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***411 PROTECTING TITLE IN CONTINENTAL EUROPE AND THE UNITED STATES -- RESTRICTION
OF A MARKET**

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I. INTRODUCTION

Out of the many issues facing homebuyers, arguably, the most important is ensuring that title to their property is free and clear of encumbrances. Property with defective title risks being the subject of a claim brought by, among others, someone claiming superior title, or a financial institution holding an unsatisfied mortgage. The buyer must follow jurisdictionally prescribed protocols in order to ensure and protect ownership rights over property, and avoid later claims. This paper will compare title protection procedures and costs for residential real estate in United States and Continental Europe. The different procedures for ensuring transfer of good title, or at least financial protection from third party claims, are the result of each region's unique historical development. [FN1] In the United States, the title insurance industry provides the process in which homebuyers and lenders protect their rights; [FN2] however, throughout much of Europe, the Latin notary, an impartial [FN3] state licensed [FN4] official, is ordinarily charged with the duty of ensuring that the buyer acquires good title, through registration in the land title registry, providing the buyer with a rebuttable presumption of its validity. [FN5] Other than the manner in which title research is performed, these two systems have little in common regarding the rights and responsibilities surrounding this crucial aspect of the real estate transaction, and yet, have faced similar controversies in recent years regarding their business structure and costs for the services.

***412** The beginning of this paper will look at some of the general consistencies in the Continental European market regarding title protection, highlighting a few differences among some countries. This paper will discuss Continental European systems that utilize the Napoleonic Code, as well as some central European countries such as Germany and Switzerland. Additionally, this note will provide a brief account into the Latin notary's additional duties and his position as an intermediary for the transaction as well as his role investigating and authenticating title. The note will then examine some recent controversies regarding the general organizational structure of the Latin notary system, which directly impacts transaction costs. The next section will provide background on the American title insurance industry, and the role it plays in the residential real estate transaction. It will then focus on the manner in which the purchaser obtains title insurance and the included costs. The following section will discuss some recent controversies as to the ratio of the cost to provide the service and the price charged, as well as issues regarding the competitive inequities existing in both the Latin notary and the title insurance markets. Finally, the last section of this paper will explore some of the recent reforms being discussed and implemented as well as look into two jurisdictions that have taken their own steps in reforming their respective industries.

II. EUROPEAN PROTECTION OF TITLE

A. Registration of Property

Property in Europe is usually registered under two registration schemes, depending on the rules of a given jurisdiction. [FN6] The cadastre is based on a technical survey and mapping of the land, and the land register registers and charges ownership of that land. [FN7] Because it focuses on ownership and rights, this paper will discuss only the land register; however, *413 an accurate cadastre is critical to create an accurate land register in order for relevant data to be exchanged and referenced between the two. [FN8]

Because of its importance, the State performs the land registration function [FN9] and registrars are ordinarily highly educated [FN10] to ensure a high standard of reliability. [FN11] Countries often require that all property be registered [FN12] for a variety of reasons, including: creating legal certainty regarding the true owner of the property, preventing disputes, protecting the interests of all parties involved, [FN13] and even raising national affluence. [FN14] In addition to unencumbered property interests, registries usually contain a record of partial property interests such as easements, and mortgages, [FN15] with the order of priority determined by either the registration date, [FN16] or, in some instances, the date of the registration application. [FN17]

Two basic land registry systems have developed in continental Europe: (1) the land book, which registers rights in Central Europe, Portugal and Spain, [FN18] and (2) the mortgage register or register of deeds, [FN19] which is used in other countries using the Napoleonic Code to register documents. [FN20] While the finer points of each country's registration system are specific to the historical development and culture of each country, many similarities exist between them. This paper will therefore examine some of the general commonalities existing within continental Europe.

Depending on the system, registration either has a constitutive effect [FN21] or declaratory effect. [FN22] Constitutive registration creates a rebuttable presumption [FN23] that the registered right belongs to the person named in the *414 registry, [FN24] while declaratory registration functions as evidence for opposing third party claims [FN25] and as the sales contract transferring ownership between the parties to the sale. [FN26] Generally, bona fide third parties are protected as long as they purchase in good faith from a seller who is listed in the register. [FN27] However, some countries with declaratory registration systems may not protect even the good faith bona fide purchaser, [FN28] and still others may only protect the first bona fide third party purchaser to register. [FN29] Interestingly, unlike the United States, possession usually does not play a role in the registration and acquisition of title in the European system unless prescription is at issue. [FN30]

Because registration is so crucial to ensure the owners' property rights, any registration errors may be attributed to the individual who improperly registered. [FN31] The act of registration almost always requires an authentic act or at least that the documents be certified [FN32] in order to prevent fraud and maintain the registry's integrity and accuracy. [FN33] Generally, authentic acts must be subscribed by a notary, and even in those countries where mere certification of the signature without legal counsel is sufficient, the notary's participation is usually required elsewhere in the transaction. [FN34] The notary's duty in securing title is merely part of his role in the real estate transaction. Therefore, the following subsections will explain not only the notary's duties regarding securing good title, but his other duties which often are interrelated. Because of these interrelated duties, the notary's fees are usually based on more than just his role as it relates to securing title.

*415 B. The Latin Notary

1. Notary in General

The evolution of their respective legal systems has caused the American common law notary and the Latin notary (“notary”), found in civil law jurisdictions, to have little in common. [FN35] Though they both have the power to attest to a document's authenticity, the Latin notary has additional duties which are much more analogous to many American lawyers. [FN36] However, as a general proposition, the Latin notary rarely participates in judicial proceedings [FN37] and is not an advocate. Instead, he acts as an advisor who judges the legality of a transaction. [FN38]

The notary has three primary, often exclusive, duties granted to him by the state. [FN39] The notary performs the public act of authentication, conclusively establishing that a document or instrument is genuine, and that its contents are accurate with regard to what the notary saw and heard during its preparation. [FN40] Notarially authenticated documents have such high evidentiary value that contradictory evidence is inadmissible in ordinary judicial proceedings, and a special action must be brought in order to challenge its veracity. [FN41]

A second duty of the notary is that of a public records office. [FN42] The notary must archive the original of every instrument he prepares. [FN43] The notary organizes the originals of these documents in the protocolo which is bound into volumes. [FN44] Although officially belonging to the state, the notary keeps the protocolo at his office. [FN45] Because he holds his position for life, as *416 long as he is in good standing, it is kept there until he leaves office, either by his death, retirement, or other reason. [FN46] The protocolo's contents are confidential, comparable to a limited attorney-client privilege, [FN47] and if the notary breaches his duty in this respect, he is subject to similar penalties as an American lawyer who does the same. [FN48]

The notary's final duty is document-creation. The notary drafts important legal documents such as contracts, wills, corporate charters, land conveyances, [FN49] and documents relating to family legal matters. [FN50] These documents often require the notary to perform extensive research into the legal and factual aspects of the document's contents, and he must properly draft them in order to give “proper legal form to the agreement desired by the parties.” [FN51] This note, however, will only analyze the notary's duties and documents in terms of a real estate conveyance.

2. Notary and Negotiations

An individual party to a real estate transaction may hire a notary to act as an advisor and ensure that his financial interests are adequately represented. [FN52] Because the property buyer has the right to choose his own notary, he should be aware that any notary recommended by an estate agent is probably representing that agent's interests. [FN53] On the other hand, when both parties to a land transaction hire a single notary to facilitate the sale, the notary owes a duty to the transaction itself [FN54] as a representative of the public interest in its fairness. [FN55] However, he may also owe an affirmative duty to the inexperienced parties to a transaction which, if breached, may result in damages. [FN56] While acting as the representative to the transaction, the notary must be impartial, “advising both parties and disclosing all the defects as well as the advantages of the property in question.” [FN57] In fact, it is “the notary's responsibility to verify that the seller has good title and that *417 any liens or mortgages can be discharged with the purchase price,” [FN58] and he must ensure that the parties understand their rights and liabilities regarding the sale. [FN59] Even though the seller is liable for such defects, and may be subject to an action in damages, should the notary to the transaction fail to make the proper inquiries, he may be held jointly and severally liable to the buyer. [FN60]

It is not uncommon for the parties to a sale of land negotiate a lower price to be subscribed by the notary in order to avoid paying certain taxes on the transaction. [FN61] The difference between the stated price and the purchase price is then paid “under the table” without informing the notary. [FN62] Such a transaction, however, is illegal [FN63] and risky. Since the notary has no knowledge of this secondary transaction, in the event that an encumbrance is later discovered the buyer may only recover the recorded purchase price. [FN64] Therefore, unless the parties to the transaction truly trust one another, it is wisest for the buyer to allow the notary to perform his duties properly to ensure complete legal protection from potential defects.

The information gathered during negotiations is usually protected by a certain amount of confidentiality. However, in line with the notion that notaries have been entrusted by the government to perform the public duty of authenticating such public documents, [FN65] the notary may inform nonparties to a transaction of encumbrances that should be reflected in the registry even if he received that information from a party to a notarial transaction. [FN66]

3. Notary and the Documentation

Along with the negotiations between parties, the notary is responsible for drafting or authenticating most of the official documents relating to a real estate transaction. [FN67] Because of the important public nature of these documents, notaries must be experts in the substantive law applicable to the transaction at hand. [FN68] They are expected to perform their duties based on the status of the law at that time, [FN69] and thus must be constantly abreast of the latest legal developments.

***418** Often, the notary is charged with the exclusive responsibility of drafting the actual contract of sale, acting as a sort of insurance policy. [FN70] However, the notary is only sometimes required to authenticate the contract which would give it legal force. For example, even though German law requires notarial attestation for the contract of sale, it does not affect actual transfer of title. [FN71] In Napoleonic Code countries such as France, Italy, and Spain, the contract of sale does not necessarily require authentication because it precedes the registration. Although it transfers ownership as between the parties, [FN72] the contract of sale, even if authenticated, does not always have a public effect on the actual transfer of title. [FN73] Nevertheless, it is probably in the buyer's best interest to have a notary authenticate the contract of sale. [FN74] Even though it adds another fee to the transaction, contractual authentication provides another level of security. In practice, even if not required, contracts of sale are nearly always authenticated. [FN75] The contract of sale is often binding between the parties, with or without notarial involvement, but the finalization of real property transactions requires authentication because they “require public documentary form, in order to enter into the public registry and to bind third parties.” [FN76]

While the sales contract may not have to be notarized, [FN77] a formal and valid sales contract may serve to transfer title to the purchasing party. [FN78] In France, the notary drafts the acte de vente, [FN79] or deed of sale, after verifying the “situation of the real estate at the registry of deeds” and obtaining information from registered creditors about the amounts required to discharge mortgages. [FN80] However, an official copy of an acte de vente only shows that a piece of property was purchased on a specific date, and not that it is currently owned by that party, [FN81] so diligent research is imperative in order to ensure transference of good title.

***419** Upon completing the documents of sale, the parties will gather, usually at the notary's office, where he will read those documents out loud and answer any questions the parties may have regarding their contents and meaning. [FN82] While some may see this as an unnecessarily cumbersome ceremony inevitably adding to the

final costs, [FN83] it does provide some amount of security to the parties. [FN84] Unless each party has hired his own notary, no other person checks the work of the draftsman. [FN85] Because of this, and the fact that the notary usually holds monopoly over this type of transaction, [FN86] the notary finds himself in a position of extraordinary responsibility regarding the quality of his work. [FN87] Because notaries are subject to three different types of liability, [FN88] it is in their best interest to aspire to the highest quality, but like many similar liberal professions, liability insurance is available to offset the costs of a mistake or breach. [FN89] However, because the state strictly regulates the number of available positions, the appointing authority may also revoke professional status in the event of malfeasance or negligence [FN90] in a further effort to preserve the integrity of the profession.

4. Notary and the Registration

The land registry enables “the exact ownership relationships and encumbrances of real estate to be determined at any time, and a relatively high legal security prevails” [FN91] For this reason, it is common, if not required, for all transactions involving real estate to be registered with the national land registry. [FN92] Because the registry is State-run, its documents are public and the notarial authentication requirement [FN93] ensures the highest evidentiary value. [FN94]

*420 Despite the notary's monopoly over the preparation of the sales documents, jurisdictions vary as to who bears the duty to enter them into the registry. For example, in France, only the notary may register *acte de vente*, [FN95] which must be done soon after the completion of the sale [FN96] in order to put third parties on notice of prior claims to title. [FN97] On the other hand, Germany considers registration a judicial act, normally performed by a judicial officer [FN98] exercising independent authority and subject to review by the Registrar of Titles. [FN99]

In Napoleonic Code countries such as Italy, Spain, and France which require two contracts in order to complete the sale, [FN100] the buyer may register the preliminary contract in order to preserve his right to the property until the signing of the final notarized contract. [FN101] If the preliminary contract is registered, registration of the final notarized contract has the declaratory effect of transferring ownership. [FN102] The later registration, often required by law, serves primarily to assert title against third parties. [FN103] In some countries, such as Italy, bona fide third party purchasers are technically not protected from prior claims of title, and could theoretically obtain ownership from a non-entitled seller. [FN104] However, because the notary must search the registry for improperly registered property [FN105] and check the chain of title to ensure that no prescriptive easements or adverse possession claims exist, [FN106] the notary should be in a position to inform bona fide third parties that the seller does not have title to that property he is purporting to sell. Finally, in Germany, the buyer may register a priority notice [FN107] guaranteeing the seller's duty to convey the property to the buyer before the contract's completion. A registered priority notice renders a subsequent disposal of the property to a third party invalid as against the buyer with the notice. [FN108] After completion of the contract, the notary must record the transaction in the registry. However, an unrecorded transfer is not rendered invalid if it is later registered properly, [FN109] with title transferring upon entry. [FN110] Presumably, this *421 serves to give the purchaser an opportunity to rectify the notary's malpractice without leaving his property rights in question.

5. Notary Payment

Ordinarily, payment occurs upon the completion of the sales contract, as between the parties, ownership has changed hands. However, in some countries, payment occurs at some point before registration. [FN111] Be-

cause of the public legal nature of the notarial transaction, most countries that require a notary for real property sales legally enforce payment if necessary. France, for example, requires payment to the notary prior to the preparation of any notarial document. [FN112] An exception to this rule is Germany, which requires the buyer to affirmatively submit to legal enforcement of his payment duties. [FN113]

If payment is through the notary in an escrow account, the notary pays the mortgagees, who then usually send the notary the proper paperwork to remove the mortgage encumbrance from the buyer's title. [FN114] On the other hand, if payment is directly to the seller, the mortgagee will inform the notary of the amount due, and the notary will instruct the buyer to pay the mortgagee that amount, with the difference going to the seller. [FN115]

6. Notary Fee Regulation

Because notaries are “public functionaries” licensed by the state, [FN116] they are subject to a variety of regulations meant to achieve specific ends ranging from numerus clausus and nationality requirements [FN117] to fixed fees, which are meant to further freedom of choice and ensure the notaries a minimum income. [FN118] A common restriction for nearly all civil law notary systems [FN119] is the existence of national statutes [FN120] determining the *422 appropriate fee to be charged which prevents the market from determining the value of notary services. Notary fees for real estate transactions are usually linked to the value of the transaction itself. [FN121] In most instances, notaries may not unilaterally reduce their fees; however, because fees are required for certain transactions, there may be instances in which a notary can waive the fees altogether. [FN122] Notary fees, are meant to serve three ends: (1) allowing the notary to make a living; (2) providing such an important service at a reasonable cost; and (3) allowing the notary to maintain his independence. [FN123] An argument in favor of fee regulation as it relates to quality is presented by Professor Roger Van den Bergh and Yves Montangie:

Fee regulations can be a useful tool to prevent the problem of adverse selection. If consumers cannot judge the quality of services provided by professionals, they will base their decision to purchase certain services mainly on the price and will not be willing to pay higher prices for higher quality. Under conditions of asymmetric information, advertising will focus on aspects that consumers can easily assess, such as prices or commercial quality features (location of the notary's offices and availability of parking space, free cup of coffee). Legal quality, which to a large extent is a credence good, cannot be easily advertised and not be appropriately assessed by the buyers of the services. [FN124]

This argument presumes that individuals will favor price over quality most of the time. While this may be true generally, perhaps the subject matter and relative cost plays a greater role in such a decision. Protecting one's interest in property is certainly something that few, if any, would take lightly, and contrary to the American title insurance system, [FN125] European registration provides more protection to the property owner. [FN126] Additionally, because real estate purchases already cost so much, it is plausible that the purchasers consider the notary's services and legal protections to be only a nominal added cost. However, a problem with this argument is that people base the value of those services and protections on the fees that they are quoted. And because these fees are the same everywhere, buyers lack sufficient information to determine the value compared to the cost of the service.

*423 Often the notary fees include taxes, registry fees, and other payments that must be made in addition to the cost based on the actual price of the property, [FN127] so fixed fees paid straight to the notary may also serve to simplify the transaction. Some countries consider registration and other related fees a separate cost of

the transaction, with registry fees varying from about a quarter of a percent of the value of the transaction in Switzerland, [FN128] to up to eleven percent in Italy. [FN129]

On average, those countries requiring the traditionally regulated notary fees for real estate transactions tend to have the highest such legal fees in Europe. [FN130] Notary fee scales usually calculate the fee based on the value of the transaction, with the percentage being inversely proportional as the price increases, but some contend that they are arbitrarily determined without considering the actual cost of the service. [FN131] However, high notary fees are often just a fraction of the entire transaction costs. In addition to the notary's personal fees, buyers are usually responsible for registration fees and transfer taxes, and each party must pay his respective agent commissions. [FN132] Notary fees themselves vary from country to country, ranging from less than a half percent of the transaction cost in some Swiss Cantons, to up to about two and a half percent in Italy. [FN133] When all external transaction costs are factored in, the percentage of the notary's fees greatly varies among countries as well. Switzerland's notary fees are on the lower end, averaging less than ten percent of the transaction costs. [FN134] On the other end of the spectrum, the higher end countries of Belgium, France, [FN135] and Italy range between about ten and twenty two percent of the cost of the transaction. [FN136] Notary fees in Germany and Spain fall in the middle at between about eight and thirteen percent of the total. [FN137]

Although the prescribed notary's fee is just a fraction of the entire transaction cost, the notary's role in searching the registry and *424 authenticating the registered documents contribute to the assurance that the transaction is legally sound. The fees charged by the notary are usually not the highest external costs. Registration fees and transfer taxes themselves tend to be a higher proportion of the transaction costs than notary fees. [FN138] It is no surprise then that parties often conspire to agree to a lower price on paper in order to avoid being hit by higher fees that benefit neither the buyer nor the seller. [FN139] However, the benefits of performing an honest transaction may outweigh the economic and legal costs of such a gamble largely because of the level of security that comes with the notary's complete participation. [FN140]

C. Conclusion

In Continental Europe, registration in the Land Registry either confers ownership of the conveyed property to the buyer, or effectively informs the world that the transaction between the buyer and seller has been officially completed, with the buyer now holding legal title to that property. A key figure in this procedure, the Latin notary, plays an important and often exclusive role in the transaction, extending beyond his duties of researching title and authenticating documents. He ordinarily drafts the contract of sale and acts as a neutral advisor and representative of the transaction, protecting not only the buyer, but also the seller and the integrity of the entire registration scheme. Many of the restrictions imposed upon the profession are remnants of a Europe before the liberalization measures set forth by the formation of the European Union. The debate over their compatibility with EU law is important not only for the profession itself, but also for homebuyers. If future decisions of the European Commission and European Court of Justice continue to dismantle countries' notarial regulatory structure, and if, as proponents suggest, the current industry restrictions truly protect the notary's clients, [FN141] then reforms must be prevented from rendering the notary profession inoperable and incompetent. On the other hand, if the notarial profession in its present form is incompatible with European Union regulations, then an alternative registration paradigm would likely emerge. Without a state functionary, however, registration would lose much of its legally effective force and would become similar to the American system, requiring insurance to protect the buyer's rights. Still, the additional benefits that come with the notary's assistance are crucial to protect the interests of the parties to the transaction, while those interests may actually be hindered by the

American-based title insurance industry.

*425 III. TITLE INSURANCE: AMERICAN PROTECTION OF TITLE

A. Background

While the United States and Europe have both developed systems to record property rights, the Recording system in the United States does not have the same declaratory or constitutive effect as the European Registration system. Instead, it merely provides a rebuttable presumption that those recorded instruments are genuine, [FN142] with certain instances of recording insufficient to establish good title. [FN143] Therefore, instead of registration precluding the need for litigation as is the case in Europe, a party claiming a property interest must bring an action in court and has the burden of proving that he, and not the current possessor, holds actual title. [FN144] Title insurance developed as a way to protect lenders and secondary mortgage holders from these judicial actions that may affect their investment interest. As the secondary mortgage market expanded across the country in the late nineteenth century, so did the market for title insurance. [FN145] In contrast to earlier lending practices involving local institutions, [FN146] as the increase of demand for capital investment grew, creditors expanded their operations nationally and did not want to have to rely on local lawyers and have to bring a lawsuit upon every title controversy. [FN147] A primary factor in the rapid growth of the title insurance industry was the influx of homebuyers following World War II. [FN148] Creditors and secondary mortgage buyers established the practice of *426 demanding title guarantees because of their high volume of business, [FN149] and today, it is a general rule that loan approval is conditioned on the borrower's purchase of a title insurance policy. [FN150]

“Title insurance has been developed as a method for shifting or transferring to the title insurance company the risks of defective title assumed when real property interests are acquired.” [FN151] Unlike other forms of insurance, by the time the policy has been purchased, any events that may result in a claim have already occurred, and standard policies exclude any defects that arise after the policy has been issued. [FN152] Because of this retroactive nature of the policy's coverage, title insurance premiums are only paid when the land is purchased, and it covers the buyer and his heirs [FN153] for the value of the policy at the time it was purchased [FN154] as long as they hold an interest in the property. [FN155]

B. Types of Title Insurance Policies

There are two basic title insurance policies, both of which are purchased upon closing of the transaction. [FN156] The owner's policy protects the buyer of the real estate for an amount up to the purchase price of the property, [FN157] while the lender's policy assures the lender that the borrower has title to the property being offered as security and the mortgage is a valid first lien. [FN158] The lender's policy expires when the mortgage is paid in full, but it turns into an owner's policy if the lender forecloses and takes ownership of the property. [FN159] Both types of policies act in the same way, guaranteeing that title is sound, based on the title search, they also provide that they will both defend against challenges to title and compensate the buyer and lender if such a claim succeeds. [FN160]

*427 C. The Process of Obtaining Title Insurance

1. Title Search and Curative Actions

In order to protect their investment, title insurers expend their resources on avoiding the risks of claims over the insured property. [FN161] Generally searching the public records does this, and the search is performed, depending on the jurisdiction, by an abstracter, [FN162] independent title agent, [FN163] or representative of the title insurance company. [FN164] After examining the abstract of title, [FN165] the title agent will attempt to cure any present title defects, [FN166] and those that cannot be cured, or carry little risk, may be listed as exceptions for which the policy will not provide coverage. [FN167] However, if the defects are serious enough, the parties to the transaction may try to modify the purchase contract or even cancel the transaction altogether. [FN168] Before the closing, a final search is performed to ensure that nothing relating to the title has changed between the date of the initial search and the closing. [FN169]

Because of the amount of time and effort put into the title search, many title insurance companies and title agents have developed privately owned title plants that house copies of public records in order to increase efficiency and decrease costs. [FN170] Such systems have been able to decrease *428 the length of time required to perform an accurate title search to days or even minutes. [FN171] However, in regions without title plants, such as parts of New York, it may take as long as four months to complete an accurate search. [FN172] Because of the insurance industry's financial interest in providing conclusive determinations on the status of title, these title plants are often so accurate that public records offices have even utilized title plants as a means to replace their own public records that may have been destroyed by fire. [FN173] An important benefit of the title plant system is that because they are usually in the possession of the parties performing the searches, if they are kept up to date, they can provide an accurate starting point for a subsequent title search on property that has already been insured by that company, [FN174] theoretically decreasing the costs of the search.

D. Title Insurance Coverage

Title insurance policies provide that the insurer will indemnify the purchaser in the event that he loses his property to someone with superior title. [FN175] However, this, even along with the title search, would not be sufficient for the purchaser to feel confident that he is getting his money's worth buying such a policy. [FN176] An important inclusion in the title insurance cost is the actual defense of title against third party claims provided by the insurance company. [FN177] There is usually no limit to the number of claims that the insurer will defend on behalf of the policyholder because the policy is meant to protect the title from the point of purchase until the policy expires by way of conveyance in the case of the owner's policy, or loan repayment in the case of the lender's policy. [FN178] The insurer may settle third party claims against the property holder as long as it acts in a manner that will not injure the policyholder's rights to the property. [FN179] In many cases such settlements even improve the quality of title by the insurance company purchasing a quitclaim deed from the individual claiming superior title. [FN180]

*429 However, despite the fantastic coverage provided by title insurance, the industry, as a whole pays out less than ten percent of the premium costs. [FN181] One justification for this discrepancy is the fact that title insurance companies must maintain a certain level of loss reserves that cover all known and future losses, and an additional surplus to protect from unexpected losses from underwriting and investment activities. [FN182] Additionally, individuals who would otherwise have to defend title actions on their own may not be able to afford the high litigation costs, and run the risk of settling for less expensive, potentially less effective legal counsel. On the other hand, because insurers have attorneys experienced in all facets of the title insurance industry, [FN183]

they are likely to be far more effective at defending third party claims. So, in the long run, despite the huge discrepancy in the amount of money paid in as a premium compared to the small amount paid out in claims, title insurance is still likely the least expensive and most effective means of protecting title under the American system.

However, the actual number of third party claims brought against title is an important factor. It has been estimated that approximately one third of all properties sold has some kind of defect that must be cured before closing. [FN184]

E. Marketing of Title Insurance

For the vast majority of real estate purchases, title insurance, is a prerequisite for a loan. For the most part, it is title agents, [FN185] and not the insurance companies themselves that sell policies to consumers. [FN186] These title agents usually perform the majority of the legwork surrounding the title search, abstract examination, and policy preparation. [FN187] However, as a practical matter, title agents do not promote insurance policies to the home buyers; instead, they actually market to “participants in the real estate industry with an ability to refer them business.” [FN188] It is important to *430 mention that, although there may be a referral system in place among title agents and real estate professionals, it is officially illegal for parties to pay for referrals. [FN189] Because homebuyers usually have very little information regarding the nature of title insurance, [FN190] they tend to go with the recommendation of their real estate professional. [FN191] Additionally, the common occurrence of title insurance being bundled with other closing costs further diminishes the buyer's ability or incentive to perform an independent comparison of policy options. [FN192] As a result, the consumer likely only knows that the policy is a condition for receiving his loan, and by the time the he is aware of the costs, he is unlikely to be willing to shop around for the best deal because in reality, the policy only amounts to a fraction of the transaction's total cost. [FN193] Therefore, any competition in the title insurance industry exists only between the title agents and their pursuit of referrals to real estate professionals, making the title insurance process quite different from traditional market systems. [FN194]

F. Costs of Title Insurance

The overhead costs of providing a title insurance policy are based primarily on the direct title search [FN195] and the subsequent abstract examination and underwriting performed by the title agent. [FN196] The primary goal of the title search is to reduce the amount paid out in claims. [FN197] Thus, it is in the insurer's best interest to do its best to prevent a later claim over the property that would require it to pay out on a claim. Costs to the insurance company itself are generally commissions to those title agents who are affiliated with the insurer, [FN198] and sometimes even illegal benefits to *431 those independent agents and real estate professionals for referring the insurance company to the homebuyer. [FN199] According to Rande Yeager, president and CEO of Old Republic National Title Insurance Co., two important aspects of title insurance rates are that: (1) they avoid the problems that would be posed if title charges in a particular transaction were based on the actual costs incurred in handling the particular transaction; [FN200] and (2) they intentionally incorporate cross-subsidization [FN201] principles between higher value and lower value transactions that ensures the ready availability of title insurance for moderate and low income consumers. [FN202]

Therefore, even though the actual costs for creating a title insurance policy are quite low, [FN203] the prices of the policies are much higher partly because of the general premium pricing scheme that takes into account both profits [FN204] and cross-subsidization principles that help to ensure that lower priced homes remain mar-

ketable. [FN205]

While the federal government has imposed some restrictions on the title insurance industry, [FN206] most states [FN207] have their own regulations regarding the rates imposed upon policy purchasers. [FN208] The result is a wide variance in the level of rate regulation in the industry depending on the situs of the property. For example, New Mexico, Texas, and Florida promulgate the rates that may be charged and the percent split of the premium [FN209] between the insurer and agent. [FN210] Eight states [FN211] require the title *432 insurance company to obtain approval by the state insurance regulator before those rates may become effective. [FN212] Twenty-eight states, [FN213] Puerto Rico, and the U.S. Virgin Islands utilize what is called a “file and use” system, in which the insurers set their rates, but those rates may not be charged until the state regulator has been notified and given time to review and act upon them if it is necessary. [FN214] Two states [FN215] have a system called “use and file” where the insurer may set and charge the rate immediately so long as that rate schedule is filed with the state's regulatory body. [FN216] Finally, six states [FN217] and Washington D.C. have no direct rate regulation. [FN218]

In addition to the varying rate regulations among states, insurance premiums may also cover different aspects of the transaction. For example, premiums in Texas and Pennsylvania include the risk, search, examination and settlement fees, [FN219] while California does not include settlement and closing costs in its determination of premium rates. [FN220] Utah, on the other hand does not include the search and examination in its rates, but does include the closing costs. [FN221] Therefore, because of the lack of uniformity in what is covered by the insurance premium, any comparison of rates must be viewed with the understanding that the costs may cover more parts of the transaction in one jurisdiction than in another. In one study, controlling for both title insurance premiums and closing costs between states in what they include in their title insurance premium, the average cost ranged from \$1,331 in Nevada to \$2,290 in Texas, with an average of \$1,533. [FN222] In addition to closing costs and title insurance, origination fees ranging from \$931 in New Jersey, to \$1,566 in Texas, [FN223] increase the total transaction *433 cost of a home purchase to anywhere from just under \$3,000 to almost \$4,000. [FN224] Because these are all costs that benefit the purchaser of the property, the buyer usually pays the entire amount. [FN225] Therefore, the transaction costs to the buyer of residential real estate in the United States, which includes all of the title insurance related services, whether or not they are specifically included in a specific state's premium is between one and two percent of the value of the property being purchased. [FN226]

G. Conclusion

Title insurance provides a relatively inexpensive way for homebuyers to protect title. However, even though an individual purchasing the home may have complete confidence in the accuracy of title, and may have conducted an accurate search of the record, because the reality is that most people must borrow money in order to purchase a home, they must purchase a lender's policy as a condition to receiving that loan. It makes sense that some jurisdictions require the seller to provide the owner's policy, or that others are silent, with the buyer only purchasing the insurance should he desire. However, because buyers generally do not have all the information when they are making such a decision, it is reasonable to believe that they would blindly follow the advice of real estate professionals, who may place their own interests and those of the title agent ahead of the home buyer. [FN227] Additionally, because the policies only protect the value of the property at the time it was purchased, it is conceivable that the property value will have increased by the time a third party claims title to the property. So, although title insurance policies transfer the costs of defending those claims to the insurer, if an individual

truly wants to protect his investment, he must continue to update his policy to ensure that he recovers the current market value of his house. Yet, the more time that passes after purchasing a home; it becomes increasingly rare that any succeeding claims to title exist. Which brings us back to the question: if today's searches are so thorough that there are so few actual claims to title, is title insurance really necessary?

***434** IV. RECENT CONTROVERSIES FOR BOTH THE TITLE INSURANCE INDUSTRY AND THE LATIN NOTARIAL SYSTEM

Both the notary profession and the title insurance business have recently come under fire for a variety of issues, most of which are unique to the specific industry, yet sharing similar concerns. Both have recently faced an increasing amount of criticism over the validity of the prices charged related to the actual costs of the service and protections provided. The problem of a lack of any real competition is present both in continental Europe and in the United States. However, some of these issues raise the response that the quality of the product provided is dependent on the schemes that are in place today. Finally, the Latin notary has the explicit duty of providing information to the parties of the transaction beyond the title issues. On the contrary, while the title insurance industry seems to thrive on the fact that individuals are led blindly by real estate professionals into purchasing the policy from the insurer that is presented to them.

A. Costs to the Consumers

1. Title Insurance

One of the main issues surrounding the price of a title insurance policy is the fact that the cost of providing the services is relatively low compared to the actual price of the premium that consumers must pay. According to one study, America's largest title insurance company doubled its premium prices over a ten-year period, [FN228] while at the same time reducing the costs of the title search and average claims and payouts to fractions of the premium price. [FN229] The increase in the number of refinances during this period [FN230] likely explains the reduced cost of the search because the time between the purchase of the first policy when the home was bought and any subsequent policies reduces the time and effort needed to perform such a search. With the increase of property values during the previous decade, the production costs of title insurance policies have not increased at the same rate as the increase in premium prices. [FN231] In fact, the Director of *435 Insurance of the Consumer Federation of America has concluded that this increase in premiums has no legitimate basis in the title search or underwriting costs, and that "revenue growth [of the title insurance industry] has far exceeded the reasonable costs of providing the title insurance service." [FN232] Because consumers are required to purchase such policies in order to purchase a home or refinance, they are stuck purchasing a policy at an artificially inflated price that does not reflect any real change in the situation of the industry. [FN233]

2. The Price of the Notary's Services

Because notary fees are determined by statute based on the value of the transaction, [FN234] they do not reflect any individual notary's actual costs of providing the service. One primary argument for the fixed fee system is that fixed fees enable "cross-subsidization" of other notarial duties that must be artificially depressed. [FN235] Because only the notary can perform certain transactions, some of which are not profitable, fixed fees enable some of the higher cost transactions to subsidize those of a lower value that the notary has no choice but to perform, [FN236] enabling the notary to remain in business. However, cross-subsidization may be seen to

only benefit those individuals who either use the services that need such subsidization, or otherwise qualify for a reduced fee. It has been argued that rather than simply requiring those people who use the notary for one purpose to subsidize the price of another, pricing regulation should be targeted in different ways. [FN237]

Additionally, and similar to a justification for the title insurance pricing structure, the schedule of fees based on the value of the transaction provides the notary's client with an accurate estimation of the final cost to the consumer, even though it is not necessarily indicative of how much it costs the specific notary to perform his duties. This may reduce the costs of the notary constantly keeping track and updating the client of the various individual costs of the service, and protects him from potential clients who realize that the fees are more than they expected and cannot pay.

***436 B. Competition**

Pricing regulations are not the only factors that contribute to the artificially high cost of both notary services and title insurance policies. Market competition for the notary is almost entirely statutorily inhibited through fee statutes [FN238] as well as numerus clausus and nationality restrictions. [FN239] With title insurance, even though there is no legal restriction on title insurance competition, the fact is that there is very little incentive for small title insurance companies to exist due to the de facto oligopoly owned by a small number of companies that leaves less than ten percent of the market to other insurers. [FN240]

1. Notarial Competition

a. Numerus Clausus and Regional Restrictions

The number of notaries in a given region is usually highly restricted by “numerus clausus.” [FN241] These restrictions usually limit the number of notaries based on population. [FN242] Numerus clausus further two causes: (1) preservation of choice of inhabitants in relation to notaries; and (2) insurance of a minimum income for the notary. [FN243] The exclusivity of the profession means the wait time for an appointment can be considerable, [FN244] but it also acts as a quality control, with only the most qualified individuals, with the highest test scores, earning one of the coveted openings upon the death or retirement of a predecessor, or the rare creation of a new position. [FN245] One justification for numerus clausus is that the quality of notaries and their services is ensured by restricting the number that enter the field and permitting notaries to focus on their profession rather than also requiring them to be business professionals as well. [FN246]

In conjunction with the numerus clausus, notaries are often restricted to a specified area within that country. [FN247] However, there have been recent relaxations of the regional limitations and numerus clausus. For example, *437 in 1986, French notaries were permitted to perform their duties, with some exceptions, throughout the country. [FN248] Additionally, since 1990, French notaries have no longer been restricted to individual practice, and have been able to form partnerships and corporations. [FN249]

b. Nationality Restrictions

Until recently, notaries were required to be nationals of the country in which they worked. [FN250] However, the European Commission's action in the European Court of Justice (“ECJ”) against certain European Union member states that retain the notarial nationality requirement has brought this issue to the forefront. [FN251] The Commission considers nationality requirements to be contrary to Article 43 of the European Com-

munity Treaty that guarantees freedom of establishment. [FN252] However, the member states consider the notarial acts to be activities related to the exercise of national authority and therefore outside the scope of European Union regulation under Article 45. [FN253] Portugal has also been referred to the ECJ because, although it has officially repealed its nationality requirement, authorities have interpreted the national constitution in a way that continues to require notaries to be Portuguese nationals. [FN254] The nationality requirements are not the only targeted restrictions. The Commission has conceded that certain specifically aimed regulations of professional services are necessary, and others contend that prohibited advertising, fixed prices, and the monopoly over real estate transactions should be eliminated. [FN255]

c. Subject Matter Monopolization

In addition to the above statutory restrictions, the notary also enjoys a lack of competition from outside industries. Because the notary usually has *438 a legally regulated monopoly in various aspects of the real estate transaction, such as “receiving and registering acts that transfer title to real estate,” [FN256] there is no real opportunity for the actual costs of providing the service or market factors to force notaries to compete with other industries. [FN257] However, there is still a practical argument for the notary's monopoly over certain services. [FN258] Because the notary's authentication and certification provides such a high presumption of validity, his exclusive duty of “[a]uthenticating legal documents on transfer of property is crucially important for the proper functioning of the economy” [FN259] His duty in this regard involves extensive research to both protect individual parties and the integrity of the entire state system, [FN260] and perhaps the notarial monopoly over such subject matters is necessary in order to preserve accuracy and honesty. [FN261]

d. Conclusion

The various notarial regulations certainly help protect the notary's ability to continually earn a living. [FN262] However, other than the antiquated and potentially illegal nationality restrictions, there are valid arguments both for and against the current existence of most other notary regulations. Perhaps the best argument for retaining such regulations is in the area of monopoly over subject matter. This is because the uniformity of services and requirements ensures the legal value of the registration.

2. Competition in the Title Insurance Industry

a. Marketing to Parties Who Are Not the Actual Consumers

While the notarial profession and the title insurance industry technically vary on the issue of competition, the free market that exists in the title insurance industry is largely illusory. While there is no restriction on entry into the title insurance industry per se, only four title insurance providers [FN263] account for greater than ninety percent of the premiums *439 written. [FN264] The controversy here, however, is not based on the fact that these four companies happen to have successfully cornered the market by providing a superior product. Instead, the issue surrounds the manner in which these providers have ensured that their policies are those being sold to homebuyers. Because real estate professionals or lenders usually refer title agents to the home buyer or person obtaining the loan, [FN265] title agents, and thus the insurers they work with, take advantage of “a disconnect that allows for little price competition.” [FN266] Additionally, the fact that the title insurance policies offered in a given location are essentially the same, with claims and payouts such a rare occurrence, there is little competition in this area. [FN267] According to Colorado's Deputy Commissioner of Insurance, Erin Toll, price competition in the title insurance context, if done legally, arises out of: (1) the quality of the title report such as its accuracy and depth; and (2) the quality of the service such as its speed, customer service, and “surety

of closing.” [FN268] Unfortunately, certain practices, some of which are potentially illegal, between title insurance companies and real estate professionals, have inhibited any real competition in the industry. [FN269]

b. Kickbacks

The clearest form of anticompetitive activity that is explicitly against federal law is the handing out of kickbacks and referral fees, which are outlawed in the Real Estate Settlement Procedures Act (“RESPA”). [FN270] Such kickbacks serve to induce real estate agents to suggest specific title insurance company to the homebuyer who may have little information [FN271] or incentive to comparison shop for a lower price. However, despite the statutory attempt to eliminate fees that “unnecessarily increase the costs of [title insurance],” recent lawsuits indicate that this attempt has not been effective. [FN272] Additionally, there are some discrepancies in the compensation schemes set up between title agents and the insurers, suggesting that sometimes title agents may actually receive payment for services they are not providing. Ordinarily, because title agents perform most of the actual legwork in searching and writing up title insurance *440 policies, [FN273] they actually retain between eighty-five percent and ninety percent of the premium paid, leaving only between ten percent to fifteen percent of the premium going to the insurer. [FN274] However, this percentage retained by the title agent doesn't necessarily change in those states where the title search is not included in the premium price, meaning that the consumers may actually be paying for the service twice. [FN275] This is not to say that such practices are illegal, their legality depends on whether they comport with RESPA. [FN276] Nevertheless, these title agents would clearly have little incentive to refer homebuyers to a smaller insurance company who may decide to give a smaller percentage to the agent. Thus, whether or not the activities are technically considered illegal kickbacks, practices by few members of title insurance industry have all but extinguished the opportunity for competitive pricing by smaller firms because they are not benefiting from the referral process.

c. Other Methods of Suppressing Competition

As a way to get around the prohibitions against kickbacks, title insurance companies have developed “controlled business models” [FN277] that may be involved in the great majority of real estate transactions. [FN278] Such business arrangements owe their success to “consumer[] ignorance and their reliance upon real estate professionals to make a recommendation . . . The success and profit of a controlled business arrangement is dependent upon tainting the advice that real estate fiduciaries provide to their principals when selecting a title company.” [FN279] The most common form of this kind of arrangement involves a title company approaching a group of real estate professionals and establishing a joint venture that performs the services that the title insurance company already includes in its package of services. The title company is the general partner, with the real estate professionals being silent partners. The real estate professionals then receive a proportional percentage of the joint venture's profits based on *441 their share of the company and the amount of business they refer; [FN280] and because real estate professionals have a captured audience who will pay whatever they are told, the incentive is to constantly raise prices. [FN281] These arrangements are so costly to arrange that smaller title insurance companies would have to raise their fees to get involved, [FN282] so instead they are “forced to market directly to the real estate customer, which has proven nearly impossible.” [FN283]

d. Conclusion

Because the title insurance industry is primarily regulated by the states, it can be difficult to generalize any specific issues regarding competition. Those states that permit the title agents to essentially be paid for the same service twice [FN284] may face higher scrutiny than those who include the title search in the premium rate. The

2006 United States Governmental Accountability Office Report on Title Insurance (“GAO Report”) [FN285] highlights many of the primary issues present in the current title insurance industry and explains the different state approaches to title insurance in greater detail. As a result of the investigations and inquiries [FN286] into the title insurance industry, the United States Department of Housing and Urban Development (“HUD”) issued new regulations that have been implemented over the past few years. [FN287] However, there have yet to be any substantial amendments to the elements of the affiliated business arrangements, which remain a relatively easy way through which large insurers can maintain their near monopoly over the entire industry.

C. Recent Reforms and Proposals

While the above information describes the standards for both the title insurance industry and the notary's control over the European registration system, there are instances of sovereigns taking the initiative and acting to reform their own systems. The primary examples are the Dutch liberalization of the notarial profession which began in 1999 and the state of Iowa's unique approach to title insurance regulation. In addition, the United States government and the European Commission have stepped in *442 to a certain extent to further a certain amount of protection to both the consumers and the relative industries affected.

1. Liberalization of the Dutch Notarial Profession

When it passed the Notary Act of 1999, the Netherlands became the continental European country with the most liberalized notarial profession. [FN288] The legislative goals behind the Notary Act were twofold: “to achieve acceptable prices and [to promote] the provision of high-quality notarial services.” [FN289] In order to achieve these objectives, the common notary regulation of fixed fees was abandoned, and notaries were finally able to enjoy freedom of establishment. [FN290] However, because of their monopoly status for certain duties, notaries must still offer the full range of notarial services and accept all potential clients. [FN291]

Dutch notarial liberalization came about for a variety of reasons, many of which stemmed from the fact that fees themselves were not cost based. [FN292] One reason was that profits were thought excessive, the others being that notarial monopoly gave the consumers little choice and that notaries had little incentive to innovate their services to make them more efficient. [FN293] Additionally, because entry into the profession was highly regulated, incumbent notaries were highly protected, even though there was a surplus of junior notaries who were trying to get into the profession. [FN294] Finally, another of the main arguments for the liberalization of notarial fees was that their statutorily fixed status violated European Union anti-competition law. [FN295]

Of course because of the highly important public function of the notary, the State still plays an important role in determining who is permitted to enter the profession. [FN296] By retaining control over whether a notarial applicant is approved without the seemingly arbitrary figures that *443 are present in the traditional system, the State can retain a certain level of control over the profession to further the notary's underlying purposes [FN297] while easing some seemingly unnecessary restrictions. [FN298] The easing of many of the entry restrictions, with the implementation of others, has resulted in “hardly any significant increase in the number of notaries . . . [because] of the high costs and the risks” of starting a notarial company. [FN299] Therefore, according to notaries, the profession has been liberalized to the extent that it can be done without putting crucial notarial duties at risk. [FN300]

Liberalization of fees appears to have had a direct impact on the cost of services that the notary provides. First of all, it appears that permitting notaries to charge market rates for their services has all but

erased the benefits of cross-subsidization. Family law service fees have increased and real estate transaction costs have dropped. Both have done so at a significant rate, [FN301] which supports the initial justification behind cross-subsidization. [FN302] However, because of the requirement that only the notary may perform certain duties, the Dutch Notary Act still regulates fees for family services for low income families, and in instances where it is “necessary to guarantee accessibility of notarial services . . . if fees become extremely high.” [FN303]

The Dutch experiment in notarial deregulation has been looked upon favorably by the Center of European Law and Politics at the University of Bremen, which lauded the Dutch reforms as improving customer service, efficiency, promotion of innovation, and welfare gains. [FN304] The Netherlands, having instituted what appears to be a successful alternative to the justifications for the highly regulated notary industry, may be seen as the model for future European notarial reform starting from the recent European Commission decisions declaring nationality restrictions as contrary to the values of the European Union. [FN305]

*444 2. American Alternatives, Reform and Iowa

One of the primary issues surrounding the title insurance industry in the United States is the fact that homebuyers have historically been presented with little, if any, information regarding the availability of other title insurance carriers. After the issuance of the GAO report, HUD amended RESPA to ensure that consumers received information that might increase the level of competition in the title insurance industry. [FN306] Additionally, the state of Iowa has, for a long time been the American outlier regarding title insurance, having creating a state monopoly over the sale of title insurance policies.

a. Iowa's Take on Title Insurance

Since Souix City title insurance companies collapsed in 1947, Iowa has banned the sale of title insurance, [FN307] creating the Iowa Title Guarantee, a state agency that provides essentially the same title assurance and curative procedures as a title insurance policy. [FN308] However, “[t]itle guaranty in Iowa runs around \$500 on a \$500,000 standard purchase transaction, assuming \$110 for the coverage plus \$200 each for the services of an abstractor and an attorney.” [FN309] Further, the State pays thirty-seven percent of the premiums to cover claims, [FN310] which is significantly higher than the amount paid out by title insurance companies, [FN311] proving that it is possible to supply adequate coverage at a much lower rate. However, Iowa utilizes a system similar to the Torrens system, meaning that “title is fixed, so the homeowner isn't out his or her property if a defect is later discovered. In contrast, title insurance simply pays up to the limit of the policy and the buyer can lose the property.” [FN312] By taking control over the title protection industry, Iowa may be able to lower the costs of title searches by ensuring a uniform procedure for finding title defects.

*445 b. HUD and its Reform of RESPA

In the past two years, HUD has implemented changes to RESPA designed to provide home buyers with an increased awareness of their rights and opportunities regarding a variety of issues surrounding the purchase of real estate. One such reform was the implementation of a requirement that lenders provide the buyer with a good faith estimate form that includes a list of third-party settlement service providers. [FN313] This enables the buyer to then determine whether to shop around for another provider or go with the company suggested by the real estate professional. [FN314] Additionally, the good faith estimate must be supplemented by an estimate of the charges and terms of settlement procedures. [FN315] This increase of information may actually have little impact on buyers shopping around for other services such as title insurance providers. It is plausible that when a

buyer realizes that after the ordeal of getting his finances in order and finding a home, he would be unlikely to go through the extra time and effort to seek out another title insurance company that may or may not be less expensive, but likely provides the same services. Moreover, if the buyer trusts that his lender or real estate professional is referring the best company, then the added information may seem as unnecessarily cumbersome for the mere possibility of minimal savings.

V. CONCLUSION

The procedures and costs of guaranteeing title in both the United States and Continental Europe are developments of their respective historical development, including the increase of economic and political strength of groups resisting changes in the status quo, as well as a desire to maintain a certain level of national protection. It remains true that the costs in both of these systems are merely fractions of the total transaction, but this does not mean that they need to be as high as they currently stand. The seemingly arbitrary nature of the fee restrictions in Europe and the somewhat laissez-faire approach to title insurance in the United States have produced similar results. Services that, although may not appear to be expensive when viewed in relation to the entire transaction, still may be unnecessary as they relate to the actual costs of providing them. The American reforms, aimed at providing more information to the consumer attempts to place this responsibility on the buyer, and the recent reforms in ⁴⁴⁶ the Netherlands, may lead to a move toward greater liberalization of the notarial profession in Europe. Perhaps these two seemingly polar opposite industries can find a middle ground in which elements of each may be used both here in the United States and in Europe. It has only been ten years since the Dutch Notary Act, which includes the recent recession, so it may be a while before the value of the reforms materializes. RESPA reforms have been in force for less than a year, ^[FN316] so they too will require some time before it can be determined whether they have solved anything. Clearly, however, recent controversies have not been entirely resolved and should periodically be examined for both their effectiveness and, if possible, alternatives.

^[FN1]. J.D. Candidate, University of California, Hastings College of the Law, 2011; B.A., International Relations, University of California Davis, 2005. Thank you to Professor Ugo Mattei for pointing me in the right directions in writing this note.

^[FN1]. Such as American western expansion. Harry Mack Johnson, *The Nature of Title Insurance*, 33 *J. Risk and Ins.* 393, 396-97 (1966).

^[FN2]. *Id.* at 394.

^[FN3]. Unless he is performing his duty as a representative of a particular party to the transaction.

^[FN4]. See, e.g., *Property Law and Procedure in the E.U.*, *infra* note 6, at 50.

^[FN5]. See *infra* notes 21-30 and accompanying text.

^[FN6]. *Eur. U. Inst. Florence / Eur. Private L. F. Deustches Notarinstitut Würzburg, Real Property Law and Procedure in the European Union General Report 29* (May 31, 2005), available at <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/GeneralReport.pdf> [Hereinafter *Property Law and Procedure in the E.U.*].

[FN7]. *Id.*; In Germany, each land parcel has a separate certificate of title, is conveyed based on the dimensions recorded in the cadastre. However, a land parcel must be at least one cadastral unit, but it may be more than one, while a cadastral unit may not be comprised of more than one parcel. Murray Raff, *Private Property and Environmental Responsibility: A Comparative Study of German Real Property Law* 212 (2003); see also Henry Dyson, *French Property and Inheritance Law* 21 (2003) (In France, the proprietorship register records the land owner or interest holder, and the property register records the transactions relating to the land itself. By being able to search the two registries, the individual searching the registry can accurately represent the situation of the property.).

[FN8]. *Property Law and Procedure in the E.U.*, supra note 6, at 29.

[FN9]. *Id.* at 30-31.

[FN10]. Some must meet the same education requirements as the Latin notary, while other countries may require them to be lawyers. *Id.* at 31.

[FN11]. However, ironically, the French register, for example is maintained in French handwriting, which may have the effect of protecting certain professions for French nationals despite potential European Commission decisions to the contrary. Dyson, supra note 7, at 21.

[FN12]. While registration may be required, this may simply mean that the party who does not register runs the risk of losing his interest to someone who registers before him. Raff, supra note 7, at 152-53.

[FN13]. See, e.g., Dyson, supra note 7, at 21 (neglecting to register gives grounds for an action in damages for a person injured by a failure to register a transaction).

[FN14]. Presumably a country with an efficient and accurate registration system will be more attractive to those wishing to purchase property there. Raff, supra note 7, at 152-53.

[FN15]. In Germany, legal alteration of proprietary rights, such as succession, need not be registered when they become effective, but they may be registered as a correction in order to preserve accuracy. *Id.* at 214-15.

[FN16]. Such as in Germany. *Id.*

[FN17]. *Property Law and Procedure in the E.U.*, supra note 6, at 42.

[FN18]. Called the Mortgage Register in Portugal and Spain. *Id.* at 32.

[FN19]. *Id.*

[FN20]. Rights registers are organized by the property, and document registers are organized by the owner's name. *Id.*

[FN21]. *Id.* at 33.

[FN22]. *Napoleonic Code Countries.* *Id.* at 34.

[FN23]. Valid rebuttal may include a notarized but unregistered transfer of the interest in question to someone other than the registered proprietor of that interest. Raff, supra note 7, at 219.

[FN24]. Bürgerliches Gesetzbuch [BGB] [Civil Code], Aug. 18, 1896, Sachenrecht §§ 891-92 (Ger.), English translation available at http://www.gesetze-im-internet.de/englisch_bgb/ (last visited Mar. 30, 2010).

[FN25]. However, in countries such as Spain and Italy, registration is declarative for the transfer of ownership, but constitutive for limited rights such as mortgages. Property Law and Procedure in the E.U., supra note 6, at 34.

[FN26]. Christian H. Kälin, *International Real Estate Handbook: Acquisition Ownership and Sale of real Estate Residence, Tax and Inheritance Law* 400 (2005).

[FN27]. Property Law and Procedure in the E.U., supra note 6, at 33.

[FN28]. Belgium, France, Italy, Luxemburg. Id. at 34.

[FN29]. Such as Spain, with those bona fide third party purchasers who are unable to obtain title contractually entitled to file a claim for damages against the seller. Kälin, supra note 26, at 540.

[FN30]. Property Law and Procedure in the E.U., supra note 6, at 35.

[FN31]. Thus, it may be in the purchaser's best interest to have the notary, who will inevitably be involved in other aspects of the transaction, register the property. The notary and registry officials may be required to have a certain amount of liability insurance to cover such claims. Raff, supra note 7, at 210-11.

[FN32]. French law specifies that only certain types of official documents may be registered in order to preserve the register's accuracy. The exception to this is that preliminary agreements may be registered in order to protect the buyer's rights before the sale has been finalized. Dyson, supra note 7, at 21.

[FN33]. Property Law and Procedure in the E.U., supra note 6, at 43.

[FN34]. Such as in the contract of sale in Germany. Id. at 42-43.

[FN35]. See Pedro Malavet, [Counsel for the Situation: The Latin Notary, a Historical and Comparative Model](#), 19 *Hastings Int'l & Comp. L. Rev.* 389 at 404-34 (1996).

[FN36]. Id. at 432.

[FN37]. Id. at 439.

[FN38]. Id.

[FN39]. Id.

[FN40]. John Henry Merryman & Rogelio Perez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* 107 (3d ed. 2007).

[FN41]. "As a general rule, the Latin notarial document is deemed to be authentic and executor and constitutes proof of the facts asserted therein" Malavet, supra note 35, at 443. On the contrary, the evidentiary value of a document subscribed by an American notary public is far more limited; subscription acknowledges the genuineness of the signature, but not the facts stated in the document. Also, the presumption that the notary public's cer-

tificate and seal are valid may be rebutted by clear and convincing evidence. *Id.* at 441-42.

[FN42]. Merryman & Perez-Perdomo, *supra* note 40, at 107.

[FN43]. *Id.* However, the originals of certain documents such as those establishing agency agreements are not necessarily required to be retained by the notary. See, e.g., Pedro Malavet, [The Non-Adversarial, Extra-Judicial Search for Legality and Truth: Foreign Notarial Transactions as an Inexpensive and Reliable Model for a Market Driven System of Informed Contracting and Fact-Determination](#), 16 *Wis. Int'l L.J.* 1, at 11-12 (1997).

[FN44]. Malavet, *supra* note 35, at 445.

[FN45]. And although accessible by state officials, is not turned over until a specified time has passed and they must be turned over to public archives. Malavet, *supra* note 35, at 445.

[FN46]. *Id.* at 446.

[FN47]. However, third parties involved in the judicial act contained in the public document are not subject to this confidentiality. *Id.* at 448. Also, if a testator admits to having a “natural” child, the notary may disclose that information. Malavet, *supra* note 43, at 41.

[FN48]. Including civil liability and even criminal prosecution. Malavet, *supra* note 43, at 41 (citation omitted).

[FN49]. Merryman & Perez-Perdomo, *supra* note 40, at 107.

[FN50]. Such as marriage contracts and wills. Roger Van den Bergh & Yves Montangie, [Competition in Professional Services Markets Are Latin Notaries Different?](#), 2 *J. Competition L. & Econ.* 189 (2006).

[FN51]. Malavet, *supra* note 43, at 20.

[FN52]. Dyson, *supra* note 7, at 4-5.

[FN53]. *Id.* at 29.

[FN54]. *Id.* at 30.

[FN55]. Nigel Foster, *German Law & Legal System* 80 (1993).

[FN56]. *Id.*

[FN57]. Dyson, *supra* note 7, at 30.

[FN58]. Kälín, *supra* note 26, at 238.

[FN59]. Dyson, *supra* note 7, at 43-45.

[FN60]. *Id.*

[FN61]. *Id.* at 41; see also Kälín, *supra* note 26, at 400, 417.

[FN62]. Dyson, *supra* note 7, at 41.

[FN63]. Kälin, *supra* note 26, at 417.

[FN64]. Dyson, *supra* note 7, at 41.

[FN65]. Malavet, *supra* note 35, at 434.

[FN66]. *Id.* at 448.

[FN67]. Malavet, *supra* note 43, at 35.

[FN68]. *Id.* at 34.

[FN69]. Benito Arruñada, *The Economics of Notaries*, 3 *Eu. J. L. & Econ.* 1, 5 (1996), available at <http://www.arrunada.org/PublicationsExpBusc.aspx?Id=32>.

[FN70]. *Property Law and Procedure in the E.U.*, *supra* note 6, at 50.

[FN71]. A second authenticated act is required before the transfer of ownership. *Id.* at 48, 53.

[FN72]. *Id.* at 48, 52.

[FN73]. Malavet, *supra* note 43, at 28.

[FN74]. For example, in Italy, two contracts are required to complete the sale of land, but the preliminary contract need not be notarized unless a party wants it registered to ensure the land is conveyed to him upon the signing of the final notarized contract. This protection lasts for three years unless the parties have agreed for an earlier deadline for the notarized contract. Registration of the preliminary contract also publicizes the purchase price so that it cannot change upon the signing of the final notarized contract. Kälin, *supra* note 26, at 399-400.

[FN75]. *Property Law and Procedure in the E.U.*, *supra* note 6, at 49.

[FN76]. Malavet, *supra* note 43, at 28.

[FN77]. For example, French law only requires authentication of sales contracts of newly built property because it is considered more risky than ordinary real estate. *Property Law and Procedure in the E.U.*, *supra* note 6, at 49.

[FN78]. In Spain and France, although this does not necessarily bind third parties. *Id.* at 53.

[FN79]. Dyson, *supra* note 7, at 59.

[FN80]. Kälin, *supra* note 26, at 232.

[FN81]. Dyson, *supra* note 7, at 3.

[FN82]. The custom or required by law in most Civil countries. In Portugal it is the duty of the non-Portuguese speaking party to provide a translator to the reading of the contract. Kälin, *supra* note 26, at 488.

[FN83]. Gill Mather, *Opinion, Europe's notaries need to modernise and abandon their pompous ceremonies*, *Law Soc. Gazette*, Nov. 19, 2009, <http://www.lawgazette.co.uk/opinion/comment/europe-notaries-need-modernise-abandon-their-pompous-ceremonies>.

[FN84]. Although perhaps not always entirely necessary.

[FN85]. Dyson, *supra* note 7, at 60.

[FN86]. Kälin, *supra* note 26, at 226.

[FN87]. Dyson, *supra* note 7, at 60.

[FN88]. Professional-ethical liability, civil liability for damages, and criminal liability. Malavet, *supra* note 35, at 476.

[FN89]. Kälin, *supra* note 26, at 226.

[FN90]. Malavet, *supra* note 35, at 476.

[FN91]. Kälin, *supra* note 26, at 13.

[FN92]. Malavet, *supra* note 35, at 458-62; see also Foster, *supra* note 55, at 246.

[FN93]. Malavet, *supra* note 35, at 459-63.

[FN94]. In Germany, entries in the Land register are *prima facie* evidence of legal ownership. Foster, *supra* note 55, at 246.

[FN95]. Kälin, *supra* note 26, at 238.

[FN96]. The *acte de vente* must be registered within sixty days after completion. Dyson, *supra* note 7, at 67.

[FN97]. Kälin, *supra* note 26, at 233.

[FN98]. Raff, *supra* note 7, at 210 (*der rechtspfleger*).

[FN99]. *Id.* (a judge of the local court).

[FN100]. Property Law and Procedure in the E.U., *supra* note 6, at 48-49.

[FN101]. However, all registered contracts must be prepared or authenticated by a notary. Kälin, *supra* note 26, at 400.

[FN102]. *Id.*; Real Property Law and Procedure, *supra* note 6, at 48.

[FN103]. Kälin, *supra* note 26, at 400.

[FN104]. *Id.*

[FN105]. *Id.*

[FN106]. Usually about thirty years. Property Law and Procedure in the E.U., *supra* note 6, at 57.

[FN107]. *Id.* at 54.

[FN108]. Property Law and Procedure in the E.U., *supra* note 6, at 55.

[FN109]. Bürgerliches Gesetzbuch [BGB] [Civil Code], Aug. 18, 1896, Sachenrecht §311b (Ger.), English translation available at http://www.gesetze-im-internet.de/englisch_bgb/ (last visited Mar. 30, 2010).

[FN110]. Foster, *supra* note 55, at 246.

[FN111]. Property Law and Procedure in the E.U., *supra* note 6, at 54.

[FN112]. Dyson, *supra* note 7, at 7.

[FN113]. Property Law and Procedure in the E.U., *supra* note 6, at 56.

[FN114]. *Id.* at 58.

[FN115]. *Id.*

[FN116]. Malavet, *supra* note 35, at 434.

[FN117]. See *supra* notes 250-55 and accompanying text.

[FN118]. Malavet, *supra* note 35, at 472.

[FN119]. The Netherlands no longer has fixed fees, among other deregulatory measures. Center of European Law and Politics (ZERP), University of Bremen, Summary of the Comparative Legal and Economic Study Into the EU Conveyancing Market 31 (December, 2007) [hereinafter ZERP Summary], available at http://ec.europa.eu/competition/sectors/professional_services/studies/csm_standalone_en.pdf.

[FN120]. However, countries with a federal structure such as Switzerland, may place that responsibility on the Canton. On the other hand, Germany, despite moving toward a unified notarial structure, maintains three different notarial models, one more traditional, another made up of advocates who have some notarial privileges, and third, the civil service notariat. Efforts to finally unify the profession have been resisted by particularist forces, and have moved slowly. Gisela Shaw, Notaries - A Profession Between State and Market 12 (Report submitted at the 38th Congress of the French notarial organization Jeune Notariat Mouvement Nov. 18-24, 2007), available at http://notaries.org.uk/articles/articles/profession_between_state_and_market_files/page4_1.pdf.

[FN121]. Kälin, *supra* note 26, at 15-19.

[FN122]. For example, French notaries may waive scale fees, but may not reduce them without the consent of the local chamber des notaries. Dyson, *supra* note 7, at 7.

[FN123]. Malavet, *supra* note 43, at 54 tbl. 1.

[FN124]. Van den Bergh & Montangie, *supra* note 50, at 210.

[FN125]. See *infra* notes 142-43 and accompanying text.

[FN126]. See *supra* notes 21-30 and accompanying text.

[FN127]. See, e.g., Dyson, *supra* note 7, at 7; Kälin, *supra* note 26, at 503.

[FN128]. See, e.g., Country Statistics Comparison, GlobalPropertyGuide.com, <http://www.globalpropertyguide.com/country-comparison#result> (last visited Apr. 1, 2010).

[FN129]. *Id.* (Registry fees between three percent and seven percent, and two percent each for the land registry tax and cadastral tax).

[FN130]. With the deregulated Dutch notary system averaging the second lowest. ZERP Summary *supra* note 119, at 16.

[FN131]. Christoph U. Schmid, Center of European Law and Politics (ZERP), University of Bremen, Conveyancing Services Market 15 (2007).

[FN132]. See, e.g., Country Statistics Comparison, *supra* note 128.

[FN133]. Some countries such as France and Switzerland also add value added tax to the notary's fees. *Id.*

[FN134]. *Id.*

[FN135]. In France, the buyer pays the *fraise de notaire* which does not only include the notary's fees. It also includes the other costs involved in the transaction, including taxes, registration fees and stamp duty. Dyson, *supra* note 7, at 7.

[FN136]. Most of the time, the seller pays less than five percent of this total. See, e.g., Country Statistics Comparison, *supra* note 128.

[FN137]. *Id.*

[FN138]. See, e.g., Country Statistics Comparison, *supra* note 128.

[FN139]. Dyson, *supra* note 7, at 41.

[FN140]. See *supra* notes 57-60 and accompanying text.

[FN141]. See *infra* note 245 and accompanying text.

[FN142]. 73 C.J.S. Property § 69 (2009).

[FN143]. Depending on the State's recording act, a prior purchaser who records after a bona fide purchaser may not have superior title because the bona fide purchaser had no way of finding the conveyance in the record. 66 Am. Jur. 2d Records and Recording Laws § 140 (2010).

[FN144]. Possession is prima facie evidence of ownership but can be rebutted by evidence of superior title. *Willcox v. Stroup*, 467 F.3d 409, 412 (4th Cir. 2006).

[FN145]. Johnson, *supra* note 1, at 393.

[FN146]. Local lenders understood the applicable laws and customs and were acquainted with local attorneys so they did not require this level of protection. Title insurance provides a right of recovery without negligent activity. Title Insurance: Cost and Competition: Hearing Before the Subcomm. on Housing & Community Opportunity

of the Comm. on Financial Services, 109th Cong. 223 (2006) [hereinafter Title Insurance Hearings] (testimony of Rande K. Yeager, Pres. & CEO of Old Republic Nat'l. Title Ins. Co. on behalf of the Am. Land Title Ass'n).

[FN147]. Upon which lenders could only recover in the instance of a lawyer's negligence, and if he could not pay the judgment, the lender received nothing. Title Insurance Hearings, *supra* note 146, at 57 (testimony of Rande K. Yeager, Pres. & CEO of Old Republic Nat'l. Title Ins. Co. on behalf of the Am. Land Title Ass'n).

[FN148]. The purpose of the title insurance industry during this time was to “facilitate mortgage financing by broadening the base of investors and increasing the availability of investment funds for mortgage financing.” *Id.* at 222-23.

[FN149]. Benito Arruñada, A Global Perspective on Title Insurance, 16 Housing Fin. Int'l. 2, 3 (Dec. 2001), available at <http://www.arrunada.org/PublicationsExpBusc.aspx?Id=37>.

[FN150]. Johnson, *supra* note 1, at 393.

[FN151]. Johnson, *supra* note 1, at 395.

[FN152]. Arruñada, *supra* note 149, at 3.

[FN153]. Johnson, *supra* note 1, at 399.

[FN154]. Title Insurance Hearings, *supra* note 146, at 57 (testimony of J. Robert Hunter, Dir. of Ins., Consumer Fed'n. of Am.).

[FN155]. Even if the policyholder sells the property, the policy does not expire as long as he retains a right or obligation in that property. Arruñada, *supra* note 149, at 2.

[FN156]. Title Insurance Hearings, *supra* note 146, at 66 (testimony of J. Robert Hunter, Dir. of Ins., Consumer Fed'n. of Am.).

[FN157]. *Id.* at 57. The policy does not take into account inflation, and any recovery by the holder of the owners policy is only based on the purchase price unless the policyholder updates or purchases a new policy. Johnson, *supra* note 1, at 401.

[FN158]. *Id.* at 402.

[FN159]. Johnson, *supra* note 1, at 402.

[FN160]. Title Insurance Hearings, *supra* note 146, at 57 (testimony of J. Robert Hunter, Dir. of Ins., Consumer Fed'n. of Am.).

[FN161]. Arruñada, *supra* note 149, at 3.

[FN162]. *Id.*

[FN163]. The title agent is an intermediary between the insurance company and the consumer who may or may not be affiliated with the insurer. Title Insurance Hearings, *supra* note 146, at 64 (testimony of J. Robert Hunter, Dir. of Ins., Consumer Fed'n. of Am.).

[FN164]. *Id.*

[FN165]. A summary of the title search that shows how title has purported to pass from owner to owner and potential breaks in the ownership chain. Johnson, *supra* note 1, at 394.

[FN166]. Including obtaining releases or payoffs from prior mortgages and liens on the property and even correcting typographical errors in the title records. Such curative actions are taken in approximately one third of all residential real estate transactions. Title Insurance Hearings, *supra* note 146, at 230 (testimony of Rande K Yeager, President & CEO of Old Republic Nat'l. Title Ins. Co. on behalf of the Am. Land Title Ass'n).

[FN167]. Certain discovered exceptions that, as a rule, are not covered by a title insurance policy include: public land use regulations such as zoning ordinances, unrecorded eminent domain actions, matters known or agreed to buy the purchaser, and defects that cause no loss or damage. Arruñada, *supra* note 149, at 3. Additionally, pre-printed general exceptions include unknown defects that may not have been discoverable upon a proper search of the records such as unrecorded possessory interests or liens. See James L. Gosdin, *Title Insurance: A Comprehensive Overview* 135 (3d ed. 2007).

[FN168]. This is rare because the title industry works hard to clean title and preserve the integrity of the public records. Title Insurance Hearings, *supra* note 146, at 230 (Testimony of Rande K Yeager, President & CEO of Old Republic Nat'l Title Ins. Co. on behalf of the Am. Land Title Ass'n).

[FN169]. *Id.* at 231.

[FN170]. Eliminating the necessity of exploring the variety locations that house public records. Proprietors of title plants may even permit plant access to others, for a fee, so they may perform their title search. U.S. Gov't Accountability Office, GAO-07-401, *Title Insurance: Actions needed to Improve Oversight of the Title Industry and Better Protect Consumers* 8 (Apr. 2007) [hereinafter GAO Report].

[FN171]. GAO Report, *supra* note 170, at 17. However, a relatively small percentage of title plants are computerized, so many searches must still be performed by hand either at the records office or the title plant. Title Insurance Hearings, *supra* note 146, at 239 (testimony of Rande K. Yeager, President & CEO of Old Republic Nat'l Title Ins. Co. on behalf of the Am. Land Title Ass'n).

[FN172]. Certainly affecting the cost of the service. GAO Report, *supra* note 170, at 17 (Apr. 2007)

[FN173]. Johnson, *supra* note 1, at 398.

[FN174]. *Id.*

[FN175]. *Id.*

[FN176]. Of course, the lender who requires the policy doesn't pay for it, so perhaps it would be sufficient for the lender.

[FN177]. Johnson, *supra* note 1, at 398.

[FN178]. Johnson, *supra* note 1, at 399.

[FN179]. *Id.*

[FN180]. Id.

[FN181]. Scott Wooley, Inside Am.'s Richest Insurance Racket, *Forbes*, Nov. 13, 2006, <http://www.forbes.com/forbes/2006/1113/148.html>; Claims have recently increased as a result of foreclosures and mortgage delinquencies. Best's Special Report, 2008 Market Review: U.S. Title 3 (2009), available at http://www.alta.org/images/PDF/09-12-14_AM_Best_Report.pdf [hereinafter AM Best Special Report].

[FN182]. AM Best Special Report, *supra* note 181, at 15.

[FN183]. Id.

[FN184]. Kimberly Palmer, Opting Out of Title Insurance, *U.S. News & World Rep.*, Jun. 18, 2008, <http://www.usnews.com/money/personal-finance/real-estate/articles/2008/06/18/opting-out-of-title-insurance.html>.

[FN185]. Who may work for the insurance company, or may be an independent intermediary.

[FN186]. Title Insurance Hearings, *supra* note 146, at 59 (testimony of J. Robert Hunter, Dir. of Ins., Consumer Fed'n. of Am.).

[FN187]. GAO Report, *supra* note 170, at 3.

[FN188]. Title Insurance Hearings, *supra* note 146, at 81 (testimony of Douglas R. Miller, Pres. & CEO of Title On Inc., Minneapolis Minn.).

[FN189]. Id. at 65 (testimony of J. Robert Hunter, Dir. of Ins., Consumer Fed'n. of Am.). However, historically such regulations have been circumvented by business arrangements between the real estate professionals, title insurers, and title agents. See *infra* notes 277-83 and accompanying text.

[FN190]. Such as its costs, or scope of protections and limitations. GAO Report, *supra* note 170, at 3.

[FN191]. Title Insurance Hearings, *supra* note 146, at 59 (testimony of J. Robert Hunter, Dir. of Ins., Consumer Fed'n. of Am.).

[FN192]. Id.

[FN193]. Id. at 62.

[FN194]. See *infra* notes 265-66 and accompanying text (instead of the tradition of the producers marketing their products directly to consumers).

[FN195]. Title Insurance Hearings, *supra* note 146, at 184 (testimony of Erin Toll Co-Chairperson, Title Ins. Issues Working Group Nat'l. Ass'n of Ins. Commissioners).

[FN196]. Id. at 65 (testimony of J. Robert Hunter, Dir. of Ins., Consumer Fed'n. of Am.).

[FN197]. Many states have codified the requirement that the insurance company perform an adequate title search and that the policy is not issued on a casualty basis so that the industry remains solvent and claims are kept to a minimum. Title Insurance Hearings, *supra* note 146, at 235 (testimony of Rande K. Yeager, President

& CEO of Old Republic Nat'l Title Ins. Co. on behalf of the Am. Land Title Ass'n).

[FN198]. Title agents usually get between seventy percent and ninety percent of the premium because they do most of the searching, examination, and underwriting of the policy. *Id.* at 65 (testimony of J. Robert Hunter, Dir. of Ins., Consumer Fed'n. of Am.).

[FN199]. Title Insurance Hearings, *supra* note 146, at 65; see *infra* notes 270-83 and accompanying text.

[FN200]. If the premium was based on the costs for each transaction, then the costs would not be quotable up front, making the costs of the transaction difficult to estimate, and comparison shopping difficult. Title Insurance Hearings, *supra* note 146, at 236-37 (testimony of Rande K. Yeager, President & CEO of Old Republic Nat'l Title Ins. Co. on behalf of the Am. Land Title Ass'n).

[FN201]. By basing premiums on a rate per thousand dollars of liability, higher priced property subsidizes those that are priced lower. The “average cost per policy” that the insurer incurs is based on the idea that the premium rates are intended to cover all costs involved in producing policies and claims. Therefore, premiums for lower priced homes will be below this “average cost per policy” and they will be subsidized by the premiums paid for higher priced homes. *Id.* at 237 (testimony of Rande K. Yeager, President & CEO of Old Republic Nat'l Title Ins. Co. on behalf of the Am. Land Title Ass'n).

[FN202]. *Id.* at 236.

[FN203]. *Id.* at 66 (testimony of J. Robert Hunter, Dir. of Ins., Consumer Fed'n. of Am.) (“a few hundred dollars for the title search and taxes and 5 percent of the premium price for losses”).

[FN204]. *Id.*

[FN205]. *Id.* at 237 (testimony of Rande K. Yeager, President & CEO of Old Republic Nat'l Title Ins. Co. on behalf of the Am. Land Title Ass'n).

[FN206]. Under the Real Estate Settlement Procedures Act (RESPA), [12 U.S.C. §§ 2601-2617 \(1974\)](#).

[FN207]. Iowa does not recognize title insurance as a product and maintains its own regulatory scheme. AM Best Special Report, *supra* note 181, at 8.

[FN208]. Title Insurance Hearings, *supra* note 146, at 235 (testimony of Rande K. Yeager, President & CEO of Old Republic Nat'l Title Ins. Co. on behalf of the Am. Land Title Ass'n) (“virtually all states require that title insurance rates must not be excessive, inadequate, or unfairly discriminatory”).

[FN209]. *Id.* at 236.

[FN210]. AM Best Special Report, *supra* note 181, at 8.

[FN211]. Idaho, Maryland, Nebraska, Nevada, New Hampshire, New Jersey, South Dakota, and Wyoming. AM Best Special Report, *supra* note 181, at 8.

[FN212]. *Id.*

[FN213]. Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Kansas, Kentucky,

Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, New York, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Virginia, Washington, and West Virginia. Id.

[FN214]. Id. at 6, 8.

[FN215]. Id. at 8.

[FN216]. Id. at 6, 8.

[FN217]. Georgia, Hawaii, Illinois, Indiana, Massachusetts, and Oklahoma. Id. at 8.

[FN218]. However, the state regulatory body still oversees the title insurance industry, and may question the propriety of a rate that violates standards such as those prohibiting unfairly discriminatory rates. Id. at 6, 8.

[FN219]. GAO Report, *supra* note 170 at 20.

[FN220]. Id.

[FN221]. Id.

[FN222]. The study based its rates on obtaining a \$200,000 loan with twenty percent down on a \$250,000 house and gathered rates from each state's most populous city, with California including costs for both Los Angeles and San Francisco, and Washington D.C. State by State Closing Costs, Bankrate.com (Sept. 1, 2009), <http://www.bankrate.com/finance/mortgages/state-by-state-closing-costs8-131404.aspx>; Holden Lewis, Texas Tops 2009 Closing Costs Exclusive, Bankrate.com (Sept. 1, 2009) <http://www.bankrate.com/finance/mortgages/texas-tops-2009-closing-cost-exclusive.aspx>.

[FN223]. State by State Closing Costs, *supra* note 222.

[FN224]. State by State Closing Costs, *supra* note 222.

[FN225]. Which does not include real estate broker's fees; transfer taxes and seller's legal fees which are usually paid for buy the seller, and can be up to nine percent of the value of the transaction. See, e.g., Country Statistics Comparison, *supra* note 128. However, the purchaser of the owner's policy varies across the United States. In some jurisdictions seller purchases the policy as a means of informing the buyer that he is conveying good title, while others simply group the two title insurance policies together, with the purchaser paying for both, and still other jurisdictions require the buyer to ask for an pay for the policy, should he desire it. See generally Am. Land Title Ass'n, Title Insurance, A Comprehensive Overview (Mar. 15, 2005)., available at <http://www.alta.org/press/TitleInsuranceOverview.pdf>.

[FN226]. Country Statistics Comparison, *supra* note 128.

[FN227]. See *infra* notes 272-77 and accompanying text.

[FN228]. From 1996 to 2006. Wooley, *supra* note 181, at 1.

[FN229]. When title searches can be conducted electronically, the costs may be as low as \$25.00 for the search, and in these circumstances mistakes are so rare that an average of only \$74.00 of each policy goes to paying claims. Id.; but see Title Insurance Hearings, *supra* note 146, at 62 (in 2003 an estimate of the “administrative

and labor costs for title insurance were \$262 per policy, but those costs could be reduced to \$94 per policy [via computer searches]”) (testimony of J. Robert Hunter, Dir. Of Ins., Consumer Federation of Am.).

[FN230]. Two million in 2000 up to seven million in 2006. Wooley, *supra* note 181, at 1.

[FN231]. GAO Report, *supra* note 170, at 4. In fact, the costs may have even reduced the costs of providing the service, with technological advances in the industry allowing title insurance companies to be more accurate while closing offices and reducing employment costs. Wooley, *supra* note 181, at 1.

[FN232]. Title Insurance Hearings, *supra* note 146, at 57 (testimony of J. Robert Hunter, Dir. Of Ins., Consumer Federation of Am.).

[FN233]. Wooley, *supra* note 181, at 1.

[FN234]. See, e.g., Foster, *supra* note 55, at 80.

[FN235]. ZERP Summary, *supra* note 119, at 11.

[FN236]. *Id.*

[FN237]. Such as creating caps for the fees charged for family law matters for those that fall within a certain income. See *id.* This would not be all that different than U.S. lawyers being required to perform a certain amount of pro bono work. See, e.g., State Bar of California, Pro Bono Resolution, available at <http://cc.calbar.ca.gov/LinkClick.aspx?fileticket=ILe2Zrg9bG0%3D&tabid=1195>.

[FN238]. Malavet, *supra* note 43, at 54.

[FN239]. See *infra* notes 243-48 and accompanying text.

[FN240]. See Industry Financial Data, Am. Land Title Ass'n, <http://www.alta.org/industry/financial.cfm> (last visited April 1, 2010).

[FN241]. Malavet, *supra* note 35, at 472.

[FN242]. *Id.*

[FN243]. *Id.* (footnote omitted).

[FN244]. Up to fifteen years. Foster, *supra* note 55, at 80.

[FN245]. Malavet, *supra* note 35, at 469-72.

[FN246]. In fact, a study suggests that by liberalizing entry into the profession, notaries' “concerns on how to survive in the competitive struggle may dominate ethical considerations and jeopardize the quality of the notarial services.” Van den Bergh & Montangie, *supra* note 50, at 203-04; but see, *infra* notes 290-307 and accompanying text (explaining actual effects of liberalization of notarial profession).

[FN247]. Malavet, *supra* note 35, at 473.

[FN248]. For transactions involving the first transfer of immovable property, he may only authenticate docu-

ments in a specified region. However, he may negotiate a property transaction anywhere in the country. Dyson, *supra* note 7, at 2.

[FN249]. As of 2007, only about a third of French notaries practice on their own, and notarial firms have even emerged. Shaw, *supra* note 120, at 14-15.

[FN250]. Malavet, *supra* note 35, at 469.

[FN251]. Ene Andresen, State Tasks of the Public office of the Notary, *Juridica Int'l* XVI 159 (2009), available at http://www.juridicainternational.eu/public/pdf/ji_2009_1_157.pdf.

[FN252]. Press Release, European Union, Nationality Requirements for notaries: Commission takes seven Member States to Court of Justice to ensure compliance with the principle of non-discrimination (June 27, 2007), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/915&format=HTML&aged=1&language=EN&guiLanguage=en>.

[FN253]. *Id.*

[FN254]. Press Release, European Union, Nationality Requirement for notaries: The European Commission brings a case before the European Court of Justice to ensure nondiscrimination in Portugal, (Oct. 8.. 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1471&format=HTML&aged=0&language=EN&guiLanguage=en>.

[FN255]. Van den Bergh & Montangie, *supra* note 50, at 190.

[FN256]. Kälin, *supra* note 26, at 238, 259.

[FN257]. Such as, a title insurance industry.

[FN258]. For a more detailed analysis on this subject, see Van den Bergh & Montangie, *supra* note 50 at 193-95.

[FN259]. *Id.* at 196.

[FN260]. See *supra* notes 35-51 and accompanying text.

[FN261]. See, e.g., Van den Bergh & Montangie, *supra* note 50, at 198 (“Even if there are anti-competitive effects, these outcomes must be balanced against the welfare gains....”).

[FN262]. See *supra* note 122 and accompanying text.

[FN263]. As of the third quarter of 2010, the top four providers are Fidelity, First American, Stewart, and First Republic. See, e.g., Industry Financial Data, Am. Land Title Ass'n, <http://www.alta.org/industry/financial.cfm>.

[FN264]. This figure has been relatively stable for at least the past decade. See *id.*

[FN265]. GAO Report, *supra* note 170, at 4.

[FN266]. Title Insurance Hearings, *supra* note 146, at 184 (testimony of Erin Toll, Deputy Commissioner of Insurance, Colorado Co-Chairperson, NAIC Title Insurance Issues Working Group).

[FN267]. *Id.*

[FN268]. *Id.* at 185.

[FN269]. *Id.*

[FN270]. Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601-2617.

[FN271]. See *supra* notes 315-16 and accompanying text.

[FN272]. E.g., \$50 million worth of settlements in California in 2003 and 2004, and investigations in Colorado, Oklahoma and Wisconsin. Catherine A. Asaro, Beecher Carlson, Crackdown on Illegal Practices in the Title Insurance Industry 2-4 (2005), available at http://beechercarlson.net/files/pdf/title_insurance.pdf.

[FN273]. See *supra* notes 162-164 and accompanying text.

[FN274]. Title Insurance Hearings, *supra* note 146, at 183 (testimony of Erin Toll, Deputy Commissioner of Insurance, Colorado Co-Chairperson, NAIC Title Insurance Issues Working Group).

[FN275]. GAO Report, *supra* note 170, at 1.

[FN276]. 12 U.S.C. § 2607(c)(4). There are three requirements in order to establish the propriety of such an agreement: (1) Informing the referred party that such a business arrangement exists and the range of charges for the services provided; (2) not requiring the referred party to use any specific provider of the services; and (3) the arrangement may only be compensated in the form of a return on the ownership interest or franchise relationship.

[FN277]. They are also called Affiliated Business Arrangements, One Stop Shopping, Ancillary Services, and Bundled Services. Title Insurance Hearings, *supra* note 146, at 78 (testimony of Douglas R. Miller, President and CEO of Title One, Inc., Minneapolis).

[FN278]. *Id.*

[FN279]. Title Insurance Hearings, *supra* note 146, at 79 (testimony of Douglas R. Miller, President and CEO of Title One, Inc., Minneapolis).

[FN280]. Title Insurance Hearings, *supra* note 146, at 82.

[FN281]. *Id.* at 80.

[FN282]. Raising fee is something they are likely unwilling to do because competitive pricing is essentially their only real competitive quality. *Id.* at 79-80.

[FN283]. *Id.* at 80.

[FN284]. See Title Insurance Hearings, *supra* note 146 and accompanying text for note 277.

[FN285]. GAO Report, *supra* note 170.

[FN286]. See, e.g., Title Insurance Hearings, *supra* note 146.

[FN287]. 24 C.F.R. § 3500 (2009); see also *infra* notes 315-17 and accompanying text.

[FN288]. Nicole Kuijpers, Joelle Noailly & Ben Vollaard, CPB Netherlands Bur. for Econ. Pol. Analysis, No. 93 Liberalisation of the Dutch Notary Profession: Reviewing Its Scope and Impact 11 (Sept. 2005), available at <http://www.cpb.nl/sites/default/files/publicaties/download/liberalisation-dutch-notary-profession-reviewing-its-scope-and-impact.pdf>.

[FN289]. *Id.*

[FN290]. Fees for real estate transactions were gradually liberalized, and completely free from regulation in 2003. *Id.* at 19, 23.

[FN291]. Notaries still may have to lower or regulate fees if this is the only way a party can have a notary perform a certain duty over which he has a monopoly. *Id.* at 23.

[FN292]. *Id.* at 31.

[FN293]. *Id.*

[FN294]. Kuijpers, Noailly & Vollaard, *supra* note 288, at 31.

[FN295]. *Id.* at 35.

[FN296]. One way this is accomplished is by requiring prospective notaries to submit a business proposal that ensures that they will break even within three years of opening a shop, and the following elements: (1) the town of establishment; (2) whether the post is new or an existing vacancy; (3) whether the post is a solo practice or within an association; (4) a market survey; (5) a description of the organization and practice; (6) a forecast of expected earnings; (7) the financial basis. *Id.* at 20-21.

[FN297]. Such as ensuring that even those in potentially unpopular or less profitable areas still have access to services that fall exclusively within the notary's duties.

[FN298]. For example, the notary is no longer required to live in the area in which he is licensed to work, but may only have an office in that area. Additionally, geographical practice restrictions have been eased, and the notary may now practice outside his designated area if they have an "incidental character." Kuijpers, Noailly & Vollaard, *supra* note 288, at 21.

[FN299]. Leon Verstappen, World of Welcome: The Dutch Situation on Regulation of Notaries, 5 (2009) (Conf. Paper, Legal Research Network 2d. Ann.Conf., Aug. 27-29, 2009), available at <http://www.law.ugent.be/en/researchnetwork/papers2009/Paper-VerstappenL.pdf>; but see, ZERP Summary, *supra* note 119, at 31 (citing a 12% increase in notaries "despite an economic downturn").

[FN300]. Verstappen, *supra* note 299, at 5.

[FN301]. Fees for family law deeds more than doubled in the first five years after liberalization, and fees for very small real estate transfers also increased. On the other hand, the costs for transferring real estate, especially those of a higher value have decreased significantly. *Id.* at 7-8.

[FN302]. See supra notes 236-38 and accompanying text.

[FN303]. Kuijpers, Noailly & Vollaard, supra note 288, at 23.

[FN304]. ZERP Summary, supra note 119, at 31-32.

[FN305]. See supra notes 252-256 and accompanying text.

[FN306]. RESPA - Real Estate Settlement Procedures Act, Dep't. of Hous. & Urban Dev, http://www.hud.gov/offices/hsg/ramh/res/respa_hm.cfm (last visited Apr.3, 2010).

[FN307]. Iowa's Title Insurance Alternative Lifts Its Game, The Title Report, Feb. 20, 2006, at 1, available at <http://www.iowalandtitle.org/documents/IowaTitleReport.pdf> [hereinafter, The Title Report].

[FN308]. Title Insurance Hearings, supra note 146, at 63 (testimony of J. Robert Hunter, Dir. Of Ins., Consumer Federation of Am.).

[FN309]. The Title Report, supra note 309, at 3; but see State by State Closing Costs, Bankrate.com, <http://www.bankrate.com/finance/mortgages/state-by-state-closing-costs8-131404.aspx>, (showing that when closing costs are factored in, Iowa has the 16th lowest closing costs in the United States).

[FN310]. Binyamin Applebaum, Title Insurers Face Criticism Over Pricing, Boston.com, Apr. 13, 2008, http://www.boston.com/business/articles/2008/04/13/title_insurers_face_criticism_over_pricing/.

[FN311]. See Wooley, supra note 181 and accompanying text.

[FN312]. Title Insurance Hearings, supra note 146, at 72 (testimony of J. Robert Hunter, Dir. Of Ins., Consumer Federation of Am.).

[FN313]. Providers include, for instance, title insurance companies.

[FN314]. Dep't. of Hous. & Urban Dev., OMB Approval No. 2502-0265, Good Faith Estimate (GFE), available at <http://www.hud.gov/offices/hsg/ramh/res/gfestimate.pdf> (last visited Apr. 3, 2010).

[FN315]. 24 CFR §3500.7 (c) (2009).

[FN316]. 24 CFR § 3500 (2009).

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