

Environmental law committee launched *Leading practitioners to co-chair group*



Mary K. Ryan



Gregor I. McGregor

The Environmental Committee will apprise the REBA Board of Directors on legislative initiatives in the environmental field and monitor trends in decisional law. The Committee welcomes new members.

"REBA is the only statewide bar association offering a professional home to environmental practitioners," said the Association's President-Elect Bob Moriarty. "This is another step in our growth as we reach out to serve lawyers and other real estate professionals across Massachusetts."

REBA Executive Director Peter Wittenborg added: "We have been indeed fortunate in securing two of the most highly-regarded environmental lawyers in the region to head this new group."

Accomplished advocate

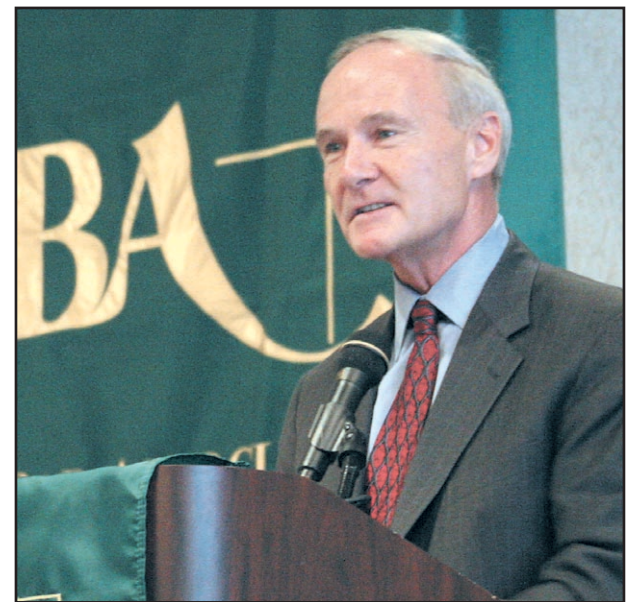
Ryan's practice includes substantial trial and appellate cases in state and federal courts in the environmental field. She possesses significant expertise in federal and state hazardous waste litigation, including CERCLA and Chapter 21E cases as well as related insurance coverage issues.

She was one of the lead trial counsel for AVZ Corporation in the New Bedford harbor PCB litigation. She also represented the City of Fitchburg involving multiple cases with the City of Leominster over the development of an industrial park in a reservoir watershed. These cases included a *certiorari* action brought in the Supreme Judicial Court, invoking its original jurisdiction.

In 1997, Ryan was appointed special assistant attorney general representing the Commonwealth of Massachusetts in the Ruggles Center indoor air pollution litigation. She is currently environmental counsel for the South Shore Tri-Town Development Corporation in connection with the redevelopment of the South Weymouth Naval Air Station. She has also handled environmental matters for companies such as ConocoPhillips, Whitaker Corporation, Applied Power, Inc. and the Reso-

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AG attacks bill limiting homebuyer access to attorneys



Tom Reilly, speaking at the Spring Seminar, criticized the measure as anti-consumer

In a luncheon keynote address at REBA's Spring Seminar in Westborough, Attorney General Tom Reilly came out in opposition to House Bill 904, which would permit non-lawyer settlement companies to close residential and commercial real estate transactions in Massachusetts, with grave consequences for consumers and homebuyers.

The bill (sponsored by a Pittsburgh-based coalition of corporate settlement service providers) would deprive homebuyers of numerous legal protections by limiting their access to legal advice when purchasing a home, and reverse REBA's hard-fought victories in the *Closings Ltd.* case (1993) and the *Colonial Title and Escrow* case (2001).

Reilly received a rousing ovation from a crowd of more than 600 REBA members and guests at the May 9

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New law alters relationships among brokers, buyers and sellers

By Robert J. Moriarty Jr. and David Murphy

On July 1, a new law went into effect creating new relationships between real estate brokers and salespersons and purchasers and sellers of residential real estate. The new law further defines and clarifies the nature of existing relationships.

The existing statute, G.L.c. 112, Registration of Certain Professions and Occupations, has been amended by St. 2004, Chapter 149, Section 156 by inserting G.L.c. 112, §87AAA13/4 (the "Act").

Real estate brokers and salespersons are required to disclose the nature of the relationship and related fiduciary duties,

President-Elect of REBA, Bob Moriarty concentrates his practice in title-related matters. He is a principal in the Boston-based firm of Marsh, Moriarty, Ontell & Golder, P.C. He can be reached at rmoriarty@mmoglaw.com. Associated with the firm of Marsh, Moriarty, Ontell & Golder, P.C., David Murphy practices in the area of residential and commercial real estate development. He can be reached at dmurphy@mmoglaw.com.

if any, to purchasers and sellers through disclosure forms issued by the Massachusetts Board of Real Estate Brokers and Salespersons (the "Board").

Additional disclosures may be required as the transaction progresses. The Board has issued regulations interpreting this law and forms to implement the required disclosures, both of which may be found on the website of the Board of Registration of Real Estate Brokers and Salespersons (www.mass.gov/dpl/boards/re).

In the wake of the Act, there will be a number of different types of possible relationships between real estate professionals and their clients or customers, some the traditional agency concepts with which we are all familiar and some new concepts that are not entirely familiar.

The Act was passed as an outside budget item and did not have public hearings or opportunity for amendments prior to its enactment. It will take some time before we are able to understand all the implications of the new relationships for our clients. The basic forms of the relationships permitted under the Act are set forth herein.

Traditional agency

The traditional concept for the sale of real estate has typically been one in which all brokers or salespersons involved in the transaction represent the seller, and the buyer is not represented, even though buyers have often mistakenly believed that the agent was also "representing" them. Under this form of representation the agent owes the seller the duties of loyalty, full disclosure, confidentiality, to account for funds, reasonable care and obedience to lawful instruction.

This form of agency began to change in the late 1980s when the concept of the "Buyer Broker" became into use. Under this theory, the buyer agent's obligation was to the buyer only and that person did not have the traditional obligations to the seller.

There have always been theoretical issues with respect to payment of commission to a buyer broker by the seller and whether that raised potential conflict issues, but those issues have always been resolved and today the buyer broker is an accepted form of agency. The buyer broker owes the same duties to a buyer that a traditional broker owes to the seller.

These forms of agency, either seller or buyer, also have extended to the brokerage firms themselves. Under this traditional office policy, the fiduciary obligations of the broker to the seller or purchaser that it represents extend to the entire firm. If a broker or salesperson was engaged as a seller broker or as a buyer broker, then everyone in that firm will represent the seller or the buyer, only.

Under the Act, brokers and salespersons may continue to use the traditional form of agency in which the agent represents only the seller or the purchaser and does not represent the other party.

Dual agency

Brokers and agents have always struggled with the dilemma of representation of a seller and a purchaser in the same transaction. It is not possible to provide the type of loyalty and duty owed to a principal when the two parties have such diametrically opposed purposes in the same transaction.

This situation typically occurs when a broker represents a seller of a particular

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To promote the improvement of the practice of real estate law, the mentoring of fellow practitioners is the continuing professional responsibility of all REBA members. The officers, directors and committee members are available to respond to membership inquiries relative to the Association's Title Standards, Practice Standards, Ethical Standards and Forms with the understanding that advice to Association members is not, of course, a legal opinion.

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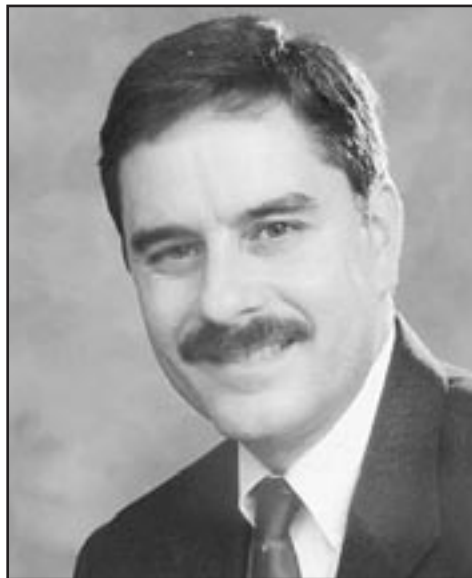
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Please note that the website password has changed and all active members have been notified. Contact REBA for more information.

From the President's desk

By Daniel J. Ossoff



May 9 – the date of REBA's Spring Meeting in Westborough – was a special day for the Real Estate Bar Association for Massachusetts.

Not only was the Spring Meeting that day believed to be the largest event ever held by the Association, but also, at that event, Attorney General Tom Reilly clearly and forcefully registered his support of REBA's efforts to preserve the role of the attorney in the real estate closing process.

In order to accommodate members, guests and exhibitors in attendance at the Spring Meeting, REBA literally took over the Wyndham Westborough Hotel. As has been the custom at recent meetings, those in attendance were able to choose from a diverse selection of educational offerings, including, among others, an update on issues impacting the development of affordable housing, a session on litigating title problems and disputes, and a discussion of issues and concerns involved in the use of homesteads.

The luncheon meeting saw the presentation of the Richard B. Johnson Award – the highest award bestowed by the Association – to a very worthy recipient, the late Robert V. Cauchon. Judge Cauchon was recognized for his contributions to the real estate bar both as a former chief justice of the Land Court and, following his retirement from the court, as a distinguished and leading member of the panel of neutrals of REBA Dispute Resolution.

Daniel J. Ossoff served as a long-time member of the Association's board before becoming REBA's 2005 president. He chairs the real estate practice group at Rackemann, Sawyer & Brewster, P.C. and lives in Andover. He can be reached at djo@rackemann.com.

My sincere thanks to Susan Graham, REBA's Chief Operating Officer and event planner extraordinaire, and to REBA's Continuing Education Committee chaired by Pamela Butler O'Brien, for their efforts in planning the Spring Meeting and implementing those plans on May 9. While the continued growth of REBA's semi-annual event does not come without its challenges, Susan and her colleagues in the REBA office have worked tirelessly to make each event a worthwhile and enjoyable experience. Susan's attention to detail was certainly evident to those who made the trip to Westborough in May.

If there are suggestions as to ways that we can make our May and November meetings even more relevant or pleasant for the entire REBA membership, please do not hesitate to pass those suggestions along directly to me or to Susan at the REBA office.

As reported elsewhere on these pages, the frosting on the cake at the Spring Meeting was provided by Attorney General Reilly in his keynote address. While touching upon a number of issues of interest and concern to real estate practitioners, the Attorney General made absolutely clear his opposition to House Bill 904.

That legislation, filed on behalf of out-of-state closing companies and settlement service providers, would permit corporations to perform real estate closings and engage in other activities in the transactional area, activities which, under current Massachusetts law, constitute the practice of law and may be performed only by attorneys.

In his remarks, Mr. Reilly acknowledged the importance of real estate closings in the financial life of the average homeowner, and asserted the need to keep attorneys involved as the stewards of these transactions in order to protect the consumer. The Attorney General's remarks – coming as they did from the constitutional officer who is charged with protecting the consumer in Massachusetts – served to reaffirm the importance of this issue to the consumer. This is a significant development in REBA's continuing efforts to preserve the role of the attorney in the closing process in Massachusetts.

It goes without saying that Attorney General Reilly's remarks left REBA's leadership and committee chairs reinvigorated in our efforts to oppose, with all the resources available to us, House 904 and other efforts to marginalize attorneys in the real estate transactional arena.

We continue to maintain an active political calendar, not only to "get the word out" about the dangers of House Bill 904,

but also to offer support of REBA's entire legislative agenda. With barely a chance to catch our breath after the Spring Meeting, members of REBA's leadership team and its Legislation Committee assembled to testify on Beacon Hill before the Joint Committee on the Judiciary and the Joint Financial Services Committee on bills supported by REBA – including the Landowners Title Protection Act (Senate Bill 921 / House Bill 762) and REBA's omnibus mortgage discharge reform bill (Senate Bill 624).

Through the efforts of immediate Past President Chris Kehoe, the hearing room of the Financial Services Committee was literally packed wall-to-wall with supporters of REBA's discharge bill. While work remains to be done to bring that significant piece of legislation to fruition, we are encouraged by the importance that has been placed on that bill by certain key legislative leaders, and we will continue to work diligently with all interested constituencies to make that particular dream a reality.

I am extremely encouraged by the support that we received from REBA members who attended the hearing on the discharge bill or who have otherwise contacted members of the Financial Services Committee to urge support for that bill. The response that we received when we reached out to the membership is evidence not only of the importance of this particular bill, but also of the increased awareness of our members that REBA can achieve its legislative goals only with the support of its entire membership.

We will continue to reach out to the membership to attend critical hearings, to contact their elected representatives on matters of importance, and to provide financial support to REBA's political action committee. To assist us in that effort, and in recognition of the fact that "all politics is local," we are asking our members to provide their home addresses so that we can identify the legislative district (and elected representatives) of each of our members.

This will allow REBA to assure that key legislators are contacted by their own constituents on matters of importance to the real estate bar. The cooperation of our membership in providing this information will serve to increase REBA's ability to effectively pursue its legislative agenda.

Since my last column, REBA has also undertaken an initiative to reach out to other bar associations to explore issues of mutual interest and concern. A key item on the agenda for each of these meetings are concerns related to the unauthorized practice of law by lay persons and corporations, issues which are

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New Land Court rules of procedure: A primer

By Lawrence P. Heffernan



After soliciting and receiving comments from the bar, the Land Court adopted new rules of procedure effective July 1, implementing the first major changes in the rules of the court

since April 1982. Combined with time standards and the case management and individual calendar system recently adopted by the court, the new rules mark significant changes in practice.

Larry Heffernan is a partner in the Boston office of Robinson & Cole LLP. His practice focuses on litigation in the real estate, title insurance, commercial, and banking arenas. He is chair of the ABA TIPS Title Insurance Litigation Committee and co-chair of the REBA Litigation Committee. Larry can be reached at lheffernan@rc.com.

Many of the “new” rules restate prior rules or recognize other rules that apply to Land Court proceedings. New Rule 2 essentially combines previous Rules II through IV concerning fees and expenses payable under statutes and orders of the court and application of filing fees for registration and confirmation complaints to the insurance fund under G.L.c.185, §99.

Rule 3 governing court appointments to fee-generating positions makes it clear that appointments of title examiners, commissioners, guardians and masters will be governed by Supreme Judicial Court Rule 1:07, which has applied to the Land Court since June 5, 2004. The SJC rule assures that all such appointments are made on a fair and impartial basis.

Rule 4 carries forward part of former Land Court Rule VIII, which provided for retention of evidence and exhibits three years after the trial or hearing. The recorder may destroy or discard such exhibits after giving 30 days notice to the parties, if practicable.

Substantial changes

Substantial changes are found in the new rules concerning motion practice

and discovery disputes. New Rule 5 governs motions to dismiss for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted, motions for judgment on the pleadings and motions for summary judgment. It elaborates and expands upon old Land Court Rule X and mirrors Superior Court Rule 9A in some respects.

Motions and oppositions must contain: (1) a statement of the issue or issues presented; (2) an argument in summary form; and (3) a short conclusion stating precisely the relief or order sought. Unlike old Rule X, new Rule 5 also requires that the supporting briefs contain a statement of the legal elements, with citations to supporting law, of each claim upon which judgment is sought or opposed.

Similar to the Superior Court Rules, the new Rules of the Land Court require that any motion to dismiss for lack of jurisdiction over the subject matter and any motion for summary judgment be accompanied by a concise statement, in consecutive numbered paragraphs, of the material facts upon which the mov-

ing party relies, with page or paragraph references to supporting pleadings, discovery responses, deposition testimony and affidavits.

Oppositions to such motions must include a response to each statement of fact and a concise statement of any additional material facts. Any denial of a statement of fact or statement of additional material fact must include references to pleadings, discovery and affidavits.

In addition, these statements must be accompanied by an appendix, appropriately indexed, which contains all cited portions of the documents and other materials to which the statements refer and copies of all legal or other authorities cited in the brief, except for the Massachusetts General Laws and cases reported in the official Massachusetts Reports, the Massachusetts Appeals Court Reports or the Land Court Reporter.

Motions to dismiss, motions for judgment on the pleadings, or summary judgment, must be filed within the applicable time standards established by the court. Cross-motions must follow the

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SJC case on defining 'practice of law' could impact conveyancers

By Douglas W. Salveson



Darryl Chimko recently found himself in the ironic position of arguing to a Massachusetts bankruptcy judge that he should avoid sanctions because he was not engaged in the "practice of law"

A partner in the Boston law firm of Yurko & Salveson, P.C. Doug Salveson serves as counsel to the Association's Practice of Law by Non-Lawyers Committee. He also represented the REBA Amicus Committee, authoring a brief on behalf of the Association in *In the Matter of Darryl Chimko (SJC 09388)* discussed in this article. He represented the plaintiff in *Massachusetts Conveyancers Association, Inc. v. Colonial Title & Escrow Company (2001)*. Salveson also served on a 2004 task force of the Massachusetts Bar Association to define the practice of law. He can be reached at dws@bizlit.com.

– ironic because he's an attorney and, moreover, an attorney who specializes in bankruptcy law.

The question of whether Chimko was engaged in the "practice of law" was certified to the Supreme Judicial Court and argued in May. (*In the Matter of Darryl Chimko, SJC-09388.*) The answer to that question could have significant ramifications for Massachusetts conveyancers.

In 2003, Antonio Lucas filed a pro se bankruptcy petition in Massachusetts. One of Lucas's creditors was a finance company that had loaned money to Lucas secured by a third mortgage on his Massachusetts home.

Under the provisions of the Bankruptcy Code, a creditor can avoid having its debt discharged in bankruptcy if the individual agrees to reaffirm the debt and executes a reaffirmation agreement in accordance with the requirements of the Code.

On behalf of the finance company, Chimko wrote Lucas a letter on the letterhead of his Michigan law firm, and enclosed a proposed reaffirmation agreement and a document that purported to explain the reaffirmation process.

Chimko asked Lucas to complete the form, reaffirm the debt to his client, and return it to him. Chimko then filed the proposed reaffirmation agreement and other documents with the Bankruptcy Court.

Under a local rule of the Massachusetts Bankruptcy Court, the reaffirmation agreement was not valid until it was approved by the court following a hearing. However, statements in the documents that Chimko sent to Lucas, which were also filed with the court, suggested the agreement was effective upon filing. These statements arguably could encourage a pro se debtor to make payments under the terms of the reaffirmation agreement that he was not legally required to make until, if at all, a hearing was held by the Bankruptcy Court.

After reviewing the reaffirmation agreement and the other documents filed by Chimko, the Bankruptcy Court scheduled a hearing as to why the documents should not be stricken and sanctions imposed for violating the local rule.

At the hearing, Chimko noted that he did not negotiate any of the terms of the proposed reaffirmation agreement, which

were provided by his client, and that the reaffirmation agreement was a form agreement that was essentially the same as the form approved by the Bankruptcy Court.

Chimko asserted that he could not be sanctioned by the Bankruptcy Court because he had not filed an appearance and his actions were merely ministerial and did not constitute the "practice of law." Furthermore, Chimko noted that his letter to Lucas explicitly said that he could not provide legal advice and that, the documents often referred to Chimko as an "agent" rather than an attorney.

Following the imposition of sanctions by the Bankruptcy Court, the matter was appealed to the U.S. District Court in Massachusetts. Because the issues turned, in part, on the definition of the practice of law, the District Court certified certain questions to the SJC.

Defining the practice of law

It is a truism that only lawyers can practice law. However, formulating a perfect, all-encompassing definition of the practice of law is no easy matter. The dif-

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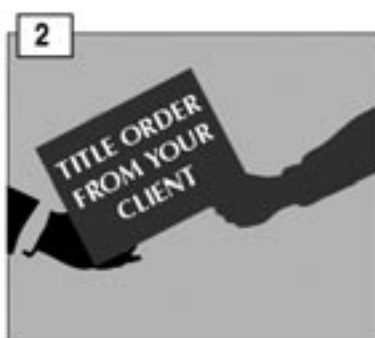
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Bill would clarify status of homestead exemption

By Richard P. Howe Jr.



In a 1939 radio speech, Winston Churchill described Russia's foreign policy as "a riddle wrapped in a mystery inside an enigma." Were he alive today, Churchill might say the same

about homestead law in Massachusetts.

Each day at the Middlesex North Registry of Deeds customer service office, we are besieged by unanswerable questions about homesteads due to ambiguities in

Dick Howe has served as the Register of Deeds for the Middlesex North District since 1995. He also held the office of president of the Massachusetts Registers and Assistant Registers of Deeds Association in 1998 and 1999. Prior to his election as Register of Deeds, Mr. Howe was engaged in the private practice of law, concentrating in real estate and criminal defense. He can be reached at richard.howe@sec.state.ma.us.

G.L.c. 188. House Bill 648, sponsored by Rep. Kevin J. Murphy of Lowell, now pending before the Legislature brings much needed clarity to this area of the law.

The most frequently asked question is whether a homeowner with a prior homestead must record a new one after refinancing. Those who say "yes" argue that since a mortgage is technically a deed and executing a new deed cancels a homestead, the new mortgage cancels the existing homestead. Many disagree, maintaining that a new mortgage is not fatal to the homestead.

The proposed legislation resolves this debate. It states: "A mortgage executed by an owner for property that is already subject to a declaration of homestead shall not terminate such homestead."

The amendment also eliminates the need for lenders to require releases or subordinations of existing homesteads by exempting "debts contracted that are secured by a mortgage on the premises, whether said mortgage was executed by the owner or by a predecessor in title" from the homestead's protection.

Whether a homestead may be declared on property held in trust is another ques-

tion. Since a trust is a separate legal entity, a home owned by the trust is no longer the "family home" that the homestead is designed to protect. But for better or for worse, many trusts are simply the title holding alter-ego of the individual and the property is indeed the family home.

The proposed amendment allows a homestead in such a case, stating, "A trustee may file a declaration of homestead for real property that is held in trust, provided the trustee occupies such property as his principal residence."

When and how spouses may file homesteads is another contentious issue. The standard homestead only permits one spouse to file, but spouses who are elderly or disabled may each file one separately.

Because the amount of the exemption is the same for both versions (\$500,000), there is no reason to perpetuate two different homesteads. Consequently, the new bill eliminates the elderly and disabled homestead and permits filing by any family member – defined as a spouse, child or parent – who has an ownership interest and resides in the property.

It also extends the protection of a homestead filed by one family member to debts

of a non-filing family member who has an ownership interest and resides in the home. For example, where a parent and an adult child own a home jointly and both occupy it as their personal residence, the protection of a homestead filed by one would cover the debts of the other.

This approach affords the homeowner the benefit of his own homestead and of another filed by a family member. In such cases, the proposed amendment specifically allows homeowners to combine or "stack" the protection of two or more homesteads.

Aside from the amount of the exemption, little has changed about homestead law through the years. Perhaps its ambiguity explains its stability.

With its many different interpretations, homestead law has been all things to all people. Still, a more precise, predictable set of rules would benefit lawyers, creditors and homeowners.

House Bill 648 will do much to resolve questions about the impact of mortgages, trusts and spouses on homestead law. Please visit the homestead section of the Middlesex North website at www.lowelldeeds.com for a full copy of the bill and to leave your comments and suggestions.

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Joel Reck joins REBA Dispute Resolution



Reck

Joel M. Reck of Brown Rudnick recently joined the panel of neutrals for REBA Dispute Resolution, Inc., the first alternative dispute resolution service in Massachusetts exclusively focused on property-related disputes.

estate experience and legal expertise to conflict resolution to help disputants reach an agreement without litigation," he said.

For more than 37 years, Reck's diverse real estate practice has included development projects, acquisitions, sales, financings, leases and workouts for a variety of institutions with an emphasis on developers, real estate advisors, high-tech companies, pension plans and REITS.

His practice consists of structuring, managing and closing sophisticated commercial real estate transactions throughout the country and has included several of the largest recent development projects in the Boston area.

Reck has handled two of the three largest leases ever undertaken in the City of Boston, in one instance representing the building owner and in the other instance representing a major institutional tenant.

REBA Dispute Resolution was established to meet the growing needs of tomorrow's real estate law practice. By combining the talents and resources of REBA members who are highly recognized in their fields of expertise with a well-respected bar association known for its dedication to excellence, REBA Dispute Resolution brings much-needed specialized dispute resolution alternatives to the legal and real estate communities as well as to the general public.

As a former member of REBA's Board of Directors, Reck was invited to join the REBA-DR panel of 14 prominent real estate attorneys and retired judges, who are accredited to act as mediators in real estate disputes.

According to Peter Wittenborg, executive director of REBA Dispute Resolution, Inc., "REBA Dispute Resolution is indeed fortunate to have secured Joel Reck, one of the preeminent real estate practitioners in Massachusetts, for our growing alternative dispute resolution program. I am sure Joel will bring the same energy and commitment he has brought to the Boston Bar Association, the Boston Bar Foundation, and his many other involvements."

Reck said he was "honored" to join REBA Dispute Resolution.

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'Reverse' 1031 exchange: A problem-solver for your client

By Carla M. Moynihan



Most REBA members are familiar with a "1031 exchange" – the device available under the Internal Revenue Code allowing a real estate investor to exchange properties and defer capital gains taxes by selling one property (Relinquished Property) and buying another property (Replacement Property).

As a general matter, a tax-deferred exchange provides an investor or property owner with a greater amount of proceeds to invest in the acquisition of new prop-

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erty than he would have if he had re-invested the after-tax proceeds from the sale of property into a new one.

Less well-known but growing more prevalent is the use of a "reverse" 1031 exchange.

For a number of reasons, including a robust real estate market, an investor may need to close on the acquisition of new property before selling his current property. This situation may occur where property demand is high and inventory is low.

The purpose of this article is to summarize the procedures necessary to successfully complete a reverse 1031 exchange.

The gain

In general, capital gains taxes are owed on any excess derived from the difference between the original purchase price reduced by depreciation and the sales price reduced by any closing costs (i.e., legal fees and broker commissions).

Internal Revenue Code Section 1031(a)(1), allows an investor to roll that gain into a replacement property by providing that "no gain or loss shall be recognized on the exchange of property held

for productive use in a trade or business or for investment if such property is exchanged solely for property of like kind which is held either for productive use in a trade or business or for investment." Any proceeds remaining at the termination of the exchange may be subject to a tax.

The parties

The four parties involved in a tax deferred exchange are the taxpayer, the seller, the buyer and the qualified intermediary (QI).

The taxpayer owns property that he would like to exchange for new property. The seller is the one who owns the Replacement Property that the taxpayer wishes to acquire.

The buyer is the one who wants to purchase the taxpayer's property. The QI is the entity that buys and resells the properties at an agreed upon price in return for a fee for facilitating the exchange.

The IRS regulations state that a QI may not be a "disqualified person" which includes any person who acts as the taxpayer's agent, employee, attorney, broker, any family member, a corporation where 10 percent or more of the out-

standing stock is owned by or for the taxpayer or any beneficiary of a trust for which the taxpayer is the grantor.

Regular exchange

Before analyzing the components of the reverse exchange, it may be useful to review the primary features of a regular tax deferred exchange.

The Relinquished Property and the Replacement Property must be for investment or business purposes and may include vacant land or rental property. The titleholder on the Relinquished Property must be the same title holder on the Replacement Property.

The taxpayer cannot have actual or constructive control of the sale proceeds from the Relinquished Property, and all proceeds must be held by the QI.

Within 45 days after the closing date of the Relinquished Property, the taxpayer must identify a list of one or more properties from which to select the Replacement Property.

Within 180 days after the closing date of the Relinquished Property, the tax-

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Courts grappling with many open questions in commercial lease law following SJC ruling

By John T. Ronayne



By general consensus, the Supreme Judicial Court's decision in *Wesson v Leone Enterprises, Inc.*, 437 Mass. 708 (2002), was one of the most significant developments in Massachusetts commercial lease law in recent years.

The court in *Wesson* – overturning hun-

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dreds of years of precedent – rejected the doctrine treating the obligations of landlord and tenant in a commercial lease as “independent covenants,” in favor of the more “modern” doctrine of “dependent covenants.” This change has potentially far-reaching ramifications, many of which have yet to be addressed by decisional case law.

Under the independent covenants doctrine, a tenant could not terminate its lease, and was required to continue paying rent, no matter what defaults the landlord might have committed (for instance, serious breaches by landlord of obligations to repair and maintain the property).

In most cases, the tenant's only option was to stay put and sue for damages and/or for specific performance. The only exception to the strict application of this rule arose when landlord's actions constituted a “constructive eviction,” in which case the tenant could terminate the lease and move out (or, for the more

cautious, sue for declaratory judgment and then terminate and move out). But tenants had to keep paying rent until it terminated.

Under the doctrine of “dependent covenants,” the tenant has more, potentially many more, options. The SJC adopted the formulation of “dependent covenants” in *Wesson* from § 7.1 of the Restatement, (Second) of Property (Landlord and Tenant) (1977).

The court quoted the treatise as follows: “Except to the extent that the parties to a lease validly agree to the contrary, if the landlord fails to perform a valid promise contained in the lease to do, or to refrain from doing, something, and as a consequence thereof, the tenant is deprived of a significant inducement to the making of the lease, and if the landlord does not perform his promise within a reasonable period of time after being requested to do so, tenant may (1) terminate the lease....” *Wesson*, 437 Mass. at 720.

The balance of Restatement § 7.1, not quoted or otherwise explicitly adopted by the court, provides to the tenant a range of other remedies (beyond simply terminating) not previously available to the commercial tenant in Massachusetts, including abatement of rent, use of rent to perform the landlord's defaulted obligations, and payment of the rent into escrow until the landlord performs its obligations.

In *Wesson*, the tenant had already terminated the lease and moved out by the time the case got to court, so the absence of reference to these other remedies should not necessarily be construed as suggesting reluctance by the SJC to bring the balance of Restatement § 7.1 into Massachusetts law when the appropriate cases present themselves.

Many open questions remain

The *Wesson* case opens whole new areas for exploration in Massachusetts

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Residential seller's duty of disclosure: Buyer beware

By Stephen D. Silveri



A common misconception in residential real estate transactions is that the seller must alert the buyer about defects of which the seller is aware. In Massachusetts,

however, the party selling a home generally will not be liable to the buyer for failing to disclose problems with the home itself, the property, or the various systems located thereon.

In order for the seller to be liable to the buyer, the seller must owe the buyer a

Stephen Silveri is a sole practitioner in Dedham with a focus on residential real estate. He represents buyers, sellers and lenders at all stages of the closing process. More information about his practice can be found at www.silverilaw.com. He can be contacted at Stephen@silverilaw.com.

duty of disclosure. Absent this duty, which only arises under limited circumstances, the buyer could be left without a legal remedy if problems are discovered in the future. This article presents several tips to help preserve the buyer's important legal rights.

Asked and answered

While a non-commercial seller generally has no obligation to disclose known defects voluntarily, absent a fiduciary relationship, he or she must do so when the buyer asks a specific question. In that case, the seller must answer truthfully, accurately, and completely to the best of his or her knowledge.

Should the seller fail to do so, and the buyer reasonably relies on those statements, the buyer may have a claim against the seller even if the buyer fails to investigate those statements (mere expressions of opinion, however, are generally not actionable). In addition, while a seller is not obligated to disclose that which he or she does not know, the seller cannot actively avoid discovering the details of a suspect-

ed problem or tell half-truths.

Moreover, it is important to note that these same principles also apply to anyone who is acting as the seller's agent, such as a real estate broker. Consequently, the buyer should make every attempt to obtain specific promises and factual representations from the seller and the seller's agents about the condition of the property (e.g. presence of wood-boring insects, water leakage, asbestos, etc.).

Put it in writing

Buyer's counsel should incorporate the statements made by the seller, or the seller's agents, into the purchase and sale agreement in order to preserve the buyer's ability to assert a claim in the future. If the seller provided his or her broker with a seller's statement form, describing the condition of the property, you should also require its inclusion as an exhibit.

You must further modify the purchase and sale agreement because the standard boilerplate language generally invalidates any representations made out-

side of the four corners of the document. Therefore, you must strike any conflicting language and incorporate by reference any attached exhibits.

In addition, you must also include express language that these representations will survive delivery of the deed or the buyer will not be able to enforce these provisions after accepting title to the property. Accordingly, these steps are necessary to avoid inadvertently forfeiting your client's legal rights. Where the seller or seller's representatives have failed to comply with their legal obligation to disclose defects, in addition to potential claims for fraud, misrepresentation, and breach of warranty, the buyer may also have a claim under the Massachusetts Consumer Protection Act, General Laws Chapter 93A, which primarily protects consumers who have been subject to unfair or deceptive trade practices and is particularly powerful because of the potential for treble damages, costs, and attorney fees.

It is important to note, however, that

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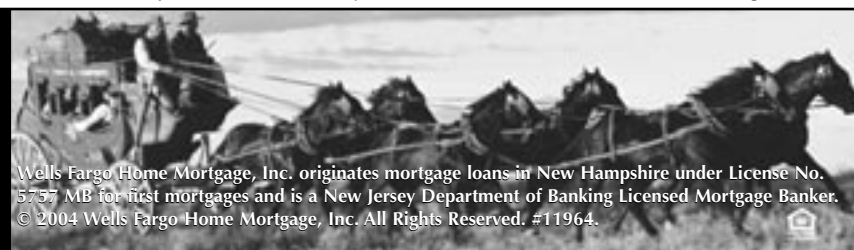


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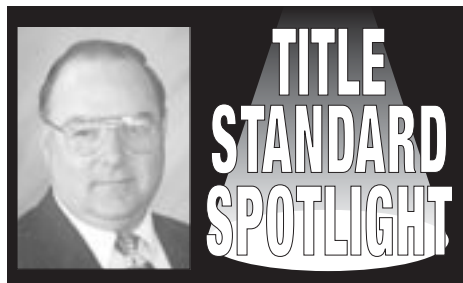
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Condo lien certificate sufficient to clear title

By Ward P. Graham



This edition of the Title Standard Spotlight will focus on a title standard that, while a little over a year-and-a-half old, seems to have escaped the attention of a number of conveyancers.

REBA Title Standard No. 69, entitled "Certificates Pursuant to G.L.c. 183A, §6(d)," was adopted on Nov. 3, 2003,

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and helps resolve an issue that used to concern many faced with recorded complaints to enforce condominium liens appearing in the chain of title to a condominium unit.

The certificates referred to in the title standard are the condominium lien certificates issued pursuant to G.L.c. 183A, §6(d) by the organization of unit owners certifying the status of liens for common expenses and assessments on a condominium unit.

When a copy of a complaint to enforce a condominium lien is found in the chain of title for a unit being sold or mortgaged, it is not uncommon to find nothing on record (court clerk's certificate, court order, release by the association or any other document) to show that the case was dismissed or otherwise disposed of so as to dissolve the lien.

The question many conveyancers used to have when this situation arose was whether the subsequent recording of a so-called "6(d) certificate" was sufficient to establish that the lien was satisfied or dissolved and that the record ti-

tle was now clear if the certificate did not list the assessments that were the subject of the complaint as being still outstanding. (For purposes of this article, such a certificate will be referred to as a "clean 6(d) certificate.")

Two schools of thought

There seemed to be at least two schools of thought causing this concern.

First, the condominium lien is enforced through a court proceeding under G.L.c. 254, §§5 and 5A as directed by G.L.c. 183A, §6(c). Notice of this proceeding is established by the recording of a copy of the complaint as required by G.L.c. 254, §5.

This caused many conveyancers to treat the record of such a complaint as akin to a lis pendens that needed to be cleared from the record in a similar manner. (See, for example, REBA Title Standard No. 29, "Dissolution of Lis Pendens," which provides that a lis pendens may be dissolved by recording a certificate of the clerk of court where the action was entered or the judgment was entered stating that (1) the action has

gone to final judgment in favor of the defendant or (2) the action has been discontinued, dismissed or finally disposed of as to the land in question.) Although the language of G.L.c. 183A, §6(d) itself should have helped dispel that concern, it nonetheless lingered for many years.

Second, the issuance of condominium lien certificates under G.L.c. 183A, §6(d) were viewed by some as similar to the issuance of municipal lien certificates under G.L.c. 60, §23 in that both are supposed to be binding on the issuing authority as to any assessments not showing on the certificate.

However, despite the respective statutory provisions making the recorded certificates binding on the issuing authority, many conveyancers have seen both municipalities and condominium associations try to collect previously omitted assessments by adding them to subsequent lien certificates issued on the same property.

Certainly unlawful, such practices nonetheless have caused any given

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The evolving Registry of Deeds: E-filing is a 'good thing'

By Edward Rainen and Carrie B. Rainen

Commentary

Richard P. Howe Jr. isn't afraid of new technology.

The Register of Deeds for the Northern District of Middlesex County in Lowell has been



keeping up with the latest modes of communication and technology by maintaining on the registry's website a blog (a 'Web Log' for the over-50 set).

Some recent blog entries have dealt with the futuristic idea of electronically recording documents at the Registry of Deeds. While hardly a "stranger in a strange land," the digitally savvy Howe has identified in his online posts the occasional misgivings that he, and others, have expressed with regard to electronic filings for real estate transactions.

In fact, Howe's staff has actually been accepting 'e-recordings' since June 2. The blog provides a frequently wry view of what can happen when present-day practice meets the technology of the future.

While we accept the notion that machines, as created by man, are fallible, the issues raised by modernization of land recordkeeping are not as dire as they may seem. In fact, what is dire is the registry system's need for *additional* infusions of modern technology.

Currently, the 21 registries operate using one of five different computer software programs, most notably Browntech and ACS. The ACS system was used to unify those registries under supervisory control

of Secretary of State William Galvin.

With the anticipated conversion to ACS software by summer's end of the Essex County Registries of Deeds in Salem and Lawrence, 11 registries in Massachusetts will operate the ACS system. The Browntech software is presently found in the Hampden, North Worcester (Fitchburg), Norfolk and Barnstable Registries of Deeds. Other systems, with various capabilities, exist in Plymouth, Bristol, Dukes and Nantucket counties.

While unification is a fine first step, particularly as the registers of deeds work to implement the uniform indexing standards approved several years ago, the registries must be brought further into the 21st century.

Many, if not most, closing attorneys already receive closing packages from national lenders via electronic transmission. Prospective buyers take virtual tours of homes for sale from their own living rooms. If we can send presents via Amazon.com, purchase at auction on eBay, and download from iTunes, it is hardly adventurous for digitally conscious real estate professionals in law and business to expect both online recording and more efficient electronic filing systems within

the registries themselves.

The technology for off-site electronic document submission has existed for some time. With affordable high-speed networks in conjunction with office scanning equipment and software, it was time for the legal framework provided by the Massachusetts version of Uniform Electronic Transactions Act, (Mass. UETA) codified by G.L.c. 110G added by Chapter 133 of the Acts of 2003, effective Feb. 24, 2004. The truth is that from the attorney-conveyancer's perspective, electronic recording is not significantly different from scanning and sending other legal documents via e-mail.

A paper document, signed in ink is referred to a "wet document." In a typical transaction, after all documents are properly executed and copied for the file, those "wet documents" that are to be recorded will also be scanned and saved. That same format is what is found online today at the registries using the ACS and Browntech systems.

In what is known as a 'Level I' electronic recording, paper documents are executed in the traditional "wet" fashion, scanned and e-mailed for recording.

Continued on page 16

A long-time observer and commentator on the mores and culture of the Commonwealth's 21 registries of deeds, Ed Rainen practices conveyancing law with his wife, Shelly Rainen. Their daughter, Carrie, works for the Law Offices of David M. Datz and has worked at various registries of deeds. She is a third-year law student at New England School of Law. Ed co-chairs the Association's Registries Committee and can be reached at erainen@aol.com.

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Commercial title insurance endorsements can expand coverage

By Sophie S. Stein



Endorsements to a title insurance policy add value to the basic coverage contained within the pre-printed policy and, in some cases, override certain express policy provisions limiting the coverage.

Nationwide, there is a great variety of the endorsements, ranging from the standard American Land Title Association (ALTA) and California Land Title Association

Sophie Stein, assistant vice president and title counsel for Old Republic National Title Insurance Company, is a frequent lecturer on commercial title insurance underwriting issues. She recently spoke at a meeting of REBA's Commercial Real Estate Finance Committee and at REBA's Spring Seminar. She can be reached at ssstein@oldrepublictitle.com.

(CLTA) endorsements to the specialized endorsements. The standard endorsements are validated and issued by the two industry trade organizations – the American Land Title Association (ALTA) and the California Land Title Association (CLTA).

California has long been a leader in proposing innovative endorsements. Indeed, ALTA often follows the lead of CLTA. Presently, there are 21 standard ALTA endorsements and over 100 CLTA endorsements. Obviously, only a few will be applicable to any particular transaction and jurisdiction.

Below are some of the most common commercial endorsements.

Access Endorsement(s) insures the policyholder that the insured premises either abut a physically open public street as named in the endorsement, or have access to publicly dedicated and open street(s) as named in the endorsement.

Contiguity Endorsement insures the insured that the parcels as described in the policy are contiguous to each other along their common boundary and, taken together, constitute a single tract of

land and that there are no gaps or gores that may separate any of the parcels along their common boundaries.

Comprehensive Endorsement (ALTA 9) insures against loss or damage arising from the existence of the enforceable covenants, conditions or restrictions, which may impair the insured mortgage.

"Doing Business" Endorsement insures that the failure of the insured to qualify to do business in Massachusetts will not affect the enforceability of the insured mortgage lien.

Usury Endorsement insures against loss or damage that the insured may sustain in the event that the loan secured by the insured mortgage is declared usurious. The standard ALTA policy does not insure against loss resulting from the invalidity or unenforceability of the insured mortgage if it is determined to be usurious.

Occasionally, a lender will request an endorsement providing usury insurance. Issuance of this endorsement requires a specific approval from your underwriter. Section 49 of M.G.L. c. 271 outlines the

restrictions on usurious loans. The statute specifically exempts federal and state regulated entities from usury regulations.

If the lender is not exempt, a simple filing with the Attorney General will insure the compliance with the law. Most title insurers will require proof of filing by non-exempt entities with the Attorney General, in order to authorize the issuance of the Usury endorsement. There is often an additional premium charge for this endorsement.

Survey Affirmative Coverage Endorsement insures that the land described in Schedule A of the policy is the same as that delineated on the survey.

First Loss Endorsement insures that in the event of loss under the policy that exceeds 10 percent of the amount of insurance, liability shall be triggered without requiring the insured to accelerate the indebtedness or pursue other remedies.

Since a title policy is a contract of indemnity, the title insurer can withhold payment to the lender, in the event of a

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Association launches environmental law committee

Continued from page 1

lution Trust Corporation.

Among her numerous leadership positions in the bar, Ryan served as President of the BBA in 1997-1998, and chaired various environmental committees of the BBA. She served as president of the Women's Bar Association of Massachusetts, chairs the Standing Committee on *Pro Bono* Legal Services for the SJC and is a member of the Board of Directors of the Environmental Business Council of New England.

Ryan is also an active member of the American Bar Association. She is the immediate past chair of the Standing Committee on Delivery of Legal Services, and she served on the Presidential Commission on Access to Lawyers in 2002-2003. She has served in the House of Delegates, and has been active with the ABA Litigation Section's Environmental Litigation Committee.

Ryan has been a frequent lecturer and writer on hazardous waste and environmental litigation issues for the American Bar Association and Massachusetts Continuing Legal Education, Inc. She is the

author of "The Superfund Dilemma: Can You Ever Contract Your Liability Away?" published in the *Massachusetts Law Review* and is a past contributor to *Environmental Management Report*.

Groundbreaking attorney

Gregor I. McGregor is the founder of the Boston environmental law firm of McGregor & Associates, PC, which handles court cases, agency appeals, and real estate and commercial transactions involving environmental disputes or opportunities. He is a founding member of the national Environmental Law Network, a group of specialty law firms sharing their expertise and experience for the benefit of their clients.

In 30 years of environmental practice McGregor has broken new ground in the law of environmental impact statements, wetland and floodplain protection, hazardous waste liability, land preservation, Home Rule environmental legislation and the constitutional doctrine of 'taking without compensation.'

For example, McGregor represented the Commonwealth in the seminal

Supreme Judicial Court case applying the Environmental Impact Report requirements of the Massachusetts Environmental Policy Act (MEPA) to MassPort and Logan Airport. He was counsel for the successful Town of Dennis in the SJC's upholding the use of Home Rule for Massachusetts municipalities to enact local wetlands protection bylaws and ordinances (now more than 165).

He represented 16 local, state, regional and national land trusts and organizations in the leading SJC case on the validity of Conservation Restrictions in Massachusetts under the first Conservation Restriction Act in the United States. His client Grazing Fields Farm in the federal courts under the National Environmental Policy Act (NEPA) forced the Massachusetts Highway Department to bypass, when building Route 25, the last, large working farm on Cape Cod.

McGregor has been in the private practice of law since 1975. Prior to that, he was an assistant attorney general and the first chief of the Division of Environmental Protection in Massachusetts.

As a member of government task forces and advisory groups, such as the Massachusetts Hazardous Waste Advisory Committee, McGregor has assisted in drafting or implementing environmental statutes and regulations on hazardous waste cleanups, toxic tort liability, emergency management, underground tanks, agency enforcement, environmental review procedures, tidelands and waterways, wetlands protection, and wildlife preservation. He serves as an expert witness in court cases where the 'permitability' of projects is at issue.

McGregor has written and spoken widely on environmental subjects. He is editor of the authoritative two-volume treatise, *Massachusetts Environmental Law*, published by Massachusetts Continuing Legal Education, Inc. He is contributing editor to the Business & Legal Reports, Inc. monthly newsletter, *Environmental Compliance in Massachusetts*. He writes the Massachusetts chapters for Mathew-Bender/Lexis-Nexis' treatises on *Brownfields* and on *State Environmental Law*.

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From the President's Desk

Continued from page 3

not unique to practice in the real estate area. We hope to meet with bar associations throughout the state, and with specialty bar associations representing a number of different practice areas, to continue to discuss our shared concerns and to bring to bear on these important issues the strength of the entire bar.

As reported in my last column, REBA's many committees continue to remain active. The Spring Meeting saw two new items brought before the membership by the Title Standards Committee. As I am writing this column, the Land Use and Zoning Committee is preparing to attend hearings on the Land Use Reform Act (Senate Bill 168 / House Bill 3544) before the Joint Committee on Municipalities and Regional Government and the Joint Committee on Community Development and Small Business.

The Commercial Real Estate Finance Committee recently held an open meeting addressing the topic of due execution, authority and enforceability opinions, which spurred discussion about the possibility of developing a model form of opinion for use in real estate financing transactions.

The Membership and Public Relations Committee, with financial support from

the local office of several title insurance underwriters, continues to oversee REBA's advertising campaign intended to elevate the public's recognition of REBA and the importance of having an attorney involved in the closing process.

These are just a few of the many REBA committees which are actively working on behalf of the real estate bar.

I encourage more members to make use of REBA's committees to become involved in the work of the Association. In that regard, it is with great pleasure that we are announcing in this issue of *REBA News* that we have finalized plans for the formation of our new Environmental Committee, to be chaired by Mary Ryan and Gregor McGregor, two of the leading practitioners in the field of environmental law in Massachusetts.

This is part of REBA's continuing effort to find additional avenues by which our members can become involved in REBA and through which REBA can better serve its members.

As the Spring Meeting so well demonstrated, these are exciting times at REBA, with much having been accomplished in recent years and with many more challenges that lay ahead. There is room for many more to become involved in these efforts. We look forward to having you join us.

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The evolving Registry of Deeds: E-filing is a 'good thing'

Continued from page 12

Here, in the same fashion as receipt of a paper document across the counter, registry staff review the document on-screen, approve it for form, substance and pricing. They then fill in the same required fields in their ACS or Browntech software to create the grantor and grantee index entries.

One step further is the 'Level II' style electronic recording. Scanned documents are sent to the registry with indexing information electronically filled in and attached by the submitter's office for automatic indexing by the registry computer system.

It's like purchasing online with a credit card, where it is necessary to fill out purchaser name, shipping address, billing address, credit card company, number and expiration. Here the registry staff not only reviews the document, as above, but edits the submitter-prepared indexing for accuracy.

Finally, in the Level III style recording, electronic documents with indexing information are recorded directly without review by staff. We do not anticipate that Level III recordings will be permitted in Massachusetts

Other e-advancements

Register Howe is hardly the only Register working to modernize land record-keeping. Register Donald Ashe of the Hampden County Register of Deeds, Stewart Title Guaranty Company, and Western New England College School of Law sponsored an informational seminar on May 7, 2004 that conducted the first electronic recording of a real estate document in the Northeast.

In an article in the Stewart Title Guaranty Company Newsletter, Michael J. Agen, branch manager and counsel in Springfield writes, "The infrastructure for the paperless real estate transaction in

Massachusetts exists. The task now presenting itself to Massachusetts real estate lawyers, as it always seems to be, is to coordinate the technical, legal and business components of the paperless transaction in a manner that serves the consumer/client, lenders and realtors."

He adds that Mass. UETA "simply substitutes electronic records and signatures for 'wet' signatures and writings. G.L.c. 110G §7 (c), (d). It states that electronic documents and signatures may not be denied legal effect or enforceability solely based upon their electronic nature. G.L.c. 110G §7 (a), (b)."

Online recording systems have already been implemented in other jurisdictions, such as Texas, and the District of Columbia. Agen hopes we have learned from mistakes in process and procedure, and allow for a smooth transition in the Commonwealth.

He also stated that within two months of introduction of those systems, approximately 30 percent of transactions relied in whole, or part, on electronic recording.

According to Register Howe, "The mechanics of the system seem to work very well. It's the 'strategic' issues that have required more thought."

Three principal players

There are three principal players in the electronic land recordation: submitters, receivers, and intermediaries. Submitters, primarily law offices closing loans, as well as large lenders and mortgage servicing entities transmitting high volumes of mortgage assignments and discharges, must be willing to install proper security components and train their staff so that submissions of recordable documents are of high quality.

While there are no statutes that can qualify a submitter, there are certainly economic barriers to paying for the in-

frastructure, equipment and support which contribute to "who" can effectively be a submitter.

The intermediary must be able to connect into the OEM land records system to ensure the web-based product contains up to date fees from each registry, including return mail and certified copy charges. It is the intermediary's responsibility to collect, deposit, and guarantee the fees, and provide the submitter a receipt.

The intermediary is necessary because, in Massachusetts, as with the rest of the country, the statutory framework does not permit a registry to advance credit for recording expenses. Under the proposed system, all submitters' recording costs are computed electronically at the end of each day, and funds are transmitted to the registry's account immediately, regardless of whether the intermediary has been reimbursed from their submitter.

The intermediary will complete a memorandum of understanding with each submitter in order to assure that 100 percent of the fees are deposited into the county's account the next day. If the submitter has a financial short, it is the intermediary's problem not the registry's.

The intermediary's substantive role in the mechanics of the online recording system is to set up a secure network and encrypt documents to ensure that they cannot be tampered with in any way. This will be accomplished with the establishment of a Virtual Private Networks (VPN) among submitter and intermediary and registries.

A VPN enables Internet traffic to travel securely over an existing public TCP/IP network by encrypting all electronic traffic from one network to another. Privacy is maintained through the use of a tunneling protocol and security procedures to encrypt all information at the IP level.

Such a system ensures that only authorized users can access the network and that the data cannot be intercepted. Essentially, a VPN gives a company the same transmission and security capabilities as a system of owned or leased lines to which that company has exclusive access. However, costs are much lower because the VPN uses the shared public infrastructure rather than exclusive line access.

The intermediary will provide the training and support that its affiliated submitters need to be successful. They keep the software up-to-date, and provide the tools to optimally scan, transmit and record documents.

The key to fairness and equity in the priorities of recording from multiple sites mandates an inviolate recording queue – or electronic "line." The software must

be designed to create a queue management system that protects the electronic submitter from race-to-record issues and conflicts with the line-standing submitters at registries.

The best methodology to achieve this is a public access computer on site. On arrival, at-registry submitters immediately type in property address, grantor name and number of documents in each recording package they plan to submit. The software establishes priority and sequence of recording so that electronically submitted recording packages cannot "sneak ahead" if they arrive while someone is standing in line to record.

In turn, the information provided at the public access terminal becomes available to off-site submitters so that they may be aware of possible intervening matters. This software provides a complete and detailed audit trail of every single action taken on a submission by both the submitter and the recording office. The intermediary will supply complete reports reflecting fees and charges to the registry on all activity to assure 100 percent integrity with the system.

The third and final party to the e-recording transaction is the receiver – the staff at registries of deeds. The receiver wields the most power and controls the recording, as mandated by UETA (G.L.c. 110G §§15 (a) (1), (2), (3)). When a submitter files online, he must perform a rundown on the property contemporaneously.

If, within a defined period of time before the recording attempt, any documents under the grantor's name or on the specific property address were recorded, the submitter will be unable to file their documents. Packages that are rejected are instantly sent back to the user with an audible and visual alarm (perhaps as a take-off on AOL it will be: "You've Got a Rejection!"), providing the submitter ample time to reconcile the issues.

The receiver has not "received" the documents for recording unless it is in a "retrievable" form, as provided by G.L.c. 110G §§15 (b) (1) and (2). Furthermore, the submitter cannot interfere with the receiver's job of saving and printing the document. G.L.c. 110G §8 (a) and (c).

Finally, after recording, documents must be returned with recording information attached (electronically, of course). The interesting question will be if certain lenders will still require an official, paper "certified copy."

Perhaps that type of official stamp can be affixed electronically, as well. The day of the embossed, raised seal on official documents appears to be entering its twilight.

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AG attacks real estate closing bill as anti-consumer

Continued from page 1

event, as he outlined the reasons why he opposed the legislation.

Below are the Attorney General's full comments:

"Looking around this room, I can tell that there's not much real estate changing hands in Massachusetts today, the Registry of Deeds must be relatively quite.

I want to thank you for inviting me here today, the law is my profession and I am very proud to be a lawyer so it's an honor for me to join you. My congratulations to Judge Cauchon's family. I never had the pleasure of meeting him but listening to his background I wish I had. He did manage to get a governor elected by 5,000 votes! I'll take it by one vote – I could use that expertise. He sounds like an absolutely wonderful man. That was a tremendous tribute. It also sounds like we both love the law and politics.

Indeed in my opinion the law is a route to a better, fairer and more just world. The law is and the law must be a tool for good. As Attorney General, of course, the notion is part and parcel of the job description.

My job is to be the people's lawyer. When you are the attorney general, you work for the entire state, not just Democrats, not just Republicans, but the entire state. So when a million people stood at risk of losing their health care coverage, because Harvard Pilgrim was headed towards bankruptcy, we saw our job as using the law to keep that coverage in place.

We put Harvard Pilgrim in receivership through a law that had never been used before, thus we began a process that brought providers and payers and business and government together. Ultimately we saved not just the company but the health coverage of those one million residents of this Commonwealth.

When the Red Sox were put up for sale, people didn't see a role for our office in that transaction. But we saw a private trust, the Yawkey Foundation, whose beneficiaries are the public charities of

this state. We saw those charities being shorted, and we had a broader vision for the law addressing the responsibilities of the foundation – a vision that demanded they do better by its beneficiaries.

So we intervened and by the end of the day we ensured those charities would receive 30 million dollars more than they would have under the original deal. Believe me, I was reminded of that \$30 million last season. I was reminded that with that \$30 million we could have had A-Rod. I said "get over it, you can win without him" and they're pretty happy now.

When water started pouring into the Big Dig, we saw not just a breach in the wall, but a breach in one of the most basic notions of law – people should get what they pay for. Although cost recovery is not the job of the AG's office, we volunteered to take on the job, using the law to vindicate that notion.

This is not just about taxpayers' dollars but the entire reputation of the state. But I am under no illusion that the Attorney General's office is the only place where the practice of law protects the public. It happens in private practice too, as each and every one of you in this room know very well.

Most of you may not know this, but I was in private practice for 10 years before I ran for public office. The first four or five years I essentially practiced real estate law most of the time. I represented buyers and sellers and developers.

It happened very early in my career but I actually drafted a deed for a plot plan, actually did it twice. Many of you may remember an old scrivener named Sumner Andrews who taught me that craft.

One was in Middlesex County and one was in Plymouth County and as far as I know the titles are still good in both of those places. It was a wonderful experience. People don't realize how important these transactions really are. They aren't every day events. As an attorney you'll often find yourselves in one of the biggest events in people's lives as they buy a new home or a piece of property to start a new business.

These are not simple transactions. They weren't back when I was in private practice, and they certainly aren't now. Issues of chain of title, particularly in an older state like Massachusetts, environmental hazards, the condition of the property, restrictions on use, access, zoning – there are many places where things can go seriously wrong without an expert, ethical and accountable steward for closing services.

To me, the role of expert, ethical, ac-

In short, having attorneys involved protects consumers and to me that is the bottom line.

countable steward is the role for an attorney. Having a lawyer involved in the process means you have someone in a highly regulated profession. You have a licensed professional that must meet competency requirements and will typically have specific expertise. You have accountability, from someone who will face very serious professional consequences if they don't do their job correctly and ethically.

When there's a lawyer in the process and something does go wrong, there may be access to insurance or a client security fund.

The money from IOLTA comes from you, and that's a tremendous credit to all of you and it's our state that benefits.

In short, having attorneys involved protects consumers and to me that is the bottom line. And it truly does protect consumers' bottom lines, and for that reason I strongly oppose the legislation that would take this level of security away from them.

My views on this aren't just from my experience in private practice but also my work as Attorney General. We've seen how predatory lenders try to take

advantage of home buyers, misrepresenting loan terms, charging far higher interest rates than promised and charging costly repayment penalties.

They try to prey upon elders and other vulnerable populations. One case affected over 10,000 consumers in Massachusetts, and left some of them trapped in costly loans that they could not pay off or refinance without having to pay very heavy penalties. In another case, some of the victims were paying up to 23 percent the value of the loan in hidden costs and fees.

Predatory lenders wreak havoc through hidden provisions that hurt consumers. It's no surprise that we found many of the companies who are actively pushing this legislation to be discouraging consumers from involving a lawyer in the closing process. It just underscores the stakes for consumers, the threats to their interests and the need for them to be protected.

As Attorney General charged with protecting the consumers of this state, I appreciate what you do on a daily basis to protect consumers. I hope that we can work together to insure that maybe the most important transaction in a person's lifetime is one that meets their expectations, protects their interests and fulfills their dreams.

It's no secret to anyone that I am a candidate for Governor. It's my sense that the Commonwealth is at a crossroads and we can't continue this path. We are the only state in the United States that is losing population – more people are leaving than staying! The demographic that is leaving is especially troubling for the Commonwealth. We are losing 25- to 35-year-old, well-educated professionals, and they are leaving this state by the thousands. There are many reasons for this, but mostly due to a lack of leadership that limits our economic recovery and new housing construction.

I'd appreciate your support, your ideas and advice for how we can build a better Massachusetts together. Thank you very much."

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‘Reverse’ 1031 exchange: A problem-solver for your client

Continued from page 8

payer must receive title to the Replacement Property.

One should use a regular exchange whenever possible due to the increased transactional costs associated with a reverse exchange. For example, it may be possible to make the purchase contingent on the sale of the current property or to schedule a later closing date. There are various ways to encourage a seller to agree to either of these terms, including an offer to increase the purchase price, to provide a larger deposit amount or to make a deposit nonrefundable.

‘Reverse’ exchange

In the event a taxpayer finds a particular property that he must acquire before he is able to sell his existing property, then a reverse 1031 exchange may be appropriate. As an initial matter, the taxpayer cannot hold title to both the Replacement Property and the Relinquished Property simultaneously. In other words, the taxpayer may not acquire title to the Replacement Property prior to the sale of the Relinquished Property.

In 2000, the IRS issued Revenue Procedure 2000-37 to provide a “safe harbor” for reverse exchanges by introducing a new entity into the process known as an Exchange Accommodation Titleholder (EAT).

The EAT signs the note and the mortgage, takes title to the Replacement Property and holds it for the tax-

payer until such time as the taxpayer sells the Relinquished Property. Once the sale of the Relinquished Property closes, the EAT executes a deed conveying the Replacement Property to the taxpayer.

Interestingly, even though the IRS has authorized its use, some banks are not comfortable with the concept and will not fund a loan under those circumstances. This hesitancy may be

the EAT. It is important to confirm with the taxpayer’s lender well in advance of closing on the Replacement Property that the bank understands the property is part of a reverse 1031 exchange and to emphasize the “parking” requirements associated with the initial title holder of the Replacement Property.

With respect to the purchase agreement, the buyer should be the tax-

requirements to accomplish a reverse 1031 exchange.

A Qualified Exchange Accommodation Agreement must be executed between the QI and the taxpayer. This agreement is prepared by the QI and reviewed by taxpayer’s counsel.

Until such time as the relinquished property is sold, title to the replacement property must be held by a QI or a legal entity under its control.

Within 45 days after the closing date of the Replacement Property, the taxpayer must identify the Relinquished Property. And within 180 days after the closing date of the Replacement Property, the Relinquished Property must be sold to a third person *and* the Replacement Property must be transferred to the taxpayer.

The taxpayer may guarantee the loan to acquire the Replacement Property, and may lease the Replacement Property from the QI until title is transferred.

The most important aspects of accomplishing a reverse 1031 exchange is to discuss it thoroughly with a financial consultant, real estate attorney or tax attorney knowledgeable about tax deferred exchanges. You must also make certain that the tax deferral on the property to be sold is substantial enough to merit the increased transactional costs. And you need to retain a reputable QI that you can trust to facilitate the transaction and ensure that all exchange requirements are met.

**You must also make certain that
the tax deferral on the property to
be sold is substantial enough to merit
the increased transactional costs
of a “reverse” 1031 exchange.**

due in part to the fact that the EAT holds title to the property that is the collateral for the bank’s loan to the taxpayer for its purchase.

The IRS does permit the taxpayer to guarantee the loan, which alleviates some lender concerns. In addition, one should ensure that an assumption clause is in the mortgage allowing the taxpayer to assume the loan made to

payer “and/or assigns.” A rider is typically added to the contract authorizing the assignment of the agreement to the EAT.

In addition, the purchase agreement should include a provision stating that the buyer/taxpayer intends to enter into a tax-deferred exchange and that the seller agrees to cooperate.

The following is a list of the primary

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tors – discerning a need to honor members contributing to their communities outside the legal profession – has established the *REBA Award for Community Service* to recognize outstanding REBA members who, in the estimation of the Nominating Committee of the Board of Directors, demonstrate an exemplary sense of caring, initiative and ingenuity through their volunteer endeavors. Email nominations for this award to Peter Wittenborg at wittenborg@massrelaw.org.



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Courts grappling with many open questions in commercial lease law following SJC ruling

Continued from page 9

commercial lease law that are largely terra incognita.

Some outstanding questions are: What landlord promises might constitute "significant inducements"? What remedies will ultimately be available? To what extent can landlord and tenant agree in advance what the remedies will be, or indeed, whether the dependent covenants doctrine is applicable at all? (For a more extensive treatment of the *Wesson* case and the issues which it raises, see the upcoming version of Section 6.1 of the MCLE Treatise "Lease Drafting in Massachusetts," which has been extensively revised by the author of this article in response to the *Wesson* case.)

Important real world consequences will flow from these cases, both in the drafting of commercial leases and in counseling landlords and tenants when disputes arise. It behooves those of us who have an interest in commercial leasing to keep a close eye on *Wesson* as it develops. My hope is to be able to report back periodically on further developments.

Post-Wesson decisions

In the two plus years since *Wesson* came down, the reported Massachusetts

cases have only just begun to fill in some of the open questions. The only subsequent SJC case in which *Wesson* has made an appearance to date is *Fafard v. Lincoln Pharmacy of Milford, Inc.* 439 Mass. 512 (2003).

In *Fafard*, the court reaffirmed the proposition that G.L.c. 239, §8A does not allow counterclaims in non-residential summary process proceedings (the correct procedure being to start a separate action and move to consolidate). In so doing, the court pointed out that "[t]he tenant did not terminate the lease or withhold rent [emphasis added] in response to any failure by landlord, after notice, to perform a promise significant to the lease." *Fafard*, 439 Mass. at 516.

At the risk of attaching too much significance to a justifiably cursory comment, the court does seem to be suggesting that, in addition to termination, the withholding of rent (as permitted under Restatement §7.1) would be a permissible course of action if the tenant plays by the rules.

The Massachusetts Appeals Court also addressed *Wesson* is discussed in *Shawmut-Canton LLC v. Great Spring Waters of America, Inc.* 62 Mass. App. Ct. 330 (2004).

In *Shawmut-Canton LLC*, the tenant entered into a lease for an office and garage facility from which its delivery trucks were to operate. The lease required that prior to commencement the landlord would create within the garage a repair shop for the tenant's trucks.

After the lease was executed, it became apparent that the use of a portion of the premises as a repair shop was not permitted under the applicable zoning. The tenant was informed by the landlord's lawyer that efforts to obtain zoning relief would be futile.

The tenant sent a notice purporting to cancel the lease.

The landlord treated this as a default, terminated, brought an action in the Superior Court to recover under the liquidated damages provision of the lease and obtained the summary judgment that was the subject of this appeal.

While the case was being heard in the Superior Court, *Wesson* was issued, and the tenant then sought to amend its answer to add a "dependent covenants" defense, based on landlord's failure to create the promised repair shop.

The judge in the Superior Court refused to permit this amendment on the basis that the lease called for written no-

tice of default to landlord and a 30-day opportunity to cure. Since this hadn't been done prior to the tenant's attempted cancellation, the cancellation was void, regardless of whether *Wesson* might provide to the tenant a substantive right to terminate.

Noting that compliance with a notice provision is not required if cure is impossible and that the issue of whether there was a possibility that the landlord could have gotten zoning relief is a question of fact, the Appeals Court reversed the summary judgment, allowed the tenant's amendment to add the *Wesson* defense and remanded the case to the Superior Court.

One question left open is whether the Appeals Court's comments regarding the notice requirements of the lease apply with equal force to the "request" and as well as the reasonable time to cure, both of which appear to be required as a matter of law under *Wesson* and Restatement §7.1.

It would seem to be a futile exercise to allow the dependent covenants defense in because notice under the lease was not required and then throw it out again on the basis that notice was required under *Wesson*, but that remains to be seen.

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New Land Court rules of procedure: A primer

Continued from page 4

same procedures and time frames.

Unlike old Land Court Rule X, which allowed the opposing party to file opposition papers seven days prior to hearing on the motion, new Rule 5 requires that opposition pleadings must be filed within 30 days after service of the motion or cross-motion. Reply briefs, affidavits and other materials must be filed with the court no later than 10 days prior to the original date set for hearing. (Rescheduling of the hearing date does not change this deadline.)

In adopting Rule 6 which governs motion practice for all other motions, the Land Court preserved the its practice of allowing the litigants to schedule motions for hearing on seven days' notice, but the moving party must schedule such hearing within the motion session schedule established by the Land Court. (The motion session schedule is published in *Lawyers Weekly* and is available on the Land Court website at www.mass.gov/court.)

The new Land Court Rule 6 also obli-

gates the moving party to determine whether a motion must be heard by a particular judge who has been assigned to the case and schedule the motion for hearing before that judge.

All motions must contain a statement of reasons supporting the motion, including authorities and a statement of the precise relief sought. Oppositions to such motions must be filed with the court and served on the parties not later than noon on the business day prior to the hearing.

Presumably, this would require effective delivery to the other parties rather than a simple deposit in the mail because the rule specifically provides that any "(a)ny papers not served and filed with the motion or opposition and in a timely fashion may be filed only with leave of Court."

In Rule 7 the court retains the discretion to decide matters on the papers without oral argument so long as the parties have been given fair opportunity to submit written statements.

Discovery disputes

Like the Federal Rules of Civil Procedure and the Superior Court rules (and reflecting the court's frustration with discovery disputes), new Land Court Rule 8 requires the parties to confer in advance of filing any motion under Mass. R. Civ. P. 37 in an effort to narrow areas of disagreement. All such discovery motions must contain a certificate stating that the conference was held together with the date and time of the conference and the names of the parties.

Under Land Court Rule 9 motions for discovery orders must be accompanied by a brief which sets forth the interrogatory, deposition question or a request that is in dispute, the opponent's response and an argument.

According to new Rule 10, motions for reconsideration must be clearly identified and labeled in the motion's title. Such motions will be transmitted to the judge who decided the original motion and will not require a response or hearing unless

the judge so requests. No such motion will be granted without giving the opposing party an opportunity to respond.

Under new Rule 11, agreements for judgment for a sum certain or for denial of all requested relief shall constitute the judgment of the court upon acceptance by the recorder. Other agreements for judgment, such as those for declaratory and injunctive relief, shall not constitute the judgment of court until the court, on its own motion or motion of one of the parties, endorses or otherwise approves the agreement.

Consistent with the individual calendar system, new Rule 12 requires that all pleadings prominently identify the judge to which the case is assigned by the judge's surname or initials in the case caption following the case number.

Finally, new Rule 13 continues to require the use of court forms for registration, confirmation, tax foreclosure or Service Members' Relief Act proceedings and encourages the use of other Land Court forms.

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Residential seller's duty of disclosure: Buyer beware

Continued from page 10

while Chapter 93A can apply to someone who is acting in connection with a trade or business, it will not apply when the deal is merely between private individuals. Therefore, before bringing a Chapter 93A claim, it is necessary to ascertain whether the seller is in the business of selling homes.

In conclusion, buying a new home is typically the single largest investment that a person will make and it must be

protected. By soliciting representations and warranties from the seller and the seller's agents about the condition of the property, and including this information in the purchase and sale agreement, you can preserve the buyer's ability to enforce his or her rights in the future.

If the buyer later realizes that he or she was deceived then he or she may be able to pursue several claims including relief under the powerful provisions of 93A.

Norfolk registry increases fee for returned documents

William P. O'Donnell, Norfolk County's register of deeds, has announced that the fee assessed to return a recorded document will increase from \$.50 per document to \$1 per document, effective July 1. In announcing the new fee, O'Donnell noted that the increase will help cover the costs associated with return-

ing original documents.

REBA members and others who have closings scheduled for the end of June for property located in Norfolk County may wish to take into account the increased fee when calculating closings costs if the closing documents will be recorded on or after July 1.

SJC case on defining 'practice of law' could impact conveyancers

Continued from page 5

faculty arises from the nature of the law itself, that normative system of enforceable social rules which governs each individual's life, freedom, social relations, and property.

Sixty years ago, when the SJC allowed accountants to counsel clients on tax law, it observed that most occupations necessitated some understanding of the law. The Court noted the difficulty of drawing clear boundaries where the law "pervades all human affairs." *Lowell Bar Ass'n v. Loeb*, 315 Mass. 176, 179 (1943).

Since then, the scope and complexity of the law have increased dramatically. In that time, the explosion in the number of federal and state statutes, the expansion of civil rights, the proliferation of regulations, and the changes in the law caused by technological developments, have been breathtaking.

REBA's members have witnessed these developments in the law of conveyancing. Even "simple" conveyances of residential real estate now require the parties to execute and to understand dozens of legal forms, many replete with dense legalese. Nevertheless, non-lawyers continue to seek to inject themselves into the conveyancing process – and to place home buyers and sellers at risk.

In responding to the certified questions, the SJC is unlikely to announce a comprehensive definition of the practice of law. Instead, the court will probably limit its review to the specific actions taken by Chimko. Under the traditional analysis, the court will determine whether the particular activity at issue requires an understanding and application of the law to reach a client's objectives. If it does, the court will likely conclude that it is the

practice of law.

There should be little doubt that the drafting of a reaffirmation agreement is the practice of law. The reaffirmation agreement, which is entirely a creation of the Bankruptcy Code and does not exist in nature, is binding and enforceable only if made in strict compliance with statutory requirements set forth in 11 U.S.C. §524(c).

Moreover, it is not a simple instrument. One who drafts a reaffirmation agreement must be familiar with, understand, and synthesize a number of federal statutes and case law. This work calls for a highly-specialized legal skill, training and ability.

Certainly, the court's analysis could be influenced greatly by Chimko's use of a form reaffirmation agreement. However, many aspects of a modern legal practice – especially the practice of a modern conveyancer – are conducted through the use of forms, legal software or other tools.

A lawyer's training equips him to recognize when a form is appropriate to use and when it must be altered to accomplish a client's goals. Indeed, nearly 70 years ago, the SJC held that a corporation engages in the practice of law when it completes legal forms for others. *In re Shoe Mfrs. Protective Ass'n*, 295 Mass. 369, 372 (1936).

Today, the law is certainly not less complex. Consequently, the "majority rule" is that preparation or filling in blanks on preprinted legal forms constitutes the practice of law. Nevertheless, the court's determination that the use of a form agreement takes the activity out of the realm of the "practice of law" could profoundly affect Massachusetts conveyancers.

The practice of law is the practice of law

While the SJC will likely use the traditional analysis described above, I propose that no such analysis is required in this case. That analysis, which has been used to determine whether a non-lawyer is engaged in the unauthorized practice of law, is superfluous where the inquiry focuses on the actions of an attorney.

Where a lawyer, in the course of representing a client, identifies himself as an "attorney" or a "counselor at law," as Chimko repeatedly did in this case, the lawyer is engaged in the practice of law, regardless of the nature of the particular activity.

As Associate Justice Paul Pfeifer of the Ohio Supreme Court sagely observed, "the practice of law is the practice of law." *Cleveland Bar Ass'n v. CompManagement, Inc.*, 818 N.E.2d 1181, 1195 (2004) (Pfeifer, J., dissenting).

In Massachusetts, non-lawyers are not permitted to identify themselves as "attorneys" or "counselors at law." (G.L.c. 221, §41.) These titles denote that the titleholder is engaged in the practice of law and may be used only by members of the bar.

When – as in this case – a lawyer in the course of representing a client voluntarily cloaks himself in the garb of a lawyer by corresponding with the judicial branch and with opposing parties on law firm letterhead that identifies the lawyer as an "Attorney and Counselor at Law," and by filing pleadings on behalf of his client with a court also identifies him as an "attorney" – he is acting as a lawyer.

Not only does this principle have the advantage of being inherently obvious, it is also supported by strong policy jus-

tifications. Citizens and businesses that hire a "lawyer" are entitled to expect that in every step of the representation the lawyer will act consistently with the Rules of Professional Conduct.

Likewise, unrepresented individuals, like Lucas, who communicate with a "lawyer" concerning a legal matter should not be put to the task of guessing if the lawyer is acting as a lawyer or as a non-lawyer. They are entitled to expect the same high ethical conduct from the lawyer once he identifies himself as such.

Conveyancers live up to these standards every day in dealing with non-clients. A pro se debtor, like an inexperienced borrower who is purchasing a home, may look to "the lender's legal representative . . . for legal advice or explanation." *Massachusetts Conveyancers Ass'n, Inv. v. Colonial Title & Escrow Co*, 2001 WL 669280 *6. (See also *Private Lending & Purchasing, Inc. v. First American Title Insurance Company*, 54 Mass. App. Ct. 532, 537 n.9 (2002) ("Explanation of the legal effect of liens or encumbrances [to a non-client] may fall within the practice of law, to be conducted by a lawyer rather than the insurer."))

While these public obligations of a lawyer are certainly distinct from his fiduciary obligations to his clients, there remains a great social utility in protecting and expanding the lawyer's role as an officer of the court.

Consequently, how the SJC eventually answers these certified questions, and whether it encourages or discourages the lawyer's public obligations, will be important issues for conveyancers.

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Commercial title insurance endorsements can expand coverage

Continued from page 13

loss, until any and all collateral securing the indebtedness is first exhausted. Then the insurer shall determine whether there is an actual loss under the policy, and, absent the First Loss Endorsement, no loss is suffered if the loan can be recovered out of other collateral.

Last Dollar Endorsement insures that where the secured amount exceeds the policy amount, payments made to reduce the indebtedness shall first be applied to the amounts in excess of the policy amount, without reducing the amount of coverage under the policy.

This endorsement overrides Section 9(b) of the conditions and stipulations of the policy, which provides that "payment in part by any person of the principal of the indebtedness...to the extent of the payment...shall reduce the amount of the insurance pro tanto..."

This endorsement is applicable when the total loan indebtedness exceeds the amount secured by the mortgage and insured under the policy. The intention is to not have the policy amount reduced as payments are made under the loan that are otherwise meant to reduce the indebtedness other than the amount secured.

Fairway Endorsements (partnerships or limited liability companies) insure that the admission or withdrawal of partners in the insured partnership or any change in the partnership interest or any changes in the interest in a limited liability company shall not result in the lapse or termination of the policy.

Tie-In Endorsement insures that multiple loan policies issued in con-

junction with one loan agreement secure a single indebtedness and that liability under these policies shall not exceed the amount under the promissory note.

Non-Imputation Endorsements (attached to Owner's Policy) insure the insured that, notwithstanding the exclusions from coverage provisions 3 (a) and (b), liability under the policy shall not be denied on the ground that the insured has knowledge of any matter or matters solely by reason of notice thereof imputed to the insured by operation of law (as opposed to actual knowledge) from the insured's participation in a named partnership or through officers and directors or former officers and directors of a corporation prior to transfer of interest to the Insured.

Non-Imputation Coverage overrides Exclusions-From-Coverage provisions numbered 3(a) and (b) of the owner's policy that would otherwise enable the title insurer to deny liability by reason of title "defects, liens, encumbrances, adverse claims or other matters created, suffered, assumed or agreed to by the insured claimant or not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant prior to the date the insured claimant became an insured under this policy."

Non-imputation endorsement will apply when the following conditions are met:

- The Insured is purchaser of an interest in a corporation, partnership or limited liability company;
- There are acts or knowledge of the persons or persons from whom the interest is being obtained of matters ad-

verse to title; and

- Those acts or knowledge would be imputed to the owning entity.

The prerequisite to issuance of this endorsement is obtaining affidavits and indemnities from the person or persons against whose acts and knowledge the non-imputation insurance is specifically required by the insured.

Tax Parcel ID Endorsement insures that the land described in Schedule A of the policy is identified as a particular tax parcel and that said tax parcel contains no other property except that described in Exhibit A.

Pending Disbursement Clause Endorsement limits liability under the policy to the amounts actually disbursed by the insured lender.

Disbursement Endorsement increases liability under the policy by the amount of the subsequent disbursements during construction and insures that the title to the insured premises has not changed from the original date of the policy except for those matters listed in the Disbursement Endorsement.

Subdivision Endorsement insures against loss or damage suffered by the insured as a result of violation of the subdivision law of the state where the insured premises are located as of the date of the policy.

Zoning Endorsements (ALTA 3 and ALTA 3.1). Because zoning laws address matters of use but not title to property, zoning matters are not covered by a standard title insurance policy. At the present time, ALTA has two forms of zoning endorsements, ALTA 3.0 and ALTA 3.1. These endorsements offer limited coverage with respect to zoning matters. It is important to note that these endorsements do not delete the zoning exclusion contained in the Policy, but rather they modify the terms and provisions of the Policy to the extent specifically stated in the endorsements.

ALTA 3 is issued when the subject property is unimproved land and insures that as of the date of the policy,

the land is located in a specified zoning district and that specified uses are permitted in said zoning district. ALTA 3.1, issued in connection with improved land, contains the same coverage as ALTA 3 but, in addition, insures against loss or damage due to violations of certain dimensional requirements of the applicable zoning ordinances.

It is important to note that zoning coverage is not as broad as a comprehensive zoning opinion. Zoning endorsements are narrow in scope, exclude liability for invalidity of the zoning ordinance until after a final decree of the court adjudicating such invalidity and prohibiting the insured uses, and excludes liability for loss due to the refusal of any person to purchase, lease or lend money on the land due to a zoning deficiency.

Zoning endorsements can be issued only when the title insurer is satisfied that the zoning coverage is appropriate.

Traditionally, these endorsements were based on an attorney's zoning opinion.

However, most underwriters now will rely on a surveyor's certification or limited zoning certificates, in order to issue zoning endorsements. All title companies charge additional extra-risk premium for zoning insurance.

Mezzanine Endorsement (ALTA 16) is attached to the owner's policy and insures the mezzanine lender the right to receive payments otherwise payable to the insured owner under the policy by way of the assignment of the insured's rights under the policy. It is imperative that both the mezzanine lender and the insured consent to this agreement by signing the endorsement.

A mezzanine loan is not secured but real estate, but rather by the equity interest in the borrower under the Uniform Commercial Code. It fills the gap between the relatively low risk first mortgage financing and the high risk subordinated equity participation of the principals of the borrower, thus allowing the loan to value ratio remain low and reducing the cost of financing of the project.



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Condo lien certificate sufficient to clear title

Continued from page 11

number of sale and refinance closings to be substantially delayed while the situation is researched and rectified. This type of experience caused some conveyancers to be wary about reliance on a clean 6(d) certificate, whether issued for the current closing or already found of record after the complaint.

In addition, some felt that when some prior document on record indicates the assertion or enforcement of a condominium lien against the subject unit, the issuance of a clean 6(d) certificate was no more binding on the condominium association than a "clean" municipal lien certificate was on a municipality when there was some prior recorded notice of a tax lien enforcement proceeding or of a notice of assessment.

In the latter case, however, the difference in binding effect between the recording of a "clean" condominium lien certificate and a "clean" municipal lien certificate is to be found in the precise language of the respective statutes.

Comparing the two statutes

The municipal lien certificate statute, G.L. c. 60, §23, states that a properly recorded municipal lien certificate "shall operate to discharge the parcel of real estate specified from the liens for all taxes, assessments, or portions thereof, rates and charges which do not appear by said certificate to constitute liens thereon, *except* taxes, assessments, or portions thereof, rates

and charges *with respect to which there has been filed for record or registration evidence of a taking or a sale by the municipality or concerning which a statement or order creating or continuing such lien has been so filed* under any provision of law, if said lien can be discharged by the recording or registration of an instrument other than a certificate under this section" (Emphasis added.)

On the other hand, G.L.c. 183A, §6(d) provides:

"A statement from the organization of unit owners setting forth the amount of unpaid common expenses and any other sums which have been assessed against a unit owner, including a statement of the amount which the organization of unit owners claims is entitled to priority with respect to any mortgage under subsection (c), shall operate to discharge the unit from any lien for other sums then unpaid when recorded in the appropriate registry of deeds; provided, however, that any statement or document issuing from an unincorporated organization of unit owners may be recorded in a registry of deeds and if so recorded shall indicate and specify therein the book and page, or document number if registered land, within such registry of the instrument from which the signatory or signatories of the statement obtained authority to sign on behalf of the unincorporated organization.

"The statement shall be furnished within ten business days after receipt of a written request, upon payment of a reasonable fee, and shall be binding

on the organization of unit owners, the governing body of the organization of unit owners, and every unit owner; provided, however, that no fee shall be required of any mortgagee, in connection with a foreclosure of a mortgage, who has given the organization notice of its intention to foreclose a mortgage upon the unit." (Emphasis added.)

Thus, it has always been the case that there is no similar limitation on the binding character of a 6(d) certificate as there is for a municipal lien certificate relative to prior recorded documents dealing with unpaid assessments not reflected in the certificate.

That is no less true where a complaint has been filed to enforce a condominium lien and the copy of the complaint is recorded in accordance with G.L.c. 254, §5.

At the same time, without any case law or title standard to guide conveyancers, even when a clean 6(d) certificate was obtained and recorded subsequent to the recorded complaint, many adopted the belt and suspenders approach and required that the action be dismissed and a clerk's certificate to that effect obtained and recorded or that the condominium association provide a separate recordable release or specifically recite satisfaction of the lien in a current 6(d) certificate.

In some cases, these requirements resulted in delayed closings. In other cases, it jeopardized closings when the organization of unit owners refused to do so, because it was unnecessary, or because they refused to incur the additional expense unless reimbursed, or for any number of other reasons.

REBA to the rescue

No longer do we need to be concerned about these issues, though.

REBA has come to the rescue with Title Standard No. 69, which dispenses with these issues in simple and appropriate fashion. This title standard provides:

"Title is not defective by reason of the existence on the record of a complaint to enforce a lien under M.G.L. c. 183A if there is recorded thereafter a later dated certificate of no common expenses in accordance with § 6(d) which asserts that there are no outstanding liens on the Unit."

The rationale for the title standard is also simply and appropriately stated in the Comment: "Section 6(d) provides that a statement from the organization of unit owners setting forth the amount of unpaid common expenses and other amounts which have been assessed against a unit owner shall operate to discharge the unit from any lien for other sums then unpaid when recorded at the appropriate registry."

The title standard does not deal with or resolve the problem of the unlawful addition of previously omitted assessments to subsequent 6(d) certificates, but it should be of great help to conveyancers in resolving what has been on more than one occasion for most of us a vexing and sometimes controversial problem in dealing with condominium lien enforcement complaints found of record.

It should help, also, to put minds at ease for those of us who have relied in the past on the plain language of §6(d) and certified or underwritten titles over recorded condominium lien enforcement complaints without requiring dismissals and recorded clerk's certificates or separate releases when clean 6(d) certificates were obtained and recorded subsequent to the complaint.

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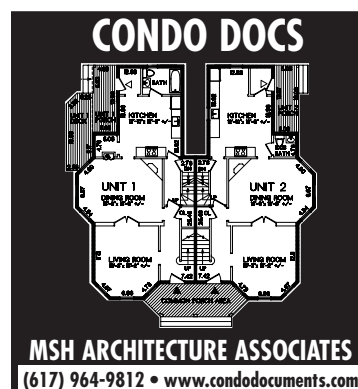
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New law alters relationships among brokers, buyers and sellers

Continued from page 2

property and then a buyer with whom someone else in the same office is working, or possibly someone who is not represented, expresses an interest in that property. This may also occur where a single broker represents both purchaser and seller or where different brokers may have brought the seller and the purchaser to the firm.

The Act has provided at least two possible outcomes for this situation. Under §87AAA13/4(b), a real estate broker or salesperson may act as a dual agent who represents both the purchasers and sellers. This requires a full written disclosure of the nature of the representation and the informed written consent of both the prospective purchasers and sellers to the dual agency.

Under the Board's regulations, a dual agent shall become neutral with regard to any conflicting interests of the purchaser and the seller. The dual agent does not have to fully satisfy the duty of loyalty, full disclosure, reasonable care, and obedience to lawful instruction, but shall have the duty of confidentiality of material information and the duty to account for funds.

Under some circumstances this may be an effective solution, but often it does not work for a brokerage firm. Sellers are often not pleased to be told that the person or agency with whom they are working to sell their home, and to whom they are to pay a substantial commission, are suddenly not working on their behalf but rather are now working as a neutral without the traditional duties of an agent to his principal.

It does not inspire confidence in sellers and can result in disputes and future lost business in a business that relies so much on word of mouth and customer satisfaction for future listings. The same issues confront a buyer broker when he or she must inform the buyer that they are no longer representing the buyer, but will now be neutral in the transaction.

Designated agency

A possible solution, particularly for larger brokerage houses to this dilemma is contained in the Act. Under §87AAA13/4(c), a brokerage firm may adopt what is termed a "designated agency policy." Under this policy, a licensee employed by the brokerage firm may act as the designated agent who represents the seller in a particular transaction.

A different licensee in the office may then be designated as the designated agent for the purchaser in the same transaction.

If designated agents affiliated with the same brokerage firm represent a purchaser and seller in a transaction, the appointing broker or agency shall be a dual

agent and neutral as to any conflicting interest of the seller and the purchaser but will continue to owe the seller and purchaser the duties of confidentiality of material information and to account for funds.

Under this circumstance, the brokerage firm and all other brokers and salespersons engaged by it will also be dual agents with only the responsibilities of a dual agent to the seller or purchaser as set forth above.



David Murphy

This requires a full written disclosure and informed written consent by both the seller and the purchaser. The designated agent will owe the seller the duties of loyalty, full disclosure, confidentiality, to account for funds, reasonable care and obedience to lawful instruction.

All other real estate brokers or salespersons affiliated with the appointing real estate brokerage firm will not represent the seller nor will they have any other duties to that seller, and may potentially represent one or more potential purchasers for a particular property. A designated agent has an affirmative obligation to disclose known material defects in the property.

One interesting aspect of the designated agency is what appears to be an attempt to modify the traditional measures of consent in an agency context. The Act states there shall be a conclusive presumption that a purchaser or seller has consented to a designated agency relationship if he has signed a disclosure form that substantially contains the descriptions required by the law no later than the date the purchaser makes or submits an offer to purchase the property, or that a purchase and sale agreement is executed, whichever occurs first.

This is a dramatic shift in the burden of proof in the event of a dispute. Under existing rules of agency, the agent would have the burden of proving that there was proper disclosure and informed consent.

The Act appears to take the issue of consent out of dispute by providing that execution of the form is conclusive. Several commentators have pointed to this as a significant issue for consumers and one that is likely to result in litigation.

This type of relationship would appear to be the one that most brokerage firms will choose to implement. It permits the brokerage office to provide representation to a seller and a purchaser in the



Robert Moriarty

same office, while at the same time maintaining at least the façade that the office is fully representing the party, and not just as a neutral in a dual agency.

Sub-agency

Sub-agencies are recognized by implication under the Act. Section 87AAA13/4(e) of the Act provides that no real estate broker or salesperson shall enter into or offer any sub-agency relationship agreement with another real estate broker or salesperson when marketing a property for sale without informing the seller about vicarious liability and obtaining the written consent of the seller.

The seller or purchaser must be informed that the secondary or subagent's actions may subject the seller or purchaser to vicarious liability and consent must be in writing.

Facilitator

Section 87AAA13/4(f) of the Act creates a new concept in stating that a real estate broker or salesperson may render services as a "facilitator." The facilitator does not represent either the purchaser or seller and does not act in an agency capacity.

A real estate professional will have no fiduciary responsibility if there is no formal agency relationship.

The Board's regulations state that a facilitator has a duty to present all real property honestly and accurately, disclosing all

known material defects and accounting for funds. The facilitator does not have a duty of confidentiality with regard to any information received by the purchaser or seller.

This is not a concept that has ever been previously recognized in Massachusetts. It is not well defined in the Act and appears on its face to be contrary to any notion of protection of consumers.

This new provision sanctions the ability of a person to act in a transaction without duty, obligation, or responsibility to either the seller or to the purchaser in a transaction other than the base duty set forth above. This is a concept that has been rejected in many other states when considered and has been rejected by the National Association of Realtors.

Timing of disclosures

A real estate broker or salesperson must present a disclosure at the first personal meeting with a purchaser or seller to discuss a specific property. No disclosure is required at an open house. The real estate professional must disclose the kind of relationship the firm offers.

The broker must also provide proper disclosures at each point through the transaction at which the relationship may change. If, for example, an office is initially representing a prospective purchaser as a buyer broker, and that client expresses an interest in a property listed by the same agent or office, then an additional disclosure is required since the broker would then be either a dual agent, or would become a designated buyer agent and the office would be a dual agent. It will be interesting to watch the practices develop in brokerage houses to handle these required disclosures and the timing required.

Summary

It will take a period of time for the issues associated with the new relationships created by the Act to be worked out. The implementation of the Act poses concerns for consumers, particularly the designated broker concept.

The Act erodes the designated agent's common law duty to sufficiently inform the client by providing that the signed disclosure form is a "conclusive presumption" that the client has consented to the designated agency relationship. Consumers need to be more aware of the nature of the representation provided by a broker. The consumer can no longer assume that everyone in an office is working for them.

On the other hand, however, the Act has helped to provide more specificity as to the relationships and what they involve. The Act will require more disclosures that provide more opportunity for sellers and purchasers to understand exactly who represents them and the nature of that representation.