

Real Estate Practice in the Twenty-First Century

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I. INTRODUCTION

The next century will bring profound changes in real estate law and in the ways that it is practiced. This prediction may seem rather unremarkable for any area of law or for almost any other area of human endeavor. But the changes in real estate law will be exceptional because of their relative rapidity and comprehensiveness.

Real estate law, perhaps more than any other area, has changed very slowly since the beginning of the common law legal system. The mortgage, which will be the engine for this century's developments, is a particularly striking example of this slow rate of evolution.¹ The instrument itself was called a mort gage as early as 1189 in England,² and today's substantive mortgage law is descended directly from England's Middle Ages.

Unlike the laws concerning security interests in personal property, which the Uniform Commercial Code codified and modernized, mortgage law never has been thoroughly overhauled.³ Modern mortgage law essentially is a mound of bandages; as a problem emerged in the law's structure, a

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1. This Article will use the term "mortgage" to denote all forms of real property security instruments, both domestic and foreign. Although the different types of real property security interests vary in their detail, those differences are insignificant for the purposes of this paper. See generally 1 GARRARD GLENN, MORTGAGES: DEEDS OF TRUST, AND OTHER SECURITY DEVICES AS TO LAND § 1 (1943).

2. RANULF DE GLANVILL, THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND 121 (G.D.G. Hall trans., 1965). See 1 GLENN, *supra* note 1, § 2, at 3 n.2.

3. Modern mortgages are governed by diverse state mortgage laws, all of which are highly idiosyncratic and deeply rooted in the medieval foundations of mortgage law that evolved centuries ago

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It seems incredible that the conceptual superstructure of our mortgage laws should rest on a foundation that evolved centuries ago out of the need to evade medieval usury laws and the struggles for primacy between the law courts and the equity courts in feudal England.

Norman Geis, *Escape from the 15th Century: The Uniform Land Security Interest Act*, 30 REAL PROP., PROB. & TR. J. 289, 291, 295-96 (1995). See also Patrick A. Randolph, Jr., *The Future of American Real Estate Law: Uniform Foreclosure Laws and Uniform Land Security Interest Act*, 20 NOVA L. REV. 1109, 1111-12 (1996) [hereinafter Randolph, *Uniform Land Security Interest Act*].

court or legislature would attempt to graft a solution onto the existing law. Almost inevitably, that solution created another problem, and the mound of bandages continues to grow. This rather haphazard method of development has made modern mortgage law and practice unnecessarily complex and cumbersome.

Given the great importance of land finance to our economy and to our society more generally,⁴ this state of affairs may seem surprising. Part of the explanation is the enormous conservatism of real estate law. Because land usually is permanent and valuable, land law is designed to provide stability of titles.⁵ Land titles must remain comprehensible from generation to generation so that they are question-free. Moreover, when dealing with an asset as valuable as land, lawyers generally are more comfortable using time-tested methods, rather than experimenting with new techniques. As it is, real estate law practitioners are subject to more malpractice claims than virtually any other practice area.⁶

The other, less benign, explanation for the relative absence of change is the self-interest of real estate lawyers, title insurers, and other participants in the real estate market. The more arcane the law remains, with its many traps for the unwary, the more indispensable are the services that these market participants provide. Additionally, changes in law and practice can require them to make substantial personal investments in education and technology.⁷ As a result, title doctrines and estates in land that originated in the earliest centuries of our legal system still exist.

The traditional resistance to change is illustrated by the very unsuccessful efforts of the National Conference of Commissioners on Uniform State Laws (NCCUSL) to introduce uniformity into real estate law. NCCUSL has proposed a wide variety of uniform and model land laws since the nineteenth

4. Mortgage loans constitute about thirty percent of the outstanding debt in this country, which is the largest debt source. GRANT S. NELSON & DALE A. WHITMAN, *REAL ESTATE FINANCE LAW* § 11.1, at 840 (4th ed. 2001). Mortgages on “single-family homes” (one-to-four family homes) secured approximately \$9.4 trillion of debt in 2005. An additional \$2.8 trillion is secured by mortgages on multifamily residential buildings, commercial properties, and farms. COUNCIL OF ECONOMIC ADVISORS, 2007 ECONOMIC REPORT OF THE PRESIDENT, TABLE B-75: MORTGAGE DEBT OUTSTANDING BY TYPE OF PROPERTY AND OF FINANCING, 1949-2006, *available at* <http://www.gpoaccess.gov/eop/2007/B75.xls>.

5. UNIF. LAND SECURITY INTEREST ACT, 7A U.L.A. 403, 406 (1985); Randolph, *Uniform Land Security Interest Act*, *supra* note 3, at 1111; Jon A. Bruce, *The Role Uniform Real Property Acts Have Played in the Development of American Property Law: Some General Observations*, 27 WAKE FOREST L. REV. 331, 335 (1992).

6. Stephen M. Blumberg, *Risky Business: Malpractice Claims in Real Estate Law*, 2 MN. REAL EST. L.J. 1, 1 (June 1985); *Top Five Problem Practice Areas*, 74 U.S. L. WK. 2132 (2005).

7. Randolph, *Uniform Land Security Interest Act*, *supra* note 3, at 1112; Bruce, *supra* note 5, at 335-36.

century. Most have not been enacted by even one state.⁸ The American Law Institute's ten-year-old Restatement (Third) of Property: Mortgages has been more successful, but the changes it has caused have been only incremental because adoption depends on individual judicial decisions, rather than on legislation.⁹

Despite this traditional inertia, the weight of centuries of land law is now yielding to the irresistible force of the market – in this case, the market for mortgages. Since antiquity, mortgages have been an attractive form of security for lenders.¹⁰ Default rates normally are quite low,¹¹ and, in the event of default, the mortgaged land usually is worth enough to repay the loan. Today, these features of mortgages have made them as attractive to the financial markets as to lenders. Investors in this country and around the world have developed a voracious appetite for American mortgages.¹² Par-

8. UNIF. NONJUDICIAL FORECLOSURE ACT (2002) (no state enactments); UNIF. LAND SEC. INTEREST ACT (Supp. 1992) (no state enactments); UNIF. SIMPLIFICATION OF LAND TRANSFERS ACT (1976) (amended 1977, 1983 & 1990) (no state enactments); UNIF. LAND TRANSACTIONS ACT (1975) (amended 1977 & 1983) (no state enactments); UNIF. REVERTER OF REALTY ACT (1944) (withdrawn 1981); MODEL POWER OF SALE MORTGAGE FORECLOSURE ACT (1940) (no state enactments); UNIF. ESTATES ACT (1938) (withdrawn 1981); UNIF. PROP. ACT (1938) (withdrawn 1966); UNIF. MECHANICS LIEN ACT (1932) (withdrawn 1943); UNIF. REAL ESTATE MORTGAGE ACT (1927) (one state enactment; withdrawn 1943); UNIF. LAND REGISTRATION ACT (1916) (withdrawn 1934); An Act Relating to the Sealing and Attestation of Deeds and Other Written Instruments (1892) (withdrawn). Some proposed uniform laws have been adopted in only a handful of states. *E.g.*, UNIF. COMMON INTEREST OWNERSHIP ACT (enacted in two states); UNIF. CONDO. ACT (enacted in 15 states); UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT (1972) (enacted in 20 states); UNIF. PLANNED CMTY. ACT (1980) (enacted in one state); MODEL REAL ESTATE COOPERATIVE ACT (1981) (enacted in two states); MODEL REAL ESTATE TIME SHARE ACT (1980) (enacted in four states); & UNIFORM VENDOR AND PURCHASER RISK ACT (1935) (enacted in 13 states). See Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1408-09 (2004); Frank S. Alexander, *Federal Intervention in Real Estate Finance: Preemption and Federal Common Law*, 71 N.C. L. REV. 293, 307-10 (1993); Bruce, *supra* note 5, at 331-35.

9. Nelson & Whitman, *supra* note 8, at 1409.

10. Ann M. Burkhart, *Lenders and Land*, 64 MO. L. REV. 249, 249 (1999).

11. Except during economic depressions, less than 0.5% of all mortgages normally are foreclosed. See 2004 INSIDE MORTGAGE FIN. 11 (March 19, 2004).

12. See David Alan Richards, "Gradable and Tradable": *The Securitization of Commercial Real Estate Mortgages*, 16 REAL EST. L.J. 99, 110 (1987). See also JEFFREY N. TUCHMAN, LATEST INNOVATIONS IN THE US MORTGAGE MARKET 21, 40, 42 (1987); Robin Paul Malloy, *The Secondary Mortgage Market: A Catalyst for Change in Real Estate Transactions*, 39 SW. L.J. 991, 1014 n.155 (1986); Joseph C. Shenker & Anthony J. Colletta, *Asset Securitization: Evolution, Current Issues and New Frontiers*, 69 TEX. L. REV. 1369, 1422-26 (1991); Editorial, *Mortgage Insecurities*, N.Y. TIMES, Feb. 22, 2007, at A22.

ticularly in countries with unstable political systems and financial markets, American land and mortgages are regarded as relatively secure investments.¹³

The global sale of American mortgages constitutes a dramatic break from the past. Until relatively recently, prospective homeowners borrowed from a lender located within fifty miles of their land, and the lender held the note and mortgage for the entire loan term.¹⁴ Today, lenders normally sell most of the residential loans they make to what is known as the secondary mortgage market. To raise capital for these purchases, the secondary market purchasers sell ownership shares in the pools of mortgages they acquire or sell bonds that are secured by the mortgages ("mortgage securitization").¹⁵ International sales of residential mortgage-backed securities (RMBS) benefit borrowers by lowering interest rates on mortgage loans and by increasing the availability of mortgage capital.¹⁶

The momentum of the RMBS market is demonstrated by the rapidity and magnitude of its growth. Although it was relatively small until the 1970s,¹⁷ the value of outstanding RMBS in 2006 was approximately \$6 trillion, which constituted 22.9% of the U.S. bond market. In contrast, corporate bonds constituted 20.4% of the market, and Treasury bonds constituted 16.3%. The daily trading volume of RMBS in 2006 was more than \$263 billion per day. During that time, the daily trading volume of corporate bonds with maturities of more than a year was only \$23 billion.¹⁸

The success of the RMBS market created the impetus for securitization of mortgages on commercial property, such as shopping malls and office buildings. The size and rate of growth of the market for commercial mort-

13. In 2005, foreign direct investment in the United States exceeded \$1.2 trillion. U.S. Department of Commerce, Bureau of Economic Analysis, Foreign Direct Investment in the United States, <http://www.bea.gov/bea/di/fdieqty-05.htm>. Press Release, Ass'n of Foreign Investors in Real Estate, Foreign Investors Will Reduce US Real Estate Portfolio Allocations, available at http://www.afire.org/foreign_data/2004/survey.shtm ("[B]y substantial margins, the US continues to rank both as the number one country for 'stable and secure' real estate investments and the country offering the 'best opportunity for capital appreciation.'").

14. James A. Hollensteiner, *The Secondary Market Maintains a Primary Role*, SAVINGS INSTS., Jan. 1988, at S-11; Joseph Philip Forte, *Capital Markets Mortgage: A Ratable Model for Main Street and Wall Street*, SG087 A.L.I.-A.B.A. 1, 4 (2002); Michael H. Schill, *The Impact of the Capital Markets on Real Estate Law and Practice*, 32 J. MARSHALL L. REV. 269, 269 (1999).

15. Burkhart, *supra* note 10, at 274.

16. Schill, *supra* note 14, at 280.

17. See THE SECONDARY MORTGAGE MARKET: A HANDBOOK OF STRATEGIES, TECHNIQUES, AND CRITICAL ISSUES IN CONTEMPORARY MORTGAGE FINANCE 74 (Jess Lederman ed., 1987).

18. PIMCO Bonds, Bond Basics, available at <http://media.pimco-global.com/pdfs/pdf/MBS%20Basics.pdf> (last visited Nov. 4, 2007); Debt Markets Represented by The Bond Market Association, available at <http://www.sifma.net/story.asp?id=98> (last visited Nov. 16, 2007).

gage-backed securities (CMBS) is as dramatic as for the residential mortgage securities market. In 2000, \$48.7 billion in new CMBS were issued. Only six years later, \$205.7 billion in new CMBS were issued,¹⁹ and the total amount of outstanding CMBS reached \$769.6 billion.²⁰

The phenomenal success of the secondary mortgage market is driving many of the changes that are occurring in real estate finance law and practice. Perhaps the most dramatic change is the increasing standardization of mortgage law, as discussed in Part II of this Article. The growth of secondary markets in other countries is a significant reason for the rapidly expanding transnational practices of many American real estate lawyers (Part III). The increasingly national and international scope of real estate practice and the standardization that it generates are beginning to cause a loosening of the ethical restrictions on multijurisdictional practice and on laypersons providing real estate settlement services (Part IV). Finally, the demands of the mortgage market for greater efficiencies are changing real estate transactions from paper-based to electronic (Part V).

II. STANDARDIZATION OF AMERICAN MORTGAGE LAW

Since the founding of this country, real estate law has been almost exclusively the province of the states. After the Revolution, the English Crown's title to the colonies' lands passed to the new states. In forming a national government, a substantial concern for the new states was the potential loss of sovereignty over the land within their borders. To quell that fear, each original state retained title to the land within its borders, subject only to titles held by private persons. The original states also retained political sovereignty over their lands.²¹

19. COMMERCIAL MORTGAGE ALERT, CMBS MARKET STATISTICS, *available at* <http://www.cmalert.com/Public/MarketPlace/MarketStatistics/index.cfm>.

20. Terry Pristin, *A Warning on Risk in Commercial Mortgages*, N.Y. TIMES, May 2, 2007, at C11.

21. BERNARD BAILYN, *TO BEGIN THE WORLD ANEW* 114 (2003); CHRISTOPHER COLLIER, *ALL POLITICS IS LOCAL* 60-61 (2003); RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW* § 3.6 (3d ed. 1999 & Supp. 2007); A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* § 8.8 (Marie-Joy Paredes & Lisa A. Fiening eds., 2007); Robert Barrett, Comment, *History on an Equal Footing: Ownership of the Western Federal Lands*, 68 U. COLO. L. REV. 761, 764-65 (1997); Frank W. DiCasteri, Comment, *Are All States Really Equal? The "Equal Footing" Doctrine and Indian Claims to Submerged Lands*, 1997 WIS. L. REV. 179, 183; James R. Rasband, *The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines*, 32 LAND & WATER L. REV. 1, 30-32 (1997); Paul Conable, *Equal Footing, County Supremacy, and the Western Public Lands*, 26 ENVTL. L. 1263 (1996) (describing recent litigation to defeat the federal government's claims to land within state borders); Louis Touton, Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817, 833, 838 (1980).

As each new state was admitted to the Union, the federal government granted it title to and sovereignty over the land within the state pursuant to the "equal footing" doctrine – the doctrine that each state would enter the Union on an equal footing with the original states.²² As a result, land laws in this country vary widely by state due to several factors, such as differences in geography, history, and political development. Like other aspects of land law, mortgage laws differ greatly among the states as each has worked to strike a balance between the rights of lenders and borrowers. No two states have the same mortgage laws.²³

These differences in state laws had little impact on the mortgage market when it was largely a local enterprise. Today, however, the lack of uniformity has proven to be a significant problem for the secondary market because a mortgage's value is affected by the laws of the state where the mortgaged land is located.²⁴ This effect is so significant that prospectuses for offerings of mortgage securities usually describe the state laws that govern the mortgages in the pool, particularly the foreclosure laws.²⁵

22. ROTUNDA & NOWAK, *supra* note 21, § 3.6; TARLOCK, *supra* note 21, § 8.8; Barrett, *supra* note 21, at 765, 790-93; DiCastrì, *supra* note 21, at 182-84; Rasband, *supra* note 21, at 30-34; Conable, *supra* note 21, at 1267; John Hanna, *Equal Footing in the Admission of States*, 3 BAYLOR L. REV. 519 (1951).

23. Alexander, *supra* note 8, at 307; Nelson & Whitman, *supra* note 8, at 1403-06; Randolph, *Uniform Land Security Interest Act*, *supra* note 3, at 1112; Geis, *supra* note 3, at 289.

24. The severity of the loss following foreclosure is directly related to the law governing foreclosure of the mortgage. Losses on foreclosure are experienced in five ways: deterioration of the property before the holder of the mortgage is afforded possession after the mortgagor's default, the cost of holding and maintaining the property for the period between mortgagor dispossession and foreclosure sale, the cost of complying with the procedure for foreclosure in order to pass title recognized by the state, the depression of the foreclosure sale price due to uncertainties in the title so passed, and the costs associated with delays built into the foreclosure process.

Jo Anne Bradner, Comment, *The Secondary Mortgage Market and State Regulation of Real Estate Financing*, 36 EMORY L.J. 971, 995 (1987). See also Debra Poggrund Stark, *Foreclosing on the American Dream: An Evaluation of State and Federal Foreclosure Laws*, 51 OKLA. L. REV. 229, 238 (1998).

25. Nelson & Whitman, *supra* note 8, at 1406-07; Randolph, *Uniform Land Security Interest Act*, *supra* note 3, at 1111 n.4, 1120; Uniform Land Security Interest Act, 7A U.L.A. 403, 405 (1985); RESTATEMENT (THIRD) OF PROP.: MORTGAGES at 97 (1997) (introductory note to Chapter 3) ("[L]ack of uniformity may have been only a minor inconvenience in an earlier era; today it is a serious obstacle to the nation's economic welfare.").

A. Federal Preemption

During the past 35 years, the federal government has attempted to create greater uniformity in mortgage law. To date, its efforts have focused on exempting federal entities from state mortgage laws. For example, in 1973, Congress considered legislation that would have exempted all federal entities from state foreclosure laws.²⁶ Although that legislation failed, Congress has considered similar legislation several more times.²⁷ Unable to enact such a broad exemption, Congress enacted legislation in 1981 and in 1984 that exempts the Department of Housing and Urban Development from state foreclosure laws.²⁸ A currently pending bill would extend this exemption to state and local governments to which HUD transferred a multifamily mortgage.²⁹

The scope of the HUD exemption demonstrates Congress' aggressiveness in displacing state laws. "[T]hese federal nonjudicial foreclosure laws combine the harshest features of foreclosure processes currently in existence under state laws and together provide the least protection to defaulting borrowers in comparison with the laws in each of the fifty states."³⁰ These federal laws eliminate the most important state borrower protections, including the statutory right of redemption³¹ and anti-deficiency laws.³² They authorize HUD to foreclose without judicial proceedings ("nonjudicial foreclosure"), even in the approximately 20 states that do not permit this relatively fast form of foreclosure.³³ Moreover, the federal laws apply retroactively, thereby eliminating protections to which the borrower was entitled when the loan was made.³⁴ The harshness of the HUD laws raises such substantial constitutional issues, particularly concerning notice and the right to a hear-

26. H.R. 10688, 93d Cong. §§ 401-19 (1st Sess. 1973); S. 2507, 93d Cong. §§ 401-19 (1st Sess. 1973). Nelson & Whitman, *supra* note 8, at 1411; Jon W. Bruce, *The Impact of Diverse Mortgage Law and Other Aspects of the Legal Environment on the Flow of Funds for Mortgage Lending Among States: Lessons Derived from the United States Experience 11* (1992) (unpublished manuscript, on file with author).

27. Patrick A. Randolph, Jr., *The New Federal Foreclosure Laws*, 49 OKLA. L. REV. 123, 123 (1996) [hereinafter Randolph, *Federal Foreclosure Laws*].

28. Single Family Mortgage Foreclosure Act, 12 U.S.C. §§ 3751-3768 (1994); Multi-Family Mortgage Foreclosure Act, 12 U.S.C. §§ 3701-3717 (1981).

29. H.R. 44, 110th Cong. (1st Sess. 2007).

30. Stark, *supra* note 24, at 241.

31. See NELSON & WHITMAN, *supra* note 4, § 8.4. Approximately 29 states statutorily provide the owner of foreclosed property, as well as junior lienors in some states, with an opportunity to recover title to the foreclosed property after the foreclosure sale. *Id.* § 8.4, at 689 & n.2.

32. If a foreclosure sale does not generate enough money to pay the foreclosed debt in full, the foreclosing lender can sue anyone personally liable for the debt to recover the deficiency. Many states statutorily limit or eliminate lenders' right to do so. *Id.* § 8.3.

33. *Id.* § 7.19, at 581-82 n.1.

34. Stark, *supra* note 24, at 241.

ing,³⁵ that title insurers are reluctant to insure titles acquired at foreclosure sales conducted pursuant to them.³⁶

Congress' primary reason for enacting this legislation was to reduce the federal government's costs of foreclosure by eliminating the need to comply with a wide variety of state laws, especially those that lengthen the foreclosure process.³⁷ When advocating for the legislation, a HUD official testified that the cost of foreclosing FHA mortgages was "one of our most serious problems."³⁸ The accuracy of this statement is difficult to evaluate, because commentators differ on how much money is saved by preempting state laws.³⁹ On the other hand, the value of the preempted rights is demonstrated clearly by a federal statutory provision that affords the federal government protections unavailable to others under state law when it has a property interest at stake in a foreclosure.⁴⁰

Congress is not alone in its actions to preempt state mortgage laws. Even without legislative authorization, a number of federal agencies have taken the position that they are exempt from state mortgage laws based on the Supremacy Clause of the U.S. Constitution.⁴¹ Popular targets for agencies have been state statutory redemption rights, anti-deficiency laws, and notice requirements.⁴² Substantial conflict exists in the case law concerning the borrower protections that are inapplicable to federal agencies and concerning which entities are exempt from these state laws.⁴³ Surprisingly, some courts

35. NELSON & WHITMAN, *supra* note 4, at 624-25; Randolph, *Federal Foreclosure Laws*, *supra* note 27, at 128-31.

36. Stark, *supra* note 24, at n.70. *See also* Randolph, *Federal Foreclosure Laws*, *supra* note 27, at 134.

37. Geis, *supra* note 3, at 305.

38. Bradner, *supra* note 24, at 997-98.

39. *Compare* Stark, *supra* note 24, at 247 (cost savings from preempting state law is 1.6% in a state that requires judicial foreclosure), *with* Nelson & Whitman, *supra* note 8, at 1403-04, *and* Randolph, *Federal Foreclosure Laws*, *supra* note 27, at 134 ("The Office of Management and Budget estimates that the adoption of the proposed procedure would save the government \$500 million.").

40. 28 U.S.C. § 2410(c) (2006) (one-year statutory right of redemption; does not apply to FHA-insured loans, 12 U.S.C. § 1701k, or to VA-guaranteed loans, 38 U.S.C. § 1820(d)); 26 U.S.C. § 7425(c), (d) (federal tax liens).

41. U.S. CONST. art. VI, § 2.

42. Alexander, *supra* note 8, at 324-30; Bradner, *supra* note 24, at 976-96; Burkhart, *supra* note 10, at 282; Randolph, *Uniform Land Security Interest Act*, *supra* note 3, at 1122-23.

43. A substantial reason for the conflicting case law is the U.S. Supreme Court's failure to provide clear standards. In the leading case on this issue, *United States v. Kimbell Foods, Inc.*, the Court stated the test for determining whether a federal agency should comply with state law: (1) whether the federal program requires uniform national rules; (2) whether application of varying state laws would frustrate the federal program's objectives; and (3) whether failure to follow state law would dis-

have held that Fannie Mae and Freddie Mac, two of the largest purchasers in the secondary mortgage market, are exempt from certain state foreclosure laws, though they are government-sponsored enterprises (GSE), rather than federal agencies.⁴⁴

These exemption cases have proceeded on a rather piecemeal basis with individual agencies challenging their obligation to comply with a particular state law. In contrast, the Office of Thrift Supervision (OTS), which regulates federal savings and loan associations, and the Office of the Comptroller of the Currency (OCC), which regulates national banks, have comprehensively exempted federal lenders from a wide range of state laws, including those concerning (1) credit terms, such as prepayment penalties, (2) licensing, registration, filings, and reporting, (3) usury, (4) the enforceability of due on sale clauses, (5) private mortgage insurance, (6) security for loans, (7) required disclosures and advertising, (8) access to and use of credit reports, (9) escrow accounts, and (10) the processing, origination, servicing, and sale or purchase of mortgages.⁴⁵

The OCC pushed the envelope a step further in 2004 when it promulgated regulations that extended the exemptions to state-chartered subsidiaries of federal banks. The exemptions generated “fierce opposition from consumer groups, state regulators, and state attorneys general.”⁴⁶ But despite this opposition and over a vigorous dissent by three justices, the U.S. Supreme Court upheld the exemptions in its recent decision, *Watters v. Wachovia Bank, N.A.*⁴⁷

The Court’s decision in *Watters* is striking both because of the facts of the case and because of its substantial potential to further limit the applicability of state mortgage lending laws. Wachovia Mortgage was a Michigan-chartered mortgage lender. As such, it had to register with the Michigan Office of Insurance and Financial Services (OIFS) and otherwise to comply with the state lending laws.

In 2003, Wachovia Bank, a national bank, acquired Wachovia Mortgage as a subsidiary. After being acquired, Wachovia Mortgage notified OIFS that

rupt commercial relationships that are based on state law. See 440 U.S. 715, 728 (1979).

44. NELSON & WHITMAN, *supra* note 4, at 936-37.

45. OCC Real Estate Lending and Appraisals, 12 C.F.R. § 34.4(a) (2007); OTS Lending and Investment, 12 C.F.R. § 560.2(b) (2007); Laurie A. Burlingame, *A Pro-Consumer Approach to Predatory Lending: Enhanced Protection Through Federal Legislation and New Approaches to Education*, 60 CONSUMER FIN. L.Q. REP. 460, 461 (2006). See also Dale A. Whitman, *Preemption of State Laws Protecting Mortgage Borrowers: The Parity Act May Be Broader Than You Think*, 478 PLI/REAL 549, 584 (2002) [hereinafter Whitman, *Preemption of State Laws*].

46. Costas A. Avrakotos, Steven M. Kaplan, Sam Ozeck & David L. Beam, *No Trespassing: OCC Tells States to Keep Out*, 23 No. 2 BANKING & FIN. SERVICES POL’Y REP. 1, 1 (2004).

47. 127 S. Ct. 1559 (2007).

it no longer would comply with the state laws from which national banks were exempt,⁴⁸ though it did not engage in the central banking activity of accepting deposits.⁴⁹ In response, OIFS sued to require Wachovia Mortgage to comply with certain state laws that are designed to prevent mortgage lending abuses. The particular laws at issue involved the state's visitorial power.⁵⁰ Wachovia argued that it was not subject to those laws, and the U.S. Supreme Court agreed. The Court reasoned that, because national banks have authority to make mortgage loans, state law does not apply whether the bank or its state-chartered subsidiary makes them.

Whatever one thinks about the correctness of the Court's decision, it undoubtedly will decrease the number of lenders to which state laws apply, as Justice Stevens forcefully stated in his dissenting opinion. He correctly noted that "the OCC's regulation may drive companies seeking refuge from state regulation into the arms of federal parents, harm those state competitors who are not lucky enough to find a federal benefactor, and hamstring States' ability to regulate the affairs of state corporations."⁵¹ He also expressed concern about the scope of the preemption because consumer protection traditionally has been an area of state regulation.⁵²

Perhaps the more important outcome of the OCC regulations is the additional impetus it will provide to preempt state laws for all lenders, rather than just for federally regulated lenders. As described above, Congress and the federal agencies so far have acted primarily to exempt federal entities from state law. But pressure is increasing to impose uniform national standards for all mortgage lenders, and *Watters* will add to that pressure. As federal banks acquire more state-charted mortgage lenders, the number of lenders subject to state law will decrease, and they will be at a competitive disadvantage against lenders that are not similarly restricted.

B. Uniform Industry Standards

The pressure by the federal government for greater national uniformity is greatly supplemented by the force of the mortgage market. Like the federal government, the market is strongly motivated to decrease transaction costs and risks by establishing uniform national standards. The market's first major step in this direction was to employ standardized loan documents. In

48. *Id.* at 1572 (Stevens, J., dissenting).

49. *Id.* at 1580.

50. In this context, federal law defines the "visitorial" power as "(i) [e]xamination of a bank; (ii) [i]nspection of a bank's books and records; (iii) [r]egulation and supervision of activities authorized or permitted pursuant to federal banking law; and (iv) [e]nforcing compliance with any applicable federal or state laws concerning those activities." OCC Bank Activities and Operations, 12 C.F.R. § 7.4000(a)(2) (2007).

51. *Watters*, 127 S. Ct. at 1585 (Stevens, J., dissenting).

52. *Id.* at 1581.

1970, Fannie Mae and Freddie Mac promulgated form documents that today are used in approximately 90% of the residential loan closings in this country.⁵³ A similar process is underway for the documentation of commercial loans,⁵⁴ and increasing market demand for uniformity now also includes services and products related to mortgage lending, such as underwriting standards, construction standards, appraisal practices, title insurance, and mortgage insurance.⁵⁵

In addition to a desire to reduce costs and risks, real estate industry associations have incentives to adopt uniform national standards in these areas as a form of self-regulation in an attempt to forestall government regulation. For example, the Conference of State Bank Supervisors, in conjunction with the American Association of Residential Mortgage Regulators, recently promulgated principles and model legislation concerning the licensing of mortgage brokers and lenders in an attempt avoid federal licensing legislation.⁵⁶ However, they may be unsuccessful because the chair of a congressional committee more recently announced plans to introduce legislation to create a national regulatory regime for mortgage brokers, and the FDIC is pressing for national regulations.⁵⁷

On the other hand, the mortgage industry has sought Congress' help in establishing national standards when state and local governments have enacted non-uniform legislation. The most active battle currently being waged is over legislation concerning predatory lending. State and municipal legislatures have enacted a welter of laws.⁵⁸ Therefore, the mortgage industry has asked Congress to provide uniform national laws, and members of Congress have responded.⁵⁹ Three federal predatory lending bills currently are pend-

53. Randolph, *Uniform Land Security Interest Act*, *supra* note 3, at 1113. See generally Julia Patterson Forrester, *Fannie Mae/Freddie Mac Uniform Mortgage Instruments: The Forgotten Benefit to Homeowners*, 72 MO. L. REV. 1077 (2007).

54. Randolph, *Uniform Land Security Interest Act*, *supra* note 3, at 1115.

55. Bradner, *supra* note 24, at 992; Burkhart, *supra* note 10, at 280.

56. *Mortgage Lenders, State Regulators Agree on Basic Principles of Mortgage Licensing System*, INSIDE MORTGAGE FIN., Feb. 23, 2007, at 9.

57. *FDIC Presses Fed to Use HOEPA to Regulate All Subprime Mortgage Lenders, Pushes for Minimum National Standards*, INSIDE MORTGAGE FIN., July 20, 2007, at 3; *Problems in Subprime Market Bring New Energy to Capitol Hill Debate on Mortgage Legislation*, INSIDE MORTGAGE FIN., March 30, 2007, at 3.

58. Julie R. Caggiano, *2004 Update on Residential Mortgage Lending (Including Preemption, RESPA, ECOA, and TILA) and Texas HELOCS*, 58 CONSUMER FIN. L.Q. REP. 308, 308 (2004); Julia Patterson Forrester, *Still Mortgaging the American Dream: Predatory Lending, Preemption, and Federally Supported Lenders*, 74 U. CIN. L. REV. 1303, 1322 (2006); *109th Congress Winds Down Regular Season; Elections May Determine Mortgage Issues in Lame Duck*, INSIDE MORTGAGE FIN., Sept. 29, 2006, at 3.

59. Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 TEMPLE L. REV. 1, 86 (2005).

ing,⁶⁰ and several members of Congress have stated that they will introduce additional bills.⁶¹ A common feature of these bills is a total preemption of state law.⁶²

C. Secondary Market Failures

The greatest impetus for preemption may not be to facilitate the market but to prevent the great harm that the market could inflict on the economy and on the housing market. In the past few years, Fannie Mae and Freddie Mac have presented the first specters of the enormous damage that the market could inflict on the economy.⁶³ Together, they financed almost \$822 billion of new RMBS during 2006, which represented over 27% of that year's total production.⁶⁴ In that same year, they were found to have engaged in billions of dollars of accounting irregularities.⁶⁵ Fannie Mae alone committed \$10.8 billion in wrongful accounting practices.⁶⁶ As a result, Fannie Mae has been sued by several groups, including the State of Ohio on behalf of its public pension funds.⁶⁷

Unfortunately, the accounting scandal is not the only problem facing the GSEs. High ranking federal officials have charged that Fannie Mae and

60. H.R. 2061, 110th Cong. (1st Sess. 2007); *Frank Mulls Timing of His Anti-Predatory Lending Bill, Other Lawmakers Jump in With Their Own Versions*, INSIDE MORTGAGE FIN., July 20, 2007, at 11.

61. *Frank Mulls Timing*, *supra* note 60, at 11; *Frank Says Anti-Predatory Lending Bill Will Combine Components of Fair Lending, Consumer Protection*, INSIDE MORTGAGE FIN., March 23, 2007, at 5-6; Vikas Bajaj, *Senators Seek to Provide Aid on Mortgages*, N.Y. TIMES, May 4, 2007, at C9; Stephen Labaton, *Lawmakers Aim to Curb Loan Abuses*, N.Y. TIMES, March 17, 2007, at B1.

62. *E.g.*, Mortgage Lending Improvements and Uniform National Standards Act, H.R. 1295, 109th Cong. § 106 (1st Sess. 2005); Uniform National Standards Act, H.R. 4471, 109th Cong. § 106 (1st Sess. 2005).

63. Bradley K. Krehely, Comment, *Government Sponsored Enterprises: A Discussion of the Federal Subsidy of Fannie Mae and Freddie Mac*, 6 N.C. BANKING INST. 519, 519 (2002); Annys Shin, *Cut Fannie's Holdings, Critics Say*, WASH. POST, Feb. 25, 2006, at D01 [hereinafter Shin, *Cut Fannie's Holdings*] (“[S]ome analysts think it could destabilize the country's financial markets if [Fannie Mae] were to fail.”). See generally THOMAS H. STANTON, *A STATE OF RISK* (1991).

64. *Securitization Became More Popular Funding Strategy in 2006, but GSE Programs Played a Smaller Role*, INSIDE MORTGAGE FIN., March 16, 2007, at 9.

65. Annys Shin, *Fannie, Freddie Keep Up Lobbying*, WASH. POST, Feb. 20, 2006, at D01 [hereinafter Shin, *Keep Up Lobbying*].

66. Editorial, *It Looks Like Fannie Had Some Help*, BUSINESS WEEK, June 12, 2006, available at http://www.businessweek.com/magazine/content/06_24/b3988064.htm; Shin, *Cut Fannie's Holdings*, *supra* note 63, at D01.

67. *Ohio is First State to Sue Fannie Mae*, MORTGAGE NEWS DAILY, Jan. 14, 2007, available at http://www.mortgagenewsdaily.com/11232004_Ohio_Is_First_State_To_Sue_Fannie_Mae.asp.

Freddie Mac have been so massively mismanaged that they run the risk of becoming insolvent.⁶⁸ If that happens, the country's housing and finance markets could become seriously destabilized.⁶⁹ A U.S. Treasury Assistant Secretary recently said that the impacts could be as serious as those of the 1980s savings and loan crisis.⁷⁰ By one estimate, a government bailout of Fannie Mae and Freddie Mac would cost every taxpayer more than \$16,000.⁷¹

If the financial threats posed by Fannie Mae and Freddie Mac become a reality, the federal government very likely would bail out the mortgage industry as it did the thrift industry and the Farm Credit System in the 1980s. Although the full faith and credit of the federal government does not stand behind the GSEs, investors commonly assume that the government will prevent

68. *Fannie and Freddie at Risk, Treasury Says*, SEATTLE TIMES, June 27, 2006, available at <http://archives.seattletimes.nwsourc.com/web/> (search for "Fannie and Freddie at Risk").

69. In testimony before the Senate Banking Committee, Alan Greenspan, then-Chair of the Federal Reserve, warned that "future systemic difficulties" in Fannie Mae's and Freddie Mac's operations could threaten the country's financial system. Alan Greenspan, Chairman, Bd. of Governors of the Fed. Reserve, Testimony before the Committee on Banking, Housing, and Urban Affairs: Government-Sponsored Enterprises (2004), available at <http://www.federalreserve.gov/boarddocs/testimony/2004/20040224/default.htm>. See also Shin, *Keep up Lobbying*, *supra* note 65, at D01.

70. *Fannie and Freddie at Risk*, *supra* note 68.

From 1980 to 1994, record losses were absorbed by the federal deposit insurance funds. Nearly 1,300 thrifts failed, and 1,617 federally-insured banks were closed or received FDIC financial assistance. Losses to deposit insurance funds were about \$125 billion. The number of thrift institutions declined from more than 4,000 at the beginning of the 1980s to well below 3,000 by the end of the decade, and to about 2,200 by the beginning of 1993. Congress responded to these problems by enacting the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) . . . [FIRREA] created the Resolution Trust Corporation (RTC) to manage and dispose of the assets of insolvent thrifts.

NELSON & WHITMAN, *supra* note 4, at 843-44 (footnotes omitted).

While the total cost of the thrift industry bailout encompassed by FIRREA is unknown, it is clear that virtually overnight the RTC became one of the largest holders of mortgages in the United States. In the first two years of its existence, from August 1989 through August 1991, the RTC took control of 646 thrift institutions (closing 511 of them), having assets of \$340.7 billion, of which \$161.3 billion were represented by mortgage loans. At the end of this period the RTC still retained over \$83 billion in mortgage loans.

Alexander, *supra* note 8, at 322 (footnotes omitted).

71. John F. Wasik, *If Fannie and Freddie Falter, We All May Pay*, BLOOMBERG NEWS, March 9, 2004, available at <http://www.moneyfiles.org/housingcrash16.html>.

them from failing because of their government-related status.⁷² Fannie Mae and Freddie Mac are government-chartered, are responsible for advancing government housing policies, are exempt from state and local income taxes, have a line of credit with the Treasury Department, and enjoy other government benefits.⁷³ The President also appoints five members of Fannie Mae's and Freddie Mac's Boards of Directors.⁷⁴

More importantly, the federal government would be motivated to act to prevent harm to the American financial market and to protect the market's international reputation.⁷⁵ In his statement to the Senate Banking Committee, then-Chair Alan Greenspan expressed the Federal Reserve Board's concerns about GSE stability:

[The federal government is] the lender of last resort. In the event of a crisis of a major institution, which we think, were it to liquidate very quickly, could create systemic instability, we will endeavor to find a way to liquidate it gradually – unwind the whole operation, obviously eliminate all shareholders, and perhaps create some haircuts to the debt itself. But that process is necessary in order to prevent a shock to the system and a destabilization. Under the existing rules, if there is a crisis, it's going to be very difficult for the federal government not to guarantee these assets.⁷⁶

Congress has demonstrated its willingness in the past to assist GSEs when they are experiencing financial difficulties. For example, Congress exempted Fannie Mae from taxes during its insolvency from 1979-84.⁷⁷

72. Greenspan Testimony, *supra* note 69; Panos Konstas, *Privatizing Fannie Mae and Freddie Mac: An Operating Restriction May Be Enough to Increase Competition and Efficiency*, 114 *BANKING L.J.* 943, 944-45 (1997).

73. Greenspan Testimony, *supra* note 69; Wayne Passmore, *The GSE Implicit Subsidy and the Value of Government Ambiguity* 2, 8 (2005), available at <http://www.federalreserve.gov/Pubs/feds/2005/200505/200505pap.pdf>. See also Krehely, *supra* note 63, at 520-31.

74. About Fannie Mae: Executives, <http://www.fanniemae.com/aboutfm/executives/index.jhtml?p=About+Fannie+Mae&s=Executives> (last visited Oct. 19, 2007); Freddie Mac's Corporate Governance Guidelines ¶ 1, available at http://www.freddiemac.com/governance/pdf/gov_guidelines.pdf (last visited Oct. 19, 2007).

75. Joseph R. Mason & Joshua Rosner, *How Resilient are Mortgage Backed Securities to Collateralized Debt Obligation Market Disruptions?* 36 (2007), available at http://www.hudson.org/files/publications/Mason_RosnerFeb15Event.pdf.

76. Greenspan Testimony, *supra* note 69. See also Krehely, *supra* note 63, at 540 ("If the GSEs pose a major threat to world markets, the federal government is likely to intervene, regardless of any explicit or implicit guarantee.").

77. Krehely, *supra* note 63, at 537.

D. Subprime and Alt A Mortgages

Despite the magnitude of the problems that Fannie Mae and Freddie Mac could cause, subprime and Alt A (Alternative A) mortgages may present even more substantial threats to the economy and to the housing market.⁷⁸ Subprime loans typically are made to borrowers with weak credit histories. Alt A loans are made either (1) to a borrower whose credit history is better than that of a subprime borrower but not as strong as that of a borrower who qualifies for a prime loan or (2) for transactions that otherwise present greater risks.⁷⁹

Because subprime and Alt A loans bear higher interest rates than prime loans, MBS investors hungry for higher returns have caused the number of these mortgages to increase dramatically.⁸⁰ In the last decade, subprime loans have increased from 5% of mortgage originations to 20%. Together, subprime and Alt A loans constituted 39% of residential mortgage originations in 2006 and 21% of all outstanding mortgages.⁸¹ The huge growth in the number of these loans is attributable in part to lenders' more lenient lending standards for them than for other types of loans. For example, subprime originators lent 100% of the property's value in 38% of the loans they closed in 2006. In approximately 45% of the subprime loan originations, the lender

78. Mason & Rosner, *supra* note 75, at 35; Editorial, *Mortgage Insecurities*, N.Y. TIMES, Feb. 22, 2007, at A22 ("At a similar point a decade ago, Russia defaulted on its foreign debt and Asia came unglued, weakening global growth. This time, the trigger could be the rapid erosion in the quality of American home mortgages – reflected in surging delinquencies and rising defaults."); Vikas Bajaj, *Freddie Mac Tightens Standards*, N.Y. TIMES, Feb. 28, 2007, at C1 ("[C]oncerns about the deterioration of the subprime market have weighed on financial stocks. Those concerns persisted yesterday amid a sharp sell-off in stock markets around the world."). *But see* Jeremy W. Peters, *Fed Chief Addresses Foreclosures*, N.Y. TIMES, May 18, 2007, at C1 ("The Federal Reserve does not foresee a broader economic impact from the growing number of mortgage defaults and home foreclosures, its chairman said yesterday.").

79. Vikas Bajaj, *Defaults Rise in Next Level of Mortgages*, N.Y. TIMES, April 10, 2007, at C1.

80. Mason & Rosner, *supra* note 75, at 14-15. Mason and Rosner state that the increase in the subprime market also is a function of increased investor demand for MBS generally, lenders' greater ability to securitize loans, and lenders' accounting issues. Forrester, *supra* note 58, at 1310-11; Frank Says *Anti-predatory Lending Bill Will Combine Components of Fair Lending, Consumer Protections*, INSIDE MORTGAGE FIN., March 23, 2007, at 5; Gretchen Morgenson, *Crisis Looms in Market for Mortgages*, N.Y. TIMES, March 11, 2007, at A1, A15 ("In the ever-present search for high yields, buyers clamored for securities that contained subprime mortgages, which carry interest rates that are typically one or two percentage points higher than traditional loans.").

81. Mason & Rosner, *supra* note 75, at 14; Bajaj, *supra* note 79, at C1.

required little or no documentary evidence of the borrower's income. These loans have come to be known as "liar loans."⁸²

Unsurprisingly, the subprime market has faltered during the past year. The default rate on subprime mortgages increased to five times the rate for conventional loans, and the foreclosure rate is now ten times greater. The Center for Responsible Lending projects that more than two million subprime borrowers may lose their home in the next year.⁸³

The ripple effects of these defaults and foreclosures are being felt throughout the U.S. economy and the economies of many other countries. A wide variety of investors, including pension funds and insurance companies, have been hit hard by losses on subprime MBS holdings, and the problems are growing. Many subprime lenders have gone out of business or have declared bankruptcy.⁸⁴ Correspondingly, Alt A loans are starting to go into default at significantly greater rates than in the past,⁸⁵ and some industry members are now expressing concerns about lax underwriting standards for commercial mortgages.⁸⁶ As with predatory lending, these problems may motivate Congress to intervene.⁸⁷

In the worst case scenario – a government bailout of the mortgage industry – the likelihood of preemptive federal legislation will increase dramatically. Preemption would generate huge cost savings for the government's management of the mortgage portfolio that it will control as a result of the bailout. With such a large portion of the nation's mortgages being exempted from state law, Congress may decide to preempt state lending laws entirely to maintain a level playing field for state and federally regulated lenders. That

82. Mason & Rosner, *supra* note 75, at 14-15. See also Bajaj, *supra* note 79, at C1.

83. Kenneth Harney, *Will Lax Mortgage Lending Policies Hit Home?*, MINNEAPOLIS STAR TRIBUNE, Feb. 17, 2007, at H10; Noelle Knox, *Some Subprime Woes Linked to Hodgepodge of Regulators*, USA TODAY, March 16, 2007, at 1.

84. *Subprime Mortgage Virus Spreading to Larger, More Diversified Lenders*, INSIDE MORTGAGE FIN., April 13, 2007, at 4-5; *New Century Files for Bankruptcy as Most Mortgage REITs Falter in 2006*, INSIDE MORTGAGE FIN., April 6, 2007, at 8 ("Only four of the nine major mortgage REITs that had significant production capacity are still standing on their own two feet, and only one . . . reported positive earnings in the fourth quarter."); Vikas Bajaj, *East Coast Money Lent Out West*, N.Y. TIMES, May 8, 2007, at C1; Julie Creswell & Vikas Bajaj, *Home Lender is Seeking Bankruptcy*, N.Y. TIMES, April 3, 2007, at C1 (New Century Financial Corp., the second largest subprime mortgage lender, filed for bankruptcy); Morgenson, *supra* note 80, at A1, A15 ("Already, more than two dozen mortgage lenders have failed or closed their doors, and shares of big companies in the mortgage industry have declined significantly.").

85. Bajaj, *supra* note 79, at C1; *Credit Problems Begin Cropping up in Alternative A Mortgage Sector*, INSIDE MORTGAGE FIN., April 6, 2007, at 11-12.

86. Pristin, *supra* note 20, at C7.

87. *Congress Considering Federal Solution to Increase in Subprime Foreclosures*, INSIDE MORTGAGE FIN., April 13, 2007, at 6.

was a large motivation for Congress' preemption of state laws concerning usury,⁸⁸ due-on-sale clauses,⁸⁹ alternative mortgage instruments,⁹⁰ and prepayment penalties.⁹¹ Congress also has demonstrated its willingness to impose new national requirements on state, as well as federal, mortgage lenders, such as the Real Estate Settlement Procedures Act,⁹² the Truth in Lending Act,⁹³ the Fair Housing Act,⁹⁴ and the Home Mortgage Disclosure Act.⁹⁵

Of course, Congress may never have to bail out the mortgage industry. The government and the mortgage industry are pursuing remedies to correct past errors by the GSEs and the subprime market and to prevent them from happening again. And the mortgage market has managed to expand tremendously despite a wide variety of state mortgage laws. However, as described in the next section of this Article, the United States' domination of the mortgage market will diminish over the next few decades as many more countries enter the market as sellers, rather than only as buyers. The need to remain competitive with MBS from around the world will increase the pressure to unify American mortgage law.

III. GLOBALIZATION OF REAL ESTATE PRACTICE

A. American Lawyers in Transnational Real Estate Transactions

As the economy has become more global, U.S. lawyers increasingly are representing clients in other countries. Although an American law firm first established a foreign office at the end of the nineteenth century,⁹⁶ the amount of transnational legal practice has become significant in this country only during the last thirty years, but its growth during that time has been explosive. In 1986, American legal services in other countries generated \$97 million in revenue. In 2001, these services generated \$3.143 billion, an increase of

88. 12 U.S.C. § 1735f-7 (2006).

89. *Id.* § 1701j-3.

90. *Id.* § 3803c. See also Whitman, *Preemption of State Laws*, *supra* note 45, at 584 (Office of Thrift Supervision has interpreted the preemption of state law broadly).

91. OCC Real Estate Lending and Appraisals, 12 C.F.R. § 34.4 (2007).

92. 12 U.S.C. §§ 2601-17 (2006) (requires specified disclosures concerning loan closing costs and prohibits referral fees).

93. 15 U.S.C. §§ 1601-93 (2006) (requires specified disclosures concerning finance charges).

94. 42 U.S.C. §§ 3601-31 (2006) (prohibits class-based discrimination in the sale and rental of housing).

95. 12 U.S.C. §§ 2801-11 (2006) (requires lenders to disclose information concerning the locations of properties on which they hold a mortgage).

96. Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 738 (1994).

3,240%.⁹⁷ American law firms now have more than 400 offices in other countries; thousands of American lawyers regularly are practicing in foreign countries;⁹⁸ and these numbers are increasing rapidly.⁹⁹ In recognition of the importance of transnational practice, the ABA has a Transnational Legal Practice Committee, and The American Law Institute has undertaken several transnational law projects.

The great bulk of transnational representation is rendered in connection with commercial transactions, including real estate transactions.¹⁰⁰ Although lawyers in the UK are providing increasing competition, American lawyers have been dominant in this global arena.¹⁰¹ Today, American lawyers represent parties involved in foreign land transactions far more frequently than they represent foreign purchasers of U.S. real estate,¹⁰² though the amount of foreign investment in U.S. real estate is ten times greater than American investment in foreign real estate.¹⁰³

The American College of Real Estate Lawyers (ACREL), a leading national professional organization, surveyed its members concerning their involvement in foreign real estate transactions. Approximately two-thirds of the respondents said that their firm or employer had worked on at least one such transaction. They represented clients in connection with land acquisitions, sales, rentals, and financings, including complex transactions involving manufacturing plants, energy production facilities, stadia, resorts, and even a rain forest. These transactions occurred in a wide variety of countries, from

97. Maria Borga & Michael Mann, *U.S. International Services: Cross-Border Trade in 2001 and Sales Through Affiliates in 2000* tbl.1 (Oct. 2002), available at <http://ita.doc.gov/td/sif/PDF/TRADFL102002.PDF>.

98. *Speakers Review, Seek Reform of Rules That Inhibit Multijurisdictional Law Practice*, 17 ABA/BNA LAWYERS' MANUAL ON PROF. CONDUCT 351, 354 (June 6, 2001).

99. Patrick E. Mears & Carol M. Sánchez, *Going Global*, BUS. L. TODAY, Mar./Apr. 2001, at 32.

100. Abel, *supra* note 96, at 743; Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 FORDHAM INT'L L.J. 1039, 1078 (2001-02) [hereinafter Silver, *Case of the Foreign Lawyer*].

101. William E. Carr & K.C. McDaniel, *The International Practice of Real Estate*, PROB. & PROP., Sept./Oct. 1996, at 28.

102. *Id.*

103. BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COMMERCE, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES: INDUSTRY DETAIL FOR SELECTED ITEMS, available at <http://www.bea.gov/bea/di/fdilongind.htm> (in 2002, foreign direct investment in U.S. real estate was \$40.6B); BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COMMERCE, U.S. DIRECT INVESTMENT ABROAD: INDUSTRY DETAIL FOR SELECTED ITEMS, available at <http://www.bea.gov/bea/di/usdlongind.htm> (in 2002, American investment in foreign real estate was \$4.6B).

Canada and Japan to Albania, Atar, and Macedonia.¹⁰⁴ To facilitate these foreign land transactions, American title insurance companies now insure title to foreign land, and Alabama and Florida have enacted legislation to enable Americans to become civil-law notaries.¹⁰⁵

Commentators have suggested a variety of explanations for American dominance of transnational practice. Some have argued that large law firms have the greatest incentive and ability to expand their practices into other countries.¹⁰⁶ Because the great majority of large firms traditionally have been American, these firms were able to respond most quickly to the greatly increased need for transnational legal representation. In this way, they established relationships with foreign clients and cemented a large market share despite the increasing number of large European firms.¹⁰⁷ Even if this theory is correct, large size clearly is not a prerequisite. American lawyers in small firms and solo practitioners also provide transnational representation.¹⁰⁸

Others have asserted that the American style of legal practice is particularly suited to transnational transactions. Correctly or incorrectly, these commentators believe that American lawyers generally are more pragmatic and strategic in dealing with business and legal problems than lawyers in other countries.¹⁰⁹ They also state that American lawyers have more experience dealing with diverse cultures, structuring a transaction that integrates a variety of legal systems, and assessing local counsel, business cultures, political climates, and negotiation strategies.¹¹⁰

Regardless of the merits of these arguments, the most significant reason that American lawyers play a dominant role in transnational transactions is the market's desire to increase standardization. Standardization decreases

104. Sheldon Rubin & Dean Rogeness, *ACREL Goes International*, 22 *ACREL* 7, 7-8 (May 2004), available at <http://www.acrel.org/documents/newsletters/May2004.pdf>.

105. J. Brock McClane & Michael A. Tessitore, *The Florida Civil-Law Notary: A Practical New Tool for Doing Business with Latin America*, 32 *STETSON L. REV.* 727, 750 (2003).

106. Abel, *supra* note 96, at 740-41; Carole Silver, *Globalization and the U.S. Market in Legal Services – Shifting Identities*, 31 *LAW & POL'Y INT'L BUS.* 1093, 1094 (2000) [hereinafter Silver, *Shifting Identities*].

107. David M. Trubek, Yves Dezalay, Ruth Buchanan & John R. Davis, *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 *CASE W. RES. L. REV.* 407, 432-33, 436 (1994).

108. Mary C. Daly, *Practicing Across Borders: Ethical Reflections for Small-Firm and Solo Practitioners*, 1995 *THE PROF. LAW.* 123, 134 (“Rapid changes in technology and transportation have made it possible for small-firm and solo practitioners to provide clients with competent legal services in cross-border settings. Changing patterns of immigration and trade are bringing an increasing number of problems involving foreign law into these lawyers’ offices.”).

109. Silver, *Shifting Identities*, *supra* note 106, at 1096-97.

110. Carr & McDaniel, *supra* note 101, at 28. See also Trubek et al., *supra* note 107, at 426-27.

costs because the parties repeatedly can use the same transaction structures and documents for future transactions, rather than creating new ones each time. Standardization also decreases risks because the parties use structures and documents that have proven to be successful in the past and that have withstood legal challenges.¹¹¹

By virtue of the relatively long track record of American transnational transactions, they have become a commercial norm. Financial institutions and investors frequently insist on “New York-style” documents and on the choice of New York laws.¹¹² The push for standardization also extends to the other components of the market, including the applicable laws, institutions, and even legal education.

An excellent example of this process is provided by mortgage securitizations. The enormous capacity of land to generate capital has not been lost on governments, investors, and borrowers in other countries.¹¹³ Foreign countries increasingly are securitizing their mortgages, and the results have been the same in those countries as in the United States.¹¹⁴ Substantial capital is being generated by sales of MBS to domestic and foreign investors. As a result, increased and lower cost capital is available to the residential and commercial land markets.¹¹⁵ Securitization also has provided foreign lenders, as well as American lenders, with an additional tool for managing their portfolios.¹¹⁶

From the investors’ perspective, a significant attraction of purchasing MBS from a variety of countries is portfolio diversification as protection against the differing cycles of countries’ real estate markets.¹¹⁷ This desire

111. Parikshit Dasgupta, *Securitization: Crossing Borders and Heading Towards Globalization*, 27 SUFFOLK TRANSNAT’L L. REV. 243, 254-55 (2004); Tamar Frankel, *The Law of Cross-Border Securitization: Lex Juris*, 12 DUKE J. COMP. & INT’L L. 475, 482-83 (2002).

112. Silver, *Shifting Identities*, *supra* note 106, at 1095; Trubek et al., *supra* note 107, at 487-88.

113. Kevin T.S. Kong, Note, *Prospects for Asset Securitization Within China’s Legal Framework: The Two-Tiered Model*, 32 CORNELL INT’L L.J. 237, 237 n.1 (1998); Shenker & Colletta, *supra* note 12, at 1423-26.

114. *See* Dasgupta, *supra* note 111, at 250.

115. KENNETH G. LORE & CAMERON L. COWAN, MORTGAGE-BACKED SECURITIES § 1:1 (2006); Kong, *supra* note 113, at 238-39; Georgette Chapman Poindexter & Wendy Vargas-Cartaya, *En Ruta Hacia El Desarrollo: The Emerging Secondary Mortgage Market in Latin American*, 34 GEO. WASH. INT’L L. REV. 257, 257 n.1, 259-61 (2002); Shenker & Colletta, *supra* note 12, at 1371, 1429; Erica W. Stump, *Securitizations in Latin America*, 8 U. MIAMI BUS. L. REV. 195, 196 (2000).

116. Shenker & Colletta, *supra* note 12, at 1413-16.

117. Tamar Frankel, *Cross-Border Securitization: Without Law, But Not Lawless*, 8 DUKE J. COMP. & INT’L L. 255, 268 (1998) [hereinafter Frankel, *Without Law*]; Eddie Lam, *A Primer for Investors in the Korean MBS Market*, 8 J. OF REAL EST. PORTFOLIO MGMT. 127, 127-28 (2002), available at

for diversification has created increasing competition in the international MBS market and has diminished the formerly unrivalled dominance of U.S. MBS. The challenge to American dominance began relatively recently but is growing rapidly. Within the past several years, a remarkable variety of industrialized and developing countries have enacted legislation authorizing securitizations. Approximately fifty countries now allow them – countries as diverse as Ireland, Latvia, Morocco, Nigeria, Pakistan, Panama, Thailand, Turkey, and Saudi Arabia.¹¹⁸ The increase in the number of foreign securitizations has been equally rapid. For example, the total volume of new CMBS issuances in foreign countries increased from \$12.1 billion in 2000 to \$92.7 billion just six years later.¹¹⁹

The successful importation of mortgage securitizations has caused seventeen countries to import another American real estate financing device – public REITs (real estate investment trusts). The results have been dramatic. Though these countries only recently began permitting public REITs, foreign REITs already total \$213 billion. At \$395 billion, the U.S. REIT market exceeds it, but some analysts predict that rapid expansion in the foreign markets will cause that to change as soon as next year.¹²⁰

Despite the United States' diminishing global share of the investment market, American laws and lawyers will continue to play the leading role in international securitizations for two reasons: the modern securitization process originated in this country,¹²¹ and the United States still has by far the largest secondary market in the world.¹²² By virtue of the experience gained over time and while dealing with a large volume of securitizations, both in the U.S. and in other countries,¹²³ the American legal profession as a whole has the greatest expertise in handling these transactions.

1. fullerton.edu/finance/jrepm/pdf/vol08n02/04.127_140.pdf; Poindexter & Vargas-Cartaya, *supra* note 115, at 286.

118. Vinod Kothari's Securitization Website: Securitization Markets in Different Countries, <http://www.vinodkothari.com/secprep.htm> (last visited Oct. 19, 2007). See also Douglas Arner, *Emerging Market Economies and Government Promotion of Securitization*, 12 DUKE J. COMP. & INT'L L. 505, 506 (2002).

119. COMMERCIAL MORTGAGE ALERT, CMBS MARKET STATISTICS, available at <http://www.cmalert.com/Public/MarketPlace/MarketStatistics/index.cfm> (last visited Oct. 19, 2007).

120. Vivian Marino, *A Coming of Age for the Global Real Estate Market*, N.Y. TIMES, Jan. 7, 2007, at BU18.

121. Frankel, *Without Law*, *supra* note 117, at 259. Mortgage securitization is not a new concept. It has existed for at least 200 years. Shenker & Colletta, *supra* note 12, at n.49.

122. JOHN K. THOMPSON, SECURITISATION: AN INTERNATIONAL PERSPECTIVE 8 (1995); Kong, *supra* note 113, at 240 n.18.

123. See, e.g., Mark B. Johnson, *Japan Proves Itself a Land of Opportunity*, EUROWEEK, Oct. 27, 2000, at S42. See also Noah Kofi Karley & Christine Whitehead, *The Mortgage-Backed Securities Market in the U.K.: Developments Over the Last Few Years*, 17 HOUSING FIN. INT'L 31 (2002); Adam Reinebach, *Securitizing*

This expertise is particularly significant because lawyers, rather than legislatures, administrative agencies, or courts, largely have created the rules and standards that apply to international securitizations. These governing rules and standards are set forth in the documents for the securitization: "International securitization law . . . is developed through private contracts and created by the lawyers who draft them Such laws are also known as Lawyer-Made Laws (LML)."¹²⁴ As a result, "[m]ost of the mechanisms currently used in securitisation were developed in the United States."¹²⁵

American lawyers have played a significant role in the relative standardization of securitization legislation. In many countries, before the first securitization could be completed, the legislature had to enact both enabling legislation and laws dealing with related matters, such as bankruptcies and trusts.¹²⁶ In those situations, American lawyers often were involved not only in providing documentation for the transaction, but also in drafting and lobbying for the necessary legislation.¹²⁷ Therefore, "there is considerable harmonization of laws relating to securitization in various countries."¹²⁸

Moreover, many countries are following the U.S. model in structuring their secondary mortgage market. For example, some countries are developing institutions that operate like Fannie Mae to support their market.¹²⁹ International organizations, such as the World Bank, International Finance Corporation, and Merrill Lynch, are spurring this development by providing funding for these institutions.¹³⁰

As more countries adopt U.S.-like methods, legislation, and institutions, pressure will increase for the remaining countries to follow suit. Some pressure will be internal, as countries strive to increase the competitiveness of their MBS in the global market.¹³¹ But the pressure also will be external.

Europe, INVESTMENT DEALERS' DIG., Dec. 8, 1997, at 14; *Australia Moves to Centre Stage*, EUROWEEK, Jan. 2002, at 28.

124. Dasgupta, *supra* note 111, at 252. See also Silver, *Case of the Foreign Lawyer*, *supra* note 100, at 1078.

125. THOMPSON, *supra* note 122, at 43. See also Johnson, *supra* note 123, at S42; Kong, *supra* note 113, at 240 n.18 ("The exportation of the asset-backed securitization transaction to other nations has proceeded by using the U.S. model as the basic reference structure.").

126. Jason H.P. Kravitt, *Introduction*, in ASSET-BACKED SECURITIZATION IN EUROPE 5 (Theodor Baums & Eddy Wymeersch eds., 1996); Kong, *supra* note 113, at 244 (citing examples in Indonesia, Thailand, and Japan).

127. Trubek et al., *supra* note 107, at 485-86.

128. Dasgupta, *supra* note 111, at 252. See also Kong, *supra* note 113, at 244; Trubek et al., *supra* note 107, at 488.

129. Lam, *supra* note 117, at 133-34; Poindexter & Vargas-Cartaya, *supra* note 115, at 278-79.

130. Kong, *supra* note 113, at 244 n.39; Lam, *supra* note 117, at 134; Poindexter & Vargas-Cartaya, *supra* note 115, at 278.

131. Hideki Kanda, *Securitization in Japan*, 8 DUKE J. COMP. & INT'L L. 359, 377-78 (1998); Trubek et al., *supra* note 107, at 476.

International organizations, such as the International Monetary Fund, are actively promoting legal reforms that will enhance economic development through securitizations and are providing substantial funding for that purpose. The reforms include enacting necessary legislation, promulgating model documentation, and even reforming legal education. American lawyers and institutions, including the federal government, have been actively involved in implementing these reforms. Unsurprisingly, then, they often follow U.S. models.¹³²

B. International Securitizations Conducted in the United States

Although American lawyers perform many of these activities while physically located in another country, they also conduct international securitizations while in the U.S. Foreign entities conduct their securitizations in the United States for a variety of reasons. First, the relative stability of the American political system and economy makes it an attractive alternative to countries that are subject to sovereign risk, such as government instability, unpredictability of the court system, and the possibility of drastically changing tax laws,¹³³ or that have been subject to currency devaluations, inflation, or social unrest.¹³⁴ The potential for these types of problems has caused many Mexican securitizations to be conducted in the United States. The transaction is handled through American lenders and securities markets and is stated in dollars, rather than in pesos.¹³⁵ By this means, more favorable loan terms are available, and the resulting MBS is more marketable.¹³⁶

Second, the laws in many countries hamper the MBS market. For instance, securitizations in a foreign country may be difficult because of “the length of adjudication, the lack of trust law, [and] problems with possession and security interests, including the lack of a comparable U.C.C. Article 9, and bankruptcy law.”¹³⁷ Similarly, the country may provide exceptionally strong borrower protections, which makes its mortgages less attractive to investors.¹³⁸

Finally, the securitization may be performed in the United States because it cannot be performed in the country where the mortgaged land is lo-

132. Trubek et al., *supra* note 107, at 484-85.

133. Poindexter & Vargas-Cartaya, *supra* note 115, at 282-83; Stump, *supra* note 115, at 206.

134. Poindexter & Vargas-Cartaya, *supra* note 115, at 259-61; Thomas M. Shoemsmith, *Financing Cross-Border Businesses and Access to U.S. Capital Markets*, 35 SAN DIEGO L. REV. 805, 806-07 (1998); Stump, *supra* note 115, at 199-200.

135. Stump, *supra* note 115, at 206.

136. *Id.* at 199.

137. *Id.* at 203-04.

138. In Brazil, a lender might be unable to sell foreclosed land for up to seven years. In other countries, foreclosures can take up to two years. Poindexter & Vargas-Cartaya, *supra* note 115, at 262; Stump, *supra* note 115, at 208-09.

cated. The country's capital market may be too small for the transaction,¹³⁹ or the country's lenders may originate too few mortgages to support a securitization.¹⁴⁰

C. Cross-Border Securitizations

Even for countries without these situations, significant incentives exist to securitize at least in part in the United States. As international securitizations have become more sophisticated, a securitizer now can break a transaction into its component parts – (1) loan origination, (2) loan transfer to the entity that will issue the MBS, (3) MBS issuance, (4) credit enhancements, and (5) mortgage servicing – and can perform each part in a different country.¹⁴¹ By doing so, the securitizer can maximize the transaction's value by employing the most advantageous laws and market conditions.¹⁴²

In this way, securitizations that formerly would have occurred in other countries now may occur at least in part in the U.S. For example, in the past, some foreign entities have preferred not to securitize in the U.S. because of its relatively burdensome securities laws. However, they now may elect to conduct part of the transaction here to take advantage of America's relatively strong financial markets and investor base.¹⁴³

The increasing use of these cross-border securitizations¹⁴⁴ is increasing the pressure for standardization among countries.¹⁴⁵ An investor attempting to evaluate an offering that potentially involves five different countries wants to reduce the number of variables to more readily compare different offerings.¹⁴⁶ Additionally, the desire to decrease risks and costs by using structures and documents that have worked successfully in the past will exist for cross-border securitizations as it has for other securitizations.¹⁴⁷ Perhaps most importantly, a cross-border securitization will be unworkable if the laws

139. Ivan Angelis, *Foreign Sources of Financing Privatization*, in *PRIVATIZATION IN EASTERN EUROPE: LEGAL, ECONOMIC, AND SOCIAL ASPECTS* 109, 113 (Hans Smit & Vratislav Pechota eds., 1994); Dana Chasin, *Private Sources of Financing Privatization*, in *PRIVATIZATION IN EASTERN EUROPE*, *supra*, at 122, 124; Dasgupta, *supra* note 111, at 249; Francesca Murra, *Australian RMBS Continues to Look Global*, *ASSET SECURITIZATION REP.*, Oct. 27, 2003.

140. THOMPSON, *supra* note 122, at 40; Kong, *supra* note 113, at 244; Poindexter & Vargas-Cartaya, *supra* note 115, at 279.

141. Frankel, *Without Law*, *supra* note 117, at 260-61.

142. Yuliya A. Dvorak, Comment, *Transplanting Asset Securitization: Is the Grass Green Enough on the Other Side?*, 38 *HOUS. L. REV.* 541, 553 (2001); Frankel, *Without Law*, *supra* note 117, at 263, 265.

143. Dasgupta, *supra* note 111, at 251.

144. *Id.* at 250.

145. *Id.* at 269.

146. Frankel, *Without Law*, *supra* note 117, at 267-68.

147. *Id.* at 271-72.

and standards of the different countries that are involved are incongruent.¹⁴⁸ Therefore, countries that want to be active participants in this market will have a strong incentive to conform to the evolving norms.¹⁴⁹ As cross-border securitizations become more standardized, the strong role that American laws and lawyers already play globally will continue to expand.¹⁵⁰

By the end of this century, that expansion could be enormous. Despite the tremendous growth of the transnational real estate market and of mortgage securitizations, only a small part of the world currently is participating. Many countries have such inadequate land title systems that titles are insufficiently secure to serve as collateral for loans.¹⁵¹ The Peruvian economist Hernando de Soto has estimated that 80% of the world's land is located in these countries and, therefore, constitutes "dead capital."¹⁵²

Many of these countries now recognize that creating an efficient and secure system of land titles and a secondary mortgage market will increase the capital available for the construction of homes and businesses and, thereby, their citizens' standard of living. As they have in other countries, American lawyers undoubtedly will play a significant role in helping to establish both the title systems and the secondary market.¹⁵³ In that process, they will tap into markets for legal representation that currently represent a very small

148. *Id.* at 273.

149. *Id.* at 281-82.

150. Dvorak, *supra* note 142, at 542 ("Most cross-border/transnational securitizations are structured using the U.S. model."); Frankel, *Without Law*, *supra* note 117, at 276-77.

151. Lynn Holstein, *Towards Best Practice from World Bank Experience in Land Titling and Registration* 13 (1996), available at http://www.surv.ufl.edu/publications/land_conf96/HolsteinPD.pdf.

152. HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* 40 (2000).

153. See generally Bernadette Atuahene, *Legal Title to Land as an Intervention Against Urban Poverty in Developing Nations*, 36 GEO. WASH. INT'L L. REV. 1109 (2004); Lev S. Batalov, *The Russian Title Registration System for Realty and its Effect on Foreign Investors*, 73 WASH. L. REV. 989 (1998); Joseph Blocher, Note, *Building on Custom: Land Tenure Policy and Economic Development in Ghana*, 9 YALE HUM. RTS. & DEV. L.J. 166 (2006); Donovan W. Burke, Note, *Argument for the Allocation of Resources to the Development of a Well-Defined System of Real Property Law in the Czech Republic*, 29 VAND. J. TRANSNAT'L L. 661 (1996); Maegan L. Conklin, Note, *Land Reform in Russia: Unlocking the Assets of the Rural Poor*, 43 VA. J. INT'L L. 1051 (2003); Tim Hanstad, *Designing Land Registration Systems for Developing Countries*, 13 AM. U. INT'L L. REV. 647 (1998); Holstein, *supra* note 151; Timothy Lindsey, *Square Pegs & Round Holes: Fitting Modern Title into Traditional Societies in Indonesia*, 7 PAC. RIM L. & POL'Y J. 699 (1998); Kristen Mitchell, *Market-Assisted Land Reform in Brazil: A New Approach to Address an Old Problem*, 22 N.Y.L. SCH. J. INT'L & COMP. L. 557 (2003); Joyce Palomar, *Land Tenure Security as a Market Stimulator in China*, 12 DUKE J. COMP. & INT'L L. 7 (2002); Dale A. Whitman, *Chinese Mortgage Law: An American Perspective*, 15 COLUM. J. ASIAN L. 35 (2001).

portion of their transnational practices. For example, only .4% of American lawyers' foreign revenue comes from Africa and 5% from Latin American.¹⁵⁴ Those areas and others offer the potential for tremendous growth. To enable American lawyers to make the most of these opportunities, states increasingly will relax their rules concerning the unauthorized practice of law, as described in the next section.

IV. UNAUTHORIZED PRACTICE OF LAW

Every state prohibits the unauthorized practice of law (UPL), which includes both a lawyer's practice of law outside the state where licensed and a layperson's practice of law. Penalties for violations include denial of fees, a fine, an injunction against further representation, and punishment for contempt of court. In some jurisdictions, UPL constitutes a misdemeanor.¹⁵⁵

The increasingly national and international scope of real estate practice and the attendant standardizations have resulted in widespread violations of both UPL restrictions. Real estate lawyers are routinely providing representation in states and in countries where they are not licensed, and laypersons routinely are providing real estate settlement services, such as title searches and document preparation. For the reasons discussed below, states have begun to loosen the UPL restrictions on these activities, and they will continue to do so in response to changes in the real estate market and in the legal profession.

A. Multijurisdictional Practice

The most rapid change occurring in the unauthorized practice of law rules concerns multijurisdictional practice (MJP). MJP – a lawyer's practice of law in a jurisdiction where he or she is not licensed – generally has been illegal since states enacted their UPL rules at the turn of the twentieth century. However, those rules have undergone a substantial and relatively rapid transformation since the ABA amended its Model Rules of Professional Conduct in 2002. The new ABA rule on MJP authorizes lawyers to render legal services in another state “on a temporary basis” if those services “arise out of or are reasonably related to the lawyer's practice” in the state where licensed.¹⁵⁶ In less than five years, 33 states have adopted the ABA rule or a similar version; another six states are considering adoption of the same or a similar rule; four more states' MJP study committees have recommended

154. Borga & Mann, *supra* note 97, at tbl.7.1.

155. Joyce Palomar, *The War Between Attorneys and Lay Conveyancers – Empirical Evidence Says “Cease Fire!”*, 31 CONN. L. REV. 423, 449-50 (1999); Christine R. Davis, Comment, *Approaching Reform: The Future of Multijurisdictional Practice in Today's Legal Profession*, 29 FLA. ST. U. L. REV. 1339, 1351 (2002).

156. MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(4) (2002).

adoption of the same or a similar rule; and each of the remaining states has appointed a committee to study it.¹⁵⁷ To date, only one state committee, Kansas, has rejected it.¹⁵⁸

This rapid reversal of course after a century of established rules reflects the tremendous changes that have occurred in the marketplace, in clients' expectations, and in the legal profession since states first enacted their UPL rules. At the time of enactment, lawyers seldom practiced outside their state, so the MJP rule was not a significant impediment.¹⁵⁹ In sharp contrast, real estate transactions today frequently involve properties in more than one state, and many clients conduct business across state borders.¹⁶⁰ A lawyer may represent developers who build stores or hotels for national chains, retailers who rent space throughout the country, lenders who finance construction nationally, REITs and other national real estate investors, or a client who is buying a vacation or retirement home in another state.

Unless MJP is permitted in these types of situations, a client who wants legal representation has to retain counsel in the state where the land is located, and that attorney must perform or closely supervise the legal work.¹⁶¹ Particularly with the increased price competition in the legal profession, many clients balk at what they perceive to be the unnecessary additional expense of complying with this requirement, and they object to the extra time required.¹⁶² More importantly, clients want to work with their own attorney.

157. AM. BAR ASS'N, STATE IMPLEMENTATION OF ABA MJP RECOMMENDATIONS (June 20, 2007), available at http://www.abanet.org/cpr/jclr/mjp_alpha_chart.pdf; AM. BAR ASS'N, STATE IMPLEMENTATION OF ABA MODEL RULE 5.5 (MULTIJURISDICTIONAL PRACTICE OF LAW) (Sept. 25, 2007), available at http://www.abanet.org/cpr/jclr/5_5_quick_guide.pdf.

158. *Amendments to Kansas Ethics Rules Include Many ABA Updates, But Not MJP*, 76 U.S. L. WK. 2692 (2007).

159. ABA CTR. FOR PROF'L RESPONSIBILITY, REPORT OF THE ABA COMMISSION ON MULTIJURISDICTIONAL PRACTICE 1 (2002), available at http://www.abanet.org/cpr/mjp/final_mjp_rpt_5-17.pdf; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 cmt. e (2000); Davis, *supra* note 155, at 1340.

160. Roger J. Goebel, *The Liberalization of Interstate Legal Practice in the European Union: Lessons for the United States?*, 34 INT'L LAW. 307, 323 (2000); Carol A. Needham, *The Multijurisdictional Practice of Law and the Corporate Lawyer: New Rules for a New Generation of Legal Practice*, 36 S. TEX. L. REV. 1075, 1082 (1995); Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 668 (1995).

161. Georgette C. Poindexter, *Crossing the Line: Real Estate and the Ethics of Multi-jurisdictional Practice*, SG009 A.L.I.-A.B.A. 647, 651 (2002).

162. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 cmt. e (2000); Letter from the ABA Real Property, Probate and Trust Law Section to the ABA Commission on Multijurisdictional Practice (Jan. 23, 2001), available at http://www.abanet.org/cpr/mjp/mjp-comm_srpt2.html; Wolfram, *supra* note 160, at 677.

They have established a relationship based on confidence and trust, and the attorney already is familiar with the client and its business.¹⁶³

The latter consideration is particularly significant when the client needs legal representation for repeated and standardized transactions throughout the country, such as leasing retail space.¹⁶⁴ Conversely, a client who has a unique, complex, or cutting edge transaction may want the services of a lawyer who specializes in that type of transaction regardless of where he or she is licensed.¹⁶⁵ These considerations are particularly weighty because of the increasingly accepted view that consumers should have greater choice in their legal representation.¹⁶⁶

Related to the issue of a client's right to choose, some commentators argue that MJP restrictions violate the federal Commerce Clause.¹⁶⁷ By definition, MJP constitutes interstate commerce. Limiting a client's choice of representation to in-state attorneys violates the Commerce Clause in two ways: it discriminates against interstate commerce and burdens it. By increasing the pool of legal service providers available to a client, MJP promotes competition and thereby lowers costs and improves service, which are the goals of the Commerce Clause.¹⁶⁸

Whether the MJP prohibitions are legal or illegal, many attorneys simply ignore them.¹⁶⁹ When the ABA Commission on Multijurisdictional Practice held hearings, the witnesses unanimously testified that lawyers regularly engage in MJP and agreed that MJP was increasing.¹⁷⁰ In his article, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*,¹⁷¹ Professor Charles W. Wolfram, the Reporter for the Restatement (Third) of the Law Governing Lawyers, stated: "A

163. American College of Real Estate Lawyers, Position Statement to the American Bar Association Commission on Multijurisdictional Practice 3-4 (June 2001), available at http://www.abanet.org/cpr/mjp/mjp-comm_acrel.html; ABA Real Property, Probate and Trust Law Section Comments, *supra* note 162.

164. Goebel, *supra* note 160, at 340.

165. ABA CTR. FOR PROF'L RESPONSIBILITY, *supra* note 159, at 3; American College of Real Estate Lawyers, *supra* note 163, at 3; Wolfram, *supra* note 160, at 669.

166. ABA CTR. FOR PROF'L RESPONSIBILITY, *supra* note 159, at 12; Goebel, *supra* note 160, at 338; Marla B. Rubin, *Multijurisdictional Practice*, 487 PLI/REAL 669, 674 (2002).

167. Davis, *supra* note 155, at 1347; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 cmt. e (2000).

168. American College of Real Estate Lawyers, *supra* note 163, at 4; Goebel, *supra* note 160, at 340; Davis, *supra* note 155, at 1347-48.

169. Samuel J. Brakel & Wallace D. Loh, *Regulating the Multistate Practice of Law*, 50 WASH. L. REV. 699, 699 (1975); Quintin Johnstone, *Multijurisdictional Practice of Law: Its Prevalence and Its Risks*, 74 CONN. B.J. 343, 348 (2000); *Admissions: Speakers Review, Seek Reform of Rules That Inhibit Multijurisdictional Law Practice*, 17 A.B.A./B.N.A. LAW. MANUAL ON PROF. CONDUCT 351 (June 6, 2001).

170. ABA CTR. FOR PROF'L RESPONSIBILITY, *supra* note 159, at 10.

171. Wolfram, *supra* note 160, at 685-86.

very large, yet undetermined number of lawyers are flouting at least the literal terms of the ‘thou shalt not’ of the professional codes. In fact, many transactional lawyers often – some habitually – practice law in jurisdictions in which they are not admitted.” The American College of Real Estate Lawyers confirmed that real estate lawyers are no exception; they routinely work on transactions involving property in other states.¹⁷²

MJP violations are not limited to lawyers in large, national law firms. Although lawyers in larger firms probably handle a disproportionate number of cross-border real estate transactions,¹⁷³ MJP violations also occur in smaller firms and in solo practices. A former chief justice of the Nebraska Supreme Court has said: “I don’t know of anybody in the smallest Nebraska community who limits his practice to the intrastate practice of law.”¹⁷⁴ In-house counsel also frequently violate the MJP laws, though some states exempt them from the laws’ prohibitions.¹⁷⁵

Such widespread violations of the MJP rules are attributable in large part to lax enforcement.¹⁷⁶ Although courts have held lawyers liable for MJP and lawyers have been indicted for it,¹⁷⁷ the risks of being caught and held liable obviously were not great enough to prevent the conduct. However, the risk calculus changed dramatically in 1998 with the California Supreme Court’s decision in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*.¹⁷⁸ In that case, the court held that a New York law firm could not collect more than \$1 million in fees that a California client owed it for work performed in California. The severity of this holding triggered a national debate that was the catalyst for the ABA’s new MJP rule.¹⁷⁹

The new rule that allows lawyers to render legal services in states where they are not licensed is eminently sensible. It eliminates a meaningless distinction that was the foundation of the former MJP rule. Under the former rule, the most significant factor in determining whether a violation occurred

172. American College of Real Estate Lawyers, *supra* note 163, at 2.

173. Johnstone, *supra* note 169, at 352.

174. *Admissions: Speakers Review*, *supra* note 169.

175. ABA CTR. FOR PROF’L RESPONSIBILITY, *supra* note 159, at 10; Davis, *supra* note 155, at 1353-54.

176. ABA CTR. FOR PROF’L RESPONSIBILITY, *supra* note 159, at 11; American College of Real Estate Lawyers, *supra* note 163, at 5; Wolfram, *supra* note 160, at 686.

177. American College of Real Estate Lawyers, *supra* note 163, at 5; Goebel, *supra* note 160, at 324; Celeste M. Hammond, *The Unauthorized Practice of Law*, PROB. & PROP., July/Aug. 2005, at 55, 59; Rubin, *supra* note 166, at 671.

178. 949 P.2d 1 (Cal. 1998).

179. ANNOTATED MODEL RULES OF PROF’L CONDUCT R. 5.5 (2007) (“The case that brought the issue of multijurisdictional practice to national attention was *Birbrower* This sparked a nationwide debate, ultimately resulting in the amendments to Model Rule 5.5 and accompanying changes recommended by the ABA Commission on Multijurisdictional Practice.”).

was the lawyer's physical location when performing the disputed activity; was the lawyer physically located in the state where licensed or in another state? However, the lawyer's physical location is entirely irrelevant to the question of whether the lawyer acted competently.

Even before the MJP rule was amended, a lawyer who was physically located in the state where licensed could advise clients about other states' laws and their implications for a transaction and could be liable for malpractice for failing to do so. Lawyers also could prepare documents to be interpreted under another state's laws and could communicate about an out-of-state transaction with people in other states by e-mail, telephone, or any other means.¹⁸⁰ Yet under the old rule, the lawyer was liable for MJP if the identical activities were performed in another state.

States also are correct to adopt the new MJP rule because the arguments against it are based on apparently incorrect assumptions. Some opponents of the new rule argue that out-of-state lawyers have insufficient knowledge of and experience with other states' laws to provide competent representation.¹⁸¹ Others argue that, because in-state lawyers are more knowledgeable about state professional responsibility rules and local customs and are more readily disciplined by state authorities, they are less likely to act unethically or unprofessionally than out-of-state lawyers. Opponents also often argue that competition by out-of-state lawyers will diminish the vitality of state and local bar associations, which could decrease pro bono representation and other forms of public service. Finally, some critics argue that MJP will create a "race to the bottom" by encouraging law students to take the bar exam in the state that they perceive to have the easiest standards because they still will be able to practice law anywhere in the country.¹⁸²

These concerns appear to be misplaced. Despite the widespread occurrence of MJP before it was authorized, the ABA Commission on Multijurisdictional Practice found no evidence that such representations "pose a significant disciplinary threat or result in the provision of incompetent representation."¹⁸³ Similarly, the comments to the ABA's Annotated Model Rules of Professional Conduct state that providing legal services in another state on a temporary basis "do[es] not create an unreasonable risk to the interests of . . . clients, the public or the courts."¹⁸⁴

These conclusions are unsurprising. Unlike their earlier counterparts, today's lawyers have ready access to every state's laws by computer and otherwise.¹⁸⁵ Additionally, the increasing standardization of real estate transac-

180. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 cmt. e (2000).

181. Poindexter, *supra* note 161, at 651; Rubin, *supra* note 166, at 674; Davis, *supra* note 155, at 1344.

182. ABA CTR. FOR PROF'L RESPONSIBILITY, *supra* note 159, at 14-15.

183. *Id.* at 15.

184. MODEL RULES OF PROF'L CONDUCT Rule 5.5 cmt. 5 (2002).

185. Wolfram, *supra* note 160, at 674; Davis, *supra* note 155, at 1339-40; ABA Real Property, Probate and Trust Law Section Comments, *supra* note 162, at 3.

tions has eliminated many unique aspects of state laws and practices. In its comments to the ABA Commission on Multijurisdictional Practice in favor of the MJP rule change, the ABA Real Property, Probate and Trust Law Section stated that lawyers increasingly rely on uniform title insurance policies, survey standards, construction and design contracts, and other uniform national standards, laws, and practices.¹⁸⁶

Perhaps the most important reason that MJP has not caused substantial problems is that lawyers are observing the ethical injunction against performing tasks for which they are not competent.¹⁸⁷ Real estate lawyers, in particular, have a generally well-deserved reputation for being belts-and-suspenders practitioners, because correcting a mistake in this area of practice often is difficult and expensive. The relatively high rate of legal malpractice claims involving real estate transactions¹⁸⁸ also provides a powerful incentive for a lawyer who is unfamiliar with another state's laws to retain local counsel, rather than to handle the work alone.

Although the rule change is a step in the right direction, it is only a first step. Limiting MJP to "a temporary basis" appears to be a product of political compromise or of one-step-at-a-time experimentation, rather than of necessity. The reasons for permitting MJP – increased consumer choice, competition, and efficiency – would be realized more fully without this limitation, and the finding that MJP is not harmful to clients does not appear to depend on a lawyer practicing for only a limited period of time in another state.

The European Union's experience also demonstrates that a temporal restriction is unnecessary. Since 1977, the EU and its predecessor, the European Economic Community, have permitted lawyers from any member state to practice law full-time in any other member state.¹⁸⁹ Despite the significant differences in the states' laws and in the educational and licensing requirements for legal practitioners,¹⁹⁰ the EU approach has been successful. One commentator has described the system as being "clearly superior" to the U.S. system in promoting consumers' right to choose and as being "vastly preferable" in creating economic efficiencies.¹⁹¹

During the next few decades, states will be subject to substantial pressures to eliminate the temporal limitation on their MJP rules. As described in the last section of this Article, growing global competition will necessitate

186. ABA Real Property, Probate and Trust Law Section Comments, *supra* note 162, at 3.

187. ABA CTR. FOR PROF'L RESPONSIBILITY, *supra* note 159, at 14; American College of Real Estate Lawyers, *supra* note 163, at 4.

188. Blumberg, *supra* note 6, at 1; *ABA Committee Malpractice Report Reveals Slight Rise in Severe Claims*, 74 U.S. L. WK. 2132 (2005).

189. Goebel, *supra* note 160, at 307-08; Davis, *supra* note 155, at 1358.

190. Gregory Siskind, *Freedom of Movement for Lawyers in the New Europe*, 26 INT'L LAW. 899, 902 (1992).

191. Goebel, *supra* note 160, at 338, 340. *See also* Davis, *supra* note 155, at 1357 (the EU system has been a "success").

greater market efficiencies, and increasing uniformity in state real estate laws and practices will diminish the need for such restrictions. Perhaps most importantly, the same client demands that caused this first change to the MJP rules will continue.

If the states do not yield to these pressures, lawyers undoubtedly will. To remain competitive and to keep their clients happy, lawyers will continue “sneaking around.” Rather than wait for another *Birbrower*-type decision and another black eye for the legal profession, the states would be wise to remove this restriction on MJP. Otherwise, they may create the public perception that they are more interested in protecting in-state lawyers than in permitting the most effective legal representation.

B. Laypersons Practicing Real Estate Law

Traditionally, only lawyers had authority to perform many of the services associated with real estate transactions. Lawyers examined and interpreted titles, cured title defects, drafted documents, advised their clients, and conducted the transaction settlement. In enforcing the UPL rules against laypersons that provided these services, bar associations and courts reasoned that these services required a lawyer’s expertise. They also reasoned that other possible providers, such as the real estate agents and title insurance company, have conflicts of interest that prevent them from acting in the best interests of the buyer, seller, and lender.¹⁹² The seriousness of these concerns caused real estate closing services to be the subject of more enforcement actions than any other type of UPL.¹⁹³

Today, however, laypersons, such as brokers and title insurance company employees, increasingly are performing many of these services in the residential real estate market. The Department of Justice and the Federal Trade Commission have stated that, in most states, laypersons now “compete with lawyers to provide services related to the preparation and execution of a deed, including title searching and issuing title reports, the answering of non-legal questions during the closing process, witnessing the signatures at closing, and the disbursement of funds.”¹⁹⁴ In many other jurisdictions, lawyers

192. Palomar, *supra* note 155, at 428; Michael C. Ksiazek, Note, *The Model Rules of Professional Conduct and the Unauthorized Practice of Law: Justification for Restricting Conveyancing to Attorneys*, 37 SUFFOLK U. L. REV. 169, 177 (2004); Todd M. Schild, Note, *To Each its Own: State Decision-Making and the Residential Real Estate Transaction*, 45 BRANDEIS L.J. 387, 388 (2007).

193. Palomar, *supra* note 155, at 429.

194. Letter from Susan A. Creighton, Director, Bureau of Competition, et al., to Paul Kujawski, Representative, Massachusetts House of Representatives (Oct. 6, 2004), available at <http://www.usdoj.gov/atr/public/comments/205772.htm> (comments on House Bill 180, concerning legislation of non-lawyer competition, from Federal Trade Commission and Department of Justice). See also Michael Braunstein

have been completely displaced from the residential real estate market.¹⁹⁵ Some lawyers have expressed concern that this trend will continue until lawyers are eliminated from the residential real estate market throughout the country.¹⁹⁶

This trend is largely attributable to the secondary mortgage market's requirements for title insurance and for standardization of forms and closing practices. A lender's title insurance policy is now issued in virtually every residential mortgage transaction in this country because Fannie Mae, Freddie Mac, and the other secondary market buyers will not purchase the mortgage otherwise. As a result, title insurance companies largely have replaced lawyers in the examination and evaluation of land titles in residential real estate transactions.¹⁹⁷

Similarly, the secondary market's demand for standardization in residential loan transactions has substantially diminished the lawyer's role in negotiating and preparing documents and in conducting closings. A survey of home sellers and buyers showed that many believe a lawyer is unnecessary because the home sale transaction has become so standardized that the title company and real estate agent are capable of handling it.¹⁹⁸ Courts, state legislators, and legal commentators increasingly agree.¹⁹⁹ Even the American Bar Association has accepted this trend. The ABA Commission on Professionalism has stated:

No doubt, many . . . real estate closings require the services of a lawyer. However, it can no longer be claimed that lawyers have the exclusive possession of the esoteric knowledge required and are therefore the only ones able to advise clients on any matter

& Hazel Genn, *Odd Man Out: Preliminary Findings Concerning the Diminishing Role of Lawyers in the Home-Buying Process*, 52 OHIO ST. L.J. 469, 471 (1991).

195. Richard J. Patterson, *Residential Real Estate Practices*, BARRISTER, Fall 1987, at 47.

196. *Id.* at 49.

197. Braunstein & Genn, *supra* note 194, at 471.

198. Palomar, *supra* note 155, at 438, 441.

199. Braunstein & Genn, *supra* note 194, at 479; Shane L. Goudey, Comment, *Too Many Hands in the Cookie Jar: The Unauthorized Practice of Law by Real Estate Brokers*, 75 OR. L. REV. 889, 927-28 (1996) ("The current trend toward increased recognition of the need for provision of legal services by real estate brokers is not an invention of the courts alone; state legislatures, bar associations, and citizens have made significant contributions as well."); Debra Pogrud Stark, *Navigating Residential Attorney Approvals: Finding a Better Judicial North Star*, 39 J. MARSHALL L. REV. 171, 176-77 (2006).

concerning the law. Inroads on lawyer exclusivity have been made and will continue to be made.²⁰⁰

Consumers normally forgo legal representation to avoid the expense and time delays that it entails.²⁰¹ Absent evidence that a lawyer will prevent harm or otherwise provide a benefit to the client, the extra cost and time appear to be unnecessary.

Courts have adopted a similar approach in determining whether a lawyer is a necessary part of a real estate transaction. To avoid imposing unnecessary costs on consumers and to preserve their freedom of choice, a court deciding a UPL case normally focuses on the public interest. It analyzes whether the public is benefited or is harmed by preventing laypersons from performing legal tasks, such as preparing legal documents.²⁰²

Before the 1990s, an individual's response to this issue of benefit versus harm was largely based on intuition because little or no empirical evidence existed. Some people believed that only a lawyer could competently handle a real estate transaction because real estate law is esoteric and technical. Others believed that brokers' and title insurers' training and experience enabled them to perform these tasks.

Today, a landmark New Jersey Supreme Court decision and a study by Professor Joyce Palomar have supplanted intuition with fact. Both provide substantial empirical evidence that the absence of legal representation does not significantly harm the parties to a real estate transaction. This evidence now largely influences the legal approach to this issue.

In the New Jersey Supreme Court decision, *In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law*, the court considered whether brokers and title insurance company employees are liable for the unauthorized practice of law when they handle residential real estate transactions.²⁰³ The court recognized that many activities involved in such transactions constitute the practice of law. However, it said that those activities constitute the *unauthorized* practice of law only if preventing laypersons from performing them serves the public interest.

To determine whether residential buyers and sellers need legal representation, the court remanded the case to a special master who conducted a sixteen-day hearing on the issue. He compared the outcomes of transactions in North Jersey, in which 99.5% of buyers and 86% of sellers have legal representation, with those in South Jersey, in which 40% of buyers and 35% of

200. AM. BAR ASS'N COMM'N ON PROFESSIONALISM, ". . . IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 52 (1986).

201. Palomar, *supra* note 155, at 438-40.

202. *In re Opinion No. 26 of the Comm. on the Unauthorized Practice of Law*, 654 A.2d 1344, 1352 (N.J. 1995).

203. *Id.* at 1345.

sellers have representation.²⁰⁴ The special master determined that the parties to South Jersey transactions did not experience any more legal problems than their North Jersey counterparts. Based on this finding, the Supreme Court of New Jersey held that residential buyers and sellers should not be deprived of the right to choose whether to retain the services of a lawyer, though the court strongly stated its belief that legal representation is worth the cost²⁰⁵ and required real estate brokers to give the buyer and seller a written notice concerning the risks of proceeding without representation.²⁰⁶

Based on a multi-state empirical survey, Professor Palomar reached the same conclusion as the New Jersey Supreme Court.²⁰⁷ She compared residential real estate transactions in which a lawyer participated with those in which no lawyer participated and found little difference between them with respect to the number of title problems or the rate of complaints against the real estate agents. On this basis, she concluded that the risk to consumers is insufficient to require consumers to retain a lawyer for real estate transactions.

The New Jersey Supreme Court's decision and Professor Palomar's conclusion are buttressed by another study that reached the same result.²⁰⁸ The researchers in that study, *Odd Man Out: Preliminary Findings Concerning the Diminishing Role of Lawyers in the Home-Buying Process*, determined that lawyers probably should not be required for residential real estate transactions because, based on preliminary survey results, buyers with a lawyer were not better prepared for the transaction and were not happier with the outcome than were buyers without a lawyer. Additionally, the number of disputes in transactions with a lawyer was very similar to those without a lawyer.

Based in part on the New Jersey Supreme Court decision and on Professor Palomar's study, the Federal Trade Commission and the Department of Justice have concluded that laypersons must be permitted to prepare deeds and to conduct real estate closings. In letters concerning the UPL laws in Georgia,²⁰⁹ Kentucky,²¹⁰ Massachusetts,²¹¹ North Carolina,²¹² Rhode Is-

204. *Id.* at 1349.

205. *Id.* at 1345.

206. *Id.* at 1361, 1363-64.

207. Palomar, *supra* note 155, at 526.

208. Braunstein & Genn, *supra* note 194, at 479-80.

209. Letter from R. Hewitt Pate, Acting Assistant Attorney General, et al., to Committee Members, Standing Committee on the Unlicensed Practice of Law (March 20, 2003), available at <http://www.ftc.gov/be/v030007.htm> (comments on the potential unlicensed practice of law opinion regarding real estate closing activity from Federal Trade Commission and Department of Justice).

210. Letter from Joel I. Klein, Assistant Attorney General, U.S. Department of Justice, to Members, Board of Governors, Kentucky Bar Association (June 10, 1999), available at <http://www.usdoj.gov/atr/public/comments/3943.htm> (letter regarding

land,²¹³ and Virginia,²¹⁴ the FTC and DOJ stated that they “have become increasingly concerned” about enforcement of the UPL rules against laypersons involved in residential real estate transactions.²¹⁵ The agencies stated that competition between lawyers and laypersons in providing these services would lower costs, enhance provider performance, and increase consumer choice. The FTC and DOJ also determined that allowing laypersons to perform these tasks was unlikely to increase the risk of harm for consumers.

The increasing role of laypersons in residential real estate transactions reflects a broader trend in UPL enforcement. In a report on UPL, the ABA Commission on Nonlawyer Practice found that all types of UPL enforcement are “increasingly difficult.”²¹⁶ The commission cited surveys that showed that, in 1980-81, 43 states had a state agency or state bar committee that actively enforced the UPL restrictions. By 1992, that number had declined to 22.²¹⁷

The ABA Commission cited a number of factors for declining UPL enforcement. First, as noted above, many courts no longer strictly prevent laypersons from practicing law. Rather, courts generally now focus on whether such activities harm consumers.²¹⁸ Second, businesses that had been the targets of UPL enforcement, such as brokers and title insurance companies, are now more vigorously and successfully challenging UPL restrictions.²¹⁹

Kentucky Bar Association Opinion KBA U-58, prohibiting real estate closings by non-attorneys).

211. Letter from Susan A. Creighton, *supra* note 194.

212. Letter from Charles A. James, Assistant Attorney General, U.S. Department of Justice, et al., to Members, Ethics Committee, North Carolina State Bar (Dec. 14, 2001), *available at* <http://www.usdoj.gov/atr/public/comments/9709.htm> (letter regarding North Carolina State Bar opinions restricting involvement of non-attorneys in real estate closings and refinancing transactions from Federal Trade Commission and Department of Justice).

213. Letter from Charles A. James, Assistant Attorney General, U.S. Department of Justice, et al., to Speaker and Members, Rhode Island House of Representatives (Mar. 29, 2002), *available at* <http://www.usdoj.gov/atr/public/comments/10905.htm> (letter regarding Proposed Bill H. 7462, restricting competition from non-attorneys in real estate closing activities, from Federal Trade Commission and Department of Justice).

214. Letter from Joel I. Klein, Acting Assistant Attorney General, U.S. Department of Justice, et al., to David B. Beach, Clerk of Court, Supreme Court of Virginia (Jan. 3, 1997), *available at* <http://www.usdoj.gov/atr/public/comments/3967.htm> (letter regarding Proposed UPL Opinion # 183 from Federal Trade Commission and Department of Justice).

215. *Id.*; Letter from R. Hewitt Pate, *supra* note 209.

216. AM. BAR ASS'N COMM'N ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS 23 (1995).

217. *Id.* at 24.

218. *Id.* at 26.

219. *Id.* at 23.

Third, consumers have become more active in demanding a loosening of the restrictions. For example, when the Arizona Supreme Court held that title insurance companies and brokers committed UPL when they prepared deeds and other types of title documents, the voters passed a constitutional amendment to change that result.²²⁰ Many advocacy groups, such as the American Association for Retired Persons, also have pushed for relaxation of the UPL rules on the ground that the legal profession is inadequately serving low- and moderate-income people.²²¹ Finally, legal scholars increasingly are arguing for narrower UPL restrictions to increase individual choice and the accessibility of the justice system.²²²

Although some groups argue that the UPL restrictions should not be relaxed or should even be broadened,²²³ this view is out of touch with the reality of residential real estate transactions. The state and the legal profession should not – and largely cannot – force consumers to retain the services of a lawyer when that representation apparently is unnecessary in many transactions. In more complex transactions, including some residential transactions, a consumer is well advised to retain the services of a lawyer, but that choice should be the consumer's. As the twenty-first century progresses, that choice increasingly will be as it already is in other countries.²²⁴

V. TECHNOLOGICAL INNOVATIONS

After centuries of paper-based real estate transactions, electronic technology is transforming virtually every aspect of them. From shopping for property to the transaction settlement and the sale and resale of the mortgage, electronic technology is making the process faster, cheaper, and more risk-free. Although some market participants are resisting, the changes are inevitable because of the tremendous advantages they offer.

A. Shopping for Land

Real estate listings are now widely available online, and an estimated 70% of home buyers search online. That percentage should increase as more buyers become familiar with the websites, because buyers who search the

220. *Id.* at 27-28.

221. *Id.* at 29-30.

222. *Id.* at 31.

223. *Id.* at 32.

224. David S. Clark, *Comparing the Work and Organization of Lawyers Worldwide: The Persistence of Legal Traditions*, in *LAWYERS' PRACTICE AND IDEALS: A COMPARATIVE VIEW* 9, 23 (John J. Barceló III & Roger C. Cramton eds., 1999); John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 *FORDHAM L. REV.* 83, 112-13 (2000).

Internet find more properties that satisfy their needs than buyers who do not.²²⁵

One reason for the Internet's usefulness is that some counties are providing online maps that include a great deal of information that is important to prospective buyers about each parcel of land in the county. In his excellent article on digital recording, Professor Dale Whitman identified one of the best examples.²²⁶ The Greene County, Ohio website includes, for every parcel of land in the county, not only the owner's name and a digital copy of the deed by which the owner acquired title, but also a photograph of the property, the lot dimensions, information about any buildings on the lot, the flood plain designation, the topography, the voting precinct and polling location, property taxes, and a great deal of additional information.

The availability of online listings and related information is a particularly welcome development with respect to properties that are in the process of foreclosure. State foreclosure laws require virtually no marketing, so the foreclosing lender usually is the only bidder at the sale and normally bids only the amount that it is owed. By massively increasing the number of people who have notice of the sale, online listings should increase not only the number of prospective purchasers and the purchase price, but also the possibility that the former owner will recover at least some part of its equity in the property.

The Internet also is providing another valuable service for buyers and sellers who want to hire a real estate broker. In the past, brokers generally have offered only one type of representation – full-service representation in exchange for a percentage of the purchase price. Today, many discount brokers offer their services online. They allow consumers to choose only those services they want, such as holding an open house or running newspaper ads, at discounted prices.²²⁷ Some discount brokers even offer free services online, such as listings and value estimates.²²⁸

Although traditional brokers originally resisted the use of electronic technology, most now have embraced it. By doing so, they have increased their productivity and their earnings.²²⁹ Websites also have proven to be an effective marketing tool. For example, the National Association of Realtors website includes not only property listings, but also information about lend-

225. Robert W. Hahn, Robert E. Litan & Jesse Gurman, *Bringing More Competition to Real Estate Brokerage*, 35 REAL EST. L.J. 86, 97-98 (2006).

226. Dale A. Whitman, *Digital Recording of Real Estate Conveyances*, 32 J. MARSHALL L. REV. 227, 243 n.30 (1999) [hereinafter Whitman, *Digital Recording*].

227. Hahn et al., *supra* note 225, at 87, 90.

228. See, e.g., Zillow.com Homepage, <http://www.zillow.com> (last visited Oct. 19, 2007).

229. Hahn et al., *supra* note 225, at 97.

ers, movers, and contractors in order to attract site visitors and to advertise affiliated businesses.²³⁰

B. Pre-Settlement Activities

After the buyer locates the property that it wishes to buy and signs a purchase agreement with the seller, the buyer normally must obtain financing, a title examination, and a survey. Electronic technology greatly can facilitate each of these processes and can reduce the time, costs, and risks.

1. Financing

Many prospective borrowers shop online for their loans. Today, approximately 8.5% of residential mortgage loans originate online. That number is predicted to increase to 12% by next year and to 15% by the following year.²³¹

Online mortgage originations have not grown as rapidly as other forms of e-commerce primarily because many consumers are uncomfortable undertaking such a large obligation online.²³² However, even if a consumer does not actually borrow online, the Internet is an important source of information. Websites give lenders the ability to provide prospective borrowers with more information than might be possible in person. For example, lenders' sites can provide links to other sites that define technical terms and that provide required disclosures almost instantaneously.²³³ This access to information is particularly valuable for people who do not have physical access to a variety of lenders, such as residents of some rural or lower-income urban areas.²³⁴

Lenders, as well as consumers, benefit by the availability of online loans. Websites enable lenders to reach a much broader market than they can with traditional forms of advertising. Bank of America realized this benefit when it received 800 online loan applications within the first two weeks that it offered that service. It also enjoyed substantial cost savings because it got

230. Official Site of the National Association of Realtors, <http://www.realtor.com/> (last visited Oct. 19, 2007).

231. James Swann, *Lending Takes an Online Turn*, COMMUNITY BANKER, Mar. 1, 2007, at 70.

232. See *Internet Lenders Expected to Suffer the Most From Shrinking Refi Market: Troubles at E-Loan*, INSIDE MORTGAGE FIN., Feb 13, 2004, at 13; *Online Mortgage Production Tops \$816 Billion as Internet Lending Growth Rate Slows Down*, INSIDE MORTGAGE FIN., Dec. 19, 2003, at 9.

233. *Id.*

234. Jeremiah S. Buckley & Margo H.K. Tank, *Electronic Signatures – Changing the Financial Landscape*, 54 CONSUMER FIN. L.Q. REP. 116, 121 (2000).

those applications without doing any marketing.²³⁵ Lenders also are realizing savings by processing applications online. For example, they can check employment, credit, and the property's value via the Internet, rather than by telephone or by mail.²³⁶

2. Searching Title

The ability to search a real estate title electronically greatly reduces the time and expense of searches and increases their reliability. Given the enormous number of real estate transactions in this country, the savings could be immense. However, the conversion to electronic title searches has not yet progressed very far, largely because conveyance documents legally had to be written on paper until recently and because title searches involve examining documents from the past. Converting all those documents to a format that is available online is costly and time consuming.

Some foreign jurisdictions are far ahead of the U.S. in this process,²³⁷ but advances are occurring here. In many counties, searchers now can access the indexes of title documents by means of a computer in the title recorder's office. In a few counties, the indexes are available online. However, online copies of the recorded documents are available in very few counties.²³⁸ Without electronic access to the documents, searchers can only search the land records where they are physically located, rather than from any computer, and still must employ the time consuming process of manually locating the documents within the record books. However, the conversion to a system that enables electronic title searches should accelerate with the increased use of electronic documents, as described below.

3. Surveying

The Global Positioning System (GPS) is revolutionizing survey preparation. The current method of describing property boundaries by metes and bounds is cumbersome and frequently provides imperfect descriptions. By

235. Carrie A. O'Brien, Note, *E-SIGN: Will the New Law Increase Internet Security Allowing Online Mortgage Lending to Become Routine?*, 5 N.C. BANKING INST. 523, 535 (2001).

236. Sam Stonefield, *Electronic Real Estate Documents: Context, Unresolved Cost-Benefit Issues and a Recommended Decisional Process*, 24 W. NEW ENG. L. REV. 205, 211 (2002).

237. John E. Blyth, *The "Electronic Signatures in Global and National Commerce Act": Its Impact: Generally and Specifically on Real Property Transactions*, 462 PLI/REAL 801, 813-14 (2000); Whitman, *Digital Recording*, *supra* note 226, at 231-32.

238. Whitman, *Digital Recording*, *supra* note 226, at 228-29. See also Kraetli Q. Epperson, *A Status Report: On-Line Images and E-Filing of Land Documents in Oklahoma*, 59 CONSUMER FIN. L.Q. 316, 316 (2005).

contrast, with equipment that is readily available today, the GPS uses the latitudes and longitudes of the parcel's boundaries to create legal descriptions that are correct to within 5 millimeters. A GPS survey also costs much less than a traditional survey. The Department of Commerce has stated that GPS has caused the average cost of a control survey point to decrease from \$10,000 to \$250. Moreover, it found that surveyors' productivity tripled.²³⁹

In addition to improving surveying, GPS will greatly enhance title examinations when they can be performed online. Rather than searching title indexes to locate real estate documents based on the owners' names or on a property description, the searcher will be able to enter the latitude and longitude of a point on the subject property. The computer then can locate all the documents that affect it.

But perhaps the greatest benefit that GPS surveying will provide during this century is in unleashing the capital value of land in developing countries. As part of its efforts to create land registration systems in these countries, the World Bank is using GPS to survey land. Based on its use, the Bank, like the Department of Commerce, has concluded that GPS substantially improved its surveying process and the quality of the resulting surveys. GPS decreased the Bank's surveying costs and increased accuracy, efficiency, and flexibility.²⁴⁰ For all these reasons, GPS should dominate, if not completely control, surveying long before the end of this century.

C. Transaction Settlement

In a sharp break from several centuries' practice, real estate settlements now can be conducted completely electronically based on the Electronic Signatures in Global and National Commerce Act (E-SIGN),²⁴¹ which Congress enacted in 2000, and the Uniform Electronic Transactions Act (UETA), which the National Conference of Commissioners on Uniform State Laws promulgated in 1999. In an electronic settlement, the documents are prepared, executed, and delivered to the lender online. The lender's software then reviews the documents' validity and the lender's title insurance policy. If they are satisfactory, the lender immediately can sell the mortgage to the secondary market online.

Lenders are exerting substantial pressure for the use of electronic settlements, in part because they can be completed much more quickly. While a settlement using paper documents can take 30-45 days to complete with the sale of the mortgage, an electronic settlement can be completed in a few

239. Martin B. Cowan, *Introducing Twentieth-Century Technology to Real Estate Recording Practices (Before the Twenty-First Century Arrives)*, 28 REAL EST. L.J. 99, 114 (1999).

240. Holstein, *supra* note 151, at 19.

241. 15 U.S.C. §§ 7001-7006 (2006).

hours.²⁴² The time spent preparing for the settlement also can be significantly reduced. According to one estimate, a real estate transaction requires 225 documents.²⁴³ If they are prepared electronically, the necessary data can be entered once, and the software will complete all the forms.

Lenders, as well as borrowers, also appreciate the substantial cost savings of electronic settlements. They eliminate a wide variety of expenses, such as courier costs, that are incurred with paper documents. The estimated cost saving for each electronic real estate transaction ranges from \$750²⁴⁴ to \$1,200.²⁴⁵ Annually, these savings could total millions of dollars.²⁴⁶

Despite the great benefits of electronic settlements, a tremendous obstacle currently prevents their use in most jurisdictions. Many title recorders' offices do not accept electronic documents for recording in the public records. In many states, their refusal is based on a state statutory provision that a document must be written or must bear an original signature to be recordable.

To eliminate this problem, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Real Property Electronic Recording Act (URPERA) in 2004 to authorize the recording of electronic documents. The Act's stated purpose is to make real estate markets "faster and more competitive."²⁴⁷ Many states apparently agree with this goal. In marked contrast to the other uniform acts dealing with real estate issues,²⁴⁸ fourteen states and the District of Columbia already have enacted URPERA, and another eight states currently are considering it.²⁴⁹

The great interest in electronic recording stems from its vast superiority to the existing system. It enables documents to be delivered instantaneously from the settlement agent's office to the recorder's office. When received in the recorder's office, software can process the document and make it available to the public in a matter of seconds, rather than days, weeks, or even months in some jurisdictions. This immediate electronic recording eliminates a great deal of risk from the transaction, including the possibility of human

242. James Bryce Clark & Maura B. O'Connor, *An Overview of Electronic Mortgage Origination and Recording Issues*, 489 *PLI/REAL* 169, 216 (2003); Janice E. Carpi, *UETA and E-SIGN: Real Estate Closings in the Electronic Age*, 462 *PLI/REAL* 881, 899 (2000); O'Brien, *supra* note 235, at 530-31.

243. Stonefield, *supra* note 236, at 206 n.5.

244. O'Brien, *supra* note 235, at 531-32.

245. Stonefield, *supra* note 236, at 228 n.87.

246. O'Brien, *supra* note 235, at 529.

247. Uniform Law Commissioners, Summary: Uniform Real Property Electronic Recording Act, http://www.nccusl.org/Update/uniformact_summaries/uniformacts-urpera.asp (last visited Oct. 19, 2007).

248. See *supra* text accompanying note 8.

249. Uniform Law Commissioners, A Few Facts About the Uniform Real Property Electronic Recording Act, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-urpera.asp (last visited Oct. 19, 2007).

error in filing, recording, and indexing the document.²⁵⁰ Electronic recording also makes title examinations easier and more effective because the records are accessible off-site and enable more sophisticated searches. Finally, electronic records reduce costs not only for title searchers, but also for the government because the recorder's office will require less space and fewer personnel.²⁵¹

Despite these advantages, many jurisdictions have not implemented electronic recording due to the costs. Installing the necessary hardware and software, training personnel, and converting already recorded documents to electronic form are expensive. Some concern about fraud also has been expressed, though the incidence of fraud should be less frequent than with paper documents.²⁵²

An equally large problem in some jurisdictions is that the recorder is opposed to electronic recording. As noted, a more efficient operation could lead to a decreased budget and staff. Operations could be moved from the county to the state, and the recorder and the staff would have to learn a new system and undertake the extra work of converting the system from paper to electronic.²⁵³

For these reasons, electronic recording is unavailable in the great majority of jurisdictions. Of the approximately 3,600 recording jurisdictions in the United States, only 65 (1.8%) allowed electronic recording in 2005.²⁵⁴ Today, the number has increased to 245 (6.8%).²⁵⁵ Although the amount of growth is significant, the number is deceiving because many of these jurisdictions allow only a small number of instruments, such as liens and mortgage releases, to be recorded electronically.²⁵⁶

Despite the obstacles, electronic recording eventually will replace the paper-based system that has been used in this country since the seventeenth century. Not only is electronic recording superior to the current system, it also is essential to realize the enormous benefits of electronic real estate transactions. Both lenders and the secondary market, especially Fannie Mae and Freddie Mac, actively are promoting electronic transactions, including electronic recording.²⁵⁷ Perhaps more importantly, the enactments of E-

250. Stonefield, *supra* note 236, at 215.

251. *Id.* at 228.

252. *Id.* at 233-34.

253. *Id.* at 236; Dale A. Whitman, *Are We There Yet? The Case for a Uniform Electronic Recording Act*, 24 W. NEW ENG. L. REV. 245, 246-47 (2002).

254. David E. Ewan, John A. Richards & Margo H.K. Tank, *It's the Message, Not the Medium!*, 60 BUS. LAW. 1487, 1488-89 (2005).

255. Property Recorders Industry Ass'n, List of Counties eRecording, <http://www.pria.us/CommitteeDocs/eRecordingCountiesList.pdf> (last visited Oct. 19, 2007).

256. Clark & O'Connor, *supra* note 242, at 217-18; Jeffrey J. Serum, *Legal Effect of Electronic Transactions*, WIS. LAW., Feb. 2005, at 60.

257. *Technology – Property*, PROB. & PROP., Jan./Feb. 2007, at 53.

SIGN by Congress and of UETA by forty-seven states demonstrate the federal and state governments' commitment to electronic transactions. If title recorders do not accept electronic documents, the governmental goal of electronic recording will be thwarted.²⁵⁸ To prevent that outcome, legislatures have the power to mandate electronic recording and seem likely to do so if necessary.

D. Selling the Mortgage

The secondary mortgage market, which owns trillions of dollars of mortgages, has obvious reasons for wanting to use electronic technology. In addition to reducing costs and risks, the relative speed with which an electronic mortgage can be sold permits more accurate pricing.²⁵⁹ Therefore, purchasers of loans from mortgage brokers pay more for them if they are electronic.²⁶⁰

The electronic mortgage market is still rather embryonic. Primarily because of the recording issue, electronic mortgages are a relatively small part of the market. Secondary market purchasers also are still refining the technologies that they will need to purchase them. For example, Fannie Mae and Freddie Mac are purchasing some electronic mortgages but primarily for use in testing their systems.²⁶¹

However, the secondary market's commitment to electronic technology is vividly demonstrated by its creation of the Mortgage Electronic Registration System (MERS) in 1997. Lenders can register their mortgages with MERS. When the mortgage is sold, the transfer is registered with MERS, rather than with the title recorder's office. It is cheaper to register with MERS, and information about the registered mortgages is always available immediately online.

MERS has been extremely successful. More than 30 million mortgages have been registered with it, and more than 24,000 additional mortgages are registered each day.²⁶² MERS clearly demonstrates how much more effectively and efficiently recorders' offices could operate if they also went online.

258. Peter M. Carrozzo, *Marketing the American Mortgage: The Emergency Home Finance Act of 1970, Standardization and the Secondary Market Revolution*, 39 REAL PROP. PROB. & TR. J. 765, 803-04 (2005); Stonefield, *supra* note 236, at 207-08; *GSEs Instrumental in Leading Single-Family Lenders Into Internet Era – OFHEO Study*, INSIDE MORTGAGE FIN., Jan. 16, 2004, at 10.

259. *Technology – Property*, *supra* note 257, at 53.

260. Stonefield, *supra* note 236, at 211.

261. *Technology – Property*, *supra* note 257, at 57; Freddie Mac and Electronic Mortgages: Questions and Answers, <http://www.freddiemac.com/singlefamily/elm/elmqa.html> (last visited Oct. 19, 2007).

262. *Technology – Property*, *supra* note 257, at 57.

VI. CONCLUSION

Real estate law and practice have remained remarkably unchanged through the decades and even through the centuries in some instances. Real estate conveyances have been written on paper since the Statute of Frauds and have been recorded in the same manner in this country since the seventeenth century. Mortgages and the laws concerning them are directly descended from the Middle Ages.

By the end of this century, however, the laws and practices will be substantially transformed. The great differences among states' mortgage laws, in particular, will disappear into national laws. While lawyers will no longer be constrained by state or national borders in their practices, they will give up parts of their practices to lay providers. And electronic technology will largely eliminate paper documents and title records. The results will be greatly increased standardization and efficiency.