE WITNESS: Gerald A. Milsky, (M I L
S K Y), 3712 Willow Bend Place, Richmond,
Virginia 23233.

15

16

HEARING EXAMINER: And are you
employed by the Commission?

17

THE WITNESS: Yes, I am.

18

19

HEARING EXAMINER: And what is your
position with the Commission?

20

21

22

23

THE WITNESS: I am Deputy Insurance
Commissioner in charge of the Life and Health
Market Regulation Division of the Bureau of
Insurance.

24

HEARING EXAMINER: All right.

25

MR. PETERS: Good morning, Mr. Milsky.

1 I'm David Peters, representing the
2 Norwest Companies.

3
4 DIRECT EXAMINATION

5 BY MR. PETERS:

6 Q Mr. Milsky, you are currently Deputy
7 Commissioner; is that correct?

8 A Yes, it is.

9 Q How long have you held that position?

10 A Since 1987.

11 Q Do you recall having addressed
12 previously the subject of debt cancellation contracts?

13 A Vaguely, yes.

14 Q What is your understanding of what a
15 debt cancellation contract is?

16 A Having not looked at that issue since
17 sometime in the early 1990s, at this point in time I
18 really don't have much of a recollection of what that is.

19 Q Mr. Milsky, I'm going to present to
20 you a hypothetical, and for the purpose of refreshing your
21 memory, and I would ask you to confirm whether it does
22 refresh your memory. A creditor, be it a bank or a retail
23 merchant, has a debt customer, a customer that is either
24 borrowing money from the bank or purchasing a product on a
25 retail installment contract from the retailer. The debt

1 is subject to the possibility that the debtor will die
2 before the debt is paid. The creditor enters into an
3 agreement with the debtor for a fee, that if the debtor
4 dies before the debt is paid, the creditor will cancel the
5 debt, a debt cancellation contract.

6 Does that refresh your memory?

7 A That sounds familiar, yes.

8 Q Is that consistent with what your
9 understanding of what a debt cancellation contract is?

10 A Yes.

11 Q Now, Mr. Milsky, do you recall being
12 asked in 1992, by representatives of Chesapeake National
13 Bank in Kilmarnock, Virginia, whether a debt cancellation
14 contract constitutes insurance?

15 A I have no independent recollection of
16 that, but that is probably true.

17 Q Mr. Milsky, I would like to hand you a
18 copy of a letter.

19 The hearing examiner and other counsel
20 already have copies of this. This is a letter
21 dated October 29th, 1992, under your signature
22 as Deputy Commissioner, addressed to the
23 Chesapeake National Bank, Attention Douglas D.
24 Monroe, Jr.

25 (Continuing)

1 Q Do you recall that letter?

2 A I recognize the letter.

3 Q Is that your signature on the letter?

4 A Yes, it is.

5 Q And does the letter address the
6 question of debt cancellation contracts?

7 A Yes, it does.

8 Q Does the letter state in the second
9 paragraph that, "It is our belief that debt cancellation
10 contracts are not insurance regulated by Title 38.2 of the
11 Code of Virginia..."?

12 A Yes.

13 MR. PETERS: Your Honor, I move the
14 admission of this document into the record.

15 HEARING EXAMINER: All right.

16 I will mark Mr. Milsky's October 29th,
17 1992 letter as GAM-6.

18 BY MR. PETERS: (Continuing)

19 Q Now, Mr. Milsky, I'm going to show you
20 another letter.

21 (Pause)

22 Mr. Milsky, this is a letter to me --
23 dated from me, dated December 23, 1992, addressed to you
24 on the subject of debt cancellation contract. Why don't
25 you take a moment to review that.

1 (Pause)

2 All right.

3 Do you recall that, Mr. Milsky?

4 A Not independently of this, but I
5 recognize the letter.

6 Q Does the letter refresh your memory
7 that, in fact, I corresponded with you on the subject?

8 A Yes.

9 Q And will you confirm that the letter
10 is a question that I'm posing that your staff's conclusion
11 that debt cancellation contracts are not insurance applies
12 as well in the context of automobile finance contracts?

13 A Well, you're stating a conclusion and
14 asking me to confirm or not.

15 Q Right.

16 Your Honor, I move the admission of
17 this document as well.

18 MR. AXSELLE: Your Honor, I don't see
19 the relevancy of what Mr. Peters thinks is a
20 conclusion of law. He has basically stated what
21 his opinion is in this letter, and that's all it
22 is. And I do not suggest that it has any
23 relevancy or merit to your decision in this
24 case.

25 If -- the other documents, the

1 administrative letters, we can argue about their
2 relevancy and their weight, but at least they
3 came from the Commission. This one came from
4 Mr. Peters and could be self-serving for that
5 purpose.

6 MR. PETERS: Your Honor, this is the
7 question that Mr. Milsky responds to by means of
8 the other letter which is December 24, 1992, and
9 puts -- not the letter I have introduced through
10 Mr. Milsky, but rather the other letter that we
11 have referred to in my cross-examination of Ms.
12 Bannister, and puts the entire issue into
13 context. And, therefore, is very relevant to
14 the question of what constitutes insurance.

15 MR. AXSELLE: But, if I may, Your
16 Honor, assuming that that is the case, and it
17 would appear that it is, Mr. Milsky in his
18 December 24th letter says, and I repeat, as I
19 did earlier, "I have no personal knowledge of
20 the automobile finance contracts to which you
21 refer in your letter." And then he says, "If,
22 however..." and so you're being asked to accept
23 this letter which is premised on a lack of
24 knowledge and a speculation, and I believe that
25 they, even in combination, go beyond what would

1 be permitted and should not be allowed.

2 MR. PETERS: Your Honor, what I'm
3 trying to do with reference to the December 24
4 letter, which Mr. Milsky has not been presented
5 yet, I'm trying to establish that, in fact, Mr.
6 Milsky advised me in December of 1992, that debt
7 cancellation contracts, if there is no third
8 party to which the risk is shifted, do not
9 constitute insurance. That's all I'm trying to
10 do, and it's clearly relevant.

11 HEARING EXAMINER: All right.

12 Under -- with that representation,
13 once again, since it does go to the entire
14 defense of the Defendants in this case, I'm
15 going to go ahead and allow the letter in.

16 Mr. Peters, you're referring to the
17 December 24th, 1992 letter, I take it?

18 MR. PETERS: Your Honor, I have not
19 yet presented that to Mr. Milsky. The letter
20 we're now talking about is my question to Mr.
21 Milsky, which is the letter of December 23. And
22 that's simply for the purpose of establishing
23 the context to which the letter I'm now going to
24 talk about speaks.

25 HEARING EXAMINER: All right.

1 I will mark your letter GAM-7,
2 December 23rd, 1992.

3 BY MR. PETERS: (Continuing)

4 Q Now, Mr. Milsky, I would like to
5 present to you a letter under your signature to me, dated
6 December 24, 1992, and I apologize, all of my copies of
7 that letter have been distributed except this one.

8 HEARING EXAMINER: I have a copy.

9 MR. PETERS: Ma'am, may I present it
10 to the witness?

11 (Continuing)

12 Q Mr. Milsky, will you confirm that your
13 signature is on that document?

14 A Yes.

15 Q And is it dated December 24, 1992,
16 addressed to me?

17 A Yes, it is.

18 Q And are you responding, according to
19 the letter, to my letter to you of December 23, 1992?

20 A Yes.

21 Q And do you state a conclusion on your
22 part as to whether debt cancellation contracts do not
23 constitute insurance?

24 MR. THOMAS: Your Honor, I believe the
25 letter speaks for itself. I don't know that Mr.

1 Milsky has to respond other than to read what he
2 said in the letter.

3 BY MR. PETERS: (Continuing)

4 Q Mr. Milsky, do you have an answer to
5 my question?

6 A My letter states a position, yes.

7 Q And what is that position?

8 A The position states, "...that debt
9 cancellation contracts are not insurance contracts
10 regulated by Title 38.2 of the Code of Virginia, as
11 amended..."

12 Q Does the letter also reference third
13 parties being involved?

14 A Yes, it does.

15 Q Now, Mr. Milsky, do you have any
16 reason to believe that that letter that you're now
17 reviewing is not an accurate documentation of your
18 position, at least as of December 24, 1992?

19 A I would state that it's an accurate
20 representation of my position, yes.

21 MR. PETERS: Your Honor, I move the
22 admission of that document.

23 HEARING EXAMINER: All right.

24 Mr. Milsky's December the 24th, 1992
25 letter, will be marked as GAM-8.

1 BY MR. PETERS: (Continuing)

2 Q Mr. Milsky, what is your understanding
3 as to the position of the Bureau of Insurance on the
4 question of whether debt cancellation contracts constitute
5 insurance?

6 A At this time?

7 Q Yes.

8 A I have no knowledge whatsoever what
9 the position of the Bureau is at this time.

10 Q Do you have any knowledge that the
11 Bureau's position would be different --

12 A No, sir.

13 Q -- from the position as stated by your
14 letter to me of December 24, 1992?

15 A No, sir, I have no independent
16 knowledge one way or the other.

17 MR. PETERS: Thank you, Mr. Milsky.

18 I have no further questions.

19 HEARING EXAMINER: Any questions?

20 MR. THOMAS: Yes, Your Honor.

21
22 CROSS-EXAMINATION

23 BY MR. THOMAS:

24 Q Mr. Milsky, referring to your letters
25 that have been previously marked GAM-6 and GAM-8, the

1 letters of October 29th, 1992, and December 24th, 1992,
2 would you characterize those letters as advisory opinions
3 of the Bureau of Insurance?

4 A It is my understanding that the Bureau
5 of Insurance does not give advisory opinions.

6 Q Do these letters bind the Bureau of
7 Insurance to the positions set forth in those letters?

8 A Certainly not in my view.

9 Q Do either of these letters bind the
10 Commission to the positions set forth in either of those
11 letters?

12 A To my knowledge, I don't have that
13 authority.

14 MR. THOMAS: No further questions.

15

16 REDIRECT EXAMINATION

17 BY MR. PETERS:

18 Q Mr. Milsky, prior to your coming here
19 this morning, did anyone from the Bureau of Insurance or
20 the State Corporation Commission Staff talk to you about
21 testimony that was given in this proceeding this morning?

22 A Yes. I spoke with Mr. Thomas for
23 about 15 seconds in the corridor.

24 Q And did Mr. Thomas advise you as to
25 what that testimony was?

1 A No, sir.

2 Q Anyone else from the Staff talk to
3 you?

4 A Until I was called about ten minutes
5 ago, I didn't even know this case was going on.

6 Q How about representatives of Lawyers
7 Title Insurance Corporation?

8 A No, sir.

9 Q Did they talk to you?
10 How about the Virginia Land Title
11 Association?

12 A Not to my knowledge.

13 MR. PETERS: That's all I have.

14 HEARING EXAMINER: All right, Mr.
15 Milsky. Thank you very much.

16 Exhibit Nos. GAM-6 through -8 will be
17 received into the record, and if I failed to
18 mention, Exhibit Nos. -1 through -5 will be
19 received also.

20 * * * * *

21 WITNESS STOOD ASIDE

22

23

24 HEARING EXAMINER: Mr. Thomas.

25 MR. THOMAS: Your Honor, is Mr. Milsky

1 free to go and resume his --

2 HEARING EXAMINER: The witness can be
3 excused, can't he?

4 MR. PETERS: Yes.

5 HEARING EXAMINER: Yes, sir.

6 MR. THOMAS: Your Honor, the Staff
7 will call Mr. Michael Beavers.

8

9

10 MICHAEL T. BEAVERS, a witness being
11 called by and on behalf of the Commission Staff, having
12 first been duly sworn, testifies as follows, viz:

13 DIRECT EXAMINATION

14 BY MR. THOMAS:

15 Q Mr. Beavers, would you please state
16 your full name for the record.

17 A Michael Todd Beavers.

18 Q And by whom are you employed?

19 A The Virginia State Corporation, Bureau
20 of Insurance.

21 Q And what is your business address?

22 A 1300 East Main Street, Richmond,
23 Virginia.

24 Q And what is your position with the
25 Bureau?

1 A I'm Supervisor of the Agent
2 Investigation section for the Property and Casualty
3 Division.

4 Q And how long have you held this
5 position?

6 A Approximately two months.

7 Q What other positions have you held
8 within the Bureau?

9 A I've held the position of Investigator
10 and the position of Senior Investigator.

11 Q And how long were you in those
12 positions?

13 A Four years each, approximately.

14 Q Mr. Beavers, I would like you to
15 identify a document which has been previously stipulated
16 to by the parties, and it's attached to the Joint
17 Stipulation as Exhibit 19.

18 A That's a chart that was prepared by my
19 unit.

20 Q Did you review the documents which
21 makes up this exhibit?

22 A Myself and my staff reviewed them,
23 yes.

24 Q Where did the Bureau obtain these
25 documents?

1 A They were obtained under a subpoena
2 issued to Norwest.

3 Q Did the Bureau attempt to review
4 documents at the offices of Norwest Mortgage, Inc., in
5 this proceeding?

6 A Yes, sir.

7 Q Was the Bureau permitted access to
8 those documents?

9 A No, sir.

10 Q Approximately when did this occur?

11 A June 21st, 1995.

12 Q And which -- were you involved in that
13 visit to the Norwest offices?

14 A Yes, sir.

15 Q And particularly, which office did you
16 go to?

17 A It would be the office located on 3190
18 Fairview Park Drive in Falls Church.

19 Q Okay, and it's your testimony that you
20 went to that office on June 21st, 1995?

21 A Yes.

22 Q And that you were not permitted access
23 to any documents related to the TOP product at that time.

24 A That's correct.

25 Q And subsequent to that date, did the

1 Commission issue a subpoena for all of the documents
2 involving the TOP product in Virginia?

3 A Yes, sir.

4 Q And it was the documents that were
5 produced pursuant to that subpoena that are summarized in
6 Exhibit 19, attached to the Joint Stipulation?

7 A Yes, sir.

8 Q What does Exhibit 19 purport to show?

9 A It's evidence of the instances in
10 which TOP or TOP Plus was sold to borrowers in Virginia.

11 Q And I just have to go back on one
12 point, Mr. Beavers. I'm sorry. The subpoena for the
13 documents related to TOP was issued by the Commission on
14 what date?

15 A The subpoena was issued on June 22nd
16 and served on June 23rd.

17 Q This was after you were denied access
18 to the TOP documents in the Norwest office.

19 A Yes, sir.

20 Q Okay.

21 Now, if you would, if you would please
22 tell this court what Exhibit 19 purports to document.

23 A You mean on a column by column basis?

24 Q I think we have some exhibits that can

25 --

1 (Pause)

2 Mr. Beavers, I believe I have placed
3 before you a series of documents which represent the
4 purchase of the TOP product of one individual, and I would
5 ask that you go through your exhibit on a column by column
6 basis and identify each of the columns of the exhibit.

7 HEARING EXAMINER: Mr. Thomas, do you
8 have an extra copy of the document you just
9 handed out?

10 MR. THOMAS: I'm sorry, Your Honor.

11 (Pause)

12 In fact, Your Honor, if I could
13 retrieve those, I seem to have grabbed the wrong
14 file here. If I can pass those back down.

15 I wondered why there weren't any
16 exhibit labels up there. Not enough room.

17 I will do this on a column by column
18 basis.

19 (Continuing)

20 Q All right, Mr. Beavers, if you would
21 work through each of the columns of your exhibit.

22 A The first column is the -- simply the
23 name and the address of each of the borrowers who
24 purchased the TOP or TOP Plus product in this state, and
25 column 2 shows the fee that was charged. The \$10

1 instances are where the TOP Plus was sold in conjunction
2 with an owner's title policy, and the larger numbers in
3 the hundreds of dollars indicate where the TOP product was
4 sold and the different amounts vary according to the
5 amount of the loan. The third column represents the --

6 Q Mr. Beavers, with respect to the fees
7 that were charged, included in the stipulation, did
8 Norwest produce actual rate charts relating to the TOP
9 product? I believe these are Exhibits 16 and 17 of the
10 Joint Stipulation.

11 A Yes. There is a rate chart, or it's
12 called a TOP Fee Advantage Schedule.

13 Q Moving on to column 3 of your exhibit.

14 A Column 3 represents the HUD-1, which
15 is a uniform settlement statement, which is required on
16 federally related loans. It identifies proceeds from --
17 it identifies -- it's a summary of the borrowers' and the
18 sellers' transactions.

19 Q Mr. Beavers, is this an example of a
20 HUD-1 that I have placed before you?

21 A Yes, it is.

22 Q And all of the documents that I'll be
23 placing before you, do they involve one particular TOP
24 account?

25 A I mean this one so far. It's just one

1 account, yes.

2 Q Who is listed as the name of the
3 borrower?

4 A It would be Thomas F. Shields.

5 Q Please continue, Mr. Beavers.

6 A The document -- it shows the summary
7 of borrowers' transactions and summary of sellers'
8 transactions as well as the settlement charges on page 2
9 which were paid from the borrowers' funds and the sellers'
10 funds, and it includes a notation on the TOP fee,
11 generally in the area of line 1111 or 1114.

12 Q Okay.
13 In which column does the TOP fee
14 appear?

15 A The column would be paid from
16 borrowers' funds at settlement.

17 Q Okay.
18 Are the statements made on the HUD-1
19 required to be true and accurate?

20 A Yes. There are some certifications at
21 the bottom of the form.

22 Q And what are they?

23 A There is a certification from the
24 borrowers and the sellers to sign that simply states, "I
25 have carefully reviewed the HUD-1 Settlement Statement and

1 to the best of my knowledge and belief, it is a true and
2 accurate statement of all receipts and disbursements made
3 on my account or by me in this transaction. I further
4 certify that I have received a copy of HUD-1 Settlement
5 Statement." And then there is a certification for the
6 settlement agent which states, "The HUD-1 Settlement
7 Statement which I have prepared is a true and accurate
8 account of this transaction. I have cause or will cause
9 the funds to be disbursed in accordance with this
10 statement."

11 Q Okay, Mr. Beavers.

12 Your Honor, I would ask that this
13 exhibit be accepted into the record.

14 MR. PETERS: Your Honor, I believe the
15 exhibit is already in the record by virtue of
16 the -- it's stipulated in the Joint Stipulation
17 of Fact. This is reflected on -- it's
18 stipulated Document No. 19, and I believe the
19 agreement was when we prepared the stipulated
20 facts, that the underlying documents themselves
21 would constitute evidence in the record.

22 MR. THOMAS: Your Honor, I am
23 producing this because you will not have --
24 unless I copy all of the Bates numbered
25 documents that are set forth in Exhibit 19, you

1 will not have a representative example of each
2 of the documents which make up that exhibit.
3 And the purpose for Mr. Beavers' testimony is
4 just to provide you with one representative
5 example of a HUD-1, one representative example
6 of a disbursement worksheet involving one
7 account, the Shields' account.

8 MR. PETERS: Your Honor, I have no
9 objection.

10 HEARING EXAMINER: All right.

11 We will mark the HUD disclosure form
12 as MTB-9.

13 BY MR. THOMAS: (Continuing)

14 Q Mr. Beavers, moving on to the next
15 column of your exhibit.

16 A The next column is a disbursement
17 worksheet which is apparently prepared by ATI to show the
18 receipts and disbursements on a residential real estate
19 closing.

20 (Pause)

21 Q And where is the TOP fee documented on
22 the disbursement worksheet?

23 A It's listed under the disbursement
24 section in Item No. 1. There is a series of about seven
25 or eight entries there, and Item No. 1716001 shows the TOP

1 fee being charged.

2 Q Now, with respect to the loan funds,
3 is there a receipt section of this disbursement worksheet?

4 A Yes.

5 Q Are the origination fees, document
6 preparation fees and any interest charges deducted out and
7 a net amount forwarded to ATI to thereby disburse?

8 A According to this document, yes.

9 Q With respect to the TOP fee, how is
10 that paid to ATI?

11 A That's -- ATI Title Company issues
12 their checks payable to those that -- under the
13 disbursement column, ATI Title Company would issue a check
14 to itself for those items listed under item 01, which
15 would include the TOP fee.

16 MR. THOMAS: Your Honor, I would ask
17 that this exhibit be accepted.

18 HEARING EXAMINER: The disbursement
19 worksheet will be marked MTB-10.

20 (Pause)

21 BY MR. THOMAS: (Continuing)

22 Q Mr. Beavers, I ask that you identify a
23 copy of this check.

24 A This is the check concerning Mr.
25 Shields' account. If you will notice on the disbursement

1 worksheet, under the disbursements, there is a reference
2 number beside item 01 of 65-00032486, and that corresponds
3 with the reference number on this check, which is from ATI
4 Title Company to ATI Title Company. And down at the
5 bottom in the note section, it includes a notation of the
6 TOP fee.

7 MR. THOMAS: Your Honor, I would ask
8 that this exhibit be accepted into the record.

9 HEARING EXAMINER: All right.

10 The check dated November 23rd, 1994,
11 will be marked MTB-11.

12 BY MR. THOMAS: (Continuing)

13 Q Moving on to column 5 in your exhibit.

14 A Column 5 is the ATI disclaimer or
15 disclosure affidavit. In our review we noticed it was
16 listed both ways, either as a disclosure affidavit or a
17 disclaimer affidavit.

18 Q And what does this document purport to
19 do?

20 A It provides some basic information to
21 the borrower and the seller concerning payoff information,
22 tax information and there is a section for -- that deals
23 with some general information concerning a title search
24 and title insurance.

25 Q And when in the process of the

1 mortgage loan would this document be completed?

2 A I'm not exactly sure. There is a
3 settlement date listed up top, which is the date of the
4 closing, but there is no date by their signatures on the
5 bottom.

6 MR. THOMAS: Your Honor, I would ask
7 that this exhibit --

8 MR. PETERS: You Honor, we don't have
9 a copy.

10 MR. THOMAS: I'm sorry, Your Honor.
11 It's just a lot of paper moving today. I'm
12 sorry I'm not keeping up with it.

13 (Pause)

14 (Continuing)

15 Q Mr. Beavers, is this the ATI
16 disclosure affidavit which you just testified?

17 A Yes.

18 MR. THOMAS: Your Honor, I would ask
19 that this exhibit be accepted into the record.

20 HEARING EXAMINER: All right.

21 The disclosure affidavit will be
22 marked MTB-12.

23 BY MR. THOMAS: (Continuing)

24 Q Moving on to the next column of your
25 exhibit.

1 A That's the notice availability of
2 owner's title insurance. That is a form required by the
3 Virginia Code to be provided to the buyer which advises
4 them of the availability of owner's title insurance and
5 requests that they make an election as to whether or not
6 they do or do not want the coverage.

7 Q And at what time during the mortgage
8 loan process is this document completed?

9 A It shows a date of November 22nd,
10 which was the date of settlement.

11 MR. THOMAS: Your Honor, I ask that
12 that be accepted into the record as an exhibit.

13 HEARING EXAMINER: The document will
14 be marked MTB-13.

15 BY MR. THOMAS: (Continuing)

16 Q Mr. Beavers, moving on to column 7 of
17 your exhibit --

18 A That would be the consumer title
19 status election.

20 Q Let me get this document out before we
21 --

22 (Pause)

23 A This is an estimated cost comparison
24 showing the cost of lender's title insurance, Option B,
25 lender's and owner's title insurance, and Option C, the

1 ATI title condition report, and then provide to the
2 insurer -- I mean provides the borrower the election down
3 at the bottom as to what option to choose, either A, B or
4 C.

5 Q And the borrower is required to make
6 one of the three options, or select one of the three
7 options?

8 A On this form, yes.

9 MR. THOMAS: Your Honor, I ask that
10 this exhibit be accepted into the record.

11 HEARING EXAMINER: The estimated cost
12 comparison will be marked as MTB-14.

13 BY MR. THOMAS: (Continuing)

14 Q And moving on to your next column of
15 your exhibit.

16 A That would be the title condition
17 report. This is a report on the condition of the title
18 done prior to settlement by ATI for Norwest or to
19 whomever.

20 Q Is it fair to say that this consists
21 of a report of the results of the title search?

22 A Yes.

23 Q And this report -- the actual title
24 search would either be done by ATI or an abstracting firm
25 that was retained by ATI?

1 A Yes.

2 MR. THOMAS: Okay.

3 Your Honor, I would ask that this
4 exhibit be accepted into the record.

5 HEARING EXAMINER: The title condition
6 report will be marked MTB-15.

7 BY MR. THOMAS: (Continuing)

8 Q And moving on to the next column in
9 your exhibit.

10 A That's the final title certificate.

11 (Pause)

12 This is a document prepared after
13 closing where ATI certifies under Norwest Mortgage that,
14 according to the records, there is evidence of a valid
15 first senior and paramount lien in their favor upon the
16 described real estate for the residential closing.

17 MR. THOMAS: Your Honor, I would ask
18 that this exhibit be accepted into the record.

19 HEARING EXAMINER: All right.

20 The exhibit will be marked MTB-16.

21 BY MR. THOMAS: (Continuing)

22 Q And, finally, Mr. Beavers, column 10
23 of your exhibit.

24 A That reflects those instances in which
25 an owner's title policy was purchased.

1 Q And that would be an owner's title
2 policy purchased in conjunction with TOP?

3 A Yes.

4 MR. THOMAS: No further questions,
5 Your Honor. Tender the witness for cross-
6 examination.

7 HEARING EXAMINER: Mr. Waechter?

8 MR. WAECHTER: No cross.

9 HEARING EXAMINER: Mr. Peters.

10 MR. PETERS: Mr. Beavers, good
11 morning.

12 THE WITNESS: Good morning.

13
14 CROSS-EXAMINATION

15 BY MR. PETERS:

16 Q Mr. Beavers, you testified as to you
17 and your staff visiting the Falls Church office of
18 American Land Title Company for purposes of gaining access
19 to documents. I believe your testimony was that that was
20 on June 21st, 1995; is that correct?

21 A Yes, sir.

22 Q Do you have any knowledge as to
23 whether that was before or after a rule to show cause had
24 been issued by the State Corporation Commission?

25 A I do not know. We were there early in

1 the morning, approximately 9:00 or 10:00 o'clock.

2 Q Do you have any knowledge when the
3 rule to show cause was issued?

4 A No, sir.

5 Q So you don't know whether it was
6 before or after.

7 A No, sir.

8 Q I believe you testified on your direct
9 testimony that stipulated documents 16 and 17, which were
10 rate charts -- do you remember those documents? This
11 would be in the Joint Stipulation of Fact.

12 A Yes, sir.

13 Q Do you have any knowledge as to
14 whether, in fact, the rates reflected on those charts were
15 in effect for purposes of the TOP program?

16 A No, sir, other than the -- where it
17 states effective 3/29/95, at the bottom of one chart for
18 Winchester, I do not know.

19 Q In your review of the documents or
20 your staff's review of the documents, have you made any
21 attempt to match the actual TOP fee charged to a
22 particular customer to these rate charts?

23 A No, sir.

24 Q Were you involved in any of the
25 deliberations of the Bureau of Insurance staff on the

1 question whether TOP constitutes insurance?

2 A I was present during meetings where
3 the question was raised, but mainly my contact with the
4 TOP investigation centered around the preparation of the
5 chart.

6 Q Did you provide any input to those
7 meetings on the question of whether TOP constitutes
8 insurance?

9 A I participated in the discussions, but
10 I don't recall any specific -- saying this is, you know,
11 one opinion or another.

12 Q At the point of those meetings, had
13 you developed any facts that you presented to those
14 participating in the meeting on the question of whether
15 TOP constitutes insurance?

16 A No, sir.

17 MR. PETERS: I have no further
18 questions.

19 HEARING EXAMINER: Redirect?

20 MR. THOMAS: Just one, Your Honor.

21
22 REDIRECT EXAMINATION

23 BY MR. THOMAS:

24 Q Mr. Beavers, I'm going to show you a
25 copy of the rule to show cause presented by the Commission

1 in this case and ask you specifically to look at the
2 Document Control stamp that appears above the heading,
3 Commonwealth of Virginia, and tell the Court at what time
4 was that document entered into the Clerk's Office here at
5 the Commission.

6 A Under the Document Control stamp, it's
7 dated 1995, J-U-N, for June, 21, p.m., 2:44.

8 Q This is after you attempted to review
9 documents at the offices of Norwest Mortgage, Inc.?

10 A That is correct.

11 MR. THOMAS: No further questions,
12 Your Honor.

13
14 RECROSS-EXAMINATION

15 BY MR. PETERS:

16 Q Mr. Beavers, are you familiar with the
17 procedure within the Commission for the issuance of rules
18 to show cause?

19 A No, sir.

20 Q Do you know whether an agency or
21 department or bureau of the Commission makes application
22 to the State Corporation Commissioners to --

23 MR. THOMAS: Your Honor --

24 MR. PETERS: May I finish my question?

25 HEARING EXAMINER: Let him finish the

1 question.

2 MR. THOMAS: Well, I'll let you
3 finish, but --

4 BY MR. PETERS: (Continuing)

5 Q Do you know whether an agency and its
6 staff makes application to the Commissioners of the State
7 Corporation Commission for the purpose of having a rule to
8 show cause issued?

9 MR. THOMAS: Object, Your Honor. Mr.
10 Beavers had testified he has no knowledge on
11 procedures on how rules to show cause are issued
12 here at the Commission.

13 MR. PETERS: Well, Your Honor, he may
14 have knowledge on the question -- the precise
15 question I have just asked him.

16 HEARING EXAMINER: Let him go ahead.
17 I'll let him answer.

18 MR. PETERS: Thank you.

19 THE WITNESS: Could I have it
20 repeated, please?

21 MR. PETERS: Yes, sir.

22 (Continuing)

23 Q Mr. Beaver(sic), do you have any
24 knowledge about the procedure for obtaining a rule to show
25 cause order in terms of whether an agency or bureau of the

1 -- excuse me -- a department or bureau of the State
2 Corporation Commission makes application to the
3 Commissioners for purposes of a rule to show cause?

4 A No, sir.

5 Q You have no knowledge of that?

6 A No, sir.

7 Q Were you advised by anyone on the
8 staff of the Bureau of Insurance prior to your visit to
9 the Falls Church office of American Land Title Company
10 that, in fact, a rule to show cause order would be issued?

11 A No, sir.

12 Q When did you first learn that a rule
13 to show cause order had been issued?

14 A I believe it was later that day, in
15 the evening, probably, 4:00, 4:30.

16 MR. PETERS: I have no further
17 questions.

18 HEARING EXAMINER: Anything else of
19 Mr. Beavers?

20 (No response).

21 Mr. Beavers, thank you very much for
22 your testimony. You may stand down.

23 Exhibit Nos. MTB-9 through -16 will be
24 received into the record.
25

1 * * * * *

2 WITNESS STOOD ASIDE

3
4
5 MR. THOMAS: Your Honor, I ask that
6 Mr. Beavers be permitted to remain in the
7 courtroom for the duration of the proceedings?

8 HEARING EXAMINER: Can this witness be
9 excused?

10 All right.

11 Very well, Mr. Beavers, you are
12 excused. You may stay in the courtroom.

13 MR. THOMAS: Thank you.

14 It will be just a second.

15 Your Honor, this is a fortuitous
16 moment. This completes the Staff's case, and I
17 notice that the time is 12:30. I timed it
18 specifically to match the usual recess for the
19 Commission for the lunch hour.

20 (Laughter)

21 HEARING EXAMINER: Mr. Thomas, your
22 credibility is getting suspect now. I know
23 lawyers and time.

24 MR. THOMAS: That completes the
25 Staff's case.

1 HEARING EXAMINER: All right.

2 Why don't we take our normal luncheon
3 recess, and we will reconvene at 2:00 o'clock.

4
5 NOTE: A luncheon recess is taken at
6 12:28 p.m., after which the hearing resumes its
7 session at 2:00 o'clock p.m., as follows, viz:

8
9 HEARING EXAMINER: Mr. Axselle? Mr.
10 Waechter?

11 MR. AXSELLE: Call John Goode to the
12 stand, please.

13
14
15 JOHN GOODE, a witness being called by
16 Lawyers Title Insurance Corporation and Virginia Land
17 Title Association, having first been duly sworn, testifies
18 as follows, viz:

19 DIRECT EXAMINATION

20 BY MR. AXSELLE:

21 Q For the record, state your name,
22 please.

23 A John Goode.

24 Q And where do you reside?

25 A 11009 Ashburn Road, Richmond, in

1 Chesterfield County.

2 Q And what is your age?

3 A 66.

4 Q What is your post high school
5 education?

6 A I have a BA degree from the University
7 of Richmond, and an LLB from the University of Virginia
8 Law School.

9 Q By whom are you employed?

10 A Only myself, at the present. I'm 99
11 percent retired.

12 Q Okay, and when did you retire?

13 A At the end of 1994.

14 Q And by whom were you employed at your
15 retirement?

16 A Lawyers Title Insurance Corporation.

17 Q When did you commence the practice of
18 law and where?

19 A When I got out of the Army, in 1954,
20 in Norfolk, Virginia.

21 Q And what type of law were you involved
22 in at that time?

23 A I worked with a gentleman who was,
24 when I went with him, a sole practitioner, had a fairly
25 general practice, but a significant amount of real estate

1 practice. I think that was the bulk of what I did.

2 Q And how long were you -- from what
3 years to what years were you employed there?

4 A It would be from 1954 to the end of
5 1961.

6 Q During that time, what type of legal
7 matters did you handle that involved real estate?

8 A We represented some developers who
9 were acquiring real estate. I think my first significant
10 job was to go down to Princess Anne Courthouse and examine
11 the title of what was to become a subdivision. We handled
12 the -- in that particular instance, handled the sales to
13 the individual buyers, dealt with the title company in
14 obtaining title insurance and where necessary dealt with
15 the mortgage lender who was making loans on that, so
16 pretty much did the whole thing from the examination end
17 through the closing and obtaining the title insurance.

18 Q Is that illustrative of the type of
19 work you did during those (sic) six-year period, that
20 seven-year period?

21 A Insofar as real estate is concerned.
22 I did a few other things, but real estate was the bulk of
23 it.

24 Q Okay, and in 1961, where did you
25 further your work in the practice of law?

1 A Then I got a position with Lawyers
2 Title Insurance Corporation in the Norfolk, Virginia
3 branch office.

4 Q How long were you employed there?

5 A In Norfolk?

6 Q Yes.

7 A Until 1968.

8 Q And what type of work did you do at
9 the Norfolk branch, '61 to '68?

10 A The office dealt, I think, exclusive
11 at that time with what we called approved attorneys who
12 would give their opinions on title to the Company for the
13 purpose of obtaining title insurance. So we dealt on a
14 number of times a day basis with the local practicing real
15 estate buyers. They would come in and ask about certain
16 problems they would run into, whether that impaired the
17 insurability of the title, what could they do to satisfy
18 the title company. So just -- I guess the company name
19 for it is the underwriting of title insurance.

20 Q Was your sole work during that period
21 of time involving real estate, title insurance and
22 financing?

23 A Yes.

24 Q Okay.

25 And in 1968, how did your employment

1 continue?

2 A I was transferred here, to Richmond,
3 to what was then called the National Headquarters of
4 Lawyers Title, and my first title, I think, was Assistant
5 Counsel, and rather than dealing directly with the
6 practicing lawyers, mainly we would then deal with the
7 issuing offices, such as branches and agents that issued
8 the policies. And my responsibility then was in a
9 numerical sense, at least, mainly Virginia, but also
10 Maryland and Pennsylvania, I believe.

11 Q What subsequent position did you hold
12 with Lawyers Title at their national office?

13 A Later on, I was called an associate
14 counsel, counsel, vice president assistant, general
15 counsel, and when I retired, I was Vice President and
16 General Underwriting Counsel.

17 Q Okay.

18 How would you characterize your
19 responsibilities from what I believe would have been '70 -
20 - '68 to your retirement in '94, at the National
21 Headquarters?

22 A Generally, at least ended up in
23 supervising the underwriting for the Company throughout
24 the country, and in doing that, of course, we had to know
25 what the requirements of our customers were, and that

1 included the number of national type lenders, such as life
2 insurance companies, Fannie Mae, Freddie Mac, people like
3 that.

4 Q Briefly for the Court, how would you
5 describe underwriting and what that process is.

6 A I would describe it as getting the
7 information about what an examiner of the title had found
8 in the public records, and then translating that into a
9 title insurance product, such as title insurance
10 commitment or policy of title insurance.

11 Q You made reference earlier to working
12 with Freddie Mac and Fannie Mae. In what respects did you
13 work with them?

14 A Let me think for a minute. I think
15 the first experience we probably had with them was when
16 the -- in the '80s, there was very high inflation, and
17 various lenders were trying to cope with it as best they
18 could, and people were developing things like share
19 depreciation mortgages and variable rate mortgages and
20 things of that nature. And they were concerned, as were
21 we, what that would do to the validity and priority of
22 their loans when interest was added on. I guess negative
23 amortization would be another situation there.

24 So they asked us to look at some of
25 their forms and whether they would meet our requirements

1 and negotiated with the title industry as to what kinds of
2 endorsements we could add to the loan policies to
3 accomplish that.

4 Q Did you continue in this period of
5 time from '68 to '94, to work exclusively in the area of
6 real estate transactions, title insurance and financing?

7 A Well, I wouldn't say exclusively,
8 because somewhere along the way I had some management
9 responsibilities. But the people that reported to me were
10 doing that sort of thing, so in an overall sense, yes.

11 Q Okay.

12 What -- if you could, in a summary
13 fashion, for His Honor, describe your responsibilities and
14 experience during those 40 years of practice, from '54 to
15 '94.

16 A I guess in the beginning I was exposed
17 to the various forms of, what some people call title
18 evidence, the parties to a transaction satisfy themselves
19 that the title is as indicated, involved in either, I
20 guess, early on issuing, and later on reviewing various
21 forms of attorneys' opinions. Occasionally we would run
22 into abstracts of title.

23 Then when I went to work for Lawyers
24 Title, of course, we got involved in the title insurance
25 process itself, and learned about what that did and

1 accomplished over and above what abstracts and attorneys'
2 opinions accomplished.

3 From time to time I would work with
4 our sales and marketing people in putting on seminars and
5 whatnot, how we could further increase the demand for the
6 product of title insurance. And, in the course of that,
7 of course, you had to understand your customer's business
8 more and more, determine how title was transferred, how
9 liens were put on real property, and that kind of thing.
10 As I indicated earlier, that kind of eventually got into
11 not only what your immediate customer requires, but in the
12 case of a mortgage lender, their end customer, the thing
13 that guided by us alone, what his requirements are.

14 Q I assume you would be then familiar
15 with the title risk that a title company may or may not
16 assume from those responsibilities.

17 A I think that's really the whole thrust
18 of what you do when you underwrite title insurance.

19 Q What type of professional and trade
20 associations were you involved with?

21 A Professional associations, I guess, as
22 a member of the Virginia -- and still am, a member of the
23 Virginia State Bar, the -- I worked quite a bit with the
24 American Land Title Association. I'm a member of the
25 American College of Real Estate Lawyers. I'm currently on

1 the Council, (C O U N C I L), of the Real Estate section
2 of the Virginia Bar Association, ex officio as immediate
3 Past Chairman.

4 Q You're Past Chairman of the Real
5 Estate section of the Virginia Bar?

6 A Yes, sir.

7 Q What year did you serve?

8 A This year, ending this past January.

9 Q What are you doing in your --

10 A You said Virginia Bar Association, I'm
11 sorry.

12 Q Yes, sir.

13 A Okay.

14 Q What are you doing in your retirement,
15 albeit only 11 months of retirement?

16 A Well, I have been trying to stay
17 abreast of what is going on generally in the real estate
18 and title insurance world. As I say, I'm still working
19 with the Bar groups. I was appointed by the Governor a
20 year before last as a member of the National Conference
21 Commission on Uniform State Laws, and one of the things
22 we're working on now is fine-tuning one of those laws for
23 introduction in the legislation next year.

24 Q You mentioned that you had been
25 elected to the American College of Real Estate Lawyers.

1 Are you still a member of that group?

2 A I am, and I'm serving on their Title
3 Insurance Committee, among other things.

4 MR. AXSELLE: Your Honor, I would like
5 to move Mr. Goode's qualifications as an expert
6 on three areas: the nature and structure of
7 real estate transactions, real estate financing
8 transactions, and title risk and title
9 insurance.

10 MR. PETERS: I have no objection.

11 HEARING EXAMINER: All right.

12 I don't think there is any question,
13 Mr. Axselle, he is qualified as an expert on
14 those three areas.

15 MR. AXSELLE: Thank you.

16 (Continuing)

17 Q Mr. Goode, when did title insurance
18 commence in the United States?

19 A In 1876, I think, in Philadelphia, at
20 the time of the first centennial.

21 Q Okay.

22 What you mentioned -- well, what were
23 there -- what evidence is the title, insurance of the
24 title were -- was used in the real estate field prior to
25 title insurance?

1 A Abstracts and attorney's opinion,
2 primarily.

3 Q Okay.

4 What is a title abstract?

5 A I think you get a different answer on
6 that, depending on where you are in the United States, but
7 I think a general answer is that it's a summary of what an
8 examiner would find in the public records of those matters
9 affecting title to a particular piece of real estate.

10 Q And what is its function?

11 A Its function is to enable somebody who
12 is getting ready on real estate -- or extend credit on the
13 security of a mortgage on real estate that the seller or
14 buyer has the quality of title that they claim to have.

15 Q Well, you made reference that you
16 granted these on occasion. What are the deficiencies of
17 title abstracts?

18 A The first deficiency that comes to
19 mind that is over a number of years, this is accumulative,
20 it gets very bulky and time-consuming for someone to go
21 through all those documents every time property changes
22 hands. That's a practical consideration.

23 I think another consideration, of
24 course, is it reflects only what somebody found in the
25 public record. Ideally that is everything that is in the

1 public record, but it could be they made a mistake and
2 missed something.

3 Q So if a title examiner did not search
4 the title properly, or missed something, or something was
5 not properly recorded, would it show up in a title
6 abstract?

7 A It shouldn't, no.

8 Q Okay.

9 Are there any title risks or title
10 defects that would not show up in a title abstract even if
11 it were done pursuant to a diligent and thorough title
12 search?

13 A Sure.

14 Q What are those referred to, generally?

15 A Off-record matters.

16 Q Off-record, since they are not on the
17 public record.

18 A Right.

19 Q You also mentioned attorney's title
20 opinion. What is the nature of attorney's title opinion?

21 A Insofar as title insurance at least is
22 concerned, I think it's going one step beyond what we just
23 talked about in the abstract, an attorney not just saying
24 here is what is here, but in my opinion title, and I guess
25 in most cases, fee simple title is vested in John Smith,

1 subject to whatever things he wants to --

2 Q And how have attorney's -- excuse me.
3 I'm sorry.

4 A I just said subject to whatever things
5 would show up, such as an existing deed of trust on the
6 property or something like that.

7 Q And what has been the function of
8 attorney's title opinion?

9 A I think historically, as we were
10 saying in the case of the abstract, I guess more recently,
11 that is to enable somebody to buy or make a loan, having
12 some comfort that they're not throwing their money away.
13 More recently, of course, it has been the basis for
14 issuing title insurance policies.

15 Q What are the deficiencies, if any, of
16 an attorney's title opinion?

17 A Those that we mentioned before. I
18 guess particularly it doesn't cover the off-record
19 matters. Human error, somebody just didn't see something
20 or the lawyer made a mistake in thinking that the property
21 passed to the daughter when it passed to the son, and
22 there was a will in the chain of title. Certainly if
23 you're dealing with a small firm, it might be some
24 question about the ability to recover if there is some
25 negligence involved. The question of the statute of

1 limitations, if an amount of time had passed and the
2 lawyer could no longer be liable.

3 A So the title abstract and the
4 attorney's title opinion, neither one protect against off-
5 record risks or negligent searches; is that correct?

6 A Well, I guess to the extent that there
7 was some liability for the negligence, you would have a
8 tort claim. But the answer to your question is no, it
9 wouldn't protect you.

10 Q So the answer is no.

11 A Right.

12 Q What is a title guarantee?

13 A I guess I think of a title guarantee
14 as sort of being the original form of title insurance. It
15 still just covers what's on record, but it overcomes some
16 of these other deficiencies we've talked about with
17 respect to the attorney's opinion and abstract, in that
18 you have, presumably, a corporation with perpetual
19 existence and hopefully some financial wherewithal to go
20 against if some mistake has been made. But it still
21 wouldn't cover the off-record matters.

22 Q But in a title guarantee, the company
23 basically does what?

24 A The company indemnifies the party
25 guaranteed against loss if what's stated in the guaranty

1 is incorrect.

2 Q So it would guarantee against a
3 negligent search, so in that sense it's different from the
4 abstract or the attorney's opinion; is that correct?

5 A That's correct.

6 Q But it does not guarantee for the off-
7 record risks.

8 A Right.

9 Q Now, title insurance -- in a general
10 sense, how would you describe title insurance?

11 A In the modern type of title insurance?

12 Q Yes, sir.

13 A I would describe it as a contract of
14 indemnity whereby one party -- well, the insurer or title
15 insurer guarantees for a consideration the other party,
16 the insured, against loss by reason of defect in the
17 title, or if it's a lender's policy, that, plus insure if
18 the title is -- excuse me, if the mortgage is invalid or
19 unenforceable or lacking in the priority indicated in the
20 policy.

21 Q For His Honor's benefit, mortgage and
22 deeds of trust, is that terminology used fairly
23 inexchangeably?

24 A Oh, I'm sorry. In all my years with
25 the Company, mortgage is the generic term. If I say

1 mortgage in Virginia, I mean deed of trust.

2 Q Virginia uses deed of trust; other
3 places use mortgage. But they are pretty much the same in
4 that respect.

5 A I think for this purpose, yes.

6 Q Okay.

7 What has --

8 A The policy says mortgage, so I guess
9 that's -- excuse me. Go ahead.

10 Q What is the general function and
11 purpose of title insurance?

12 A I think its function is the same sorts
13 of things that we have already talked about, is to provide
14 assurance to investors in real estate, and by investors I
15 mean purchasers and lenders, that the title is of a
16 quality that they're looking for.

17 Q How does a title insurer or a title
18 company issue a title policy? What steps take place?

19 A Well, the first step would have to be
20 that either the company, through its employees, agents or
21 outside attorneys or some individual would have the title
22 -- the record title examined, and then it would get this
23 information in a simple and some kind of logical fashion,
24 and then somebody on behalf of the title company -- there
25 again, it could be an agent; it could be an officer or

1 employee of the company -- would take that information and
2 such other information they could get, such as a survey of
3 the property or the affidavits that have been presented as
4 to ownership and that sort of thing, and determine in what
5 form a contract of insurance could be issued.

6 Q Okay.

7 How is that evidenced? What do they
8 issue at that point?

9 A Well, in most instances, in the case
10 of a prudent party, they would get a -- what some people
11 call a binder, others call a title insurance commitment
12 issued before the transaction closed.

13 Q What is a title commitment?

14 A I've heard some people describe it as
15 being partly a mini-policy in that it shows what the title
16 is like at that point, but the commitment aspect of it, I
17 guess, is a promise by the company that upon payment of a
18 premium and the satisfaction of various requirements, then
19 the policy or policies will be issued with certain
20 exceptions shown in that policy.

21 Q Now, you mentioned that the company
22 would issue the policy or policies if certain conditions
23 or requirements were met. Give me some illustrations of
24 the type of conditions or requirements that might be in a
25 title commitment.

1 A I think the first one that you usually
2 see is payment of the full consideration for the transfer
3 or the amount of the loan, and then you would have in the
4 case of a transfer of real estate a requirement for a deed
5 from the seller to the buyer to be executed and recorded,
6 and the same sort of requirement if it's a loan
7 transaction for a deed of trust from the -- presumably in
8 that case, the new buyer to the trustee for the new
9 lender.

10 If there were any prior liens on the
11 property that had to be disposed of, if the new lender was
12 expecting to get a first lien, then those prior liens
13 would have to be disposed of.

14 Q And once you have -- the title company
15 issued a title commitment, what needs to occur before the
16 title company, as the insurer, would issue the title
17 policy?

18 A Well, a closing would have to occur in
19 which the parties got together and complied with all of
20 these things and the property changed hands.

21 Q But it would have to comply with all
22 of those conditions before it would issue the policy.

23 A That's right. Either that, or you
24 would have a further exception in the policy.

25 Q And when does the consideration or

1 premium for that insurance get paid?

2 A It would get paid at the settlement.

3 Q Okay, and when is the title insurance
4 issued?

5 A After the requirements have been met.

6 Q That would be post closing?

7 A That would be post closing.

8 Q And what does the title insurance
9 protect?

10 A I'm sorry?

11 Q What, basically, in a very generic --
12 general sense, does the title insurance protect?

13 A It protects the interest of the
14 insured under the policy which in the case of an owner's
15 policy, would be whatever quality of estate and land the
16 buyer acquired, and 99 percent of the time it would be a
17 fee simple title. In the case of a loan policy, it would
18 say that you're borrower, Mr. Lender, has fee simple title
19 subject to whatever the policy shows, and that you have a
20 valid, enforceable and prior lien on that property.

21 Q Does the insurance protect against on-
22 record risks?

23 A It does.

24 Q Does it protect against off-record
25 risks?

1 A It does.

2 Q So title insurance covers both on- and
3 off-record risks, as opposed to the title abstract, the
4 attorney's title opinion, and the title guarantee that do
5 not cover off-record risks.

6 A Yes, sir.

7 Q Now, explain to me -- to the Court, if
8 you will, what are on-record risks.

9 A On-record risks would be those that
10 should at least be discovered from the examination of the
11 public records in that particular jurisdiction, county or
12 city in Virginia, mostly in the Clerk's Office, but also
13 in the -- wherever the tax records are kept.

14 Q Without giving an all-inclusive list,
15 just give me some illustrations of the type of defects
16 that a normal on-record risk might -- excuse me -- give me
17 some illustrations of some on-record risks.

18 A A prior deed of trust on a property,
19 easement to the power company, easement to the telephone
20 company, restrictive covenants, things shown on a plat, a
21 subdivision. There might be a right-of-way to a
22 neighbor's lot. I think they are the most common ones you
23 see in your typical residential policy.

24 Q And what would be the risk for the
25 property owner and lender and thus for the title insurance

1 company as it relates to those items?

2 A The risk would be if they fail to
3 except to those items that actually affected the property
4 when they issued the policy, and then they, in effect,
5 indemnified the insured against loss resulting from these
6 things.

7 Q Are there ever instances where title
8 examiners fail to properly report a deed of trust or
9 judgment?

10 A I'm afraid that does happen. We're
11 all human.

12 Q So the risk is that they -- these
13 items from a public records standpoint are not recorded
14 properly; is that correct?

15 A That's correct.

16 Q What is an off-record risk?

17 A That would be the other category of
18 things that might affect the title that would not, even
19 from the most thorough examination, be revealed by
20 examination of the title.

21 Q Okay.

22 Again, without giving us all of those,
23 can you give us some illustrations?

24 I'm going to hand you -- I think I've
25 shared this with everyone, if I may --

1 (Pause)

2 The document that I have handed to you
3 -- what is this?

4 A It's a brochure printed by our
5 advertising -- by Lawyers Title. I still have trouble
6 thinking in the past tense -- by Lawyers Title, Public
7 Relations Department.

8 Q And what is --

9 A It's in reference to buying title
10 insurance.

11 Q What does it purport to show?

12 A It purports to show what looks like 35
13 different things that even the best title examiner
14 wouldn't find that could affect your title.

15 Q The second one mentioned there,
16 "Forged deeds or releases," how could that take place?

17 A Unfortunately, it takes place too
18 frequently, but somebody who is trying to borrow money on
19 the security of property they didn't own, or perhaps a
20 married couple who is on the outs, and the husband wanted
21 to borrow the money and couldn't talk his wife into
22 joining in the -- signing the deed of trust, would sign
23 her name for her. That would constitute a forgery.

24 On the release side, the same sort of
25 thing, if you want to borrow money on your property and

1 it's already mortgaged up to the hilt, then one way to
2 make the record look good is take a forged release of some
3 kind down to the recorder's office.

4 Q Why would those errors in defects not
5 be revealed from a title search?

6 A Because it would look like they were
7 genuine on the record.

8 Q The third one, "Instruments executed
9 under fabrication(sic) or expired power of attorney," how
10 could that occur?

11 A Powers of attorney have always been
12 very tricky in the title insurance business. I guess the
13 fabricated one -- I don't know why you would bother to
14 fabricate it rather than just forge the deed itself, but
15 it would be an indication that I had the power to convey
16 your property, when, in fact, you hadn't given me that
17 power.

18 The expired one, if you gave me the
19 power to convey your property for a month, and then the
20 following month I gave someone a deed to it, then
21 presumably I didn't have the authority, so no title would
22 pass.

23 Q How about the sixth one, "Undisclosed
24 or missing heirs," how would that be an off-record risk?

25 A In Virginia, I think you have to rely

1 on what you find in the Clerk's Office as -- when the
2 person or representative files a list of heirs, then even
3 innocently if he said the children are A, B and C, and
4 they forgot about D who left home 40 years ago, that would
5 be a missing heir who would have an interest in the
6 property.

7 Q Eight and Nine, "Deeds by persons of
8 unsound mind, or Deed by minors," how would that be a
9 risk?

10 A Presumably neither one of those
11 parties has the capacity to do what they're purporting to
12 do.

13 Q Would that be revealed by a diligent
14 and thorough title examination?

15 A It would not.

16 Q How about No. 17, "Errors in
17 indexing," how would that occur?

18 A The clerk's could make a mistake. If
19 you have a grantor, grantee index, for example, they could
20 get the names reversed. With computerization, I think
21 that's unfortunately happening more than it used to
22 because the computer doesn't recognize things that a human
23 might. For example, NationsBank -- I forget whether it's
24 one word or two, but if you do it the wrong way, then the
25 computer will toss it out and not index the conveyance by

1 NationsBank along with where you would look for such
2 things.

3 Q How about with individual's names?
4 Could there be misindexing there?

5 A Sure. I remember a title I did in
6 Norfolk, I guess when I was in private practice, with the
7 development authority, and the people were named Leigh, (L
8 E I G H), but somebody could have thought it was (L E E),
9 and it could have been indexed differently because of
10 that.

11 Q Number 35, "Duress in execution of
12 instruments," how would that occur?

13 A I think in recent years it's more apt
14 to occur in the creditor's rights arena where somebody may
15 have been or would come back after the debt and say they
16 were forced to give a deed in lieu of foreclosure, that
17 they didn't do so of their own volition.

18 Q Are each of these items thus in some
19 fashion a defect that could occur in the title, thus a
20 risk to the insurance company that would not be revealed
21 by a diligent and thorough title examination?

22 MR. PETERS: Your Honor, I believe he
23 is asking a leading question.

24 HEARING EXAMINER: You can rephrase
25 it, Mr. Axselle.

1 BY MR. AXSELLE: (Continuing)

2 Q What then do these items represent in
3 collection, if you will?

4 A In looking over them, I think there
5 are probably a couple that don't apply in Virginia,
6 "Corporation franchise taxes," and there was one other I
7 thought I saw. But in essence, this was the list of what
8 we used to call hidden defects that the best title
9 examiner wouldn't find that would still affect the title
10 to the property. "Community property" was the other one,
11 I'm sorry.

12 Q But when you say hidden defects, is
13 that the same as off-record risks?

14 A Yes.

15 MR. AXSELLE: Your Honor, I would like
16 to move to have this introduced as an exhibit,
17 please.

18 HEARING EXAMINER: Mr. Goode, what is
19 your middle initial, sir?

20 THE WITNESS: I'm sorry, I don't have
21 one.

22 HEARING EXAMINER: You don't have one,
23 all right.

24 THE WITNESS: The Army called me NMI,
25 but that's the best I can do.

1 HEARING EXAMINER: I will just go
2 ahead and mark this Exhibit JG-17 then.

3 BY MR. AXSELLE: (Continuing)

4 Q If I may ask you some questions that
5 may be fairly fundamental, but I think they are important
6 for the record. How is title to real estate transferred
7 in Virginia?

8 A By deed of bargain and sale, or by
9 deed.

10 Q What is the impact of recording that
11 deed at the record room?

12 A The impact is to confirm for the world
13 that -- I should back up and say delivery of the deed in
14 my previous answer. But to confirm to the world at large
15 that title has passed from the grantor to the grantee.

16 Q If an individual borrows funds for the
17 use -- in the purchase of real property, how is that
18 obligation to repay those funds evidenced in Virginia?

19 A By the execution of a note.

20 Q What does the note do?

21 A The note constitutes a promise to
22 repay the funds and the conditions and terms under which
23 they will be repaid.

24 Q If the lender wants to take a lien on
25 the real property being conveyed to secure the payment of

1 the loan that has been evidenced by that note, how is that
2 done in Virginia?

3 A By execution and recordation of a deed
4 of trust.

5 Q And what does that deed of trust do
6 from a legal standpoint?

7 A It conveys the legal title to the land
8 to a trustee who is ostensibly an independent third party
9 who holds it as security for repayment of the obligation.

10 Q The title is held in trust?

11 A In trust.

12 Q What happens to the title when the
13 deed of trust is recorded?

14 A The legal title then would be in the
15 trustee.

16 Q So there are two separate documents, a
17 note and a deed of trust.

18 A Yes, sir.

19 Q Okay.

20 Now, when an original lender sells to
21 a subsequent lender on the secondary market, what do they
22 sell?

23 A In a common parlance, they sell the
24 loan.

25 Q Now, I'm going to hand you, if I may,

1 a copy of an owner's policy which I believe is in the
2 evidence as document 25, but it may be easier for you to
3 reference it as a separate item.

4 I have shared copies with counsel, I
5 believe.

6 Your Honor, the document is document
7 25. It's captured at the top, "ALTA Owner's
8 Policy".

9 (Continuing)

10 Q What does ALTA stand for?

11 A American Land Title Association.

12 Q And what does this document before you
13 basically represent?

14 A It's the latest revision of the
15 owner's policy drafted by the American Land Title
16 Association.

17 Q Is this the format used on occasion or
18 generally by title companies?

19 A I would say more than generally,
20 almost universally. In Virginia there is another version
21 of owner's policy. That is called a plain English policy,
22 but this is the one that is used more than any other one.

23 Q Now, what are the assurances or
24 insurance, if you will, that the insurance company is
25 providing to the owner under this policy?

1 A Well, as we said earlier, it's a
2 promise by the company to pay, as phrased here, the loss
3 or damage up to the face amount of the policy by reason of
4 the four eventualities stated in paragraphs 1, 2, 3 and 4
5 at the top of the page.

6 Q The first one is entitled -- it says,
7 "Title to the estate or interest described in Schedule A
8 being vested other than as stated herein(sic)." What does
9 that mean?

10 A It would protect the insured against
11 either a complete or partial failure of title, and if it
12 says title is vested in John Goode, and it's not, then
13 that would trigger that insurance provision. If it said
14 fee simple title, which it normally says, is vested in me,
15 and it turns out it's owned in an estate for years or a
16 lease hold or something, then title has not -- is not as
17 stated, so there, again, there would be liability on the
18 insurer for that.

19 Q Okay.
20 The second one says, "Any defect in or
21 lien or encumbrance on the title." What does that mean?

22 A I think that presumes that title is
23 vested under one, but the title is not as good as you
24 thought it was. For example, lien or encumbrance, as you
25 said earlier, would be something like a mechanic's lien or

1 a deed of trust lien or judgment lien that affected the
2 title, and yet if it were not accepted over in Schedule B,
3 the title insurer would be liable for that.

4 Q How does the title company address
5 valid liens, first deed of trust, tax lien or whatever
6 that is properly recorded and properly noted?

7 A That would be set forth in Schedule B
8 in the policy which is attached here.

9 Q And there are exceptions to this
10 provision No. 2?

11 A Yes, and this particular policy has
12 some samples of that sort of thing that are in there.

13 Q The third item is "Unmarketability of
14 the title." What does that mean?

15 A I believe if you look over on the
16 second page, under the definitions of the terms, that is a
17 defined term, "...an alleged or apparent matter affecting
18 (sic) title to the land, not excluded or excepted from
19 coverage, which would entitle a purchaser of the estate or
20 interest described in Schedule A to be released from the
21 obligation to purchase by virtue of a contractual
22 condition requiring (sic) delivery of marketable title."

23 I guess restating that, if I make a
24 contract to sell a block acre to you and grant you
25 marketable title, and then in your title examination turn

1 up something that you think in your mind is going to keep
2 you from getting a marketable title, then that title is
3 unmarketable to the extent that it's insured here.

4 Q Marketability thus being the ability
5 to convey the property subsequent.

6 A That's right.

7 Q No. 4, is the "Lack of a right of
8 access to and from the land." What does that mean?

9 A I think that's in the policy because
10 in theory you could have perfect title to a parcel, for
11 example, in the middle of Shenandoah National Park, but
12 you would have no way to get to it which would certainly
13 detract from the value of that property, so this is an
14 additional insurance that you not only own the property,
15 but you have a legal right of access to that property.

16 Q And in the event that any of these
17 provisions are found to have been breached, what is the
18 obligation of the title company?

19 A Well, probably one of the more
20 important obligations is the one stated immediately
21 following paragraph 4, that the company will pay the
22 costs, attorneys' fees and expenses incurred in the
23 defense of the title, as insured.

24 Q Now, this owner's policy, to state the
25 obvious, if I may, that applies to the owner, as insurance

1 for the owner; is that correct?

2 A That's correct.

3 Q I'm going to hand you another document
4 which I believe is Exhibit 26.

5 (Pause)

6 While we are passing those out, let me
7 ask you to go back on the owner's policy. Is there any
8 obligation in Virginia for an owner to purchase owner's
9 insurance?

10 A There is no obligation.

11 Q Are there any obligations under the
12 law on a settlement agent regarding the availability of
13 owner's insurance?

14 A Yes. Several years ago Virginia
15 followed the example of several other states and requires
16 the party conducting the settlement to let the purchaser
17 know that title insurance for the buyer's protection is
18 available.

19 Q Now, calling your attention to the
20 loan -- what is referred to as loan policy. This document
21 I have handed to you, what is that, basically?

22 A It's one way of putting it. It's the
23 counterpart of what we just talked about, except it's a
24 policy designed for lenders who lend on the security of
25 real estate.

1 Q And what are the assurances that they
2 provide under this policy?

3 A Well, the first four are identical to
4 those in the owner's policy. The theory being, I think,
5 that all those things, if they could affect the owner,
6 could also affect the lender. The last four are peculiar
7 to the interest of the lender.

8 Q The fifth reads, "Invalidity or
9 enforceability of the lien of the insured mortgage upon
10 the title." What does that mean?

11 A I think it means that the mortgage or
12 deed of trust is a valid instrument as between the
13 parties, and not only is it valid, it's -- that lien is an
14 enforceable lien.

15 Q The sixth paragraph says, "The
16 priority of any lien or encumbrance over the lien of the
17 insured mortgage." What does that mean?

18 A It means a lot to a lender who is
19 required to make a first lien under its governing bodies,
20 but it means that unless there is another lien shown over
21 in Schedule B, that there is no other lien ahead of this
22 lien.

23 Q And I won't read paragraph 7, but how
24 does that fit into this --

25 A That's a special provision relating to

1 mechanic's liens, and it, in effect, says at least as to
2 existing construction, there is no mechanic's lien because
3 of that construction that would come ahead of the lien of
4 the insured deed of trust.

5 Q Again, without reading the eighth
6 paragraph, what does that mean?

7 A It doesn't mean a whole lot in
8 Virginia because it only comes into play if there is a
9 recorded assignment of the mortgage or deed of trust
10 insured, and that's not typically done in Virginia, but if
11 there is such an assignment, then that ensures that the --
12 that is a valid and enforceable assignment of that, quote,
13 "insured mortgage".

14 Q And, again, assuming for the sake of
15 this illustration that there is a violation of one of
16 those eight provisions, what is the insured's
17 responsibility under the policy?

18 A Well, there again, you've got your
19 obligation to defend. I guess as stated in a very broad
20 way, the obligation is to make the insured whole. The
21 company has various options about how it does that, which
22 are set forth over in the condition of stipulations, but
23 the obligation is to indemnify the insured.

24 Q Under these policies then, under title
25 insurance generally, what is the subject matter that is

1 insured?

2 A The subject matter, at least in the
3 case of an owner's policy, is the -- in a broad sense the
4 ownership or title to the real estate.

5 Q How about a lender's policy?

6 A You would have that, plus the
7 insurance provided as to the lien status, validity, and
8 priority, enforceability.

9 Q What are the risks that are insured
10 against under title insurance?

11 A All of these things stated on the
12 insuring provision of the policy, that the title is not as
13 it was thought to be.

14 Q Does it insure on- and off-record
15 defects?

16 A It insures both on- and off-record
17 defects.

18 Q As far as the risk insured, is there a
19 difference between the owner's and a lender's policy as to
20 what was insured against?

21 A They have differing interests, so --
22 there again, I think the so-called -- what I would call
23 the title type risks, 1 through 4 in the owner's policy
24 are insured for both the lender and the owner. The lien
25 type risk, which are the last four insuring provisions,

1 are insured just in the loan policy.

2 Q What is the commencement in the period
3 of the risk that has been undertaken by the insured under
4 title insurance?

5 A The policy is that -- the risk is as
6 of the effective date of the policy, which is set forth in
7 Schedule A of the policy.

8 Q And how long does that risk that has
9 been undertaken, how long does that last?

10 A In the case of an owner's policy, in
11 theory, it could last forever, certainly as long as the
12 party insured has title to that real estate, or even the
13 heirs of that party, or if he is given some warrantees to
14 his purchaser, and then there is a claim made under those
15 warrantees, then it's still insured.

16 Q How about as to a loan policy? How
17 long does that policy and that risk undertaken, how long
18 does that last?

19 A At least as long as that loan is
20 outstanding.

21 Q What is --

22 A In the case --

23 Q -- the amount -- excuse me. I'm
24 sorry.

25 A I was just going to say in the case of

1 a lender who forecloses and acquires title to the
2 property, then he is still insured at that point.

3 Q What is the amount of the insurance?

4 A In the typical owner's case, it would
5 be the amount of the amount of the purchase price, and in
6 the typical loan transaction, it would be the amount of
7 the loan unless the lender expected to be what we call
8 "negative amortization", where the interest brings the
9 amount up.

10 Q And what is the consideration for this
11 policy and when is that paid?

12 A The premium, the title insurance
13 premium, which normally is paid at the settlement.

14 Q Now, obviously you had mentioned
15 Freddie Mac and Fannie Mae and the secondary market
16 somewhat here, and how -- what has been the relationship
17 between the advent and use of title insurance as it
18 relates to the advent and growth of the secondary market?
19 How have they interrelated, if they have?

20 A I think early on, the designers of the
21 loan policy recognized that mortgage loans didn't always
22 stay in one place, so the policy was drafted in such a way
23 as to ensure whoever owned that loan. I think in a more
24 practical sense, it's the one event that has made a
25 tremendous market for title insurance. I can recall in my

1 brief period, at least in the Norfolk area, most of the
2 residential loans were by local savings and loans, which
3 retained those loans in their own file at that time, and
4 most of them did not get title insurance. They typically
5 had their own attorney that they retained, and they relied
6 almost solely on the opinion of that attorney.

7 Later on, when the savings and loans
8 got in trouble and wanted to raise some cash by selling
9 these loans in what, I guess, we generally call the
10 secondary market, they had quite a bit of trouble doing so
11 because of these various types of attorneys' opinions and
12 other forms of title evidence that weren't necessarily
13 acceptable to the lenders that might be half the country
14 away.

15 Q How does that relate to title
16 insurance?

17 A It relates to title insurance because
18 title insurance was the one thing that these remote
19 lenders were looking for. They knew who they were dealing
20 with, whereas they might not know Joe Doe in Suffolk,
21 Virginia, who happened to represent the local savings and
22 loan.

23 Q So the remote lenders are those that
24 we would refer to generally as the secondary market.

25 A That's correct.

1 Q These are individual companies that
2 purchase a loan that had originally been made by another
3 lender.

4 A That's right.

5 Q Okay.

6 What relationship, if any, has there
7 been between the federal government insuring and backing
8 loans, and title insurance? How are they interplayed?

9 A I think, there again, that's created a
10 big demand for -- at least the mortgagee's title
11 insurance. I think it started in the depression. Things
12 that are still around that come to mind are FHA and VA,
13 which in various forms guarantee a person of the debt.
14 The lenders are more comfortable in making a loan of a
15 higher amount which increases homeownership throughout the
16 country, and I think that was the government's motive
17 behind all of this.

18 Q And how did title insurance affect
19 that motivation by the government, to increase home
20 ownership?

21 A I think it was more, probably, the
22 result than the cause, but there again, it enables
23 somebody from a long way away to have a higher comfort
24 level as to the quality of the title involved in these
25 transactions.

1 Q By virtue of there being title
2 insurance.

3 A By virtue of there being title
4 insurance from a recognized title insurance company.

5 Q In a very brief capsule, what is the
6 Federal National Mortgage Association, which is commonly
7 referred to as Fannie Mae?

8 A I think today, I think, if you pick up
9 the Wall Street Journal, you can buy stock in Fannie Mae,
10 but it started out as a government-chartered corporation,
11 I believe originally primarily to purchase FHA and VA
12 loans to make more money available for home ownership. A
13 number of years ago there was, I guess you might call it a
14 spin-off whereby Fannie Mae became a privately-owned
15 corporation, but part of its functions were retained in
16 the Department of Housing and Urban Development, under the
17 name of Government National Mortgage Association, called
18 Ginnie Mae.

19 Q So Fannie Mae, then Ginnie Mae, you
20 made reference to -- what does Ginnie Mae do now,
21 primarily?

22 A Primarily they're in the business of
23 purchasing FHA and VA loans.

24 Q Reference has also been made here to
25 the Federal Home Loan Mortgage Corporation or Freddie Mac.

1 What is that in general terms?

2 A It's similar to Fannie Mae in that it
3 is publicly -- publicly -- I mean stock is traded on the
4 New York Stock Exchange, I believe. I seem to recall that
5 it was an outgrowth of the savings and loan industry to
6 create a market for this -- these types of mortgages that
7 I was talking about earlier that were held by savings and
8 loans institutions all over the country. But today I
9 think it's -- I know it's a very strong competitor of
10 Fannie Mae, and in observing how they operate over the
11 years, you know, they compete against each other quite a
12 bit.

13 Q What is the purpose now of Fannie Mae
14 and Freddie Mac and their operation?

15 A In the broad sense, I think their
16 purpose is to make more money available for home ownership
17 throughout the United States.

18 Q And they do that in what fashion?

19 A By purchasing mortgage loans from
20 various, what we call originating lenders, all across the
21 country.

22 Q Now, is Freddie Mac an insured through
23 a title insurance policy once it's purchased a loan from
24 the originating lender?

25 A It would be, yes, under the definition

1 of insured in the policy.

2 Q Does this give Freddie Mac a right to
3 make a claim on the loan policy directly to the title
4 insurance company as the insurer?

5 A If they think they have a loss,
6 they've got the right.

7 Q As a practical matter, is this what
8 happens in the event they feel they have a loss?

9 A In the normal residential transaction?

10 Q Yes, sir.

11 A I think their normal practice is to go
12 back to the party that sold them the loan and let them
13 pursue their rights against -- the seller pursue their
14 rights against the title company.

15 Q I assume that during your 40 years,
16 you became somewhat familiar with the pricing and sale of
17 title insurance in Virginia. Who, generally, in Virginia
18 pays for the purchase of title insurance?

19 A The buyer, or in the case of just a
20 refinance, it would be the buyer.

21 Q Is the title insurance rate required
22 to be approved or filed with the SCC?

23 A No, they're not.

24 Q Are they provided to the SCC in any
25 fashion?

1 A It's my understanding, just as a
2 matter of courtesy, they're generally provided, though
3 they're not required.

4 Q How are those title insurance rates
5 generally calculated?

6 A It's based on the amount of the
7 policy, so much per thousand.

8 Q And what is the policy amount based
9 upon?

10 A The policy amount is -- in the case of
11 an owner's policy, normally the purchase price and the
12 loan policy, the amount of the loan.

13 Q There has been some prior evidence
14 about there would be occasions where an individual
15 buyer/borrower would simultaneously obtain a loan title
16 policy and an owner's title policy. When that --

17 MR. PETERS: I object to the question.
18 I don't think there is any basis in the prior
19 testimony to what he has just described.

20 MR. AXSELLE: I believe there was. In
21 the exhibits just introduced by Mr. Thomas, he
22 showed that on some of the transactions they had
23 owner's policy and lender's. So then they just
24 had one or the other. That was the basis to
25 what I was referring.

1 MR. PETERS: Oh, I see. I thought you
2 were talking about live testimony.

3 MR. AXSELLE: Well, I thought it was
4 pretty live -- no. I did not mean testimony by
5 Mr. Goode; I meant testimony previously
6 introduced.

7 Let me rephrase that then.

8 (Continuing)

9 Q In that instance where there is an
10 issuance of a lender's policy and an owner's policy
11 simultaneously, how is that -- what consequences are there
12 from that transaction in the title industry?

13 A That would call for what is generally
14 called a simultaneous issuance rate. It's treated as,
15 basically, one risk with a somewhat nominal charge charged
16 for the loan policy with the normal premium being charged
17 for the owner's policy.

18 Q What is that normal charge that you
19 referred to?

20 A I think when I started, it was around
21 \$10. About \$50 today, I believe.

22 Q And what impact does it have on the
23 title insurance rate if there is simply a refinancing of
24 an existing loan?

25 A It would normally result in a

1 reduction, assuming there was prior title insurance. It
2 results in the reduction of the amount of premium.

3 Q And what is that usually referred to
4 in the industry?

5 A I have heard it referred to both as a
6 reissue rate and a substitution loan rate.

7 MR. AXSELLE: Mr. Goode, thank you
8 very much. Answer any questions I think other
9 counsel may have for you.

10 HEARING EXAMINER: Mr. Thomas, any
11 questions?

12 MR. THOMAS: Just one, Your Honor.

13
14 CROSS-EXAMINATION

15 BY MR. THOMAS:

16 Q Mr. Goode, your previous testimony was
17 that in Virginia that there are two documents which
18 evidence the transfer of real property. One of those is a
19 deed of trust, and the other is a note. And you also
20 testified that when an originating lender sells to the
21 secondary market, what they are selling is a loan. Is
22 that loan evidenced by the note or the deed of trust?

23 A The loan, itself, is evidenced by the
24 note.

25 Q Okay.

1 When the loan is sold to the secondary
2 market, such as Fannie Mae, does the original lender have
3 an interest in the property that secures that loan?

4 A At that point, he doesn't have an
5 interest in the property, no.

6 MR. THOMAS: No further questions.

7 HEARING EXAMINER: Mr. Peters?

8 MR. PETERS: Mr. Goode, how are you
9 this afternoon?

10 THE WITNESS: Fine.

11
12 CROSS-EXAMINATION

13 BY MR. PETERS:

14 Q Mr. Goode, when you were testifying
15 under direct examination for Mr. Axselle, you described
16 your work experience. Did any of that work, either as a
17 private lawyer or as a lawyer or officer with Lawyers
18 Title Insurance Corporation, involve work directly for
19 mortgage lenders? Did you represent mortgage lenders?

20 A When I was in private practice, yes.

21 Q And how long ago was that?

22 A Too long. Prior to 1961.

23 Q When you were in private practice in
24 the real estate transactions that you worked on, were all
25 of those transactions -- did they all involve title

1 insurance?

2 A Oh, no, not in those days.

3 Q So none of them involved title
4 insurance; is that correct?

5 A No. I didn't say that. You said did
6 all of them involve title insurance, I thought. I'm sorry
7 if I misunderstood.

8 Q So your answer is some did and some
9 didn't.

10 A That's correct.

11 Q Were there -- relatively speaking,
12 were there a lot of transactions that did not involve
13 title insurance?

14 A It's difficult to answer. In the
15 Norfolk area, owner's policies were not common. Most loan
16 transactions, I think, did involve title insurance. I
17 hope that's a fair answer.

18 Q Did those transactions close on the
19 basis of a title search report in the absence of title
20 insurance?

21 A I'm afraid the borrowers probably
22 didn't get that much. They just got their loan and went
23 home happy.

24 Q How about the lenders? Did they make
25 the loans on the basis of the title --

1 A There were some lenders that required
2 only an attorney's opinion.

3 Q Now you have referenced attorney's
4 opinion. How about simply an examination done by a
5 private firm that made a report as to what the record
6 title was?

7 A I can't recall any such situation as
8 that.

9 Q Are you familiar with the term
10 "owner's and encumbrance reports," O&E reports?

11 A I've heard the term.

12 Q Do you understand what the term means?

13 A Well, its name would imply that
14 someone is reporting who owns the property and what
15 encumbrances are on it.

16 Q But your practice, either as a private
17 lawyer or as an employee of Lawyers Title Insurance
18 Corporation, did not directly involve itself with owner's
19 and encumbrance reports.

20 A I can't recall any such situation as
21 that.

22 Q Now, you have published on the subject
23 of title insurance; is that correct?

24 A I'm not sure what you mean by
25 "publish". You mean articles, that kind of thing?

1 Q Yes.

2 A Yes. I've written several articles.

3 Q Have you ever written an article that
4 is focused on or was focused on what constitutes
5 insurance?

6 A I don't recall doing so.

7 Q Are you familiar with title 38.2 of
8 the Code of Virginia?

9 A Is that the section defining title
10 insurance?

11 Q Title 38.2 is the Virginia Insurance
12 Code. Are you familiar with that?

13 A I wouldn't claim any familiarity with
14 it, no.

15 Q Are you familiar with any statutory
16 definition of the term of insurance?

17 A I looked for one the other day and
18 couldn't find one. But I did find title insurance.

19 Q How about regulations of the Bureau of
20 Insurance defining "insurance". Are you familiar with any
21 such regulation?

22 A No, I'm not.

23 Q Are you familiar with administrative
24 letters issued by the Bureau of Insurance?

25 A You mean specific --

1 Q No, in general. Are you familiar with
2 the practice of the Bureau in issuing administrative
3 letters?

4 A Not really. I mean I assume they
5 issue letters, but I'm not familiar with the practice.

6 Q Now, you referred in your direct
7 testimony to abstracts. You referred to attorneys'
8 opinions, and you referred to title guarantees; is that
9 correct?

10 A I believe so.

11 Q Did you -- can you refresh my memory
12 as to any other search and report document that you
13 referred to, other than those three that I just mentioned?

14 A That I referred to?

15 Q Yes, sir.

16 A I don't believe so.

17 Q All right.

18 As to an abstract, is it my
19 understanding that the abstractor, the party that prepares
20 the abstract does not guarantee title?

21 A That's my understanding.

22 Q And the attorney that renders a title
23 opinion, does he guarantee title?

24 A No.

25 Q And you referred to, was it title

1 guarantees? Is that the term you used?

2 A I believe so.

3 Q Does that guarantee title?

4 A I think so.

5 Q Does it guarantee title with reference
6 to off-record defects?

7 A No. By its nature it's only for on-
8 record defects.

9 Q Only on-record defects.

10 Now, Mr. Axselle reviewed with you a
11 list of types of off-record defects there might be. Based
12 on your knowledge of the industry, what is the frequency
13 of an off-record defect? How often in Lawyers Title's
14 history did --

15 A I'm not good at statistics, but I know
16 with respect to forgery and fraud, it's a lot more
17 frequent than we would like. Of course, I guess the
18 biggie we had in that area was the Indian claims that rose
19 across the country a few years ago.

20 Q But how about with reference to non-
21 new construction residential transactions? Are off-record
22 defects frequent?

23 A I don't know what you mean by
24 frequent. I mean having been down the hall from the
25 claims people for a number of years, I mean I've heard an

1 awful lot of conversation about survey claims and things
2 of that nature.

3 Q Of all of the claims that Lawyers
4 Title might have to pay in the course of a year, would
5 off-record defects constitute less than 10 percent of
6 those claims?

7 A I can't answer that, I'm sorry.

8 Q You don't know whether it's more or
9 less than 10 percent.

10 A No. As I say, I'm not a numbers guy.

11 Q Back to the abstract that you referred
12 to. My understanding from your testimony is that an
13 abstract does not provide a guarantee as to off-record
14 defects, but how about the on-record defects? Is there a
15 guarantee there?

16 A I would think it would -- is intended
17 to report what's on the record, so if they miss something,
18 there would be some liability for off-record defects.

19 Q And the basis of that liability would
20 be a tort action?

21 A For negligence on the part of the
22 abstractor.

23 Q And would the same be true of an
24 attorney's title opinion?

25 A I think by and large, it would be. I

1 guess at least in my mind there is a line between tort and
2 contract in that area is somewhat fuzzy (sic).

3 Q All right.

4 You have described in some detail the
5 information that a lender receives before making a loan or
6 -- excuse me -- that a title insurance company receives
7 before issuing a policy. I believe you indicated that
8 there is a title commitment issued, and that commitment
9 lists certain things that have to be done in order to have
10 a final policy issued. Am I correct in my understanding?

11 A In the majority of cases. Sometimes
12 it's after the fact.

13 Q All right.

14 So if those conditions listed in the
15 commitment, in fact, are fulfilled, there is not much
16 risk, is there, that is being covered by the title
17 insurance policy?

18 A Well, title insurance is described as
19 a risk-elimination business, but you have all of these
20 matters we have talked about earlier, on-record matters
21 that may have been overlooked in a title examination, plus
22 the off-record matters. And in the case of a loan policy,
23 you've got really the nitty-gritty when you're getting
24 down to how good a mortgage lien or deed of trust lien do
25 you have.

1 Q Now, you're testifying as to the
2 relationship between title insurance and the development
3 of the secondary market for the purchase of loans. Do you
4 remember that testimony? I believe your testimony was
5 that they were somehow related. Am I correct in my
6 understanding that?

7 A I don't know if I used the word
8 "related". I certainly think it was an advantage to both
9 parties that title insurance was available and that this
10 market was available.

11 Q Well, is it your testimony then that
12 these purchasers in the secondary market require title
13 insurance before they will purchase the loan?

14 A Some of them do.

15 Q How about Freddie Mac, do they require
16 it?

17 A I believe their sellers' guide
18 requires either title insurance or an attorney's opinion.

19 Q How about Fannie Mae?

20 A I believe that's the same.

21 Q How about Ginnie Mae?

22 A I don't recall any such requirement
23 for Ginnie Mae.

24 Q It's your testimony that Ginnie Mae
25 does not require any title insurance?

1 A My testimony is that I don't recall
2 any such requirement.

3 Q How about on the VA? Do they require
4 title insurance before they will insure a loan?

5 A I don't think they require it, but
6 they like it.

7 Q What do you mean they like it?

8 A I think that they are comforted by the
9 fact there is a title insurance policy in the file
10 evidencing that they haven't lent their money to somebody
11 who doesn't have any title.

12 Q How about the FHA? Do they require
13 title insurance?

14 A I think that's the same as the VA.

15 Q So they do not require title
16 insurance; is that correct?

17 A Not per se.

18 Q Does Lawyers Title Insurance Company
19 or Corporation have any subsidiaries?

20 A I'm sure they have a slue of
21 subsidiaries.

22 Q Are you familiar with the subsidiaries
23 of Lawyers Title loans?

24 A I know of several. I'm not --
25 certainly not familiar with all of them.

1 Q Could you identify two?

2 A Two?

3 Q Yes, sir.

4 A Continental Land Title is a west coast
5 subsidiary. Last I heard there was a subsidiary in
6 Memphis called MidSouth Title.

7 Q Are these title agencies?

8 A I think MidSouth is technically an
9 underwriter. Continental, I think, is probably
10 technically not an underwriter, so I guess you would call
11 them an agent.

12 Q Now, does Continental Land Title do
13 business with the public?

14 A I think so.

15 Q Do they borrow money?

16 A I don't know.

17 Q Do they enter into contracts with
18 third parties?

19 A I'm not familiar with their day to day
20 operation.

21 Q Do you know whether Lawyers Title
22 Insurance Corporation, as the parent of Continental Land
23 Title, has ever guaranteed an obligation of Continental
24 Land Title?

25 A I don't know for sure.

1 Q How about MidSouth Title?

2 A Same answer.

3 Q Are you aware of the practices of any
4 of the secondary market purchasers in requiring a
5 guarantee of the lender's obligation, where there is a
6 sell of the loan to that secondary market purchaser?

7 A I'm sorry. That was a long question.
8 Could you repeat it?

9 Q All right. Yes, sir.
10 Do you have any familiarity with
11 situations where a corporate parent guarantees an
12 obligation of its subsidiary to either Ginnie Mae, Fannie
13 Mae or Freddie Mac?

14 A I don't have any peculiar knowledge of
15 any such event, no.

16 Q You have no such knowledge?

17 A I'm sorry?

18 Q Is your testimony that you have no
19 such knowledge?

20 A Well, I gather from looking at this
21 that something like that is going on.

22 Q Have you seen that document before?

23 A Not -- I saw some of the stipulated
24 documents in this case.

25 Q Did you see any of the documents that

1 were introduced into evidence this morning?

2 A No, I did not.

3 Q Did you have any conversations with
4 anybody that was in this courtroom about your testimony
5 this morning?

6 A These gentlemen over here.

7 Q And you had that conversation after
8 the testimony this morning?

9 A Oh, no.

10 Q Now, are you familiar with product
11 guarantees, manufacturer of a product or a retailer of a
12 product that makes guarantees with reference to the
13 product?

14 A Just as a consumer. I haven't had
15 that level of familiarity, I guess.

16 Q Well, I want to get an appreciation --
17 in view of your experience and expertise in the insurance
18 industry, I want to determine whether you have an
19 understanding and view as to whether guarantees constitute
20 insurance.

21 Let me just take a hypothetical.
22 You've got a manufacturer of aluminum siding.

23 MR. AXSELLE: Excuse me, if I may, Mr.
24 Peters.

25 MR. PETERS: Sure.

1 MR. AXSELLE: Before you start your
2 hypothetical, to voice an objection, I think,
3 Your Honor, this goes far beyond the scope of
4 his direct examination. He made no reference to
5 guarantees of products of this nature. He has
6 indicated that his only knowledge is as a
7 consumer, and now we're getting ready to pose to
8 him a hypothetical. And I suggest that the
9 situation, by his own testimony, is such that he
10 doesn't have the knowledge to it, so I would
11 object on that basis.

12 HEARING EXAMINER: Mr. Peters?

13 MR. PETERS: I have no response. My
14 question is as stated, and I would like an
15 answer to the question.

16 HEARING EXAMINER: Well, I will let
17 you pursue this line of questioning briefly.

18 MR. PETERS: All right.

19 HEARING EXAMINER: I do think it is
20 beyond the scope of the direct examination, but
21 I want to give you every opportunity to defend
22 your client here. So I will let you pursue
23 this, but just briefly.

24 MR. PETERS; Yes, sir.

25 (Continuing)

1 Q The hypothetical I'm proposing is that
2 of aluminum siding, and the party I'm interested in is the
3 manufacturer of the aluminum siding. And when the
4 manufacturer sells that aluminum siding to a customer, the
5 manufacturer issues a guaranty to that customer as to the
6 workmanship and quality of the aluminum siding product.

7 Now, in view of your expertise in the
8 title insurance industry, do you have any view as to
9 whether that guarantee itself constitutes insurance?

10 A I feel like you're asking me for a
11 legal opinion, and I wouldn't be -- feel qualified to
12 render such an opinion.

13 Q So you have no view that you're
14 willing to express today?

15 A That's correct.

16 Q All right.

17 (Pause)

18 Mr. Goode, in your direct testimony,
19 with reference to your testimony about a lender that sells
20 a loan to a purchaser in the secondary market, I believe
21 your testimony was that the lender, once the sell is made,
22 has no interest in the property, once the sell is made to
23 the secondary market purchaser. Have I correctly
24 understood your testimony?

25 A If I recall, I hesitated on that

1 question, and then the wording was interest in the
2 property, which I assume is the title, and my answer there
3 was I didn't think at that point he did have any interest
4 in the property.

5 Q Wouldn't the lender have an interest
6 in the sense that if the title, that is the lien is not of
7 a first priority variety, which is what he has represented
8 to the secondary market purchaser, wouldn't the lender
9 have a retained interest in at least that question, as to
10 whether it is a first lien that is being sold?

11 A Would have a retained --

12 Q Let me restate it. When the --

13 A You don't mean if he sold -- his
14 assignment was incomplete; is that your example?

15 Q No, sir. He sold -- let's assume that
16 the lender sold what he represented to the purchaser as a
17 first lien mortgage.

18 A Yes.

19 Q And it turns out that it's not a first
20 lien; it's a subordinate lien. Doesn't the lender have an
21 interest in the transaction?

22 A If he didn't have it before he sold
23 it, he hasn't got it after he sold it.

24 Q So your testimony is that once the
25 sale is made, the lender has no further interest in either

1 the property or the title to the property?

2 A I'm having trouble with the question.

3 Q All right.

4 A If he sold it, he sold it. If he
5 hasn't sold it, he hasn't sold it.

6 Q Does the lender have a risk as to
7 title after the sale is made?

8 A It would depend on his agreement with
9 the buyer, I think.

10 Q Well, if the lender made a
11 representation to the buyer that it is a first lien
12 variety, and he undertook to indemnify the buyer or buy
13 back the loan if it's not a first lien, tell me whether or
14 not the lender has a risk as to title.

15 A And then he is under the definition of
16 an insured as the owner of the indebtedness if he buys
17 back the loan. He has reacquired the indebtedness.

18 (Pause)

19 MR. PETERS: That's all I have.

20 HEARING EXAMINER: Any redirect, Mr.
21 Axelle?

22 MR. AXELLE: Yes, just a couple of
23 clarifications.

24

25

REDIRECT EXAMINATION

BY MR. AXSELLE:

Q Mr. Goode, Mr. Peters was asking you some questions about the relationship of Lawyers Title with some of its subsidiaries, and I believe you had indicated that you were not aware of what the arrangements were for any guarantees by the parent of any debt of the subsidiary, and then he asked you some question about -- and I forget the exact nature of the question, but led you to then point to the chart which is here in the courtroom, and I would like for the record to reflect that he was referring to Exhibit MMB-3.

Do you recall that portion of your testimony?

A I do.

Q And have you seen that document prior to your sitting down in the witness stand today?

A This chart?

Q Yes, sir.

A I could see it from the back of the room, but other than that, no.

Q Okay, but did you have any familiarity with it at all --

A No, sir.

Q -- prior to your testimony?

1 A No, sir.

2 Q Do you have any familiarity with it
3 even now?

4 A Just what I see there.

5 Q Okay.

6 Now, --

7 A May I expand on the first part of your
8 question, if you don't mind? In -- our Legal Department
9 is segmented into -- the Company's Legal Department was
10 segmented into corporate and underwriting matters, and I
11 really was not involved with the corporate side that much.

12 Q That's fine.

13 Just a couple of quick questions, if
14 we can. Reference was made in the early part of your
15 practice wherein you worked with and represented mortgage
16 lenders; is that correct?

17 A That's right.

18 Q But during the 40 years of your
19 experience, did you also work with, interchange with,
20 communicate and work actively with mortgage lenders
21 throughout your 40 years of experience?

22 A Yes.

23 Q Now, reference was also made to an O&E
24 report. In your 40 years of experience are O&E reports
25 commonly used here in Virginia?

1 A Certainly not commonly used. I'm
2 trying to think if I ever saw anything with such a label
3 on it. I can't recall.

4 Q And a title abstract, attorney's title
5 opinion, does it give anyone any guarantee that it's a
6 title?

7 A No.

8 Q And --

9 (Pause)

10 Mr. Peters made reference to off-
11 record risks, and whether they exist frequently or
12 infrequently in certain percentages which you were not
13 able to respond to. But in your 40 years of experience,
14 have you seen off-record risks that have resulted in title
15 defects in residential real estate transactions?

16 A Yes, and I guess one I didn't mention,
17 I guess we don't advertise in the brochure, it's hard to
18 say to distinguished members of the Bar, but a huge off-
19 record risk is attorney defalcation, and that has cost
20 Lawyers Title and a number of other companies lots of
21 money over the years.

22 Q These 35 title defects, off-record,
23 that are mentioned in JG-17, are these theoretical or
24 real?

25 A They're real. To point out a couple

1 that I didn't think applied -- this is a brochure for
2 national use. A couple don't apply in Virginia, I think,
3 but they're all real things.

4 MR. AXSELLE: Thank you very much.

5 HEARING EXAMINER: Any further
6 questions?

7 MR. PETERS: I have just one follow-up
8 question.

9
10 RECROSS-EXAMINATION

11 BY MR. PETERS:

12 Q Mr. Goode, with reference to these O&E
13 reports, I think your testimony was that in Virginia
14 you're not -- you don't believe they are very common, if
15 at all. How about your knowledge of their use in other
16 jurisdictions? Do you have any knowledge about that?

17 A Only one thing comes to mind, and that
18 has to do with a document or information that is required
19 in environmental type due diligence situations where the
20 purchaser might want a chain of title to the property to
21 show if some chemical company had owned it back in the
22 past somewhere.

23 Q So is your testimony --

24 A I think that would come within -- I
25 think you could characterize that as an owner's report, at

1 least, maybe not an encumbrance report.

2 Q So that's at least one example of
3 where you know that kind of report has been used and been
4 relied upon; is that correct?

5 A That's correct.

6 MR. PETERS: All right.

7 That's all I have.

8 HEARING EXAMINER: Anything further?

9 MR. AXSELLE: No, sir.

10 HEARING EXAMINER: Mr. Goode, thank
11 you very much for your testimony.

12 THE WITNESS: Thank you.

13 HEARING EXAMINER: You may stand down,
14 sir.

15 * * * * *

16 WITNESS STOOD ASIDE

17
18
19 HEARING EXAMINER: Exhibit No. JG-17
20 will be received into the record, and I believe
21 that completes Lawyers Title's case.

22 MR. AXSELLE: It does, Your Honor.

23 HEARING EXAMINER: All right.

24 We will take a short recess and
25 reconvene at ten minutes to 4:00.

1
2 NOTE: A recess is taken at 3:40 p.m.,
3 after which the hearing resumes its session at
4 3:54 p.m., as follows, viz:
5

6 HEARING EXAMINER: All right, Mr.
7 Peters.

8 MR. PETERS: I would like to call Mr.
9 Michael Keller.
10

11
12 MICHAEL JOHN KELLER, a witness being
13 called by and on behalf of the Defendants, having first
14 been duly sworn, testifies as follows, viz:
15

16 DIRECT EXAMINATION

17 BY MR. PETERS:

18 Q Would you state your full name,
19 please.

20 A Michael John Keller.

21 Q And where do you reside?

22 A Des Moines, Iowa.

23 Q How old are you?

24 A 47.

25 Q What is your post high school
education?

1 A I graduated from the University of
2 South Dakota with an education degree, and then from the
3 University of South Dakota with a juris doctorate.

4 Q So your first degree was in what year?

5 A 1970.

6 Q And was your second degree from the
7 University of South Dakota Law School?

8 A Yes.

9 Q Are you a lawyer?

10 A No, not anymore.

11 Q You were a lawyer.

12 A I was.

13 Q What is your present employment?

14 A I'm the Executive Vice President of
15 Norwest Mortgage.

16 Q And do you have any other positions?

17 A Yes. In my role at Norwest Mortgage,
18 I supervise a number of subsidiaries. I'm the Chairman or
19 President of those subsidiaries.

20 Q How about American Land Title Company?

21 A I'm the Chairman of that.

22 Q Mr. Keller, when you graduated from
23 law school in 1974, what did you do?

24 A My first job was with a company called
25 Dial Financial. It was a consumer finance company in Des

1 Moines, Iowa, and I was the Assistant General Counsel
2 there.

3 Q Tell me whether or not Dial Financial
4 was engaged in mortgage lending?

5 A Yes. As a consumer finance company we
6 did second mortgages for consumers in many states. Part
7 of my responsibility was providing legal advise to that
8 activity.

9 Q What was the nature of your legal
10 advice to Dial Financial?

11 A We wrote manuals and answered
12 questions for our field operations about how to comply
13 with the laws for second -- or for second mortgage
14 lending, how to perfect their security interest in the
15 real property and how to be -- I guess how to safely lend
16 within the legal environment for second mortgage lending.

17 Q Did you deal in your work directly
18 with loan production officers?

19 A Yes.

20 Q How long were you with Dial Financial?

21 A In that capacity, I was with them from
22 '74 to mid '78.

23 Q All right.

24 What happened in 1978?

25 A I then was responsible for our leasing

1 activity.

2 Q Still under Dial Financial?

3 A From '78 until about '82, still under
4 Dial Financial, only I was in charge of a leasing company.

5 Q Is Dial Financial a part of Norwest
6 Corporation?

7 A It is now; it was not then.

8 Q When was it acquired?

9 A 1982.

10 Q All right.

11 So you're no longer with Dial
12 Financial; correct?

13 A Correct.

14 Q What happened next in your employment
15 history?

16 A When Norwest Corporation, which was
17 then known as Northwest Ban Corporation, bought Dial in
18 1982, I moved up to the corporate offices and became an
19 assistant general counsel at what is now Norwest
20 Corporation.

21 Q What was the nature of your work in
22 the Legal Department of Norwest Corporation?

23 A I was giving legal advice and had
24 legal supervisory responsibility over their nonbank
25 subsidiaries over what is now called Norwest Financial.

1 Q Did those nonbank subsidiaries include
2 mortgage lenders?

3 A Yes.

4 Q What happened next in your employment
5 history?

6 A Oh, about a year later, a year and a
7 half later, I moved over as an employee of -- out of
8 Norwest Corporation into Norwest Mortgage, what is now
9 called Norwest Mortgage.

10 Q Would that have been 1985?

11 A Right at the beginning of 1985.

12 Q And what was your work with Norwest
13 Mortgage?

14 A Initially, I was in charge of their --
15 I was in the Chief Administration Office for the Human
16 Resources Department, legal facilities management, things
17 like that, for about a year.

18 Q All right.

19 Then what happened?

20 A Then I was put in charge of all the
21 loan production offices that were making loans around the
22 country at that time.

23 Q In connection with the work you then
24 did in charge of the loan production offices, did you
25 become familiar with real estate financing transactions?

1 A Yes. Our principal business at
2 Norwest Mortgage was and is making first mortgage loans.

3 Q How about title insurance issues? Did
4 you have any familiarity with them?

5 A Yes. Title insurance was commonly
6 used to -- in part of many of the transactions that we did
7 in most of the states that we were doing business.

8 Q Have you had any subsequent changes in
9 your employment?

10 A Yes. By 1994, I gave up supervisory
11 responsibility for the loan production offices, and
12 assumed responsibility for our title subsidiary, our
13 appraisal subsidiary, our software development companies
14 for real estate agents, and some public records companies.

15 Q In this capacity, do you have any
16 direct communications with title agents?

17 A Yes.

18 Q Do you still have direct
19 communications with loan production offices?

20 A Yes.

21 Q Do you have direct communications with
22 representatives of purchasers in the secondary market?

23 A Yes.

24 Q Would that include Ginnie Mae?

25 A No.

1 Q How about Fannie Mae?

2 A Yes.

3 Q Freddie Mac?

4 A Yes.

5 Q Over the years, roughly how many real
6 estate transactions have you had either direct involvement
7 in or supervisory responsibility for?

8 A Many hundreds of thousands.

9 MR. PETERS: Mr. Hearing Examiner, I
10 would like to move to qualify Mr. Keller as an
11 expert on the nature and structure of real
12 estate transactions, real estate finance
13 transactions and title insurance risks.

14 MR. AXSELLE: Your Honor, I would
15 object to his qualifications in a number of
16 respects, but primarily as it relates to title
17 insurance and title insurance risk. His history
18 of employment primarily deals with mortgage
19 lending, loan production, human resources,
20 facilities management, computer software and
21 things of this nature. And at one point, when
22 he was asked the question, he said title
23 insurance was commonly used as part of
24 transactions in most states in which we did
25 business. That does not indicate, however, that

1 he had any knowledge or familiarity with how
2 title insurance operates or works or doesn't
3 work.

4 And then, in 1994, I think he became
5 head of this agency, but it's one of many of his
6 responsibilities. And so I just didn't hear
7 anything that gave me any comfort that he was an
8 expert in title insurance or title risk. I
9 would object on that basis, and especially as it
10 relates to anything in the State of Virginia,
11 too.

12 MR. PETERS: Your Honor, I believe Mr.
13 Keller's testimony was that even when he was
14 with Dial Financial, which began in 1974,
15 following graduation from law school, he was
16 familiar with the risks of title, and, of
17 course, that's what title insurance was all
18 about, dealing with the risk of title. And then
19 over the course of the years, being responsible
20 for hundreds of thousands of transactions, I
21 believe his testimony was that he is familiar
22 with title insurance issues and the risks of
23 title. And on that basis, I believe he has
24 already testified sufficiently to establish his
25 credibility as an expert.

1 HEARING EXAMINER: In Virginia a
2 witness can be qualified as an expert on certain
3 topics if they have sufficient knowledge, skill,
4 experience, training or education on those
5 topics. After listening very carefully to the
6 witness' testimony, I do believe he qualifies as
7 an expert on the issue of title insurance and
8 title insurance risks, so the objection is
9 overruled.

10 The motion is granted.

11 MR. PETERS: Thank you.

12 (Continuing)

13 Q Mr. Keller, how large, in terms of
14 assets, is Norwest Corporation?

15 A Between 70 and 80 billion.

16 Q Is it considered a large bank-holding
17 company?

18 A Yes. It's in the top ten in the U.S.

19 Q What is the business of Norwest
20 Mortgage?

21 A Its principal business is making first
22 mortgage loans. We make some second mortgage loans.

23 Q Do you have any knowledge of Norwest
24 Mortgage's business in Virginia?

25 A Yes.

1 Q Is your testimony about the principal
2 business the same as Virginia -- in Virginia as it is
3 elsewhere?

4 A Yes.

5 Q What is the principal business of
6 American Land Title Company?

7 A It's in the business of being a title
8 agency.

9 Q And to your knowledge, is American
10 Land Title licensed to conduct that business in Virginia?

11 A Yes.

12 Q Now, before we get to some specific
13 questions about the subject of TOP, which is the focus of
14 this proceeding, I would like to pose some questions to
15 you about real estate transactions and financing
16 transactions in general. Typically, in a real estate
17 transaction, what parties are involved?

18 A Well, the buyer and seller on a
19 purchase transaction, and if it's financed, which is
20 fairly common -- very common, lucky for our business, is
21 that a lender will be involved.

22 Q Well, in the simple straight
23 buyer/seller transaction, are there representations and
24 warranties that the seller makes to the buyer?

25 A Yes.

1 Q What are they?

2 A Typically that the seller is
3 delivering to the buyer good title and property.

4 Q Do either the buyer or seller have any
5 risks as to title?

6 A Yes, both.

7 Q Both do?
8 And what are the buyer's risks?

9 A The buyer's risk is that the seller
10 did not deliver the buyer the title that they promised.

11 Q What are the seller's risks?

12 A The same as that the seller failed to
13 deliver what he promised to the buyer.

14 Q All right.

15 Let's focus on a transaction that
16 involves financing. How is the financing entity chosen?

17 A Well, the borrower will usually select
18 a lender based on either their real estate agent's
19 recommendation or a home builder's recommendation or
20 general awareness of the lender or prior experience with
21 the lender.

22 Q When a loan is made to finance a real
23 estate transaction, is that loan typically secured?

24 A Yes. In our company it's always
25 secured.

1 Q And it's secured by what?

2 A Well, when we're in our principal
3 business of making first mortgage loans, it's secured by a
4 first lien on the property. And when we make second
5 mortgages, it would be secured by a second mortgage on the
6 property, or in Virginia by deeds of trust.

7 Q When a loan is made, does the lender
8 have a risk of title?

9 A Yes.

10 Q And what is that risk?

11 A Our risk is that our lien priority
12 will not be as we expected.

13 Q And where does that risk come from?

14 A Well, the risk comes from the fact
15 that we're making a loan transaction. It's inherent in
16 the fact that we're making a loan with the expectation
17 that we're going to have a first lien.

18 Q What does a lender typically do to
19 determine the nature and extent of that risk?

20 A Well, lenders, in general -- first
21 mortgage lenders, in general, will have the title
22 searched, typically by a title agency, and will, in some
23 states, however it's more common to have an attorney do a
24 search, and the lender will generally get either a title
25 insurance policy or an attorney's opinion, offering

1 evidence that our lien is as expected, that it's, in fact,
2 a first lien.

3 Q Does your subsidiary, American Land
4 Title Company, perform the title examinations or searches
5 that you have just described?

6 A Yes, it does.

7 Q Do they do it exclusively for Norwest
8 Mortgage?

9 A No. We do it for as many lenders as
10 we can.

11 Q Does the service of the title search
12 and report as to what is found eliminate the lender's risk
13 of title?

14 A No, it does not.

15 Q What defects would a title examiner
16 expect to find?

17 A Well, I think the prior witness did a
18 good job of that, but liens, encumbrances, easements,
19 survey problems.

20 Q Would off-record defects be found by a
21 title examiner?

22 A No.

23 Q What are some examples of off-record
24 defects?

25 A Well, forgeries, missing heirs. I

1 think the prior witness, again, did a better job than I
2 could at that, but we think our primary risk is forgery.

3 Q Based on your experience, what is the
4 frequency of an off-record defect occurring in a non-new
5 construction residential loan?

6 A Diminimus to -- I can't recall one
7 specific incident.

8 Q During what period of time do you not
9 recall one specific incident?

10 A In my career.

11 Q And you're speaking with reference to
12 Norwest Mortgage not having one such incident?

13 A And Dial Finance or Norwest Financial.

14 Q Suppose the title searcher, including
15 American Land Title Company, makes a mistake in its search
16 of the title, would the lender have a cause of action
17 against the searcher?

18 A Yes. We think we have a claim for
19 negligence if it's something that should have been found.

20 Q All right.
21 Once a loan is made, what happens to
22 the loan?

23 A Well, at Norwest Mortgage, the first -
24 - all the first mortgages that we make, we try to sell on
25 the secondary market.

1 Q What is the secondary market?

2 A It's parties who are willing to buy
3 loans from people like us who originate first mortgage
4 loans. We sell them to the people in the secondary market
5 who then bundle up our loans with other people's loans and
6 sell securities backed by those mortgages through Wall
7 Street.

8 Q Who are the purchasers in the
9 secondary market?

10 A There's Fannie Mae, Freddie Mac, and
11 Ginnie Mae, and another group that they are usually locked
12 into, the name of private investors.

13 Q What is Ginnie Mae?

14 A Ginnie Mae is an organization formed
15 by Congress to buy FHA and VA insured loans and issue
16 securities backed by those mortgages.

17 Q Why was Ginnie Mae created?

18 A Many lenders, Norwest included, don't
19 have the funds to continually make new loans to replenish
20 funds for local investors. Ginnie Mae was formed to
21 resell that into the capital markets. Many lenders were
22 unwilling to make loans of -- to the lower income people
23 in this country, and Ginnie Mae and the FHA -- combined
24 with FHA and VA made that much more possible and provided
25 liquidity to local lenders to do that.

1 Q You have referred to Ginnie Mae
2 purchasing VA and FHA insured loans. Does Ginnie Mae
3 purchase any loan that is not insured by either of those
4 organizations?

5 A Not to my knowledge.

6 Q What do VA and FHA insure?

7 A VA and -- excuse me -- VA and FHA
8 insure the payment of the note.

9 Q Why were Freddie Mac and Fannie Mae
10 created?

11 A For the same function, but for a
12 different category of loans. Today their function is that
13 they provide the same liquidity and the same access to the
14 capital markets that Ginnie Mae does, but for loans that
15 are less credit worthy -- or more credit worthy than FHA
16 and VA loans. They don't have the insurance of FHA or VA
17 standing behind the loans.

18 Q Are the loans that Freddie Mac and
19 Fannie Mae purchase insured by the VA or the FHA?

20 A No.

21 Q Does Norwest Mortgage sell any of its
22 loans to Ginnie Mae, Freddie Mac and Fannie Mae?

23 A Yes, all of them.

24 Q Do you have any information as to the
25 year 1994, the percentage of loans that were sold by

1 Norwest Mortgage to Ginnie Mae?

2 A Yes.

3 Q And what is that?

4 A Roughly we sold 53 percent to Ginnie
5 Mae, maybe 23 percent to Freddie Mac, and roughly 16
6 percent to Fannie Mae.

7 Q Is there a larger seller of mortgage
8 loans to Ginnie Mae in the United States than Norwest
9 Mortgage?

10 A No. We're the largest seller of loans
11 to Ginnie Mae.

12 Q When a lender like Norwest Mortgage
13 sells a loan to a purchaser on the secondary market, does
14 that lender make any representations and warranties as to
15 title?

16 A Yes, we do.

17 Q What are those representations and
18 warranties?

19 A Norwest and any lender who sells loans
20 to any of those three government sponsored entities,
21 represent that we are selling them first mortgage loans.
22 The loans are secured by first liens.

23 Q And is this a contractual
24 representation?

25 A Yes.

1 Q Is there any undertaking to provide a
2 remedy in the event that it's not a first mortgage lien?

3 A Yes. Their remedy is that we cure the
4 -- we make the lien first, if it proves not to be, or that
5 we pay the damages for the failure to be first, or,
6 ultimately, buy back the loan.

7 Q Now, is it your testimony that all
8 lenders make these representations and warranties?

9 A Yes. That is my belief.

10 Q With these representations and
11 warranties, is the selling lender assuming from the
12 purchaser any risk in title?

13 A No.

14 Q Well, does the selling lender have any
15 risk of title, once the sale is made?

16 A Yes.

17 Q Where does that risk come from?

18 A Well, our risk is that the lien that
19 we have represented to the buyer is not first, as we
20 represented. It's the same lien -- or the same risk we
21 had when we did the loan in the first place.

22 Q So is it the same risk that you had
23 when you made the loan, that the lender retains when the
24 loan is sold into the secondary market, or is that not the
25 case?

1 A It is the case. That risk is inherent
2 in the loan from beginning to end.

3 Q Do any of the second market --
4 secondary market purchasers require that title insurance
5 be secured to protect their interest?

6 A No.

7 Q What requirements do they make?

8 A Well, generally, Fannie and Freddie
9 require either title insurance or attorneys' opinions.
10 With respect to Norwest Mortgage, they also both allow us
11 to follow the TOP process. Ginnie Mae has no
12 requirements, or they allow for title insurance or
13 attorney's opinions, or many other evidences of title.

14 Q Well, what would be another evidence
15 of title that would satisfy Ginnie Mae?

16 A They use the word "certificate of
17 title."

18 Q What is a certificate of title?

19 A The word is not clearly defined in
20 Ginnie Mae's rules, but we take it to be that a
21 certification that the record indicates that we have a
22 first lien.

23 Q Is the certificate of title in that
24 context a guarantee of title?

25 A No.

1 Q Why is it not?

2 A Because it just certifies that the
3 record says it's a first lien. There could be reasons
4 that the record is wrong or that off-record problems may
5 arise.

6 Q Do you know whether VA requires title
7 insurance?

8 A They do not.

9 Q How about the FHA?

10 A They do not.

11 Q All right.

12 Let's turn to the TOP program itself,
13 which is the subject of this proceeding. Are you familiar
14 with the program known as Title Option Plus?

15 A Yes, I am.

16 Q How is it that you're familiar with
17 it?

18 A I was the co-author of the program,
19 with Mike Fahey.

20 Q Who is Mike Fahey?

21 A He is the President of ATI, American
22 Land Title.

23 Q Would you spell Fahey for the record.

24 A (F A H E Y).

25 Q All right.

1 Mr. Keller, what is TOP?

2 A It's the process by which Norwest
3 Mortgage investigates the status of the title of the
4 property that we have been asked to make a loan on, and
5 Norwest Mortgage then determines that title is either
6 satisfactory for us to make a loan on or it is not.
7 Assuming that it is satisfactory or the defects on the
8 title can be corrected prior to closing, we make the loan
9 on the strength of -- Norwest Mortgage makes the loan on
10 the strength of its determination that we have reviewed
11 the title, and it's satisfactory for us. We believe we
12 have a first lien.

13 Q Is there any precedent in the mortgage
14 lending industry for this concept, TOP?

15 A Yes.

16 Q What is that?

17 A In the second mortgage environment,
18 it's very common today for lenders in the second mortgage
19 business to order a search from a title agency, like ATI
20 or many others, and take that search and make their
21 decision on whether the lien status is acceptable to them.
22 First mortgage lenders, as the prior witness testified,
23 historically would follow a similar practice,
24 occasionally, and today some first mortgage lenders
25 continue to follow that practice.

1 Q And do these lenders that you have
2 just described, both first and second mortgage lenders,
3 require title insurance?

4 A No.

5 Q Does the term "owner's and encumbrance
6 report," mean anything to you?

7 A Yes.

8 Q Would you describe what it means.

9 A It's a label given to a piece of paper
10 that title agencies in the Midwest at least name this
11 piece of paper that reports the status of the title, lists
12 the liens, encumbrances and whatever other problems that
13 they discover. It's just a name given to that report.

14 Q Is the owner's and encumbrance report,
15 as you understand it, a guarantee of title?

16 A No.

17 Q Why would a lender relying on an
18 owner's and encumbrance report run a risk of title without
19 title insurance?

20 A Because we view -- would view the risk
21 as diminimus, not worth the expense of a title report.

22 Q Why do you consider the risk
23 diminimus?

24 A Well, at Norwest Mortgage, our
25 experience has told us that there are just very few claims

1 that are related to defects that we cannot discover with a
2 thorough title search.

3 Q Do firms that prepare these owner's
4 and encumbrance reports charge for their service?

5 A Yes, they do.

6 Q And who typically pays those charges?

7 A Typically, whether the lender pays
8 them directly to the searcher or not, the borrower is
9 required to contribute fees to pay for that.

10 Q To your knowledge, are owner's and
11 encumbrance reports, or the practice of issuing them,
12 regulated in any jurisdiction as insurance?

13 A No.

14 Q If such a report is in error, and it
15 turns out that the lender's lien is not what was
16 anticipated, does the lender have a cause of action
17 against the preparer of the report?

18 A We believe we do, yes.

19 Q And what would be the basis of that
20 cause of action?

21 A It would be a negligence claim for not
22 finding something on the record that they should have
23 found.

24 Q All right.

25 Now, how does this owner's and

1 encumbrance report precedent relate to TOP?

2 A Well, TOP is the process of receiving
3 a report on the status of a title, and making a decision
4 to make a loan on the strength of that report. It's, in
5 effect, another name for the same process.

6 Q Is there a counterpart document used
7 in the TOP program that would be comparable to the owner's
8 and encumbrance report?

9 A That would be the title condition
10 report.

11 Q I'm going to show you --
12 May I approach the witness?

13 HEARING EXAMINER: Yes.

14 BY MR. PETERS: (Continuing)

15 Q I'm going to show you a document that
16 has been stipulated as document No. 7, and it has the
17 title "Title Condition Report". Mr. Keller, look at that
18 document, and advise me as to whether that is the
19 counterpart document to the owner's and encumbrance
20 report.

21 A Yes, it is.

22 Q Does this document constitute a
23 guarantee of title?

24 A I don't believe so, no.

25 Q When Norwest Mortgage receives the

1 title condition report, what happens next?

2 A The mortgage company, on the strength
3 of what is reported there will decide whether it can, in
4 fact, obtain a first lien on the property, and if we can,
5 and if the other creditworthiness requirements and the
6 quality of the property are met, we make that customer the
7 loan.

8 Q I'm going to show you another document
9 that has been stipulated. This is No. 13, and it has the
10 title "Final Title Condition Certificate." Are you
11 familiar with that document?

12 A Yes, I am.

13 Q And what does that document represent?

14 A It represents, really, an updating of
15 the title condition report, that at closing the title
16 agent, in this case ATI, has gone back into the record and
17 searched it, and determined that the status -- believes
18 that the records show title status as of this time as
19 opposed to when we searched it for the title condition
20 report.

21 Q Is that document a guarantee of title?

22 A No.

23 Q Does that document make any
24 representation as to off-record defects?

25 A No, it does not.

1 (Pause)

2 Q Does Norwest Mortgage in the TOP
3 program do anything else, other than look at this title
4 condition report and then the final title condition
5 certificate to protect its risk of title defect?

6 A No, we don't.

7 Q Now, the title condition report
8 referenced a report fee. Are you familiar with that?

9 A Yes.

10 Q And what is the report fee?

11 A It's the fee that the borrower
12 ultimately pays for the preparation of the report.

13 Q How is that fee determined?

14 A We've priced the TOP process off of
15 what -- on a market by market basis, based on what other
16 evidences of title are priced at, principally title
17 insurance.

18 Q Is your report fee on the title
19 condition report more or less than what the market would
20 be for other evidences of title?

21 A It's less. It's at least 10 percent
22 less.

23 Q Is TOP available for all types of
24 properties?

25 A No. We only do TOP on residential,

1 existing property as opposed to new construction property.
2 We don't do it on commercial or lease holds or things like
3 that.

4 Q Why do you not do it on new
5 construction property?

6 A Because we believe the risks are
7 higher on that type of property versus residential,
8 existing property.

9 Q Why do you not do it on commercial
10 property?

11 A Same reasons. Usually those are much
12 more complicated.

13 Q Now, if the borrower elects not to
14 have TOP applied in the transaction, what happens?

15 A Then the borrower is offered title
16 insurance, and the lender, Norwest Mortgage, will require
17 the borrower to either pay for a title policy, a lender's
18 title policy for our benefit, or an attorney's opinion for
19 our benefit.

20 Q Is the borrower required to use TOP?

21 A No.

22 Q If a borrower elects to have TOP
23 applied, can the borrower purchase an owner's title
24 policy?

25 A Yes, in some jurisdictions. Yes.

1 Q Has that always been the policy of
2 Norwest Mortgage?

3 A No. When we first introduced the
4 product, we didn't think we could structure it so that the
5 consumer could pay less money if they bought both a TOP
6 and a buyer's -- owner's policy.

7 Q And has that policy changed?

8 A Yes. Since then we have found ways
9 that we can produce a price advantage for the consumer,
10 even though they buy both an owner's policy and a TOP
11 process.

12 Q Does this new change in policy have a
13 name?

14 A Well, TOP Plus.

15 Q Is that Title Option Plus Plus?

16 A Title Option Plus Plus.

17 Q Is there a fee charged for TOP Plus?

18 A Yes.

19 Q And what is that charge in Virginia,
20 if you know?

21 A Back to four years ago, it's \$10.

22 Q The fee currently being charged is
23 \$10?

24 A For a TOP, in conjunction with a
25 buyer's policy, our current fee is \$10.00.

1 Q All right.

2 When was the TOP Plus option made
3 available in Virginia?

4 A I think around March of this year.

5 Q Now, Mr. Keller, I would like to show
6 you a stipulated document that is No. 14. It has the
7 title "Consumer Title Status Election, First Lien Options;
8 PURCHASE." Do you see a footnote (5) on that form?

9 A Yes.

10 Q Would you read that footnote.

11 A "Owner's Title Insurance coverage is
12 not available if the ATI Title Condition Report is
13 elected."

14 Q Now, is that report dated in any way?

15 A Yes. The borrower's signature is
16 dated, June 20th, of '95.

17 Q Now, if TOP Plus became available in
18 Virginia around March of this year, 1995, how does that
19 square with footnote (5)?

20 A It doesn't. This was -- if it was
21 done at this date, it was a mistake. They used the wrong
22 form.

23 Q Now, I am going to show you another
24 document, Mr. Keller, and this has up in the right-hand
25 corner "Consumer Title Status Election, First Lien Options

1 - PURCHASE." It's Bates stamped N401175. Do you see a
2 footnote (5) on that document, Mr. Keller?

3 A I do.

4 Q Has that footnote been changed in any
5 way?

6 A Yes, it has.

7 Q Would you explain the change.

8 A It originally read, "Owner's Title
9 insurance coverage is not available if the ATI Title
10 Condition Report is elected." It was marked up to read,
11 "Owner's Title insurance coverage is available if the ATI
12 Title Condition Report is elected as TOP Plus."

13 Q Is this the form of the report that
14 should be used in the TOP program?

15 A Yes, although since this time, I
16 believe, we have now revised it so it doesn't have to be
17 marked up.

18 MR. PETERS: Your Honor, I would like
19 to note for the record that the document that
20 was just referred to by the witness in his
21 testimony is already in the stipulated evidence.
22 It is there by virtue of paragraph 7 (19) of the
23 Joint Stipulation of Fact, which makes the
24 underlying documents that form the basis of the
25 matrix that was presented through the Bureau of

1 Insurance evidence part of the record, and it
2 happens to be from the Anderson file.

3 HEARING EXAMINER: All right, sir.

4 BY MR. PETERS: (Continuing)

5 Q I would like to show you -- I'm not
6 going to do that.

7 (Pause)

8 Are loans on which TOP has been
9 elected sellable by Norwest Mortgage into the secondary
10 market?

11 A Yes.

12 Q Are they sellable to Ginnie Mae?

13 A Yes.

14 Q Does Ginnie Mae, in fact, purchase
15 loans on which TOP is being used?

16 A Yes, it does.

17 Q How about Freddie Mac?

18 A Yes, they do.

19 Q How about Fannie Mae?

20 A Yes, they do.

21 Q In your earlier testimony, you advised
22 us that Freddie Mac and Fannie Mae require either title
23 insurance or an owner's policy -- excuse me -- an
24 attorney's title opinion; is that correct?

25 A I think I said generally they require

1 that.

2 Q All right.

3 Now, have Freddie Mac and Fannie Mae
4 made any modifications to those requirements when a TOP
5 program is used?

6 A Yes. For -- they have given us
7 permission to use the TOP process as an alternative to
8 either title insurance or attorney's opinions.

9 Q All right.

10 Back to Ginnie Mae, before we go on
11 with Fannie Mae and Freddie Mac, this chart, which has
12 been admitted into evidence, the yellow arrows that run
13 from Norwest Mortgage to Fannie Mae says, "Agreement to
14 accept TOP, Agreement to repurchase." Is that correct?

15 A Correct.

16 Q And the same is said on the yellow
17 arrow that runs to Freddie Mac; is that correct?

18 A Correct.

19 Q But on the arrow that runs from
20 Norwest Mortgage to Ginnie Mae, there is no reference to
21 TOP; is that correct?

22 A Yes.

23 Q Well, is that, in fact, accurate?
24 Does Ginnie Mae, in fact, purchase TOP loans?

25 A Yes. We have a standard agreement

1 with Ginnie Mae that allows TOP.

2 Q All right.

3 I'm now back to Freddie Mac and Fannie
4 Mae. Have they imposed any other requirements with regard
5 to a TOP Loan if they purchase it?

6 A Yes. They demanded that our parent
7 corporation guarantee Norwest Mortgage's promise of first
8 lien status when we sell loans to them.

9 Q Well, in view of the guarantee, does
10 that mean that Norwest Mortgage, Inc. has no risk of title
11 defects?

12 A No, sir.

13 Q Why?

14 A It remains our risk, that when we made
15 the loan it was built with the expectation of a first
16 mortgage. It remains inherent in that loan, and it is our
17 risk that if, in fact, the first lien is not first as
18 represented to whoever bought the loan, it's our
19 responsibility to be subject to all the remedies in those
20 promises.

21 Q Does Ginnie Mae require the guarantee
22 by Norwest Corporation?

23 A No, they do not.

24 Q Does VA require a guarantee by Norwest
25 Corporation?

1 A No, they don't.

2 Q How about the FHA?

3 A No, they don't either.

4 Q In fact, does Norwest Corporation
5 guarantee the obligation of Norwest Mortgage, Inc., to
6 Ginnie Mae?

7 A No, it does not.

8 MR. PETERS: I don't have any further
9 questions.

10 HEARING EXAMINER: Mr. Thomas?

11

12 CROSS-EXAMINATION

13 BY MR. THOMAS:

14 Q Mr. Keller, you previously testified
15 that you were -- you, as well as Mr. Fahey, were
16 responsible for the development of the TOP product.

17 Q Right. I would prefer to call it a
18 process as opposed to a product.

19 Q I just took that off of the -- I'm
20 going to pass you your own copy of the Joint Stipulation
21 of Facts, so I don't have to keep getting up and down.

22 I would refer you to Exhibit 20 of the
23 Joint Stipulation. Is that the -- what I would call the -
24 - it's called a "New Product Concept For Title Evidence."
25 Is that correct?

1 A That's the title.

2 Q The title of the memoranda?

3 A Yes.

4 Q And is this the -- I guess the initial
5 exposure of the TOP product to the senior management team
6 of Norwest Mortgage, Inc., or Norwest Corporation?

7 A As far as I can recall, it's the first
8 written discussion that they would receive.

9 Q Okay.

10 Who is responsible for marketing the
11 TOP product to the consumer here in Virginia?

12 A Norwest Mortgage presents the election
13 to the consumer.

14 Q Would that be a Norwest Mortgage loan
15 officer?

16 A Typically.

17 Q Who is responsible for training the
18 Norwest Mortgage loan officers in the sale of TOP?

19 A The ATI employees try and explain what
20 the product is for them.

21 Q So here in Virginia you have both
22 Norwest Mortgage loan branch offices, and then you would
23 also have separate offices that ATI Title Company would
24 operate out of.

25 A Correct.

1 Q Are the Norwest Mortgage loan officers
2 compensated for closing loans with TOP?

3 A Not generally, no.

4 Q All right.

5 Are they offered any incentives to
6 close a loan with TOP?

7 A We occasionally have contests.

8 Q Are the Norwest Mortgage branch
9 offices compensated for closing loans with TOP?

10 A They receive a credit on their P&Ls,
11 if a TOP product is used.

12 Q Would that be a -- what the Company
13 refers to as a soft dollar credit?

14 A Yes.

15 Q And what is the amount of that soft
16 dollar credit?

17 A I can't recall, specifically.

18 Q Subject to check, would you say it's
19 approximately 20 percent?

20 A That sounds familiar, but --

21 Q What training materials are provided
22 to Norwest Mortgage loan officers to assist them in either
23 selling or marketing the TOP product?

24 A We deliver some handouts that are
25 meant to be training for what the TOP product is all

1 about.

2 Q If you would turn to Exhibit 1 in the
3 Joint Stipulation of Fact. Is this the type of training
4 manual that would be delivered to a Norwest Mortgage loan
5 office to assist them in marketing the TOP product?

6 A Yes, I would say an understanding of
7 then marketing it.

8 Q Okay.

9 If you would also turn to Exhibit 15.
10 After Exhibit 15, these appear to be overheads that would
11 be used in the presentation of the TOP product; is that
12 correct?

13 A I don't know.

14 Q Okay.

15 Do you know what Exhibit 15 consists
16 of? Would that have been produced by Norwest Mortgage,
17 Inc., or would this have been produced by ATI?

18 A It would have been done by both, in
19 concert.

20 Q Okay.

21 Would this presentation be used or
22 would this presentation be directed at realtors, mortgage
23 -- other mortgage lenders? Would this be used for
24 consumers here in Virginia, or how was this particular
25 marketing -- how were these particular marketing materials

1 used?

2 A Well, let me take a look.

3 (Pause)

4 My opinion is that that would be used
5 internally.

6 Q Thank you.

7 As I understand TOP, and Norwest's
8 position on TOP, that TOP provides lenders title
9 protection; is that correct?

10 A TOP is a process whereby Norwest
11 Mortgage obtains evidence of a title status, and we decide
12 to make a loan using it.

13 (Pause)

14 MR. THOMAS: Just a moment, Your
15 Honor.

16 (Pause)

17 (Continuing)

18 Q Is it Norwest's position that TOP
19 offers the same title protection for the borrower as a
20 lender's title insurance policy?

21 A For the borrower?

22 Q That's correct.

23 A Yes.

24 Q Would you agree with the statement
25 that TOP is title coverage that costs the borrowers at

1 least 10 percent less than standard lender's title
2 insurance and provides the same or better protection
3 against loss?

4 A Provides it to the lender, if that's
5 what your question means. I believe that it does provide
6 the same, to the borrower, on behalf of a lender.

7 Q Okay, but provides the borrower no
8 direct protection.

9 A Correct.

10 Q How would you define the term
11 "coverage" as used in the insurance context?

12 A I would not.

13 Q Well, just say generally. As commonly
14 used in the insurance industry, what does the term
15 "coverage" mean?

16 A That an insured party is covered for a
17 risk.

18 Q Would you agree with the statement
19 that ATI is the largest bank holding company-owned title
20 insurance company in the United States?

21 A I'm not sure about that.

22 Q All right.

23 If you will turn to Exhibit 1.

24 (Pause)

25 And I believe it's the page that is

1 Bates numbered N400067. On the third paragraph of that
2 page, beginning with the first sentence in that paragraph,
3 would you please read that.

4 A "Title Option" --

5 Q No.

6 A The third paragraph?

7 Q The third paragraph.

8 A "ATI, the largest bank holding
9 company-owned title insurance company in the Unites
10 States, is combining its expertise and national network of
11 district offices with Norwest's financial strength to
12 offer TOP."

13 Q Thank you.

14 (Pause)

15 Could Norwest Mortgage, Inc. sell its
16 loans covered by TOP to Fannie Mae or Freddie Mac without
17 the guarantees issued by its parent Norwest Corporation?

18 A No.

19 Q Are the risks to Norwest Mortgage Inc.
20 of TOP versus standard lender's title insurance
21 substantially equal?

22 A I think -- would you ask that again?

23 Q Are the risks to Norwest Mortgage,
24 Inc. of TOP versus standard lender's title insurance
25 substantially equal?

1 A In my mind, yes; however, off-record
2 defects are clearly --

3 Q Okay.

4 A -- not covered or not addressed by
5 TOP, whereas they would be covered by title --

6 Q Now --

7 A -- insurance.

8 Q Under a lender's title insurance
9 policy, doesn't the title insurance company assume the
10 risk of loss for title defects, any title defect?

11 A Well, if they haven't excluded it, I
12 believe we have transferred the risk to the title company,
13 yes.

14 Q Okay, and under the TOP product,
15 Norwest assumes the risk of loss for any title defect.

16 A I would not say "assume". I would say
17 we just retain it.

18 Q Does TOP satisfy Norwest's requirement
19 for title insurance?

20 A We have no requirement for title
21 insurance.

22 Q If you will turn over to page N400069,
23 where you sort of are listing the features and benefits of
24 the TOP product to the borrower, and then in the "Feature"
25 column, would you read the second feature of the TOP

1 product?

2 A "Meets lender requirement for title
3 insurance."

4 Q Thank you.

5 If I am a consumer in Virginia who
6 elects to purchase TOP, what have I bought or purchased?

7 A Well, you have acquired on behalf of
8 the lender evidence of the status of the lien that we're
9 going to get.

10 Q So it's your position that the
11 borrower has paid a fee so that the lender may obtain a
12 title abstract?

13 A We don't do an abstract, in the usual
14 sense of that word.

15 Q Well, is the owner's and encumbrance
16 report, which you state is widely used in the Midwest,
17 doesn't that just report the status of the title based on
18 the records maintained in the courthouse or the land title
19 record office?

20 A Yes.

21 Q And doesn't a title abstract just
22 report what is shown on the records from the land title
23 record office?

24 A Also yes; however, the abstract is
25 typically much more extensive.

1 Q Okay.

2 Would it be fair to say that I, as the
3 lender, have purchased on behalf of Norwest Mortgage, Inc.
4 a title condition report and a final title certificate?

5 A Would you say that again?

6 Q Okay.

7 Would it be fair to say that as the
8 borrower, I have purchased on behalf of Norwest Mortgage,
9 Inc., a title condition report and a final title
10 certificate?

11 A I would not say that. I would say the
12 borrower paid for it on our behalf, but because they
13 didn't buy it and they're really not privy to that
14 contract, I don't view it as a purchase.

15 Q All right.

16 Now, on the --

17 (Pause)

18 Would you please provide the Court
19 with a breakdown of the TOP fee charged the borrower.

20 A I don't understand the word breakdown.

21 Q Okay.

22 If you would turn to Exhibit No. 20,
23 and specifically page 35 of that exhibit, where this says,
24 "ATI Strategic Plan, O&E Product Analysis." Would that
25 product analysis be the TOP product?

1 A It was the former name, yes.

2 Q Okay.

3 Please explain how the revenue from
4 that product is derived?

5 A The revenue for the product is charged
6 to the borrower.

7 Q Right.

8 When I look at the term "direct labor
9 costs", if I'm charged \$500 for the TOP product, does 19
10 percent of that \$500 represent direct labor costs for
11 producing that product?

12 A That was the plan.

13 Q All right.

14 What about -- and what would direct
15 labor costs be?

16 A The cost of searching the record and
17 producing what we now call title condition reports --

18 Q Okay.

19 A -- et cetera.

20 Q Now, the 7.3 percent that indicates
21 "indirect labor", what would those costs be comprised of?

22 A I can't tell you. This is over three
23 years old. I can't recall.

24 Q All right.

25 About 24.7 percent for "management &

1 other operating expenses".

2 A Again, that's many years ago. I can't
3 recall what's exactly in there.

4 Q But these were part of your business
5 plan projections as to the expected earnings of the TOP
6 product.

7 A They were hoped for earnings, yes.

8 Q All right.

9 Now, who does the borrower pay the TOP
10 fee to?

11 A Well, it seems to vary by
12 jurisdiction, based on settlement practices. Sometimes at
13 the settlement, the check can be cut direct out of the
14 loan proceeds to ATI. Occasionally, sometimes it will be
15 -- a check will be written from Norwest Mortgage to ATI.

16 Q And I believe it's your testimony that
17 you cannot break down the TOP fee charged the borrower.

18 A I don't understand "break down",
19 again.

20 Q How much of the TOP fee is profit?

21 A To date? None.

22 Q All right.

23 Now much does Norwest Mortgage, Inc.
24 charge for a title examination?

25 A I don't recall.

1 Q Let me rephrase that question: Is the
2 cost of the title examination included in the TOP fee?

3 A We don't do what we characterize as a
4 title exam.

5 Q All right.
6 Now, if Norwest Mortgage, or I should
7 say if ATI retains the services of an abstracting firm to
8 review the land records, approximately what is the charge
9 for that service, and does the borrower have to pay for
10 that?

11 A It varies widely by jurisdiction, what
12 the charge actually is, and I believe we --

13 Q Could you just ball park it? If I
14 told you, subject to check, that in the Norwest documents
15 that were produced subject to the subpoena here in
16 Virginia, that ATI paid its outside abstracting firms
17 between \$75 and \$100 to review the title and provide the
18 results of their review to ATI, would you accept that,
19 subject to check?

20 A Yeah.

21 MR. PETERS: Your Honor, I object to
22 the question. The question is asking Mr. Keller
23 to state an answer to his question subject to
24 check, and that is an absolutely improper basis
25 on which to give evidentiary evidence into this

1 record. Subject to check, Mr. Keller, after the
2 case is over, could check the records and could
3 find perhaps that it's not accurate, and the
4 damage has been done, and the testimony is in.

5 HEARING EXAMINER: Well, I can tell
6 you this, Mr. Peters, and all other counsel,
7 that lawyers frequently, especially in utility
8 rate cases always ask that question: "Do you
9 accept this number, subject to check?". And my
10 standard response is that unless that number is
11 checked and in the record, I'm not going to give
12 it any weight.

13 BY MR. THOMAS: (Continuing)

14 Q Approximately, do you know what -- and
15 maybe you're not the proper witness.

16 In the response to interrogatories,
17 Mr. Peters had indicated that one of the --
18 another witness from ATI Title Company here in
19 Northern Virginia was going to testify, and I'll
20 just defer that question to that individual. I
21 think they would be a little more knowledgeable
22 on what the Northern Virginia office of ATI pays
23 for a title search.

24 HEARING EXAMINER: All right.

25 BY MR. THOMAS: (Continuing)

1 Q Mr. Keller, has Norwest Mortgage,
2 Inc., established any reserves for expected losses which
3 may occur in the sale of the TOP product?

4 A Yes.

5 Q And how were those reserves
6 established?

7 A We based our experience of the
8 incident of undiscoverable off-record defects in title, we
9 felt the number would be very low. But since it's a new
10 product and accountants encourage conservatism, we picked
11 what we felt was a very conservative number, based on our
12 experience.

13 Q Were the -- you mentioned accountants.
14 Were the level of reserves established by your
15 accountants, or were the level of reserves actuarially
16 determined?

17 A It was determined by myself. The
18 reference was accountants to what we think accountants --
19 that we gave consideration to accountants' concern for
20 conservatism.

21 Q If you would turn to Exhibit 14 in the
22 Joint Stipulation of Facts. With respect to the numbers
23 shown under "Option A" and "Option B", are those estimates
24 on the part of Norwest Mortgage, Inc. of what title
25 insurance would cost, or are those actually hard dollar

1 numbers for title insurance?

2 A They are estimates.

3 Q But the number as shown under "Option
4 C" is the actual cost of TOP.

5 A No. I believe that's an estimate as
6 well.

7 Q But that estimate is based on the
8 proposed loan amount?

9 A The loan amount; correct.

10 Q Okay, and under Option C, Norwest
11 Mortgage, Inc. does not charge an abstract fee; is that
12 correct?

13 A Correct.

14 Q And under Option C, Norwest Mortgage,
15 Inc. does not charge a fee for a survey of the property.

16 A Correct.

17 Q Now, as far as pricing of the TOP
18 product, I believe you previously testified that it is
19 priced at 90 percent of the cost of lender's title
20 insurance.

21 A Our policy is at least 90 percent --
22 at least 10 percent less.

23 Q Now, is that the premium amount shown
24 in column A, or is that 90 percent of the total estimate
25 shown in column A?

1 A It's the -- we tried -- the total
2 estimate.

3 (Pause)

4 It looks like here it was a lot more
5 than 10 percent.

6 Q That's correct.

7 Are the fees for TOP sometimes
8 included in the amount borrowed from Norwest?

9 A I can't say that for sure.

10 Q Does Norwest have a product that they
11 call Norwest 90?

12 A Yes.

13 Q And under that Norwest 90 product, if
14 I could sort of refresh your recollection, are you able
15 under that product to -- basically it's a loan that has no
16 closing costs.

17 A The 90 you have referenced is to a \$90
18 closing cost; correct, so the closing costs are kept at no
19 greater than \$90.

20 Q And that would be total closing costs?

21 A Correct.

22 Q So that would be --

23 A Be careful between the distinction
24 between prepaids and closing costs, and there is a number
25 of -- a variety of charges --

1 Q When you talk about "prepaids", you're
2 speaking of points.

3 A No. You have some homeowner's
4 insurance and some escrow accounts and things like that.

5 Q Okay, but what about points or other
6 settlement charges?

7 A Points would be in closing costs.

8 Q Okay.

9 So that \$90 covers it all, basically.

10 A All -- everything that we characterize
11 as closing costs, yes.

12 Q All right.

13 (Pause) -

14 In --

15 A If I could clarify it, if your prior
16 question about whether the TOP fee is in the loan amount,
17 Norwest 90 does not put the fee into the loan amount, if
18 that would help.

19 Q Okay.

20 Could you identify any first mortgage
21 lenders and second mortgage lenders who manage their risk
22 of loss for title defects with products similar to TOP?

23 A Norwest Financial.

24 Q Any others? Any other lenders not in
25 the Norwest family?

1 A Yes. Certainly, Associates Financial.

2 Q And are they a first mortgage lender
3 or second mortgage lender?

4 A Both.

5 Q And what product do they use?

6 A They would obtain a search by whatever
7 name it's called. I think in Virginia, the common name is
8 a limited title search or something to that effect, and
9 they would make their decision to make a loan or not.

10 Q Any others?

11 A Not that I can recall.

12 Q Now, in providing the owner's and
13 encumbrance report to second market lenders, such as
14 Freddie Mac or Fannie Mae, does Norwest make a
15 representation to secondary market lenders that it has
16 complied with all federal, state, local laws and
17 regulations?

18 A Yes.

19 Q In that master agreement that Norwest
20 has with Freddie Mac, does Norwest represent to Freddie
21 Mac that Freddie Mac or its successors or assigns shall be
22 in a first lien position?

23 A I would want to read it, but I believe
24 that's materially correct; yes.

25 Q In the event of a defect in the title

1 to a piece of property securing a Norwest loan, what has
2 Norwest agreed to do on behalf of Freddie Mac or Fannie
3 Mae under those master agreements?

4 A That was a little long for me. I lost
5 it.

6 Q Okay.

7 In the event of a defect in the title
8 to a piece of property securing a Norwest Mortgage loan,
9 that is sold to Freddie Mac or Fannie Mae, what has
10 Norwest agreed to do on behalf of those two secondary
11 market lenders?

12 A Our representation warrantee is that
13 we have a first lien; if we do not, we promise to either
14 cure the defect, pay the damage as a result of the defect,
15 or ultimately buy back the loan whether we've got TOP on
16 it or title insurance or an attorney's opinion.

17 Q And with respect to the TOP product,
18 you agree to do that for both on-record and off-record
19 title defects.

20 A Our rep. and warrantee is complete in
21 all respects to those agencies.

22 Q Okay, but that sort of ducked my
23 question a little bit. If there is an on-record or an
24 off-record defect in the title, to a piece of property
25 that is securing a Norwest Mortgage loan that is sold to a

1 secondary market lender, is it your testimony that Norwest
2 Mortgage, Inc. has agreed to indemnify those two secondary
3 market lenders, provide defense costs, cure the defect or
4 ultimately, if you cannot do either of those, to
5 repurchase the loan?

6 A Yes, and I would like to add that's
7 true whether we buy title insurance or whether we use TOP
8 or whether we purchase an attorney's opinion.

9 Q Has Norwest Mortgage, Inc. advised
10 Freddie Mac or Fannie Mae that at least 10 states consider
11 the TOP product to be title insurance?

12 A Yes.

13 Q Has Norwest Mortgage, Inc. notified
14 Freddie Mac or Fannie Mae of the pending proceeding here
15 in Virginia?

16 A I don't know if we have specifically.

17 Q After the issuance of the rule to show
18 cause in Virginia, did Norwest Mortgage, Inc. continue to
19 issue TOP in Virginia?

20 A Yes.

21 Q If so, approximately how many loans
22 involved the sale of TOP in Virginia, after the issuance
23 of the rule to show cause?

24 A I don't know.

25 Q During the time that -- or I should

1 say subsequent to the introduction of TOP in Virginia, did
2 you -- let me back up a bit. When was TOP initially
3 introduced in Virginia?

4 A I'm not sure. I believe about
5 February of '93. No, that's when it was licensed to do
6 business as an agency. I can't recall.

7 Q Would it be mid-1994?

8 A I can't recall.

9 Q Okay.

10 When was -- I believe it's your
11 testimony that TOP Plus was introduced in Virginia around
12 February or March of 1995?

13 A March, I think I said.

14 Q Okay.

15 Subsequent to the introduction of TOP
16 in Virginia, have any of the -- have the -- I should say
17 subsequent to the introduction of TOP in Virginia, have
18 the representations or warranties contained in the title
19 condition report changed?

20 A I can't tell you for sure.

21 Q Okay.

22 If you would look at Exhibit 1, and
23 it's page -- it's Bates numbered N400112, and specifically
24 it's in the first line where it says, "In consideration of
25 payment of the Report Fee, the undersigned Company

1 warrants to the Lender the accuracy and completeness of
2 the above information..."

3 Now, if you would turn to Exhibit 7,
4 which is a title condition report used in Virginia, and
5 specifically page, Bates numbered N400150, I'm going to
6 read the same language. It says, "In consideration of the
7 (sic) payment of the Report Fee, the undersigned Company
8 represents to the Lender that the above information is
9 accurate..."

10 Would you tell me why the language was
11 changed from a warranted -- from warrants to represents?

12 A No.

13 Q The final title certificate that ATI
14 issues to Norwest Mortgage, Inc., this essentially is ATI
15 certifying to Norwest Mortgage, Inc., that Norwest
16 Mortgage, Inc. has a valid first lien in the described
17 property?

18 A I would say it certifies that that is
19 what the record reflects as searched by ATI.

20 Q In the mortgage loan transaction, does
21 Norwest require the owner or seller to execute an
22 affidavit that is described as an owner/seller affidavit?

23 A Yes.

24 Q And when does this occur?

25 A Would you repeat the prior question?

1 Q Yes.

2 A Did you say Norwest, or ATI, or both,
3 or either?

4 Q It's -- if you would turn to Exhibit
5 18 in the Joint Stipulation.

6 A Uh-huh.

7 Q Who requires the borrower to execute
8 this document?

9 A I believe ATI does, if we're the
10 settlement agent.

11 Q Okay.

12 And when is this document executed?

13 A I believe at settlement.

14 MR. PETERS: Your Honor, I object to
15 the question. I'm sorry I didn't focus on it
16 when it was asked. The question to Mr. Keller
17 is who requires the borrow to execute this
18 document. I believe Mr. Thomas has to establish
19 that, in fact, the borrower executes this
20 document as distinguished from the seller.

21 MR. THOMAS: I believe the testimony
22 previously in the record, Your Honor, is that
23 they, being Norwest or ATI, would require either
24 the borrower or seller to execute these
25 affidavits. I mean that's previously in the

1 record today, so I think I'm entitled to
2 question the witness on that point.

3 HEARING EXAMINER: I'm sorry, Mr.
4 Peters. I didn't understand the basis of your
5 objection, sir. Would you mind repeating it
6 again?

7 MR. PETERS: Well, Mr. Thomas'
8 question specifically with reference to this
9 document is who required the borrower to execute
10 this document, and I didn't think it had been
11 established that, in fact, the borrower had
12 executed this affidavit as distinguished from
13 the seller.

14 BY MR. THOMAS: (Continuing)

15 Q Do you require the borrower to warrant
16 the status of title to a Norwest -- that secures a Norwest
17 Mortgage loan?

18 A Yes.

19 Q And in what document do you require
20 the borrower to warrant the status of title?

21 A Well, it's not in this one.

22 Q Okay.

23 A I can't recall. It's in here some
24 place, I remember.

25 Q Would it be in the deed of trust?

1 A That may well be.

2 (Pause)

3 Q If you turn to Exhibit 6, and
4 specifically the second page of that exhibit, Bates
5 numbered N400220, at the very top is that the borrower,
6 that very first paragraph, is that the borrower's
7 representation to Norwest that the borrower has valid
8 title to the property being conveyed?

9 A Yes.

10 Q I hate to keep jumping around, Mr.
11 Keller. Turning back to Exhibit No. 20, would it be fair
12 to say that the genesis for the development of the TOP
13 product was the onerous regulatory environment that was
14 prohibiting Norwest Mortgage, Inc. from implementing its
15 strategic business plan?

16 A Onerous is your word.

17 Q No, Mr. Keller, onerous is your word.

18 A Oh.

19 HEARING EXAMINER: Where is that
20 terminology, Mr. Thomas?

21 MR. THOMAS: I'm -- it's on the fourth
22 page on the exhibit, under the "Executive
23 Summary", the first sentence, the
24 "Introduction".

25 HEARING EXAMINER: Okay.

1 THE WITNESS: Where is that?

2 MR. THOMAS: It's the Executive
3 Summary.

4 THE WITNESS: Of Exhibit 20?

5 MR. THOMAS: That's correct, and it's
6 the first sentence under the heading
7 "Introduction".

8 THE WITNESS: It said it was more
9 onerous than originally anticipated.

10 MR. THOMAS: Correct.

11 THE WITNESS: I did use that word
12 three years ago.

13 BY MR. THOMAS: (Continuing)

14 Q When you used the word "more onerous
15 than originally anticipated," was this as respects the
16 banking laws in various states?

17 A No.

18 Q Was this as respects the controlled
19 business laws in various states?

20 A Yes, partially. I think the next
21 sentence says, "Anti-affiliation and controlled business
22 statues (sic)..."

23 Q And would this also include the
24 insurance regulatory laws in the various states?

25 A Those are where some of those anti-

1 affiliation and controlled business statutes are found.

2 (Pause)

3 Q In this document, you seem to indicate
4 that the O&E warranties will be made available to the
5 highest quality, most solvent lenders. Was it your
6 intention to provide the TOP product to lenders other than
7 Norwest?

8 A We thought so at the time.

9 Q I would like to turn to page 39 of
10 Exhibit 20.

11 A Mine aren't marked.

12 Q It should be in the bottom right-hand
13 corner. Keep going, and you get to about page 9. You
14 will see some handwritten notations.

15 A Okay.

16 Q Turn to page 39.

17 (Pause)

18 Is this where --

19 MR. PETERS: I'm sorry, Your Honor. I
20 am totally lost. Is this Exhibit 9?

21 MR. THOMAS: No, I'm saying Exhibit 20

22 --

23 MR. PETERS: All right. I'm sorry.

24 MR. THOMAS: Page 39.

25 MR. PETERS: Okay.

1 (Pause)

2 BY MR. THOMAS: (Continuing)

3 Q Is this your evaluation of the risks
4 associated with the implementation of the TOP product in
5 the various states?

6 A Mine and the other authors of this,
7 yes..

8 Q And would you please read the second
9 bullet for me.

10 A "Insurance commissioners may attempt
11 to construe product as insurance even though they have not
12 done so to date. Insurance commissioners may seek
13 legislation to allow regulation of this product even
14 though it is not 'title insurance.'"

15 Q Okay, and this was prepared by you in
16 1993, well before the implementation of the TOP product.

17 A Yes.

18 Q Okay.

19 During the development of the TOP
20 product, was the final approval over the implementation of
21 the TOP product, was that done by the Board of Directors
22 of any of the Norwest Companies, or was that done by the
23 senior management team of one of the Norwest Companies?

24 A It was done by the senior management
25 team of Norwest Mortgage.

1 Q Okay.

2 Prior to the implementation of TOP --
3 let me back up. Does Norwest Mortgage retain the services
4 of outside auditors to review its business operations?

5 A Yes.

6 Q And who are your outside auditors?

7 A I can't recall.

8 Q All right.

9 Prior to the implementation of TOP,
10 did Norwest Mortgage, Inc. submit the TOP product to its
11 outside auditors for review to determine whether or not
12 TOP was insurance?

13 A No. Our auditors are accountants.

14 Q They do audit your business
15 operations.

16 A But not our legal risks.

17 Q Okay.

18 Does Norwest Mortgage, Inc. retain the
19 services of an outside law firm to provide legal advice on
20 a regular basis?

21 A We view Norwest's corporate legal
22 department as our outside law firm, and yes, we pay them a
23 lot of money.

24 Q But other than Norwest Corporate
25 Legal, do you retain the services of any outside attorneys

1 to provide legal advice on a regular basis?

2 A I would say occasionally, but not on a
3 regular basis.

4 Q Okay.

5 A We don't see any need.

6 Q Was the TOP product provided to any
7 outside law firm, for them to render a legal opinion on
8 whether TOP constituted insurance?

9 A From my perspective, Norwest Corporate
10 Legal, but that was -- to my perspective we did submit it
11 to Norwest Corporate Legal, which is an outside firm for
12 Norwest Mortgage, but they are still in the corporate
13 family. So if that's not outside in your definition, I
14 don't know.

15 Q Well, it -- my definition of an
16 outside attorney would be an independent law firm retained
17 by Norwest Mortgage, Inc. or Norwest Corporation to review
18 the regulatory impact of the TOP product.

19 A No.

20 MR. PETERS: Your Honor, this line of
21 questioning is belaboring the point that is
22 going to run smack into the attorney/client
23 privilege.

24 MR. THOMAS: Don't worry, Your Honor,
25 I'm not going any further.

1 (Continuing)

2 Q Prior to the implementation of TOP in
3 -- prior to the implementation of TOP, did Norwest
4 Mortgage, Inc. seek a review of the product by any state
5 insurance department prior to its implementation in that
6 state?

7 A No.

8 (Pause)

9 Q Now, you have had some -- I would like
10 you to clarify something for me with respect to Ginnie
11 Mae. Does Ginnie Mae require title insurance on the loans
12 which it purchases from first mortgage lenders?

13 A You said title insurance.

14 Q That's correct.

15 A No.

16 Q Does Ginnie Mae require an attorney's
17 title opinion on any loan that it purchases from a first
18 mortgage lender?

19 A "Any loan" has me a little worried.
20 That's a broad category, so --

21 Q Okay.

22 A They don't require it at Norwest
23 Mortgage.

24 Q And, in fact, Ginnie Mae would not
25 require TOP on loans that it purchases from Norwest

1 Mortgage.

2 A Ginnie Mae requires some evidence that
3 you have done due diligence on the status of title. They
4 call it a variety of names. We think the TOP process,
5 which ends up in this title condition report or
6 certificate qualifies under their definitions.

7 Q All right.

8 In Virginia -- you were present during
9 the testimony of the previous witness -- there are two
10 documents that evidence the transfer of real property.
11 One is a deed of trust, and the second is the note which
12 evidences the loan.

13 Now, if there is a defect in the title
14 to the property securing the loan, am I, the borrower,
15 still obligated to pay on the loan?

16 A Of course.

17 (Pause)

18 MR. THOMAS: That concludes the
19 questions that I have, Your Honor.

20 HEARING EXAMINER: All right.

21 Let's go off the record for a minute.

22
23 NOTE: After brief discussion between
24 counsel and the hearing examiner, the hearing
25 resumes as follows, viz:

1
2 HEARING EXAMINER: During the off-the-
3 record discussion, we discussed the possibility
4 of continuing this case until tomorrow to
5 complete it. But after discussing it with
6 counsel, we decided that we would go ahead and
7 at least complete this witness and then make a
8 decision about whether or not the case has to be
9 continued.

10 All right, Mr. Waechter.

11 MR. WAECHTER: Good evening, Mr.
12 Keller.

13 THE WITNESS: Good evening.

14 MR. WAECHTER: We've passed afternoon,
15 I think.

16
17 CROSS-EXAMINATION

18 BY MR. WAECHTER:

19 Q In response to some questions from
20 your counsel, I was confused as to one answer that you
21 gave. I understood you to say that you felt that off-
22 record risks were inconsequential, diminimus, negligible,
23 words to that effect; is that correct?

24 A Correct.

25 Q And then I also understood you to say

1 that forgery was a real problem.

2 A I said that's the most common off-
3 record risk.

4 Q It's the most common, and yet it's
5 your testimony that you have never seen a forgery problem
6 in all of the years in the mortgage lending business.

7 A Correct.

8 Q How do you know it's the most common
9 problem?

10 A Because that's what all the experts
11 tell me.

12 Q So you don't have any direct knowledge
13 of that.

14 A No.

15 Q How about defalcations? I believe you
16 heard the witness testify with respect to the mortgage
17 lenders -- I'm sorry, the title insurers that have
18 suffered significant losses in recent years, regrettably
19 for our profession, because of attorney defalcations?
20 Have you ever seen one of those in your work history?

21 A I have seen many of them, but I have
22 never seen one cause damage on a residential property.

23 Q All right, and then you wouldn't know
24 that when you have seen them, whether the property had
25 title insurance or not.

1 A Some did and some didn't.

2 Q When you say there weren't losses,
3 does that mean that your employers over the years haven't
4 suffered losses or that there were no losses occasioned by
5 any loans?

6 A The losses were suffered by the title
7 underwriters for money taken by their representatives, but
8 they were not -- we have never experienced somebody on
9 purpose defalcating on the status of the title where we
10 lost money on the loan.

11 Q All right.

12 Is it your testimony that -- let me
13 give a little background. When a first deed of trust loan
14 is sold to a secondary market purchaser, is it your
15 testimony that although Norwest has sold the loan, that it
16 retains risk?

17 A Absolutely.

18 Q Does it have any risk until it
19 repurchases the loan?

20 A Yes.

21 Q Now, your counsel --

22 I'm referring to a document -- your
23 counsel showed you a copy of document No. N41175 which was
24 a consumer title status election report, and the gist of
25 that testimony was that it was showing that the mistake

1 that had been used with respect to TOP Plus had been
2 corrected by handwriting language in -- do you still have
3 the document?

4 A No, I don't. I recall it, but --

5 Q I'm trying to figure out which tab it
6 was behind.

7 HEARING EXAMINER: It's behind 14.

8 MR. WAECHTER: Behind 14?

9 HEARING EXAMINER: Yes, sir.

10 MR. WAECHTER: Correct.

11 THE WITNESS: That's not the one that
12 has been corrected.

13 MR. WAECHTER: That was the one that
14 was --

15 THE WITNESS: Uncorrected.

16 MR. WAECHTER: It was incorrect.

17 MR. THOMAS: I have a copy.

18 Your Honor, I'll provide my copy to
19 the witness.

20 HEARING EXAMINER: All right.

21 BY MR. WAECHTER: (Continuing)

22 Q And this was offered by your counsel,
23 and you identified as a form which would have been
24 correctly filled and that mistake cured it.

25 A Well, there was no mistake on this

1 form.

2 Q No mistake on this form.

3 A Right.

4 Q Can you tell me on that form which
5 election the borrower made?

6 A You're right. The borrower didn't
7 check anything.

8 Q Well, whose responsibility is it to
9 see that that election is made?

10 A That would be the person who was
11 presenting the form to the customer.

12 Q And who would that person work for?

13 A Norwest Mortgage.

14 Q Now, if you go up to Option C, it
15 appears to me, and I'll ask you if it's correct, that
16 there is an abstract fee shown in Column C of \$150, but it
17 appears to me from the copy I'm looking at, that that \$150
18 was written over a zero that may have been preprinted on
19 the form, such as the one on the line below that.

20 A Yes.

21 Q Does -- and in connection with Option
22 C, what was the zero preprinted on the form for abstract
23 fee?

24 A When we first designed the form, we
25 didn't think that we would be charging that. We didn't

1 think we would have separate charges for that.

2 Q And so that you do charge an abstract
3 fee.

4 A Sometimes, if separately charged.

5 Q What is the abstract fee?

6 A It would be the fee that we pay to a
7 third party to produce the search of the status of the
8 title.

9 Q So when an abstract fee is charged,
10 someone other than ATI did the title abstract.

11 A Yes.

12 Q And when would that situation occur?

13 A If we don't happen to have a searcher
14 convenient to that county courthouse to search.

15 Q All right, and it was also your
16 testimony that the 90 percent mathematical calculation to
17 determine the total estimate under Option C is applied to
18 the total estimate under Option A and Option B.

19 A Yes.

20 Q And do Option A and Option B contain
21 charges for other than title insurance premium?

22 A Yes.

23 (Pause)

24 Q I believe it was your testimony that
25 there is a difference between an O&E report and a title

1 abstract, and the substance of your testimony, as I
2 recall, was that a title abstract is much more extensive.
3 Do you recall that testimony?

4 A Yes.

5 Q Can you explain how it is more
6 extensive?

7 A Well, in Iowa, which I'm most
8 familiar, that the abstract is a document that the prior
9 witness testified is very extensive, very long, very
10 complicated. It goes back deep into the history of the
11 property, maybe back to its original patent.

12 Q Is there something unusual about the
13 State of Iowa in assuring titles?

14 A Well, the State of Iowa says you
15 cannot sell or -- you cannot sell title insurance in the
16 State of Iowa.

17 Q It just doesn't exist in Iowa.

18 A You can't sell it. Many people buy it
19 out of state, but you can't sell it in the state.

20 Q Now, so that when you were -- when you
21 characterized the title abstract as more extensive, you
22 were comparing an Iowa title abstract to a Virginia O&E
23 report.

24 A I don't know.

25 Q Well, let me ask you this: What would

1 be a distinction between a title abstract in Virginia and
2 O&E report?

3 A I really don't know what a title
4 abstract, in the pure sense of that word, would be in
5 Virginia. I would think they would be quite similar.

6 Q You charge them 150 bucks for it,
7 sometimes.

8 A I don't believe that this would be a
9 full abstract in the true sense of the word "abstract".
10 This would be -- I believe this abstract fee would be
11 something similar to what we would call an O&E report.

12 Q All right.

13 A Or that we originally called an O&E
14 report when we were devising the product.

15 Q Now, I believe it was your testimony
16 also that ATI does not do a title examination.

17 A Correct.

18 Q And do you have available to you
19 Exhibit MTB-9? If not, could the bailiff provide you a
20 copy of it.

21 (Pause)

22 I would direct your attention to the
23 second page of MTB-9, which is a Bates numbered page,
24 Bates No. N301507, and I would draw your attention,
25 please, to line 1103, and I would ask you to read what

1 that says.

2 A 1103, title exam to ATI Company,
3 \$99.00.

4 Q Now, I believe it has been stated in
5 evidence here several times that, you know, these
6 statements are filled out under penalty of perjury and
7 signed by the borrower and the seller and by your -- ATI's
8 selling agent. It appears that this borrower was charged
9 \$99.00 for a title exam. How does that square with your
10 testimony that ATI doesn't do a title examination?

11 A I believe that was a mistake.

12 Q Okay.

13 Now, Mr. Keller, the bailiff has given
14 -- placed before you certain documents, which you will
15 notice, if you care to look through them, all bear Bates
16 numbers and were produced in response to the Bureau of
17 Insurance's subpoena, and I would ask you -- I'm just
18 going to go through these very quickly because I don't
19 want to particularly belabor the point, but I would ask
20 you to look first at document No. N30003, and I would ask
21 you to direct your attention to line 103 (sic) and report
22 what that says.

23 A "Title examination to ATI Company,
24 \$150."

25 Q So that in this closing, ATI collected

1 \$150 from the borrower purportedly for a title
2 examination.

3 A Purportedly.

4 Q And I would ask you now to look at the
5 next document, and the page -- Bates number is 001773, and
6 again, direct your attention to line 1103, and ask you to
7 state what that purports.

8 A The same, except the number is \$175.

9 Q So that Mr. and Mrs. Burns paid \$175
10 for something that ATI doesn't do.

11 A I think it's mischaracterized as a
12 title exam, yes.

13 Q And I would now take you to document
14 001238, and I would ask you there to advise whether the
15 seller paid an abstract fee or title -- what is the
16 difference between a title search and a title examination?

17 A A title search or an abstract is the
18 searching the record and reporting of the record. The
19 exam is where you analyze it and draw a -- particularly in
20 the title vernacular, that's what the title underwriter
21 does when they examine the record prepared by the agent
22 and to determine whether to issue title insurance or not.
23 This one I believe is correctly characterized.

24 Q That it is charged to the seller.

25 A That it was called an abstract or a

1 title search fee.

2 MR. PETERS: Your Honor, may I ask
3 which document was just being referred to?

4 MR. WAECHTER: This was Bates number
5 001238. I think it's the fourth one -- the
6 third one.

7 (Continuing)

8 Q Moving on to the next one, would you
9 report what's on page No. N301733. Would you report
10 what's on line 1103.

11 A Title examination to ATI Title
12 Company, for 105.

13 Q Now, let me ask you at this point:
14 All of these numbers that we have seen so far, the charges
15 were of different amounts. Can you tell us what those
16 charges are based upon?

17 A No, I can't specifically.

18 HEARING EXAMINER: If the charges were
19 not for title searches, what were the charges
20 for?

21 THE WITNESS: I believe that's what
22 they were for.

23 HEARING EXAMINER: Okay.

24 BY MR. WAECHTER: (Continuing)

25 Q And I direct your attention now to

1 001670, the second page of the next batch.

2 A Which number was that?

3 Q 001670.

4 A Okay.

5 Q And would you report what is stated on
6 line 1103 there?

7 A Title exam to ATI Title Company, 175.

8 Q Can you explain why that would have
9 been charged to the seller?

10 A Usually when the sellers and buyers
11 negotiate their contracts, they settle between themselves
12 who is going to pay for what. In this case, apparently,
13 the seller agreed to pay.

14 Q Now, I would like to direct your
15 attention to the next HUD-1 form in this package, and
16 particularly document N302067. I would like you to report
17 what is shown on line 1103.

18 A Title examination to ATI Title
19 Company, 405.

20 Q \$405?

21 A Yes.

22 Q What is -- would you look at line
23 1111 and report what is stated there.

24 A TOP fee to ATI Title Company of 406-
25 80.

1 Q So that in this case, the borrower was
2 charged for a title examination, a dollar 80 less than the
3 TOP fee.

4 A It appears so.

5 Q But ATI doesn't do title examinations.

6 A They do in conjunction with title
7 insurance, but not in conjunction with TOP.

8 Q And that is a TOP transaction, the one
9 we were just looking at.

10 A Well, I don't know. Apparently we
11 charged them a TOP fee.

12 Q I would hope so.

13 A I would hope so.

14 Q Would you look at document No. 001141,
15 the second page of the next HUD-1. Report what is shown
16 on line 1102.

17 A It reads, "Abstract or title search to
18 ATI Title Company," of 175.

19 Q I'm just going to --

20 I'm going to ask that these all -- I
21 think this would be more convenient to mark them
22 all as a single exhibit. I'm happy to go
23 through them. I'm happy to let the witness
24 comment on them to make sure that they are a
25 continuation of the previous document, but I

1 would ask that these all be marked as an
2 exhibit.

3 HEARING EXAMINER: All right.

4 I will go ahead and mark the HUD
5 documents as Exhibit No. MJK-18.

6 BY MR. WAECHTER: (Continuing)

7 Q Now, Mr. Keller, I believe you
8 responded that as of the time the show cause was entered,
9 that there were approximately 90 TOP transactions in
10 Virginia.

11 A I don't recall that.

12 Q You don't recall?

13 Okay.

14 (Pause)

15 You testified on direct examination
16 that you were, I believe you said, the author or the co-
17 author of the TOP product -- program, whatever you wish to
18 call it. Is that correct?

19 A Correct.

20 Q When did the efforts to develop that
21 product begin?

22 A I can't specifically recall.

23 Q Can you give us an approximate date?

24 A I would say within a few months of the
25 exhibit that we have been referring to periodically here.

1 Q Is that Exhibit 20?

2 A Let me check.

3 Yes.

4 Q Prior to the development of the TOP
5 product, did Norwest Corporation at any time, to your
6 knowledge, seek approval from the Federal Reserve Bank of
7 Minneapolis to form a title insurance underwriting
8 subsidiary to engage in the business of underwriting title
9 insurance?

10 A Yes.

11 Q And in the course of seeking that
12 approval, was the proposal as presented to the Federal
13 Reserve Bank that the title insurance would be
14 underwritten only on loans originated by Norwest
15 affiliates?

16 A I'm not familiar with what they
17 submitted.

18 Q I have passed out to you a document
19 that purports to be a letter addressed to a Mr. James
20 Lyon, the Federal Reserve Bank of Minneapolis, signed by
21 Emily H. Haddad, Counsel. It is on Norwest Corporation
22 stationery, and I ask if you have ever seen this document.

23 MR. PETERS: Your Honor, I would like
24 to object to testimony relating to this document
25 because I think it's not relevant to the

1 question of the TOP program constitutes
2 insurance. What this is relevant to is the
3 issue of a prior project, another project on
4 behalf of Norwest Corporation to create a title
5 insurer. It has nothing to do with how TOP
6 operates and whether TOP constitutes insurance,
7 and, therefore, is not relevant to this
8 proceeding.

9 HEARING EXAMINER: Mr. Waechter?

10 MR. WAECHTER: Well, Your Honor, Mr.
11 Peters has got his theory in this case, and he
12 has been given wide latitude to develop it. We
13 have a theory on this case also, and that theory
14 is essentially that Norwest Corporation, for a
15 substantial period of time, has wanted to
16 underwrite title insurance. They went to the
17 federal regulatory authorities and sought
18 permission to do that. They were denied that.
19 If I'm allowed to introduce this exhibit, the
20 next one is the response from the Federal
21 Reserve Bank of Minneapolis saying, "No, you
22 cannot do this."

23 They, within, months afterwards, start
24 disgorging memoranda, internal memoranda to
25 present and come up with this TOP product, which

1 they have, I believe, by the witness' testimony,
2 borrowed or extracted from some kind of O&E
3 process in the Midwest that is used in some
4 states out there, apparently in connection with
5 the second mortgages.

6 I think this is highly relevant.
7 There is no question that it's relevant, and I
8 think that in this case, where we're not dealing
9 with a statutory definition of insurance and
10 what is insurance, that the intent of the
11 parties, what they intend to accomplish, is very
12 relevant, and I think the authorities support
13 that.

14 MR. PETERS: Your Honor, whether or
15 not Norwest Corporation at one point in time
16 desired to create and operate a title insurer is
17 not relevant to the question of whether the TOP
18 program and the way it is structured and the way
19 it works constitutes title insurance.

20 HEARING EXAMINER: I would agree with
21 you, Mr. Peters, if this was a declaratory
22 judgment proceeding. If the only issue in this
23 case is whether or not TOP was insurance, I
24 think I would be inclined to agree with you, but
25 the Rule to Show Cause was brought under Section

1 38.2-218 of the Code of Virginia, which alleges
2 a willful and knowing violation of Virginia law.

3 I think the documents and the
4 activities that were related to the development
5 of the TOP program are all relevant under that
6 statute in determining whether or not the
7 actions of Norwest and its affiliates were
8 knowing and willful in an attempt to design a
9 product to evade Virginia law. So I think it is
10 relevant.

11 MR. PETERS: Well, Your Honor, I would
12 like to note my exception to your ruling and
13 would hope that the record will reflect that.

14 I really don't understand how
15 relationships with the Federal Reserve Board and
16 a request that was made by Norwest Corporation
17 to have authority to own a title insurance
18 company, title insurer, creates any implication
19 of willful and intentional violation of Virginia
20 law.

21 The product either constitutes
22 insurance or it does not, and prior
23 communications with the Federal Reserve Board
24 have nothing to do with the legal test that is
25 before this Court.

1 HEARING EXAMINER: Your exception is
2 noted for the record.

3 MR. PETERS: All right.

4 MR. WAECHTER: I forgot where we were.

5 (Continuing)

6 Q Have you seen this document before?

7 A I had not seen it prior to August 12th
8 of '93, but I have seen it in other hearings on the TOP
9 issue. So I have seen it recently.

10 Q So you saw this document at least on
11 August 12th of '93.

12 A No.

13 Q You had not seen it prior to August
14 12th of '93.

15 A I didn't see it until this year.

16 Q All right.

17 If the bailiff would assist me.

18 (Pause)

19 I show you what purports to be a copy
20 of a letter addressed to Emily E. Haddad, Counsel, Norwest
21 Corporation, from the Federal Reserve Bank of Minneapolis
22 stationery, signed by Jean C. Garrick, Assistant Vice
23 President, and ask you if you have seen that document
24 before?

25 MR. PETERS: Your Honor, I have an

1 objection as to this letter. Not only does it
2 constitute -- is it not admissible in my
3 judgment on relevancy grounds, but it
4 constitutes hearsay. The author of the letter
5 is someone who is not available for my cross-
6 examination and is not a party to this
7 proceeding.

8 MR. WAECHTER: Well, Your Honor, I
9 certainly believe under your previous ruling
10 that if the initial letter was admitted into
11 evidence and it wasn't to any person in this
12 courtroom or any person subpoenaed by me, by the
13 Staff, by Mr. Peters to testify with respect to
14 that, the letter is clearly relevant. It advises
15 Norwest Bank (sic) that we've gotten your
16 letter; we've not only reviewed it ourselves, we
17 sent it to the Federal Reserve Board, Legal
18 Department in Washington, and all of us concur,
19 that, no, you cannot engage -- you cannot
20 operate and form a subsidiary title insurance
21 underwriter.

22 I want to ask the witness whether he
23 is the Mike Keller who is shown as receiving a
24 carbon copy on this letter. I think he is going
25 to say yes, because that has been established in

1 an interrogatory answer. So I believe that it
2 is relevant.

3 This document comes as no surprise to
4 Mr. Peters whatsoever. We have talked about
5 this document on numerous occasions, and he is
6 well aware of it, and it is one of the documents
7 that I tried to get him to stipulate the
8 existence of.

9 The authenticity of the document has
10 been admitted in the answers to our
11 interrogatories, and I believe it is perfectly
12 admissible and is very relevant.

13 MR. PETERS: Well, Your Honor, in my
14 answers to interrogatories, I reserved the right
15 to raise evidentiary objections, including
16 relevancy and hearsay, and the fact that I have
17 known about this document has nothing to do with
18 the fact that it is a blatant example of hearsay
19 if it's introduced into evidence.

20 I cannot cross-examine Jean Garrick
21 with reference to anything about this document.

22 HEARING EXAMINER: Mr. Waechter, what
23 exception to the hearsay rule does this follow
24 under?

25 MR. WAECHTER: Well, I think it's a

1 document that is in the pertinent files of this
2 case. It has been produced by the Defendant in
3 this and in other jurisdictions, and it's got
4 the witness' name on it. I'm not going to ask
5 him -- you know, I don't propose to ask any
6 questions about it, other than I want him to
7 identify it and ask him whether he has ever seen
8 it before.

9 MR. PETERS: Your Honor, this document
10 has never been produced in this proceeding by
11 the Defendants. How Mr. Waechter got it, I have
12 no idea.

13 MR. WAECHTER: They have stipulated in
14 the interrogatory answer, have responded --

15 HEARING EXAMINER: What interrogatory?
16 Would you like to show it to me? I don't have a
17 --

18 MR. WAECHTER: Yes, it's Interrogatory
19 No. 5.

20 (Pause)

21 If I may pass to Your Honor, this is a
22 complete set of the interrogatory answers that I
23 had proposed to move into evidence. It is not
24 the total interrogatories, and -- because there
25 is one that I had omitted because the Defendants

1 could not identify the document.

2 But with the exception of that, and I
3 would direct Your Honor to the interrogatory --
4 I'm sorry, Interrogatory No. 2.

5 (Pause)

6 HEARING EXAMINER: The problem I'm
7 having, Mr. Waechter, is that the prior letter I
8 ruled on there was only an objection on
9 relevancy, and I think obviously the document is
10 relevant. This document may be relevant, too,
11 but it is hearsay, and you haven't provided me
12 any exception to the hearsay rule from which I
13 can get this letter in, mark it or have it
14 admitted.

15 MR. WAECHTER: All right, Your Honor.
16 I will note my exception to that ruling.

17 HEARING EXAMINER: All right.

18 MR. WAECHTER: Your Honor, I would
19 like to, in connection -- if we may go back to
20 the first exhibit, just -- I assume Mr. Peters
21 won't have an objection, and I meant to move the
22 admission of the interrogatory response No. 1 in
23 connection with that document.

24 Does Your Honor wish to put the
25 responses and the document together, as a single

1 exhibit?

2 HEARING EXAMINER: You want to have
3 the response to interrogatory No. 1 admitted.

4 MR. WAECHTER: Attached to the
5 document that had been admitted into evidence.

6 HEARING EXAMINER: All right, sir.
7 You mean this original document here.

8 MR. WAECHTER: That's correct.

9 HEARING EXAMINER: The one that I
10 marked MJK -- I didn't mark it yet, did I?

11 I believe it's MJK-19. I will go
12 ahead and mark that letter. That would be the
13 letter from -- to Mr. James Lyon from Emily
14 Haddad.

15 MR. WAECHTER: Correct.

16 HEARING EXAMINER: All right, sir.

17 I will mark that letter MJK-19, and
18 the response to the first interrogatory will be
19 marked MJK-20.

20 MR. WAECHTER: Your Honor, just as a
21 procedural point, I have got several other
22 documents that were referred to in our
23 interrogatories and identified by the Defendants
24 in those. Is it your pleasure to mark the
25 answers and include them as an exhibit with the

1 document if they are admitted? Is that the best
2 way to do it?

3 HEARING EXAMINER: I'm not going to
4 try to tell you how to try your case, but I will
5 be glad to mark them as a part of the exhibit or
6 however you want to do it.

7 MR. WAECHTER: Do you have --

8 MR. PETERS: If the answers to
9 interrogatories are to be admitted, I would ask
10 that the entire pleading itself be admitted,
11 because we did reserve objections, and I would
12 want those reserved objections, evidentiary
13 objections to be a part of that document.

14 It's unclear to me whether Mr.
15 Waechter is asking to introduce into evidence
16 only interrogatory 1, and then the answer, and
17 then interrogatory No. 2, and the answer, or
18 whether --

19 HEARING EXAMINER: I think he was just
20 moving to introduce the answer to interrogatory
21 No. 1, and that's the only response that I have
22 marked as an exhibit at this point.

23 MR. WAECHTER: We will just do them --

24 HEARING EXAMINER: Let's do them
25 individually because there may be some

1 objections as we go along.

2 MR. WAECHTER: All right. Very good.

3 (Continuing)

4 Q Mr. Keller, to your knowledge, did
5 Norwest Corporation ever seek to obtain approval from the
6 Federal Reserve Bank of Minneapolis to form a title
7 insurance underwriter?

8 A Yes.

9 Q To your knowledge, did Norwest
10 Corporation ever receive approval from the Federal Reserve
11 Bank of Minneapolis to form a title underwriting
12 subsidiary?

13 A No.

14 Q By answer no, do you mean that the
15 approval was -- that it was rejected? Their request was
16 rejected?

17 A All I -- well, after reading this --
18 yes.

19 Q Did you ever see a copy of the
20 document that has been rejected?

21 A Rejected?

22 Q Or that the Examiner ruled on, the
23 document that is Exhibit No. 2. Did you ever -- have you
24 ever seen that document before today?

25 A In prior --

1 MR. PETERS: Your Honor, I object to
2 this. The document has not been introduced into
3 evidence because of your ruling, and now there
4 are questions about the document as though it
5 has been introduced.

6 MR. WAECHTER: Your Honor --

7 HEARING EXAMINER: I think your point
8 has been made, Mr. Waechter, that the Federal
9 Reserve said, no, they couldn't engage in title
10 insurance, so they never received approval. I
11 don't think it's really necessary to pursue it
12 any further.

13 MR. WAECHTER: All right.

14 Thank you.

15 (Pause)

16 (Continuing)

17 Q In the course of developing the TOP
18 product, from -- I believe you said it began in, when,
19 August, 1993?

20 A That's when -- that's the first memo
21 that I am aware of that discussed it.

22 Q All right.

23 In the course of developing the
24 product, did Norwest Mortgage review claims experience in
25 the title insurance industry?

1 A We understood our own experience at
2 ATI, and we understood our own experience as a lender.

3 Q Did you ever examine or cause to be
4 examined any loss data, loss experience from title
5 insurance companies?

6 A No.

7 (Pause)

8 Q I show you what purports to be a
9 memorandum on Norwest Mortgage stationery, dated June 2nd,
10 1994, from Gary Feaker to Pat Kurt. Who is Gary Feaker?

11 A He's an accounting staff person at
12 Norwest Mortgage.

13 Q And who is Pat Kurt?

14 A She is his manager.

15 Q All right.

16 Have you seen this document before?

17 A Yes.

18 Q Did you see it contemporaneous with
19 its authorship?

20 A Yes.

21 Q And could you -- does that document
22 contain an attachment to it? I direct your attention
23 specifically to page 3.

24 A Yes.

25 Q And what is that? Have you seen that

1 information before?

2 A I don't recall it separately, but I
3 would say if it was attached to this memo, then I must
4 have seen it.

5 Q Okay.

6 The -- there is a handwritten note at
7 the top that is addressed to someone named Mike. Is that
8 you?

9 A Yes.

10 Q Okay.

11 Your Honor, I move the admission of
12 this exhibit, together with -- well, this
13 exhibit.

14 HEARING EXAMINER: All right.

15 I will mark the memorandum, along with
16 the attachment, dated June 2nd, 1994, to Pat
17 Kurt from Gary Feaker as Exhibit No. MJK-21.

18 (Pause)

19 MR. WAECHTER: And, Your Honor, I
20 would also move to admit interrogatory responses
21 -- or responses to interrogatories No. 5 and No.
22 6 in evidence.

23 MR. PETERS: Your Honor, before you
24 rule on that, may I look at my answers?

25 HEARING EXAMINER: Yes. I would like

1 to look at mine, too.

2 (Pause)

3 Mr. Peters?

4 MR. PETERS: I have no objection.

5 HEARING EXAMINER: All right.

6 I will mark the response to
7 interrogatory No. 5 as MJK-22, the response to
8 interrogatory No. 6 as MJK-23.

9 BY MR. WAECHTER: (Continuing)

10 Q Mr. Keller, I have asked the bailiff
11 to hand you a document that is dated November 4, 1994.
12 It's a memorandum, purportedly a memorandum from Harry
13 Sandstrom, to Pat Kurt, referencing TOP reserves, and I
14 would ask you if you have seen this document before?

15 A Yes.

16 Q And did you see it contemporaneous
17 with its authorship

18 A Yes.

19 Q And you're the Mike Keller who is
20 shown as receiving a carbon copy of this memorandum.

21 A Yes.

22 Q I would direct your attention to a
23 sentence, beginning on the fifth line from the bottom of
24 the second paragraph and ask if you will read that into
25 the record, please.

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1 A "NMI's risk boils down to the risk of
2 an off-the-record title defect so serious that the
3 borrower loses the property altogether. We're not able to
4 determine title insurance underwriters' claims experience
5 for this type of risk; however, we believe, based on NMI's
6 experience as an insured, it is minute. For these
7 reasons, it is our opinion that a 2 percent of gross
8 revenue reserves is extremely conservative."

9 MR. WAECHTER: Your Honor, I move
10 admission of that document into evidence,
11 please.

12 HEARING EXAMINER: All right.

13 The November 4th, 1994 memorandum to
14 Pat Kurt from Harry Sandstrom will be marked
15 MJK-24.

16 MR. WAECHTER: And I would also ask
17 that interrogatory answer -- answer to
18 interrogatory No. 8 be admitted into evidence.

19 HEARING EXAMINER: That is 7 and 8?

20 MR. WAECHTER: 7 and 8, I'm sorry.

21 HEARING EXAMINER: Thank you.

22 (Pause)

23 All right.

24 The response to interrogatory No. 7
25 will be marked MJK-25, and No. 8 will be MJK-26.

1 (Pause)

2 BY MR. WAECHTER: (Continuing)

3 Q I have asked the bailiff to hand you
4 what appears to be a memorandum dated April 13, 1994,
5 addressed to Less Biller, Jim Campbell, Ken Murray and Dan
6 Saklad, from Mike Keller, Mike Fahey and Dan Sagersin.
7 Have you seen this document before?

8 A Yes.

9 Q You are the Mike Keller who is
10 identified as the author of this document or a co-author
11 of this document?

12 A Yes.

13 Q Who are the addressees?

14 A Those are managers of our Norwest
15 Corps Banking regions.

16 Q Would they be like regional presidents
17 of Norwest Corporation or Bank?

18 A That's a fair description of their
19 managerial responsibilities.

20 Q Norwest Bank.

21 A Of Norwest Corporation.

22 Q Corporation.

23 A Responsibility for managing regions of
24 banks, and Less Biller also was the Mortgage Company
25 supervisor. He supervises mortgage companies, the credit

1 card companies and some banks.

2 Q Now, what, if anything, occasioned the
3 preparation of this memorandum?

4 A Just --

5 (Pause)

6 We prepared this for a bank management
7 meeting.

8 Q Would you read the first sentence of
9 the memorandum.

10 A "The following materials are provided
11 to serve as a report of our progress in our efforts to
12 produce a title product which is an alternative to
13 traditional title insurance and which is acceptable to
14 secondary market investors."

15 Q All right.

16 I would like to -- first off, I would
17 suggest to you that several paragraphs down it talks about
18 -- that the three of you have initially targeted 33 states
19 as your marketplace. Was Virginia one of those 33 states?

20 A I can't recall.

21 Q Would you look at page 6 or the page
22 that is numbered 6 of that document captioned "Exhibit
23 'B'". Those are the states listed there that -- are those
24 the 33 states you referred to?

25 A I don't know. I would have to --

1 (Pause)

2 If those total 33, I would say yes.

3 Q All right.

4 Is Virginia among those states?

5 A Yes.

6 Q Now, could you read the footnote at
7 the bottom of page 6.

8 A "In many of these states ATI has
9 experienced or expects to experience, regulatory barriers
10 and hurdles erected by statutes which prohibit or severely
11 limit insurance sales by bank subsidiaries. Our strategy
12 in these states therefore is to establish 'grandfather'
13 rights in anticipation of legislative enactments
14 deliberately designed to bring alternate products within
15 the regulatory orbit."

16 Q Now, if you would turn to page 11 or
17 the page that is numbered 11. It's captioned at the top
18 "Exhibit '6'" (sic). The paragraph at the bottom
19 captioned "The Genesis", could you read that into the
20 record, please.

21 A I'm having trouble finding -- okay, I
22 found it.

23 "This product was created by the
24 barriers thrown up by many state laws (authored by the
25 entrenched mom and pop title agencies and title insurers)

1 that prevent title agencies owned by financial
2 institutions from doing business in the state. Necessity
3 was the mother of this invention. We end up with a
4 product that is simpler and cheaper than the product we
5 will be competing against, i.e. title insurance."

6 Q Now, at the time, on the date that
7 this memorandum was written, is it a fact that ATI,
8 American Land Title, was a licensed title insurance agent
9 in Virginia?

10 A Yes, we were already licensed in
11 Virginia.

12 Q So you weren't facing all of the
13 regulatory barriers that you were referring to in your --
14 in the footnote on page 6 in Virginia, were you?

15 A I'm not aware of any regulatory
16 barriers in Virginia that we're facing.

17 MR. WAECHTER: Your Honor, I would
18 like to move the admission of this document into
19 evidence.

20 HEARING EXAMINER: All right.

21 The memorandum dated April 13th, 1994,
22 will be marked MJK-27.

23 MR. THOMAS: What was that number,
24 Your Honor?

25 HEARING EXAMINER: 27, MJK-27.

1 MR. WAECHTER: I would also like to
2 move admission of responses to interrogatories
3 No. 11 and 12 into the record.

4 HEARING EXAMINER: The response to
5 interrogatory No. 11 will be marked MJK-28, and
6 the response to interrogatory No. 12 will be
7 marked MJK-29.

8 (Pause)

9 MR. WAECHTER: If I can have just a
10 moment.

11 HEARING EXAMINER: All right.

12 MR. WAECHTER: Your Honor will be
13 happy to know that, I think, I only have one
14 more little series of questions for this
15 witness.

16 HEARING EXAMINER: That word "series"
17 concerns me.

18 (Laughter)

19 MR. WAECHTER: The word "series"
20 bothers you.

21 (Continuing)

22 Q Mr. Keller, suppose the following
23 situation: One of your Virginia borrowers purchases the
24 TOP program, the TOP option; the loan is made; Norwest
25 Mortgage subsequently sells the loan to Freddie Mac;

1 thereafter, it comes to light that there is a defect in
2 the title to the real estate that is securing that first
3 deed of trust loan.

4 As a result of that defect, Norwest
5 Mortgage ultimately incurs damage, loss. First off, does
6 that situation occur?

7 A I can't recall it, no.

8 Q You don't think that there has been
9 any call upon Norwest on any TOP product written anywhere?

10 A We've had a claim, but it was
11 unrelated to a title defect.

12 Q All right.

13 Under the above facts, will NMI,
14 Norwest Mortgage, seek to recover the loss from its
15 borrower?

16 A We have a right for some title claims.
17 I'm not familiar, you know -- it might depend on the type.

18 Q Explain what you mean by that.

19 A The borrower does give us a
20 representation of warrantee that he is delivering us good
21 title.

22 Q Right.

23 A And we would have a right to go back
24 against the borrower under that --

25 Q Right.

1 A -- representation of warrantee that
2 they make to us.

3 Q All right.

4 Let me extend that hypothetical just a
5 bit and ask you -- let's assume that the defect was what
6 was called a record defect, I believe an on-record defect
7 that we have been referring to here today. In that
8 situation would Norwest Mortgage seek to -- indemnity from
9 its borrower?

10 A I can't answer that in a hypothetical.
11 I can answer we never have. I know we would have the
12 right to, but --

13 Q Let's --

14 A So it would depend.

15 Q Would it -- would your answer be the
16 same, would it depend if the title defect was in the
17 nature of a nonrecord defect that we have been discussing
18 today?

19 A I don't think that would be
20 controlling in our decision.

21 Q What would control your decision?

22 A I don't know, to tell you the truth.
23 We have never done that.

24 Q Well, Mr. Keller, you know, this is
25 your baby. I mean, you know, you gave it birth, and

1 you're now the Executive Vice President, Chairman of the
2 wholly-owned subsidiary. This has never occurred to you
3 before?

4 A Sure, it's occurred.

5 Q Has there been any discussion?

6 A Our discussion has always been we have
7 never gone after a borrower for a title defect before. We
8 don't expect to in the future, but I'm not going to say
9 that I could create an example of some situation where I
10 would.

11 Q Can you create an example for me here
12 today --

13 A No, I can't.

14 Q --where you might?

15 A I can't.

16 Q Is there any corporate policy of
17 Norwest Mortgage or ATI in regards to actions that would
18 be taken to recover losses suffered on TOP loans, to
19 recover those losses from a borrower?

20 A No.

21 Q The only -- your testimony is the only
22 policy is, that you will cross that bridge when we come to
23 it, or we never have before, and I can't see circumstances
24 where we would? Clarify that point for me.

25 A If that's a policy, we haven't

1 addressed it as a policy. We just don't have the practice
2 of doing that. It doesn't come up often enough to -- I
3 guess we just haven't decided we need a policy.

4 Q It's very difficult to believe that
5 you would go into this extensive program, subjecting the
6 Mortgage Company to some risk, and not have a plan or a
7 policy with respect to what happens when one of these
8 mortgages turns out to be not good.

9 A That's because we have a hundred
10 thousand experiences where it never -- it never comes up.

11 Q You have never had a mortgage that you
12 have ever, in the history of Norwest Corporation -- I'm
13 sorry -- Norwest Mortgage has never had to take a mortgage
14 back from Freddie Mac or Fannie Mae under the repurchase
15 agreement?

16 A Oh, yes.

17 Q As a result of a title defect?

18 A Not that I can recall.

19 Q Never in all of your years of
20 experience with Norwest Mortgage and Dial and the
21 predecessors and throughout the TOP program, you have
22 never --

23 A No.

24 Q -- had to reacquire from a secondary
25 loan purchaser any mortgage on account of a title defect?

1 A No.

2 MR. WAECHTER: Thank you.

3 I think that's all I have for this
4 witness.

5 HEARING EXAMINER: Thank you very
6 much.

7 Redirect, Mr. Peters?

8 (Pause)

9

10 REDIRECT EXAMINATION

11 BY MR. PETERS:

12 Q Do you have the Joint Stipulation
13 book? Is that still in front of you?

14 A Yes, that's this, I believe.

15 Q Mr. Keller, the first document is --
16 No. 1 is this manual, "ATI Title Option Plus" manual.

17 A Yes.

18 Q Do you recall when that manual was
19 prepared?

20 A No, not specifically.

21 Q Would it have been early on in the
22 development of the program?

23 A Well, I would assume so.

24 Q Has the manual gone through revisions
25 from time to time, to your knowledge?

1 A I don't have specific knowledge on
2 that or a specific recollection of that.

3 Q Now, in your direct or, excuse me,
4 your cross-examination testimony under Mr. Thomas'
5 questions, you testified that it is Norwest Mortgage's
6 position that TOP provides the same title protection to
7 borrowers as title insurance provides. Do you recall that
8 testimony?

9 A Lenders' title insurance, yes.

10 Q Lenders' title insurance.
11 Would you explain what you mean by the
12 same title protection to the borrower?

13 A What I mean by the same is that the
14 borrower has no direct protection under a lender's title
15 policy or TOP. My perception is that the borrower would
16 have some indirect protection in that -- both under title
17 insurer issuing a lender's insurance policy or Norwest
18 retaining the risk of title, if they would have to fix
19 defects, and if they fixed them on their own behalf, the
20 offshoot of that is that they would be fixed on the
21 borrower's benefit. But there is no difference between
22 what the borrower gets under either circumstance.

23 Q Does the borrower get direct title
24 insurance protection when there is a lender's title
25 insurance policy?

1 A No.

2 Q Does the borrower get any title
3 protection when there is a TOP program?

4 A Not TOP.

5 Q All right.

6 Again, with stipulated document No. 1,
7 I believe, page 40069, was referenced by Mr. Thomas, and
8 that's the page that lists features and benefits. Under
9 "Feature", he caused you to read, "Meets lender (Norwest)
10 requirement for title insurance."

11 Now, what would be Norwest's
12 requirements for title insurance in the TOP program?

13 A Well, we have none.

14 Q You have none?

15 A -- for title insurance under TOP.

16 Q So that language -- can you explain
17 that language in the context of TOP, the language that I
18 just referenced.

19 A Well, we're suggesting that if we have
20 TOP, there is no need for lender's title insurance. I
21 regret the word "requirement", because we don't require
22 lender's title insurance anywhere anyway, but -- but this
23 means that a benefit of TOP is that you don't need to get
24 lender's title insurance.

25 Q Now, under your testimony, the TOP

1 program works with the borrower's fund -- the TOP fee is
2 taken usually from the borrower's funds; is that correct?

3 A Correct.

4 Q Are there other services provided to
5 the lender in connection with a loan transaction where the
6 borrower provides the funds?

7 A Sure.

8 Q What would be examples of those?

9 A Appraisals, credit reports, surveys,
10 inspections. There may be more, but that's all I can
11 think of at this point.

12 Q Has Norwest Mortgage met or ATI met
13 the revenue projections that were anticipated with the TOP
14 program?

15 A No.

16 Q Now, in answer to Mr. Thomas' question
17 relating to the other lenders that make either first or
18 second mortgage loans without the use of title insurance,
19 I believe you identified Associates Financial; do you
20 recall that testimony?

21 A Yes.

22 Q How about GMAC?

23 A What is the question about them?

24 Q Well, is that a lender that -- tell me
25 whether or not you have knowledge as to whether GMAC,

1 first of all, makes mortgage loans?

2 A Yes, they do.

3 Q Do you have knowledge as to whether
4 GMAC requires title insurance, lender's title insurance on
5 the loans they make?

6 A Yes. They don't always require it.

7 Q You know that from specific knowledge?

8 A Yes.

9 Q Is that true as to both first mortgage
10 loans and second mortgage loans?

11 A I know it for sure only about second
12 mortgage loans.

13 Q Now, under Mr. Thomas' examination,
14 you testified that in the event of a defect of title,
15 Norwest Mortgage has agreed to repurchase the loan from
16 Fannie Mae and Freddie Mac. And that's an agreement that
17 kicks into play whether the defect is a record defect or
18 an off-record defect; is that correct?

19 A That would kick in for any breach of
20 any of our many reps. and warrants we make.

21 Q Now, is that -- are those reps. and
22 warrants unique to Norwest Mortgage, or do they apply --
23 do other lenders make the same reps. and warrants to those
24 secondary market purchasers?

25 A Other lenders make the same reps. and

1 warrants.

2 Q Okay.

3 Do you have knowledge as to whether
4 most lenders make those reps. and warrants?

5 A My opinion is that all lenders make
6 those reps. and warrants to Fannie and Freddie and Ginnie.

7 Q All right.

8 (Pause)

9 Back to a document, stipulated
10 document No. 1, if you turn to page N4000112(sic).

11 (Pause)

12 Now, if you would look at the page
13 that precedes that, does this appear to be a two-page
14 document under the title "Title Condition Report"?

15 A Yes, it does.

16 Q Does it appear to be simply a form?

17 A Yes, it does.

18 Q Has specific information been entered
19 into this, as to who the borrower is and what the title
20 shows?

21 A No. It's a blank.

22 Q All right.

23 So it's a blank form; is that your
24 understanding?

25 A Yes.

1 Q All right.

2 Do you have any knowledge, Mr. Keller,
3 as to whether, in fact, this form of the title condition
4 report, which uses the word "warrants" on page 400112,
5 whether that form has been used in Virginia?

6 A No, I don't.

7 (Pause)

8 Q Now, if you would turn to Exhibit 18.
9 Remember your testimony and the objection I raised to Mr.
10 Thomas about the borrower having signed Exhibit 18?
11 That's the owner/seller affidavit.

12 A Yes.

13 Q Can you tell what the -- excuse me --
14 what the signature name is?

15 A On this one?

16 Q Yes. Look down in the notarial
17 certificate. Does that help you identify the signature?

18 A Yes. The notary printed --

19 Q And what is the name?

20 A The last name is Fritz. The first name
21 is Allen and Rosemary Fritz.

22 Q All right.

23 Now, turn to document No. 19, and this
24 is the matrix that has been introduced by the Bureau of
25 Insurance of all the transactions.

1 A Uh-huh.

2 Q And do you recall -- are you at tab
3 19?

4 A Yes.

5 Q Okay, and you recall that the first
6 column lists the insureds' names and address (sic); is
7 that correct? That's the title the Bureau of Insurance
8 gave to that.

9 A Yes. I'm not -- I don't like the
10 title much, but --

11 Q Now, do you -- look down through
12 there. Do the names appear to be listed in alphabetical
13 order?

14 A They do.

15 Q All right.

16 Why don't you go to the Fs --

17 MR. THOMAS: Your Honor, I will accept
18 for the record that this -- the documents shown
19 on Exhibit 18 are completed by the sellers.
20 These are affidavits that the sellers are
21 required to warrant, and I can vouch for the
22 record that none of the three names would appear
23 in Exhibit 19, so we can move on.

24 MR. PETERS: I appreciate that.

25 THE WITNESS: Was that all caused

1 because I misanswered a question?

2 MR. PETERS: No, it was a misstatement
3 of a question.

4 THE WITNESS: All right.

5 BY MR. PETERS: (Continuing)

6 Q Now, there was a question, Mr. Thomas
7 posed to you as to your original intention to make TOP
8 available to other lenders. Do you remember your
9 testimony?

10 A Yes.

11 Q And I believe your answer was that at
12 the time you did consider that an alternative.

13 A Yes.

14 Q In fact, is TOP available on loans by
15 other lenders?

16 A No.

17 (Pause)

18 Q Now, under Mr. Waechter's cross-
19 examination, introduced into the evidence was Emily
20 Haddad's letter to the Federal Reserve Board, seeking
21 approval by the Federal Reserve Board for the creation by
22 Norwest Corp. of a title insurer. Do you recall that
23 testimony?

24 A Yes, her letter.

25 Q Right.

1 A Yes, I have that.

2 Q All right.

3 Mr. Keller, you testified that you and
4 Mr. Fahey were the co-authors, the originators of the
5 concept of TOP. Speaking for yourself, was the Federal
6 Reserve Board's decision whether or not to authorize
7 Norwest Corporation to own and operate a title insurer a -
8 - the reason that you developed the TOP concept?

9 A No. Not only was it not the reason,
10 it wasn't a reason at all.

11 Q It was not a reason at all?
12 What was the reason you developed the
13 TOP concept?

14 A We were constrained as a title agent
15 in markets with controlled business finance statutes, and
16 anti-affiliation statutes from acting as a title agent in
17 some markets or to the degree that we wanted. We also
18 needed to develop some sort of competitive advantage for
19 our title agency, vis-à-vis the rest of the world out
20 there, and we felt this process met both of those needs.

21 Q Now, these anti-affiliation statutes,
22 are the state statutes?

23 A State statutes, yeah.

24 Q Not all states have these statutes, do
25 they?

1 A No.

2 Q To your knowledge, does Virginia have
3 such a state statute?

4 A I can't recall whether they do or not.

5 Q But you do know ATI, which is a
6 subsidiary of Norwest Mortgage, Inc., which in turn is a
7 subsidiary upstream of Norwest Corp., ATI is licensed in
8 Virginia as a title agency.

9 A Good point. They must not have an
10 anti-affiliation statute.

11 MR. PETERS: Mr. Examiner, it may be
12 the lateness of the day, but I have no further
13 questions.

14 HEARING EXAMINER: Thank you very
15 much.

16 Anything further of this witness?

17 MR. THOMAS: Just one item, Your
18 Honor.

19

20 RECROSS-EXAMINATION

21 BY MR. THOMAS:

22 Q Go back to your Exhibit 20 to the
23 Joint Stipulation, and again, specifically at page 39, it
24 relates to your previous testimony with respect to where
25 you obtained your legal opinion as to the TOP product.

1 Could you please read --

2 MR. PETERS: I'm sorry. I'm having a
3 little trouble finding the right book here.

4 MR. THOMAS: It's Exhibit 20 to the
5 Joint Stipulation.

6 MR. PETERS: I've got it. Thank you.

7 MR. THOMAS: Page 39.

8 (Continuing)

9 Q Could you please read the note that is
10 listed on that page into the record.

11 A Sure. "We have checked with Norwest
12 Corporate Legal and have been advised an O&E first
13 mortgage product does not present any legal risks or
14 regulatory risks other than the insurance commissioner
15 risk identified above."

16 MR. THOMAS: Thank you very much.

17 That's all I have, Your Honor.
18

19 RECROSS-EXAMINATION

20 BY MR. WAECHTER:

21 Q Mr. Keller, referring you back to Tab
22 1 of the stipulated document, the title condition report,
23 which is Bates numbered N400111.

24 HEARING EXAMINER: Could you give me
25 that cite again, Mr. Waechter, I'm sorry. There

1 are so many documents flying around, it's hard
2 to keep up with.

3 MR. WAECHTER: I understand, Your
4 Honor. Tab 1 in the stipulations.

5 HEARING EXAMINER: All right.

6 MR. WAECHTER: Document -- Bates number
7 N400111.

8 HEARING EXAMINER: All right. Thank
9 you.

10 BY MR. WAECHTER: (Continuing)

11 Q In response to the redirect from Mr.
12 Peters, I was confused by your answer, and I want to ask
13 you to clarify it. Did you say that you did not know
14 whether this form had ever been used in Virginia, or did
15 you say this form has never been used in Virginia?

16 A I said I did not know whether it had
17 been used.

18 Q Thank you.

19 A At least that's what I meant to say.

20 Q Now, let me ask you this, Mr. Keller:
21 If Norwest Corporation had been granted the authority that
22 it sought for approval to form a title insurance
23 underwriter, a title insurance company of a wholly-owned
24 subsidiary, are you telling me that TOP would have gone
25 forward?

1 A I don't know what they would have done
2 prior to my getting responsibility for ATI which was not
3 until January of 1993. But I can tell you what my
4 recommendation would have been.

5 Q What would have -- let me ask you
6 this: You acknowledge, I believe, in answering my
7 question and also to Mr. Peters, that ATI was a licensed
8 title insurance agent in this state.

9 A Right.

10 Q And I believe that, therefore, we have
11 no anti -- what are those statutes called?

12 A Anti-affiliation.

13 Q Anti-affiliation statutes.

14 A Apparently.

15 Q Apparently. So that you didn't have
16 that problem in Virginia that you say motivated TOP.

17 A Well, there's also other references to
18 controlled business laws, and I'm not sure if there are
19 any of those in Virginia either.

20 Q Well, what kind of problems with
21 controlled business? Wouldn't you have -- would ATI be
22 able to conduct its business as a title insurance agent in
23 Virginia? Have you had a problem with that?

24 A Yes, but not to the extent we hope it
25 will.

1 Q Do you consider the filling out of the
2 controlled business disclosure -- is that a burdensome
3 regulation?

4 A No.

5 Q Okay.

6 A But that's not the regulation I'm
7 referring to.

8 Q What other state regulation is a
9 problem?

10 A Some states have laws that say that if
11 you're a financial institution, your title agent can't do
12 more than a specified percentage of their business with a
13 controlled company, a controlled financial institution.

14 Q Does Virginia have such a law?

15 A I don't know, to tell you the truth.

16 Q Did you consider that before you
17 decided that Virginia would be one of the states in which
18 you introduced this product?

19 A Those laws were only one of the
20 considerations as to which states.

21 MR. WAECHTER: That's all I have.

22 Thank you, Your Honor.

23 HEARING EXAMINER: Anything further?

24 MR. PETERS: Yes.

25

FURTHER REDIRECT EXAMINATION

BY MR. PETERS:

Q Mr. Keller, Mr. Waechter asked you if Norwest Mortgage -- excuse me -- if Norwest Corp. had been granted federal approval for the creation and operation and ownership of a title insurer, if TOP would have gone forward. You testified you didn't know, but you knew what your recommendation would be. What would your recommendation have been?

A To not go forward as a title insurer.

MR. PETERS: I have no further questions.

HEARING EXAMINER: All right, Mr. Keller. Thank you very much. You may stand down, sir.

* * * * *

WITNESS STOOD ASIDE

HEARING EXAMINER: Exhibit Nos. MJK-18 through -29 will be received into the record.

MR. PETERS: Your Honor, before we proceed, may we have a break?

HEARING EXAMINER: Yes. We will take about a ten minute recess and reconvene at 7:00

1 o'clock sharp.

2
3 NOTE: A recess is taken at 6:52 p.m.,
4 after which the hearing resumes its session at
5 7:03 p.m., as follows, viz:
6

7 HEARING EXAMINER: Mr. Peters?

8 MR. PETERS: Mr. Hearing Examiner, I
9 would like to call Mr. Anthony Byrne.
10

11
12 ANTHONY J. BYRNE, a witness being
13 called by and on behalf of the Defendants, having first
14 been duly sworn, testifies as follows, viz:
15

16 DIRECT EXAMINATION

17 BY MR. PETERS:

18 Q Would you state your full name,
19 please.

20 A Anthony J. Byrne.

21 Q And where do you reside?

22 A I reside in Herdon, Virginia.

23 Q What is your occupation?

24 A I am the district manager for ATI
25 Title.

Q And what district is that? Is that a

1 geographic district?

2 A It's the southeast district.

3 Q And what area is included within the
4 southeast?

5 A It covers from Maryland/Virginia, down
6 through Florida, over to the Mississippi River.

7 Q How long have you had this position?

8 A Approximately -- I started with the
9 Company in February of 1994.

10 Q Is ATI Title the trade name for
11 American Land Title Company?

12 A That's correct.

13 Q All right.

14 What are your job responsibilities?

15 A To develop the market for ATI Title
16 Company in that geographic area I just described.

17 Q Are the people that -- the employees
18 of ATI in your district, do they report to you?

19 A Yes, they do.

20 Q Are you familiar with the TOP program?

21 A Yes, I am.

22 Q And how it's implemented?

23 A Yes, I am.

24 Q All right.

25 Is there another copy of MJK-18

1 available?

2 HEARING EXAMINER: I think the bailiff
3 can accommodate you there.

4 These are the HUD settlement
5 documents.

6 BY MR. PETERS: (Continuing)

7 Q Mr. Byrne, just presented to you is a
8 set of the HUD-1s that are exhibits in this proceeding.
9 Can you tell from the first HUD-1, that down at the bottom
10 has a Bates stamp No. N300102, whether this is a VA
11 insured loan?

12 A Yes, I can.

13 Q And what tells you that?

14 A The box up at the top is checked.

15 Q Under type of loan.

16 A Under the title.

17 Q Item 4, is there an X in the VA?

18 A That's correct.

19 Q All right.

20 Can you tell me whether or not VA has
21 certain requirements with reference to the kinds of
22 charges that may be imposed?

23 A Yes, they do.

24 Q Does the VA allow a settlement agent
25 to charge a settlement fee?

1 A They cannot classify it as a
2 settlement fee.

3 Q It cannot be -- what do you mean "not
4 classify it?"

5 A In their instructions, it specifically
6 states that you cannot charge a settlement fee in the VA
7 instructions, so typically in this state all settlement
8 agents will classify it under another category on the HUD-
9 1.

10 Q All right.
11 If you turn to the next page, which is
12 300103, do you see that, Mr. Byrne?

13 A Yes, I do.

14 Q Now, this page lists a number of title
15 charges. If you look at line 1103, you will see for title
16 examination, there is a \$150 charge there. Do you see
17 that?

18 A Uh-huh.

19 Q Is there a settlement fee charged to
20 the borrower?

21 A No, there is not.

22 Q All right.
23 Now, line 1114, lists a TOP fee, do
24 you see that?

25 A Yes, I do.

1 Q And that's for \$652; is that correct?

2 A That's correct.

3 Q All right.

4 On this transaction, how could it be
5 that ATI charged a title examination fee of \$150 and also
6 charged a TOP fee of \$652?

7 A Well, they didn't.

8 Q Why do you say that?

9 A The TOP fee is a combination, you
10 know, of two fees. The \$150 under the title exam, 1103,
11 is a settlement charge to the borrower in this particular
12 transaction.

13 Q So is it your testimony that the \$150
14 title examination description is a misdescription of a
15 fee?

16 A That's correct.

17 Q All right.

18 Let's turn to the next HUD-1 document
19 now, on page N001772, that's the first page. Could you
20 tell what type of loan this is?

21 A No, not really.

22 Q Why not?

23 A Because there is no check at the top
24 under the type of loan.

25 Q Could it have been a VA insured loan?

1 A Yes, it could have.

2 MR. THOMAS: I wasn't fast enough,

3 Your Honor.

4 BY MR. PETERS: (Continuing)

5 Q All right.

6 Turn to the next page, N001773, do you
7 see a listing for title examination?

8 A I do.

9 Q And do you see a listing -- what is
10 the reference on line 1111?

11 A 1111?

12 Q Yes.

13 A Title Option Plus report.

14 Q What does Title Option Plus represent
15 to you?

16 A The Title Option Plus is the process
17 by which Norwest, you know, retains the risk on their own
18 transactions.

19 Q All right.

20 There is a fee of \$460.

21 A Uh-huh.

22 Q Is that correct?

23 A That's correct.

24 Q How can it be that ATI charged a title
25 examination fee of \$175 and a Title Option Plus fee of

1 \$460?

2 A I would say under this particular
3 instance that you have the same fact situation as the
4 prior HUD-1.

5 Q All right.

6 Mr. Byrne, look at the next HUD-1, on
7 page N001237. Can you tell what type of loan it is?

8 A Once again, I cannot.

9 Q Why?

10 A Because that top box is not checked.

11 Q Can you tell me whether or not this
12 was a VA insured loan?

13 A Not from this document.

14 Q Is it possible that it might have been
15 a VA insured loan?

16 A Yes, sir.

17 Q All right.

18 Turn to the next page, 1238. Do you
19 see a title search fee imposed there?

20 A A title search fee, yes, I do.

21 Q And how much is that?

22 A \$175.

23 Q Do you see a settlement fee imposed
24 there?

25 A Yes, I do.

1 Q How much is that?

2 A \$175.

3 Q All right.

4 Look down at line 1111. Is there a
5 reference to TOP Plus. What does that mean?

6 A Top Plus is a new process whereby in a
7 sale transaction, the way this is written, Title Option
8 TOP Plus in a sale transaction, where the owner is given
9 the option to secure an owner's title insurance policy.

10 Q So if it references TOP Plus, would
11 there have been an owner's title insurance policy sold?

12 A Yes, there would.

13 Q I don't see any reference to an
14 owner's title insurance.

15 A It's on the wrong line.

16 Q Which number is on the wrong line?

17 A Line 1111 should be under title
18 insurance.

19 Q So that amount \$436.80 should appear
20 somewhere else?

21 A Yes.

22 Q On what line should it appear?

23 A Probably 1108.

24 Q Mr. Byrne, how can you explain these
25 misplacements of these numbers?

1 A I would say, you know, it's difficult
2 to explain other than the fact that there is, you know,
3 typo errors when this program was evolving through ATI as
4 to the processes to prepare the HUD-1s. They were unclear
5 as to exactly what line to put it on, and these are some
6 preliminary, initial mistakes that were corrected as we
7 went through time.

8 Q Now, Mr. Byrne, I would like you to
9 turn to -- do you have the stipulation book up there?

10 A No, I do not.

11 MR. PETERS: Mr. Thomas, may we borrow
12 that?

13 HEARING EXAMINER: And would you also
14 return that exhibit to the bailiff, please.

15 Thank you.

16 BY MR. PETERS: (Continuing)

17 Q Mr. Byrne, would you turn to document
18 No. 18.

19 A Okay.

20 Q Do you have that? Are you familiar
21 with that owner/seller affidavit that appears at the first
22 page of document 18?

23 A I am.

24 Q Have you previously looked at it?

25 A Yes, I have.

1 Q Did you look at it at my request?

2 A Yes, I did.

3 Q Was that in preparation of this
4 proceeding?

5 A Yes, it was.

6 Q All right.

7 I want you to look down in the
8 language that is just before the signatures on the lines.
9 Do you see the language that appears to have been typed in
10 there?

11 A I do.

12 Q And would you read that language.

13 A "This affidavit is given to induce ATI
14 TITLE COMPANY and to issue their policy of title insurance
15 with full knowledge that the Company will rely upon the
16 accuracy of same. I/We hereby affirm and state under
17 penalty of perjury that the statements made herein are
18 true."

19 Q All right, Mr. Byrne. Is there
20 something wrong with that language in the first line?

21 A Well, I think it leaves out the
22 underwriter's name.

23 Q And the underwriter would be --

24 A Whoever insured this transaction. It
25 could be Stewart Title; it could be Chicago Title.

1 Q But when the language says ATI Title
2 Company, to issue their policies of title insurance, does
3 ATI Title Company issue policies of title insurance?

4 A Only on behalf of an underwriter.

5 Q As an agent?

6 A As an agent.

7 Q All right.

8 Now, turn to the next page, which is
9 N101464. That's another owner/seller affidavit.

10 A I need to take this apart, but the
11 next page on this?

12 Q Yes, uh-huh, still under tab 18.

13 A Okay.

14 Q Now, this one does not appear to have
15 typewritten information, but just above the signatures
16 there is printed language. Would you read that language.

17 A "This affidavit is given to induce ATI
18 TITLE COMPANY and STEWART TITLE GUARANTY COMPANY to issue
19 their policies of title insurance with full knowledge that
20 the Company will rely upon the accuracy of same. I (sic)
21 hereby affirm and state under penalty of perjury that the
22 statements made herein are true."

23 Q All right.

24 Now, having read that, does that tell
25 you anything about the type of transactions this affidavit

1 was used with?

2 A About the type of transaction? I
3 would say that there was a sale involved here.

4 Q Do you know whether it was a TOP
5 transaction?

6 A No.

7 Q You don't know?

8 All right.

9 How could it be -- go back to the
10 prior page. How could it be that the language would have
11 been typed in rather than preprinted?

12 A The only thing I can say to that is
13 that, you know, this is kind of a generic form that title
14 agencies share among themselves sometimes, and I would say
15 that this may have been pre-prepared on a computer or
16 generated by a computer, and they put in some information
17 on there just as an inducement clause. It doesn't change
18 the affidavit.

19 I can't tell you why that was typed in
20 there.

21 Q All right.

22 Mr. Byrne, go to the third page under
23 tab 18. This is page N200881. Do you see preprinted
24 language just above the Blevins' signatures?

25 A I do.

1 Q Would you read that.

2 A "This affidavit is given to induce
3 NORWEST MORTGAGE, INC. to make its loan secured by the
4 property, and to induce ATI TITLE COMPANY to issue its TOP
5 Final Title Condition Certificate, with full knowledge
6 that Norwest and ATI will rely upon the accuracy of same.
7 I/We hereby affirm and state under penalty of perjury that
8 the statements made herein are true."

9 Q All right.

10 Tell me whether or not this affidavit
11 is an affidavit used in connection with the TOP program?

12 A I would say it is.

13 Q Why do you say that?

14 A It states so, that it's asking -- you
15 know, inducing ATI to issue its TOP Final Title Condition
16 Certificate.

17 Q All right, Mr. Byrne. We have just
18 reviewed three different forms of that particular
19 paragraph in owners/sellers affidavits. How do you
20 explain the three different forms that were used?

21 A I would say, once again, that you had
22 an evolving process here. The last form is the proper
23 form, that, you know, as the program evolved, these were
24 generic forms that were not designed for the TOP product,
25 and individuals were doctoring them up. As we went

1 through our audit process, we found out the discrepancies
2 and corrected it (sic) to properly reflect what the
3 process was.

4 MR. PETERS: All right.

5 That's all I have.

6 HEARING EXAMINER: Mr. Thomas?

7
8 CROSS-EXAMINATION

9 BY MR. THOMAS:

10 Q Mr. Byrne, in your direct testimony
11 you said that TOP is a combination of two charges. Would
12 you please explain what those two charges are.

13 A Well, traditionally, and depending on
14 the area, ATI will take a title examination charge and a
15 charge similar to what is reflected by title insurance,
16 combine those and reduce the amount.

17 Q Okay, so that the charge for the title
18 examination was included in the TOP fee.

19 A Yes, sir.

20 Q And do you know if that's the case
21 here in Virginia?

22 A Yes, in most areas, yes, if ATI
23 settles a transaction. It differs by area.

24 MR. THOMAS: I would ask that Exhibit
25 MJK-18 be placed in front of the witness,

1 please.

2 (Pause)

3 (Continuing)

4 Q Now, turning to the second HUD-1 in
5 that exhibit, with the Bates No. N001772, and particularly
6 at the top of that page, your testimony was that there is
7 no check mark indicating what type of loan that this HUD-1
8 was on; is that correct?

9 A That's what I said. I believe that's
10 what I said.

11 Q And your testimony was that it
12 probably could be a VA loan.

13 A That's what I said.

14 Q Isn't it just as likely that it could
15 be an FHA loan?

16 A Yes, sir.

17 Q Or it could be an FMHA loan.

18 A Yes, sir.

19 Q Or a conventional loan.

20 A Yes, sir.

21 Q All right.

22 Now, I believe it was your testimony
23 that in the -- early on, when these documents were used at
24 Norwest, or I should say ATI employees did not know how to
25 complete the documents, vis-à-vis the TOP product; is that

1 a fair characterization?

2 A Well, I don't know that I said did not
3 know how to do it.

4 Q Well --

5 A Maybe you can read that back.

6 Q Did you say that --

7 A They may have been confused.

8 Q And that confusion was early on, as
9 far as the TOP product was concerned, in how to adequately
10 document that on a HUD-1; is that correct?

11 A With some of our employees, yes. You
12 may have had new employees that were confused even later
13 on.

14 Q Now, what was the date of this?

15 A 6/14/95.

16 Q Okay.

17 When was TOP introduced in Virginia?

18 A Back in 1994, sometime, March.

19 Q March of 1994?

20 A Approximately.

21 Q When was TOP Plus introduced in
22 Virginia?

23 A I think in March of this year.

24 Q All right.

25 Going to the -- I believe it's the

1 third HUD-1 in this exhibit. It's Bates numbered N001237,
2 and turning to the second page of that exhibit, on line
3 1111, it shows "Title Option - TOP Plus", and a number of
4 436-80, and I believe it's your testimony that that number
5 is incorrect.

6 A I didn't say that. Without analyzing
7 this entirely and looking at the file, Title Option - TOP
8 Plus could be a TOP Plus, Title Option could just be the
9 Title Option Plus, depending on how they classified it.

10 Q Okay.

11 If -- I know it's difficult when you
12 have Title Option Plus and Title Option Plus Plus. As
13 respects the reporting of the fee, if the cost of TOP Plus
14 is \$10, and that fee is charged the borrower, where would
15 I report that fee on the HUD-1?

16 A Title Option Plus Plus, you're talking
17 about.

18 Q Right. Where I select an owner's
19 policy in conjunction with TOP. It's my understanding in
20 the testimony here before the Hearing Examiner today is
21 that I, the borrower, am charged a \$10 fee for TOP, and
22 then I pay whatever the premium is for the owner's title
23 insurance policy.

24 A That's correct.

25 Q Now, where would those two numbers be

1 reported on the HUD-1?

2 A Well, typically you would put the \$10
3 under line 1111, if that charge was so made, and you would
4 put the title insurance under the title insurance line.

5 Q Are you aware of any controlled
6 business laws in Virginia?

7 A No.

8 Q -- which impact ATI Title agency from
9 conducting its business here in Virginia?

10 A No.

11 Q Are you aware that in Virginia that
12 banks and other lenders are permitted by statute to sell
13 or -- I should say are permitted by statute to obtain a
14 license as an insurance agency?

15 A I am not familiar with the banking
16 work in the State of Virginia.

17 Q All right.

18 MR. THOMAS: That's all I have, Your
19 Honor.

20 HEARING EXAMINER: Mr. Waechter?

21 MR. WAECHTER: Yes, sir.

22
23 CROSS-EXAMINATION

24 BY MR. WAECHTER:

25 Q Mr. Byrne, how much time do you spend

1 in -- what office are you out of?

2 A Falls Church.

3 Q How much time do you spend there?

4 A Oh, several days a week.

5 Q It's a pretty big territory. Do you
6 travel this territory?

7 A Yes, I do.

8 Q On a regular basis?

9 A Yes, I do.

10 Q And did I understand your description
11 of your duties as primarily a marketing type job?

12 A Well, it's administrative and
13 marketing.

14 Q Okay.

15 You don't have any personal knowledge
16 of these transactions?

17 A No, I do not.

18 Q Okay.

19 So you really -- as Mr. Thomas, I
20 believe made clear, your comments about MJK-18 are --
21 insofar as what may or what may have been (sic) are just
22 speculative.

23 A As far as the VA, no. As far as on
24 the particular line, you know, I would say no because I
25 have had conversations with the employees as I did

1 personal audits on files through a quality control program
2 that I discovered such mistakes as these, and we corrected
3 them. It may not have been on these particular files
4 though.

5 Q All right.

6 Now, did I understand you to say -- to
7 state that you're not permitted to -- VA does not permit a
8 settlement charge to be made in connection with a real
9 estate settlement on a VA insured loan?

10 A VA words its closing instructions in
11 such a way that they do not want you to call it a
12 settlement charge.

13 Q Why don't they want you to call it --

14 A I can't speak for the VA.

15 Q Okay.

16 Doesn't that suggest to you that they
17 don't --

18 A No, because you can call it an
19 attorney's fee or something else like that. No, it does
20 not.

21 Q And so it's the policy in your office
22 to intentionally misdescribe as in the case of the Burke
23 file --

24 MR. PETERS: Your Honor, I object to
25 the question. His testimony is not that he has

1 intentionally misdescribed. That's got an
2 nefarious tone to it that I don't think is
3 called for.

4 BY MR. WAECHTER: (Continuing)

5 Q It's the policy of your office to list
6 on the HUD-1 form for VA loans a settlement charge under
7 something other than line 1101, settlement or closing fee.

8 A Well --

9 Q Yes or no, please.

10 A Okay, yes.

11 Q Thank you. Now go ahead. Answer --
12 if you --

13 A Typically, you know, there is --
14 settlement charges, examination charges, closing fees are
15 flipped around in the industry, and people call them
16 different things, and there is no clear description of
17 what an exam is or what a search is or what a settlement
18 charge is, and if you examine HUD-1 forms throughout the
19 industry in different areas, you will find that.

20 Q All right, sir.

21 Can I have the bailiff --

22 (Pause)

23 Now, Mr. Byrne, the first HUD-1
24 statement in Exhibit MJK-18 is for the Robert B. and
25 Catherine S. Burke purchase; is that correct,

1 borrower/purchaser?

2 A I don't know which one you're talking
3 about. What Bates -- is that a reference to a HUD form,
4 or --

5 Q There is an Exhibit MJK-18 which I
6 thought was before you, a collection of HUD-1 forms that
7 you testified about a few moments ago in response to Mr.
8 Peters' questions.

9 A I can only identify them by the Bates
10 number. I don't have --

11 Q If you look up there under -- the
12 first page -- yes. I'm sorry, Bates number N300102.

13 A Okay.

14 Q And what is the name of the borrower?

15 A The borrower is Burke, Robert B. Burke
16 and Catherine Sheldon Burke.

17 Q All right, sir.

18 I have just asked the bailiff to place
19 before you a document that is a Consumer Title Status
20 Election, First Lien Option - PURCHASE.

21 A Uh-huh.

22 Q And I would ask you to -- does it
23 appear to you that the signatures on the bottom of that
24 page might be the Burkes?

25 A I don't know.

1 Q Do they appear to be perhaps the same
2 signatures that as are on the bottom of the second page of
3 the HUD-1?

4 A They appear that way.

5 Q I would represent to you, sir, that if
6 you look at the matrix of documents produced by subpoena,
7 that that document that I have asked you about, N300323,
8 came out of the Burke closing file, and I think that the
9 exhibit will so bear that out.

10 A Okay.

11 Q Now, I would ask you, sir, under
12 Option C, to tell me what settlement fee was set in -- set
13 out for price comparison purposes for the Burke
14 transaction? Would you look at document N300323?

15 A Uh-huh.

16 Q If you go up there to your cost
17 comparisons, and you look under Option C, ATI Title
18 Condition Report --

19 A Uh-huh.

20 Q Would you tell me how much of a
21 settlement fee was to be charged to the Burkes according
22 to this document?

23 A This says zero.

24 Q And what is the settlement fee
25 disclosed for Lender's Title Insurance?

1 A You're talking about Option A?

2 Q Yes, sir.

3 A \$150.

4 Q And Option B.

5 A Option B, \$150.

6 Q All right, sir.

7 Now, that's the same \$150 -- I'm
8 sorry, not those, but where there is a zero on this form
9 under Option C, your testimony is that, in fact, the
10 borrowers were charged \$150 for a settlement fee which was
11 identified -- I'm sorry, not identified, but was stated on
12 line 1103 of the HUD-1; is that correct?

13 A I think that's what I said.

14 Q All right, sir.

15 I'm going to ask you to look up on --
16 under Option C, and I'm going to ask you to tell me how
17 much was disclosed to the Burkes in connection with
18 abstract fee.

19 A Zero.

20 Q And what was the abstract fee in the
21 event of a lender's title policy or lender's and owner's
22 title policy?

23 A \$150.

24 Q So there were two \$150 charges for the
25 title insurance option; is that correct?

1 A That's correct.

2 Q And there were none for the TOP.

3 A That's correct.

4 Q How many \$150 charges were made to the

5 Burkes?

6 A How many \$150 charges were made to the

7 Burkes?

8 Q Uh-huh, in the course of their

9 settlement?

10 A The Burkes were the borrowers?

11 Q Yes, sir. That's what your form says.

12 A One.

13 Q How many were disclosed to them in the

14 Consumer Title Status Election?

15 A One.

16 Q Where?

17 A It depends on the option they chose.

18 Q Option C.

19 A Well, evidently this may have been a

20 sales transaction, sir, and this is prepared by the loan

21 originator at the time --

22 Q You're not answering my question.

23 A I'm trying to explain the difference.

24 This is done by the loan officer at the point of sell as

25 to the different charges, as to whether they want a TOP or

1 a TOP Plus or a lender's title insurance. This HUD-1, I
2 believe, shows -- I'm not sure. I would have to analyze
3 the file. Possibly it was an owner's policy issued, which
4 means that the borrower changed their mind at the
5 settlement table or subsequent to that and decided they
6 wanted an owner's policy, so it wouldn't be included.

7 Q That can't happen. Where is an
8 owner's policy disclosed on this HUD-1?

9 A Once again, I'm saying it could be in
10 the wrong category. It could be classified improperly.
11 It's classified as a TOP when it should be under title
12 insurance, and --

13 Q The documents that you were requested
14 to produce by subpoena -- were you employed by ATI when
15 the subpoena was served?

16 A Yes, sir.

17 Q Was it served on you?

18 A Yes, sir.

19 Q Did you supervise the procuring of the
20 documents from your files?

21 A Yes.

22 Q What did that subpoena ask for? Did
23 it ask for every closing file?

24 A Yes, sir.

25 Q Every closing file in your office?

1 A And that's what we gave them. No, it
2 asked for TOP files.

3 Q That's what I thought, sir. That's
4 not every closing file, is it?

5 A No, sir.

6 Q All right.

7 A But a TOP Plus is a TOP file, if an
8 owner's policy is issued.

9 Q On the matrix -- let me ask you this -
10 -

11 A I don't have a matrix.

12 Q Let me ask you, do you find any
13 evidence on this HUD-1 of an owner's title policy, being
14 bought by the purchaser?

15 A If I had a calculator and looked at
16 the amount of insurance, I could make a determination
17 whether it was or wasn't.

18 Q So that in addition on this HUD-1 form
19 under your testimony, in addition to misstating the nature
20 of the \$150 charge, your employees would have misstated
21 the TOP fee.

22 A They didn't misstate the nature of the
23 \$150 on the HUD-1, if it was a sales transaction, sir.
24 They misstated the owner's insurance under TOP where it
25 should have been under title insurance, and the other \$10

1 fee sometimes, you know, for the simultaneous issue, if
2 one was issued, it's frequently waived.

3 Q I would like to direct your attention
4 to the bottom left-hand corner of the document in 300323.
5 I would ask you if based on your review of that, can you
6 tell which option the Burkes selected?

7 A At the time of the point of sale, they
8 selected Option C.

9 Q And are you saying that -- so it's
10 your testimony you believe that the Burkes changed their
11 mind?

12 A I believe that's exactly what
13 happened. At the time of the closing transaction, when
14 they were notified, you know, to sign a waiver, and when
15 the realtor got involved in the picture, that the Burkes
16 changed their mind and we issued a title insurance policy,
17 plus a TOP certificate to Norwest.

18 Q And made no changes on the HUD-1.

19 A I believe we made some changes. We
20 put the \$150 in there as the title examination fee which
21 would happen because that wouldn't be included in the TOP
22 fee, and that the 6-52 is improperly classified.

23 (Pause)

24 MR. WAECHTER: Your Honor, I would
25 like to have document Bates No. N300323 admitted

1 into evidence.

2 HEARING EXAMINER: The document will
3 be marked as Exhibit No. AJB-30.

4 MR. WAECHTER: I have nothing further
5 of this witness.

6 HEARING EXAMINER: Mr. Peters?

7 MR. PETERS: I have no further
8 questions.

9 HEARING EXAMINER: Anything further of
10 this witness?

11 MR. THOMAS: Your Honor, I just want
12 to clear up one point.

13 MR. PETERS: Your Honor, let's see
14 here. We have gone -- I'm trying to keep track
15 of the shifting of this ping pong ball on this
16 witness -- cross-examination of Mr. Byrne --

17 MR. THOMAS: I could -- never mind,
18 Your Honor.

19 MR. PETERS: I have no redirect. I
20 don't think --

21 MR. THOMAS: Your Honor, we can let
22 this dead horse lie.

23 I have the Burke closing file, and I
24 will raise my arguments with respects to the
25 handling of the Burke file on any subsequent

1 brief.

2 HEARING EXAMINER: All right.

3 Mr. Byrne, thank you very much. You
4 may stand down.

5 AJB-30 is received into the record.

6 * * * * *

7 WITNESS STOOD ASIDE

8
9
10 HEARING EXAMINER: Mr. Peters?

11 MR. PETERS: We rest our case.

12 HEARING EXAMINER: All right.

13 What I would like to do at this point
14 is establish a briefing schedule for the case.

15 MR. THOMAS: Your Honor, are you
16 amenable to suggestions?

17 HEARING EXAMINER: Certainly.

18 MR. THOMAS: I will put this out
19 before all counsel. My recommendation would be
20 that we -- we, being the Bureau of Insurance,
21 and Lawyers Title would file any brief within 21
22 days from the date that the transcript is filed
23 in the Clerk's Office. Norwest would have a
24 further 21 day period within which to file their
25 brief, and then the Bureau and Lawyers Title be

1 permitted an additional ten days beyond that to
2 file any rebuttal brief.

3 HEARING EXAMINER: Is that agreeable
4 to counsel?

5 MR. WAECHTER: Your Honor, I guess
6 maybe I would like to ask the reporter when she
7 thinks the transcript is going to come out. I
8 have no problem with the 21/21/10 approach. I
9 just wonder, you know, some of us may not want
10 to be writing a brief on New Year's Eve or
11 trying to get one here. There is a holiday
12 schedule coming up, and I understand it's an
13 important case, and I understand it's a very
14 important case for Mr. Peters' client. I say
15 that in all sincerity. I'm not trying to drag
16 it out, but I just wondered if maybe we had some
17 -- we might be able to work with some actual
18 fixed dates as opposed to --

19 HEARING EXAMINER: I think the
20 transcripts are normally filed about three weeks
21 after the hearing. Am I correct, Ms. Court
22 Reporter?

23
24 NOTE: The reporter responds in the
25 affirmative.

1
2 HEARING EXAMINER: I don't know where
3 that is going to put us, but I think it's going
4 to put us exactly in the middle of the holidays.

5 (Laughter)

6 MR. WAECHTER: If that's the way it
7 has to be, that's the way it has to be, Your
8 Honor. I just wanted to point that out.

9 HEARING EXAMINER: Well, I will go
10 ahead and adopt the briefing schedule proposed
11 by Mr. Thomas. If the holidays present some
12 type of insurmountable problems, I will
13 certainly entertain any motions to extend that
14 briefing schedule.

15 Just to repeat, the opening briefs of
16 the Staff and Lawyers Title will be due 21 days
17 after the filing of the transcript in the
18 Document Control Center.

19 Mr. Thomas, I would like to ask you to
20 notify counsel as soon as that transcript is
21 filed so the dates will be firmed up as far as
22 when the briefs need to be here at the
23 Commission.

24 MR. THOMAS: Certainly.

25 HEARING EXAMINER: The Defendants'

1 opening brief will be due 21 days after the date
2 established for the Staff and Lawyers Title
3 brief, and then again, ten days after the filing
4 of the Defendants' brief, reply briefs can be
5 filed by Lawyers Title and the Commission Staff.

6 Is there anything further we need to
7 address?

8 (No response)

9 Very well, I would like to thank
10 counsel for their patience, their presentation.
11 I think we have a very detailed record on which
12 we can render a decision in this case, and if
13 there is nothing further, the Commission will
14 stand adjourned.

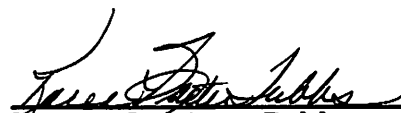
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16 NOTE: The hearing is adjourned at
17 7:42 p.m.
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CERTIFICATE OF COURT REPORTER

I, Karen Baxter Tubbs, a court reporter with Associated Reporters, Official Court Reporters with the State Corporation Commission, Richmond, Virginia, hereby certify that I was the court reporter who took down and transcribed the matter herein when heard on November 15, 1995, before the Honorable Glenn P. Richardson, Senior Hearing Examiner for the State Corporation Commission, Richmond, Virginia.

I further certify that the foregoing transcript is a true and accurate record of the testimony and other incidents of the hearing herein, taken down and transcribed by me to the best of my ability.

Given under my hand this 11th day of December, 1995.



Karen Baxter Tubbs
Official Court Reporter