REBA NEWS

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The Newsletter of the

Real Estate Bar Association for Massachusetts

Executive Order on notaries faces likely changes

By Daniel B. Winslow

Governor Mitt Romney issued Executive Order 455 (03-13) establishing new and modern standards of conduct for notaries public that will, for the first time in Massachusetts, provide notaries public with precise information about the nature and scope of their responsibilities. The guidelines will also protect consumers, help crack down on imposters, curb identity theft and property crimes and prevent document fraud.

Based on new feedback from various attorneys and bar associations, there will be certain modifications of the Executive Order, including extending the deadline for compliance to May 1.

The order provides guidance to the more than 100,000 Massachusetts notaries on what acts they are empowered to perform and how to go about those duties. After consultation with several bar associations, paralegal groups, immigration attorneys, and lay notaries, the Executive Order was designed to:

- Address abuses that have victimized members of the Latino community by prohibiting notaries from advertising themselves as "notarios." The word "notario" in Spanish means a lawyer with specialized training, and the state has received complaints about non-lawyer notaries who advertise themselves as "notarios;"
- Prohibit notaries public from performing notarial acts if the person is not in the notary's presence at the time of the notarization or does not have satisfactory evidence of identification, or if the notary public is a party to or named in the document being notarized;
- Prevent notaries public from conducting real estate closings, which the Board of Bar Overseers has stated is the unauthorized practice of law if the notary is not also an attorney;
- Provide notaries with model forms for jurats, acknowledgments, and signature witnessings to be used in substantially the same form as they appear in the Executive Order;
- Require notaries public to keep a journal in which they record their official acts; and
- Provide standards that the Governor may use to refuse to appoint or to terminate the commission of a notary public.

There is no question that change is difficult. This Executive Order contains many new, and in some cases, unfamiliar, requirements that notaries must now follow. However, these requirements are designed to bring Massachusetts in line with many other states that have been regulating notaries for many years.

Potential modifications to Executive Order

Potential modifications to the Executive Order will likely include:

- A statement that the Executive Order does not "trump" existing law;
- Clarification that a notary may satisfy the requirements of the Executive Order by using either a stamp or a seal, or a combination of a stamp and a seal together;
- A provision that allows notarization of a document if the notary is named in the document for notice purposes only;
- An exception to the requirement that a notary shall not provide or send a signed or sealed notarial cer-

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Dan Winslow serves as chief legal counsel to Governor Mitt Romney and Lieutenant Governor Kerry Healey. Winslow joined the Romney-Healey administration from the bench having served as presiding justice of the Wrentham District Court.

BBO Bar Counsel Clarifies Impact Of Notary Rule On Client Confidentiality.

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REBA extends reach in real estate bar

The Real Estate Bar Association for Massachusetts (REBA) is the new name for the 3,000-member statewide organization known for over 150 years as the Massachusetts Conveyancers Association (MCA).

The new organizational name and its new publication (REBA News) reflect the association's broader scope and mission as REBA reaches out to real estate professionals in commercial finance, permitting and land use, commercial leasing and other concentrations beyond traditional title-related fields.

What's in this issue…

REBA
THE REAL ESTATE BAR ASSOCIATION
for Massachusetts

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Mission Statement

To advance the practice of real estate law by creating and sponsoring professional standards, actively participating in the legislative process, creating educational programs and material, and demonstrating and promoting fair dealing and good fellowship among members of the real estate bar.

Mentoring Statement

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.

Endorsement Statement

While the Real Estate Bar Association for Massachusetts accepts advertising in its publications and educational offerings, it endorses no products or services.

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From the President's desk

By E. Christopher Kehoe

The days are getting longer, the sun is getting stronger and I hear the birds in the morning when I open the front door to get the newspaper. Spring is such a time of renewal and brings with it an increase in energy following the long, cold winter that I hope is finally behind us.

Spring also typically signals an increase in homebuyers in the annual real estate cycle. Rates remain at historic lows, which is also beneficial to the commercial borrower seeking to refinance or acquire new properties.

Spring is also the time to look forward to REBA's Spring Meeting, which will take place at the Sheraton in Framingham on May 10. This will be our last meeting at that venue as our organization has outgrown that space. At the meeting you will hear details about the venue of our annual meeting in November.

Pam O'Brien has promised a number of exciting educational programs that our members will find useful in their day-to-day practice. Look for Pam's column in this edition of REBA News. Please mark your calendars now.

The officers, directors and association staff of your bar association have been busy this year working on a number of issues and initiatives that will benefit you, our members now and in the future. I continue to be impressed at the diligence and effort that every officer, director and association staff member brings to the organization. I cannot say thank you often enough for their dedication.

Our Legislative Committee, ably chaired by Bob Kelly, has had a number of significant issues on its plate since the beginning of the year. Bob and his committee have been working closely with the Office of Governor's Counsel on the executive order concerning notaries public. Our organization has made a number of suggestions to the Governor's Counsel, which have been incorporated into the clarifications of the initial order.

The Legislative Committee has also been very busy with getting the Omnibus Real Estate Mortgage Discharge legislation into shape to present to the legislature. An updated executive summary of the bill appears on the REBA website at massrelaw.org. Please take a look at it and let us know if you have any comments.

The bill is now in the hands of some key legislators and is being reviewed by both the Massachusetts Banker's Association and the Massachusetts Mortgage Banker's Association. At the same time Ed Smith, our legislative counsel, Bob Kelly and I have been meeting with legislators to promote the bill. At some time in the future I will be calling on you, our members, to help gather support for the passage of this very important legislation.

Your By-Laws Committee, chaired by Greg Peterson, is in the process of a complete review of the by-laws with an eye towards taking several structural initiatives that will improve the work that REBA does for its members. We are also considering several new committees such as a Real Estate Litigation Committee and Commercial Real Estate Finance Committee. You will be hearing more about these changes in the months to come.

Through the efforts of our immediate past president Dick Keshian and our Executive Director Peter Wittenborg, the American Bar Association has agreed that its Second Annual Symposium on the Unauthorized Practice of Law will take place here in Boston on April 23 and April 24. REBA will be a co-sponsor of the event and we intend to be very actively involved in all aspects of it.

Jon Davis, chair of the Committee on the Practice of Law by Non Lawyers and Doug Salvensen, our counsel in the *Colonial Title* case, are busy getting ready for the event. I would also like to congratulate Mike Greco on his election to the presidency of the American Bar Association in 2005. We are honored to have Mike as our keynote speaker at the annual meeting in November.

There will be a couple of other events this spring, including the first annual Opinion Leaders Conference, which will take place in May. We will be seeking feedback on what more REBA can be doing for its members. Our first annual Thank You Reception will follow that program for those generous REBA members who have helped support our initiatives concerning the unauthorized practice of law and political action in Massachusetts. I hope to report on both of these events later this year.

Finally, I would like to thank Peter Wittenborg and the chair of our Members Relation Committee, Sami Baghdady, for their tremendous efforts in bringing 500 new members to REBA last year. We hope to have a similar success in recruiting new members this year and we continue to hope that every real estate attorney in Massachusetts will see the value of membership in the Real Estate Bar Association.

Chris Kehoe is a partner in the Boston office of Robinson & Cole LLP. He is a member of the American Land Title Association (ALTA), the Real Estate Finance Association (REFA) and the real estate sections of the American Bar Association (ABA), the Boston Bar Association (BBA) and the Massachusetts Bar Association (MBA). He lives in Hingham.

Mark Your Calendars!

REBA 2004 Spring Seminar
May 10, 2004
Sheraton Framingham Hotel

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4. The Amount of Insurance defined in Section 2(c)(ii) of the Conditions and Stipulations shall include Advances,

5. Section 8(d) of the Conditions and Stipulations shall not apply to Advances."

This endorsement is designed for use where the insured mortgage secures repayment of future advances made under a letter of credit, surety agreement (bond), or reimbursement agreement. Its coverage is broader in certain respects than the other two Form 14 series endorsements. It contains neither exclusions for advances made after a petition in bankruptcy or after filing a notice of a federal tax lien nor the ALTA Form 6 endorsement coverage. It also has an optional paragraph 3.d. addressing mechanics' lien coverage in the same manner as the other two Form 14 series endorsements.

Endorsement Form 15

Nonimputation-Full Equity Transfer to an Owner's Policy

"The Company agrees that it will not assert the provisions of Exclusions from Coverage 3(a), (b), or (e) to deny liability for loss or damage otherwise insured against under the terms of the policy solely by reason of the action or inaction or knowledge, as of Date of Policy, of [identify exiting or contributing partner(s) of the insured partnership entity, member(s) or manager(s) of the insured limited liability company entity, or officer(s) and/or director(s) of the insured corporate entity], whether or not imputed to the insured by operation of law, provided [identify the "incoming" partners, members or shareholders] acquired the insured as a purchaser for value without knowledge of the asserted defect, lien, encumbrance, adverse claim, or other matter insured against by the policy."

This endorsement is designed for use with the new Owner's Policy that insures the existing entity that owns the land. It is to be used where the owning entity loses all of its partners, members, or shareholders (prior equity holders) and gains new equity holders in a sale of the entity.

The buyers of the entity want a new policy and this endorsement so they are covered for loss if the entity does not in fact own the land. The new equity holders do not want to be denied coverage due to prior, unknown acts of the entity or knowledge of its prior equity holders that have not been disclosed. This endorsement insures the incoming equity holders as if they were a bona fide purchaser without knowledge in a real estate purchase.

This endorsement may also be used in a transaction that is not a "full equity transfer" but rather a deal where an entity is taking title to some land and one of the equity holders is contributing the land to the entity in exchange for an equity interest in the entity. The entity purchases title insurance on the land and later finds out that the prior owner (contributing partner, member, or shareholder) created or knew about a title defect at the time the land was contributed to the entity but did not disclose it.

This endorsement precludes the insurer from denying coverage based upon the fact that at the time the policy was issued, one of the equity holders of the insured entity had knowledge of the title problem. With this endorsement the insured entity would not lose its coverage for the title defect just because of the prior knowledge, acts, or inaction of the contributing equity holder.

While the creation and adoption of these new forms will help move our industry forward, our task is not yet completed. The Forms Committee is also working on some other endorsements as well as policy revisions, which hopefully will be completed and approved for adoption by the ALTA Board of Governors in the near future.

Endorsement Form 15.1

Nonimputation-Additional Insured to an Owner's Policy

"For purposes of the coverage provided by this endorsement, [identify the "incoming" partner, member or shareholder].

"Additional Insured" is added as an insured under the policy. By execution below, the insured named in Schedule A acknowledges that any payment made under this endorsement shall reduce the amount of insurance as provided in Section 10 of the Conditions and Stipulations.

The Company agrees that it will not assert the provisions of Exclusions from Coverage 3(a), (b), or (e) to deny liability to the Additional Insured for loss or damage otherwise insured against under the terms of the policy solely by reason of the action or inaction or knowledge, as of Date of Policy, of [identify, as applicable, the existing and/or exiting partner(s) of the insured partnership entity, member(s) or manager(s) of the insured limited liability company entity, or officer(s) and/or director(s) of the insured corporate entity], whether or not imputed to the Additional Insured by operation of law, to the extent of the percentage interest in the insured acquired by Additional Insured as a purchaser for value without knowledge of the asserted defect, lien, encumbrance, adverse claim, or other matter insured against by the policy."

This endorsement is similar to Form 15. It is to be issued with an existing Owner's Policy where a new equity holder wants to be added as an insured under the existing Owner's Policy but does not want to be liable for the pre-existing knowledge, acts, or inaction of the entity and its other partners, members, or shareholders (existing equity holders) that have not been disclosed to the new equity holder.

This endorsement adds the new equity holder as an insured but provides protection up to the original date of the policy. It does not cover knowledge, action, or inaction of the entity and its existing equity holders acquired or occurring between the date of the policy and the date of this endorsement.

Also this endorsement has a signature block for the insured entity to indicate its consent to the addition of another insured. Therefore, if the insurer has a claim under the policy by reason of this endorsement, it is possible that the additional insured (new equity holder) could be paid, leaving the insured entity with a reduced amount of insurance because the coverage under the policy is reduced by the amount of the payment made to the additional insured (new equity holder).

If the original insured entity does not consent to the addition of the additional insured to the policy, the insurer could be faced with an argument from the original insured entity that the payment to the additional insured was not authorized and does not operate to reduce the amount of insurance. This consent signature block could raise coverage issues if it is overlooked at a closing and not signed. The endorsement coverage percentage interest entity acquired by the additional insured.

Endorsement Form 15.2

Nonimputation-Partial Equity Transfer to an Owner's Policy

"The Company agrees that it will not assert the provisions of Exclusions from Coverage 3(a), (b), or (e) to deny liability for loss or damage otherwise insured against under the terms of the policy solely by reason of the action or inaction or knowledge, as of Date of Policy, of [identify, as applicable, the existing and/or exiting partner(s) of the vestee partnership entity, member(s) or manager(s) of the vestee limited liability company entity, or officer(s) and/or director(s) of the vestee corporate entity], whether or not imputed to the entity identified in paragraph 3 of Schedule A or to the insured by operation of law, but only to the extent that the insured acquired the insured's interest in entity as a purchaser for value without knowledge of the asserted defect, lien, encumbrance, adverse claim, or other matter insured against by the policy."

This endorsement was designed for the situation where an incoming partner, member, or shareholder (new equity holder) is purchasing an equity interest in the entity that holds title to the land and requests its own Owner's Policy. This endorsement, when attached to the new policy to the new equity holder, prevents the insurer from denying coverage solely on the grounds that the knowledge, action, or inaction of the owning entity affecting title is imputed to the insured (new equity holder).

What's Next?

While the creation and adoption of these new forms will help move our industry forward, our task is not yet completed. The Forms Committee is also working on some other endorsements as well as policy revisions, which hopefully will be completed and approved for adoption by the ALTA Board of Governors in the near future.

There is another access endorsement dealing with access to a public street over a private easement. Yet another deals with first-loss issues. We are also working on mobile home issues and modifications to the ALTA Form 7 endorsement. We are also working on a major revision to the ALTA 1992 Loan Policy that will give even better coverage to our insureds.

As the needs and demands of our customers change with time, it is very important for the industry to keep moving forward with the development of new and innovative forms. The ALTA Forms Committee will continue to be responsive to those needs.

ALTA adopts new form title insurance policy endorsements

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comply with the requirements of state law to secure the advances.

This endorsement is useful because the ALTA 1992 Loan Policy was drafted to cover only loans fully funded at the date of policy, other than construction loans. It is intended to be used for mortgages involving future advances the lender is obligated to make at the request of the borrower so long as the borrower is not in default.

If under the law of the jurisdiction where the land is located any future advance made by a lender, obligatory or optional, will take priority over any intervening lien, then this endorsement may be issued. This endorsement even extends to advances made by the lender after a federal tax lien has been filed in the public records as long as the advance is made not more than 45 days after the notice of the federal tax lien has been filed. This form has an optional exclusion shown as bracket paragraph 4.f, which carves out coverage for loss due to mechanics' liens.

Endorsement Form 14.1

(Future Advance-Knowledge) to a Loan Policy

"1. The insurance for Advances added by Sections 2 and 3 of this endorsement is subject to; the exclusions in Section 4 of this endorsement and the Exclusions from Coverage in the Policy, except Exclusion 3(d); the provisions of the Conditions and Stipulations, except Section 9(b); and the Exceptions contained in Schedule B.

"Agreement," as used in this endorsement, shall mean the note or loan agreement secured by the insured mortgage or the insured mortgage.

b. "Advances," as used in this endorsement, shall mean only those advances of principal indebtedness made after the Date of Policy as provided in the Agreement, including expenses of foreclosure, amounts advanced pursuant to the insured mortgage to pay taxes and insurance, assure compliance with laws or to protect the lien of the insured mortgage before the time of acquisition of the estate or interest in the land and reasonable amounts expended to prevent deterioration of improvements, together with interest on those advances.

2. The Company insures against loss or damage to the insured as a result of:

a. The invalidity or unenforceability of the lien of the insured mortgage as security for each Advance.

b. The lack of priority of the lien of the insured mortgage as security for each Advance over any lien or encumbrance on the title.

c. The invalidity or unenforceability or loss of priority of the lien of the insured mortgage as security for the unpaid indebtedness and Advances resulting from: (i) re-Advances and repayments of indebtedness; (ii) lack of outstanding indebtedness before an Advance; or (iii) failure to comply with the requirements of state law to secure Advances.

3. The Company also insures against loss or damage to the insured as a result of:

a. The invalidity or unenforceability of the lien of the insured mortgage resulting from any provisions of the Agreement that provide for: (i) interest on interest; (ii) changes in the rate of interest; or (iii) the addition of unpaid interest to the principal indebtedness.

b. Loss of priority of the lien of the insured mortgage as security for the principal indebtedness, including any unpaid interest which was added to principal in accordance with any provisions of the Agreement, interest on interest, or interest as changed in accordance with the provisions of the insured mortgage, which loss of priority is caused by (i) changes in the rate of interest; (ii) interest on interest; or (iii) increases in the unpaid principal indebtedness resulting from the addition of unpaid interest.

"Changes in the rate of interest," as used in this endorsement, shall mean only those changes in the rate of interest calculated pursuant to a formula provided in the insured mortgage at Date of Policy.

4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) resulting from

a. Advances made after a Petition for Relief under the Bankruptcy Code (11 U.S.C.) has been filed by or on behalf of the mortgagor.

b. The loss of priority of Advances to real estate taxes or assessments imposed on the land by governmental authority arising after the Date of Policy.

c. The loss of priority to a federal tax lien of any Advance made more than forty-five days after a notice of federal tax lien has been filed in the public records.

d. The loss of priority of any Advance made after the insured has knowledge of the existence of liens, encumbrances or other matters affecting the land intervening between the Date of Policy and the Advance, as to the intervening lien, encumbrance or other matter.

The loss of priority of Advances to any federal or state environmental protection lien.

Usury, or any consumer credit protection or truth-in-lending law.

[The loss of priority of an Advance to a mechanic's or materialmen's lien.]

5. The Amount of Insurance defined in Section 2(c)(ii) of the Conditions and Stipulations shall include Advances.

6. Section 8(d) of the Conditions and Stipulations shall not apply to Advances."

This endorsement is very similar to the Form 14, but this form was designed to be used for loans where the documents contemplate future advances, but the advances are optional not mandatory. The coverage is identical to the Form 14 except under this endorsement there is an additional exclusion from coverage in paragraph 4.d. that excludes for loss due to intervening liens of which the lender has actual knowledge at the time of making an advance. So long as the lender does not have actual knowledge of an intervening lien, the coverage is identical to the Form 14.

Endorsement Form 14.2

Future Advance-Letter of Credit to a Loan Policy

"1. The insurance for Advances added by Section 2 of this endorsement is subject to: the exclusions in Section 3 of this endorsement and the Exclusions from Coverage in the Policy, except Exclusion 3(d); the provisions of the Conditions and Stipulations, except Section 9(b); and the Exceptions contained in Schedule B.

"Agreement," as used in this endorsement, shall mean the letter of credit, surety agreement or reimbursement agreement, relating to the repayment of Advances that are secured by the insured mortgage.

"Advances," as used in this endorsement, shall mean only those advances of principal indebtedness made after the Date of Policy as provided in the Agreement, including expenses of foreclosure, amounts advanced pursuant to the insured mortgage to pay taxes and insurance, assure compliance with laws or to protect the lien of the insured mortgage before the time of acquisition of the estate or interest in the land and reasonable amounts expended to prevent deterioration of improvements, together with interest on those advances.

2. The Company insures against loss or damage to the insured as a result of:

a. The invalidity or unenforceability of the lien of the insured mortgage as security for each Advance.

b. The lack of priority of the lien of the insured mortgage as security for each Advance over any lien or encumbrance on the title.

c. The invalidity or unenforceability or loss of priority of the lien of the insured mortgage as security for the unpaid indebtedness, and Advances resulting from (i) re-Advances and repayments of indebtedness; (ii) earlier periods of no indebtedness owing during the term of the mortgage; or (iii) failure to comply with the requirements of state law to secure Advances.

3. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) resulting from:

a. The loss of priority of Advances to real estate taxes or assessments imposed on the land by governmental authority arising after the Date of Policy

b. The loss of priority of Advances to any federal or state environmental protection lien.

c. Usury.

d. [The loss of priority of an Advance to a mechanic's or materialmen's lien.]

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The evolving world of tenancy in common interests

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laws. Today many of the national sponsors of TIC programs treat them as securities and market them through the broker/dealer network. They have relied on the definition of a security as an "investment" contract as set forth in *U.S. v. Howey*, 328 U.S. 293 (1946), which has focused on whether the investor "is led to expect profits solely from the efforts of the promoter."

Others have taken the position that TIC interests should be treated as real estate and to bolster their case have structured their transactions so that the properties are master leased to the sponsor or another party. They have emphasized that the return to the investor is determined by the contracts in place and not the efforts of the sponsors.

The continuing viability of their position may have been negatively affected by the recent U.S. Supreme Court decision of *SEC v. Edwards*, slip op. No. 02-1196 (Jan. 13, 2004), which appeared to narrow the scope of transactions whose profits would fall outside the efforts of others.

Based on developments in a few states, it has also been suggested that the TICs may be classified under state law as both real estate and securities.

The consequences of these determinations have a substantial impact on such issues as the nature of disclosure required, the applicable regulatory authorities, who can sell the interests (and receive compensation), the compensation that can be paid and which attorneys and advisors should be involved in advising the clients. The state of the law relating to this matter clearly is in its earlier stages.

Lender Considerations

Since nearly all TIC interests sold will be interests in real estate partly financed through debt, lender's and borrower's counsel will face some of the unique challenges posed by TICs.

We start with the primary fact that no single person will own the real estate; rather numerous persons will hold the title. A typical structure of a TIC arrangement is that each owner will hold title to his interest through a bankruptcy-remote single member LLC – an admittedly cumbersome structure, particularly if there are 35 owners. The IRS is currently considering whether title could be held by a Delaware statutory trust with each of the owners being beneficial owners. Preliminary indications are that the IRS may permit that in certain circumstances, but it is unclear as to whether it will be easy to meet those conditions. It is generally thought that non-statutory trusts such as the nominee trust should qualify.

Another major set of issues is the recourse ("bad-boy") carve-outs. To what extent should co-owners be responsible for acts of the sponsor (e.g., negligence in environmental and other due diligence, fraud in connection with the loan) or of their co-owners. The underlying issues are considerably broader than those associated with a limited partnership, where a general partner generally controls the matters triggering the recourse liability.

Co-owners and sponsors may strive to limit their liability to matters under their control, but the lenders may not be satisfied with that. An overlaying factor is the Rev. Proc. requirement that all debt is shared equally. It is not surprising, therefore, that the carve-outs are a leading element of complexity in the financing of these properties.

In summary, TICs represent many potential opportunities for Section 1031 investors. For the attorneys and advisors, they present a multitude of challenges.

Tenancy in common interests represent many potential opportunities for Section 1031 investors. For the attorneys and advisors, they present a multitude of challenges.

Title Standard No. 49: Getting rid of real estate attachments

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bly is inconsequential in any event because Subsection (e) of the Rule allows the court to order another or additional attachment before or after the expiration of that period. It makes one wonder why the period is specified in the first place.

[5] This would usually occur where the plaintiff believes the defendant is the "true owner" of the attached property even though the title stands in the name of someone else, such as a spouse, relative or trustee. If that's not the case, the wrongfully attached owner can challenge the attachment under this section.

[6] This section contains the same conditions of approval of the sureties as found in §120.

[7] For situations in which the action is in Nantucket County but the attachment is in another county or vice versa, the time limit is sixty (60) days.

[8] This time frame is extended to seventy (70) days for the Nantucket County situation mentioned in the footnote above.

[9] Under G.L. c. 236, §49A, executions last for six (6) years from the date of recording, unless brought forward under the same procedures as for attachments under c. 223, §114A, or unless levy has been made before the 6 years expires. However, if a levy (i.e., sheriff's sale) has occurred before the 6 years expires, the sheriff has three (3) months within which to record the sheriff's deed under c. 236, §21. Hence, title is not free of an outstanding execution until 6 years and 3 months (90 days, plus or minus) after recording, not just the 6 years under §49A.

The subrogation risk in commercial leases

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less the lease contains an "express and unequivocal agreement" that it is. The lease in *Peterson* did contain a statement that the tenant would save the landlord harmless from "loss or damage arising from … neglect or improper conduct."

But the court did not feel that this was sufficiently explicit to cover a negligently caused fire. From this, the court concluded that the landlord's fire insurance "is deemed held for the benefit of both parties" *Id* at 753.

Second, the Court cited *Sutton v Jondahl*, 532 P.2d 478 (Okla. Ct. App. 1975) and an insurance treatise, Keeton on Insurance Law, in support of the proposition that "[e]xtending fire insurance coverage to the occupying tenants comports with public policy and with the realities of apartments renting." *Id.* at 754. The court also said that "[i]t surely is not in the public interest to require all tenants to insure the building which they share, thus causing the building to be fully insured by each tenancy." *Id.*

If there is a convincing rationale for relieving the tenant from liability for its negligence, either directly to the landlord or by subrogation to the landlord's insurer, it seems to the writer to be the broader rationale of *Peterson*, rather that the somewhat strained readings of lease terms that form the basis of *Lumber Mutual* and *Lexington*, but that is not where we have come out for commercial leases.

In *Seaco v. Barbosa,* 435 Mass. 772, (2002), the SJC declined to extend the broad holding of *Peterson* to commercial leases, and instead returned to the *Lumber Mutual/Lexington* approach of trying to divine the intention of the parties from the various provisions of the lease.

The lease in *Barbosa* did not have a "fire and other casualty" exception, which the court found (in combination with other provisions of the lease) rendered the intention of the parties ambiguous and a triable issue of fact.

Accordingly, based on *Lexington*, the presence in the lease of a yield-up provision that exempts the tenant from the obligation to restore fire and casualty damage is enough (absent, I suppose, other provisions in the lease that strongly indicate a contrary intent) to establish (so clearly that no triable issue exists) that the tenant is not liable to the landlord and/or that the tenant is a co-insured and that in either case, no subrogation claim can exist.

The absence of such a provision may (as in *Barbosa*) create an ambiguity sufficient to create a triable issue of fact.

All of this certainly places the tenant in a stronger position than previously, but the issue is still left to turn on the "intention of the parties," which individual judges may feel can be discerned so clearly that summary judgment is justified one way or the other or may feel is sufficiently ambiguous to justify trying as an issue of fact, all based on lease terms that were usually drafted with something else in mind (or perhaps as a trap for the unwary).

And none of this, of course, is at all helpful to a landlord who is confronted with a subrogation claim for property damage from the tenant's property insurer.

Notwithstanding the efforts of the SJC to move the situation at least partly towards a more rational result, the potential liabilities are too great for both landlord and tenant to leave these issues in doubt, particularly when they can be explicitly dealt with in the lease. The answer is a waiver of subrogation.

Waiver of subrogation

Notwithstanding the efforts of the SJC to move the situation at least partly towards a more rational result, the potential liabilities are too great for both landlord and tenant to leave these issues in doubt, particularly when they can be explicitly dealt with in the lease.

The answer, as noted above, is a waiver of subrogation. A typical waiver of subrogation provides, in essence, that if either landlord or tenant suffers loss or damage which is caused by the other, but which is covered by the injured party's insurance, i) the injured party waives any claim it might have against the other to the extent that it is compensated by an insurer, and ii) each party agrees to obtain from its insurer a provision acknowledging this waiver and agreeing that the insurance carrier will not be subrogated to the rights of the injured party to the extent that these rights have been waived. Thus, the waiver actually deals with the subrogation claim and also the basic liability between the parties.

It is probably worthwhile (particularly for situations outside of Massachusetts) for each party to make sure that a waiver of subrogation is permitted by the applicable insurance policy before agreeing in the lease to waive claims against the other party; otherwise, such a waiver in the lease might impair the insurance coverage. In fact, however, in Massachusetts at least, waiver of subrogation is available at no or minimal additional cost simply by asking for it (or, in many cases, is automatically permitted under the basic policy form, if specified in the lease).

The wording of a waiver of subrogation has to be considered carefully, of course, to make sure that it really does protect both parties to the extent that they expect it to. For instance, if the language, as it often does, applies only to losses for which the injured party is actually compensated by insurance, it puts on each party the risk that the other won't carry adequate insurance (even if it is required to do so under the lease).

That problem may be avoided if the language is phrased in terms of losses "required to be insured under the lease." But tenants need to be careful of this approach, as most leases will require the tenant to carry insurance on its contents. However, many lease forms don't place any casualty insurance requirements at all on the landlord.

Another cautionary note is raised by the case of *Seaco* v *Sullivan*, 15 Mass. L. Rep. 660 (Middlesex Superior Court 2003). That trial court decision (which was eventually settled on appeal) said because the tenant had allowed the insurance it was required to carry on its own property under the lease to lapse, it could not take advantage of the waiver of subrogation to protect it against a claim by the landlord's insurer for damage the tenant had caused to the building.

The writer doesn't find the rationale for this conclusion compelling, but it does present another good reason why parties to a lease should not let their insurance lapse, certainly not on the assumption that the waiver of subrogation will shield them from some of the potential risks.

Since a well-drafted waiver of subrogation provides a benefit to both landlord and tenant at little or no cost, there's no good reason to preclude it from a lease.

From the landlord's point of view, however, there is a possible hitch, G.L.c.186, §15, which renders void any provision of a lease that purports to relieve the landlord of liability for "any omission, fault, neglect, or other misconduct," and the fear is sometimes expressed that this would negate the waiver of subrogation as applied to the landlord, leaving the tenant with a unilateral advantage.

There are no reported Massachusetts cases in which this argument is raised and from the point of view of public policy and rational allocation of risk, it ought not to prevail.

Nonetheless, the REBA Leasing Committee is presently formulating an amendment to c. 186, §15, which it intends to propose for the purpose of eliminating any such concern in the context of commercial leases.

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Also, relating this back to the discussion of the life of an attachment where a post-judgment execution is issued, under §114A, the attachment lasts for six years from recording (or filing) if it turns out that an execution never issued.

Remember, as discussed above, where an execution is issued, under G.L.c. 223, §59 and c. 236, §4, an attachment will have a continuing "record life" of only 40 days after an execution on the judgment is issued if the execution is not recorded (or filed) within such 40-day period.

Thus, it can be extremely important, whenever you see an outstanding attachment more than a few months old, especially one several years old, and no execution has been recorded, to check the court case to see if an execution ever issued.

If one did and you can double check the court case and the registry to determine it was never recorded, you may not have to wait for the 6 years to run or seek a dissolution of the attachment by one of the other methods discussed in this article and Title Standard 49. At the same time, keep in mind that G.L.c. 223, §114A allows the creditor to bring forward the attachment for successive six-year periods by merely recording a letter request to do so from the creditor or his or her attorney directed to the Register of Deeds and recorded. So look out for those extensions. They do happen from time to time and they can be easily overlooked.

4. Deposit with the Sheriff. This portion of the Title Standard addresses the provisions of G.L.c. 223, §128. The Title Standard tracks the statute in providing that an attachment is dissolved by depositing with the attaching officer (usually, the sheriff) a sum of money equal to the amount of the attachment. The thing to keep in mind here is that the depositing of the money is the thing that dissolves the attachment. No approval of or action by the court or the plaintiff or his or her attorney is required.

On the other hand, we need to deal with record title. As the court is not involved with a situation involving dissolution by deposit with the sheriff, there is no court order, motion, pleading or Clerk's Certificate that can be obtained and recorded. The Comments to the Title Standard help out here by providing that the recording of a receipt from the sheriff would be sufficient evidence of the deposit of the money.

In addition, as discussed by my colleague, Richard Urban, in his *Counsel Q&A* article on page 4 of the first issue of Stewart Title's newsletter, *The Massachusetts Focus* (Spring 2002, Vol. 1, No. 1), it is possible to obtain a discharge from the sheriff upon deposit of the sum of the attachment. As Richard pointed out, however, if you have control over the contents of the discharge, try to have it make reference to the statute, if possible, but, at a minimum, try to have it make reference to the amount of money deposited with the sheriff. Otherwise, you'll still have to get a receipt showing the amount deposited.

Although it may go without saying, if you are relying on just the receipt, make sure the amount deposited matches up with the amount of the attachment. And if payment was by check, you may need to get a copy of the cancelled check or verify with the sheriff's office that the check actually cleared.

5. Death of the Debtor. Subparagraph 5 of Title Standard 49 provides for dissolution of an attachment on the death of the [defendant] debtor (a) if the property was owned by the debtor at the date of death and (b) if an administration of the debtor's estate is granted in Massachusetts on an application made within one year after the date of death.

As the Comments point out, this portion of the Standard is based on G.L. c. 223, §116 and, indeed, the Standard tracks the statute pretty closely. Although neither the Standard nor the statute mention it, one presumes the term "administration" would include the probate of a will.

Also, the reason for the requirement in the Standard that the property be owned by the decedent debtor at the time of death is because the statute exempts attachments against any property the decedent debtor "alienated" before his or her death. Such attachments are not dissolved under this statute or the Title Standard.

There is one additional caveat that bears at least passing note and one that the Title Standard doesn't mention: By its terms, G.L.c. 223, §116 only operates as to attachments outstanding at the date of death where "the debtor dies before [the attached property] is taken or seized on execution."

Generally, you're going to know if the property has been "taken or seized on execution" before the date of death because you'll see the execution recorded. One would think that recording of the execution under G.L. c. 236, §4 would be necessary to constitute a "taking" or "seizure" on execution. However, I have not found any case law directly addressing that issue.

Accordingly, be careful of a situation in which an execution did issue prior to death of the debtor but the recording did not take place until afterward. To be sure we are talking about relatively short time frames here, a 30-day or, perhaps, 40-day window.

But if you're dealing sometime down the road with an interest in your title that intervened between the date of death and the recording of an execution that was timely recorded under the statute – but was not recorded prior to the decedent's death – beware of the following argument by the creditor: The "taking" or "seizure" occurred when the execution was issued, or when it was placed in the hands of the sheriff, and the recording is merely a "perfection" of the seizure and, therefore, the lien priority of the attachment still carries forward under G.L.c. 236, §4, despite the provisions of c. 223, §116.

Sounds quite confusing but the good news is that, if you ever see such a situation at all, it's likely to be a once-in-a-career event and I'm sure your friendly title insurance underwriting counsel will be happy to help work through it with you.

* * *

[1] Note: the statutory reference in the Comments section of the Standard has a typographical error in it; rather than G.L. c. 233, §132, the reference should be G.L. c. 223, §132.

[2] G.L. c. 236 contains the provisions for "Levy of Executions on Land" based on post-judgment executions issued pursuant to c. 235.

[3] These procedures are also available in the divorce context in accordance with Mass.Dom.Rel.P. 4.1, which relies on and incorporates the provisions of Mass.R.Civ.P. 4.1.

[4] As an aside, I would note that the last paragraph of Rule 4.1 (c) requires that "any attachment of property shall be made within 30 days after the order approving the writ of attachment." Clearly, this is a mandatory provision of the Rule. However, there is nothing I have found in the Rules that provides for any particular consequences of failing to accomplish the attachment within the required 30 days under the rule. Such failure proba-

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Title Standard No. 49: Getting rid of real estate attachments

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ing standpoint, however, we'd be looking for the court's order on the petition (see §108 of the statute) dissolving the attachment either totally or as to our property, once again, together with a Clerk's Certificate.

Another statutory basis for a motion to dissolve an attachment would be under §115A of G.L.c. 223, which allows for the defendant to challenge an otherwise valid attachment on the basis that no service was made on him or her.

The statute states that "the attachment shall be dissolved unless it appears of record that notice of such action has been given to [the defendant], in such manner as the court orders, within sixty days after the commencement of the action, or within such further time as the court may allow."

Where this may be significant is in a situation in which a purchaser, mortgagee or other attaching creditor may come into the chain of title after the issuance and recording of an attachment (by either missing it or ignoring it) and the defendant wants to assist the purchaser, mortgagee or other attaching creditor in gaining priority over the first attaching creditor in the event of the failure of the attaching creditor to properly serve the defendant.

Again, I have never seen this basis for dissolving an attachment used, but you never know when it might come in handy someday if you've got a friendly defendant and your client is the subsequent purchaser, mortgagee or attaching creditor, especially if the first attachment was missed for some good reason such as by faulty indexing.

Other than challenges to an attachment under Rule 4.1, probably the most common basis for seeking dissolution or modification of an attachment is under §114 of G.L.c. 223. This section of the statute provides the defendant, or other person whose property was attached,[5] with the opportunity, by motion, to seek a reduction or discharge of an attachment on the grounds that the attachment was excessive or unreasonable. As to the defendant, these grounds are pretty straightforward, if the defendant can convince the court of one or the other or both.

As to attached property standing in the name of someone other than the defendant, the "unreasonable" part would probably be the part upon which a bona fide titleholder, for example, would challenge the validity of an attachment against his or her property. Surprisingly enough, I did not find in the statute a specific section dealing with attachments against innocent non-defendant title holders or holders of other interests (mortgages or liens). However, this section would seem appropriate for challenging an attachment as wrongful against an innocent titleholder because such an attachment would obviously be "unreasonable." If successful, the challenging titleholder would record the court order along with the customary Clerk's Certificate.

Last, there is provision for dissolution of an attachment by virtue of the appointment by a court of competent jurisdiction of a receiver of the attached property under G.L.c. 223, §130. This requires that the complaint seeking the appointment be filed within four months after the attachment was made and the statute nonetheless allows the court to continue the attachment in its discretion.

You're not likely to be relying on dissolution of the attachment in this type of situation unless you're dealing with the receiver. In such a case, various court documents may have to be recorded along with a Clerk's Certificate in order to establish the appointment of the receiver and the receiver's authority to deal with the property.

While also rarely seen, if you do run into such a situation, you have the benefit of the provisions of §130 dissolving the attachment upon the appointment of the receiver unless the court orders otherwise and this may save you from having to require a specific court order dissolving an attachment where the court didn't deal with it otherwise as part of the receiver appointment process.

b. Dissolution by Bond.

The provisions for "bonding off" an attachment are set forth in §§120 to 129A of G.L.c. 223, with the primary procedures under §§120 and 125.

Section 120 of the statute provides for dissolution of an attachment by giving a bond with sureties conditioned to pay the plaintiff's judgment, such sureties to be approved by the plaintiff or by his or her attorney in writing or by a master or the court. Once approved, §123 of the statute requires the defendant to file the bond with the court clerk within 10 days after approval and the attachment is not dissolved until the bond is so filed. Again, a Clerk's Certificate can then be recorded along with a certified copy of the bond and the approval establishing compliance with §§120 and 123.

Section 125 of the statute provides for the release of property from the attachment (as opposed to total dissolution of the attachment) upon giving a bond with sureties[6] conditioned upon paying the plaintiff either the judgment or the value of the property. The property to be released under §125 must be described in the bond. This statute provides a detailed procedure for the motion and for the appraisal and determination of the value of the property before the bond is approved. Certified copies of the court order along with a Clerk's Certificate should be recorded as with other methods of dissolution of an attachment as a result of court proceedings.

There also is a provision under §127 of the statute for a posting a bond with the court by someone other than the defendant whose property has been attached because the creditor believed (and was sufficiently able to convince the court) that the transfer to them was fraudulent as to the creditor. This procedure could be utilized in a case where the non-defendant title holder can't convince the court of the bona fide character of his or her title holding status so as to seek a dissolution under §114 (attachment unreasonable) but nonetheless needs to get the attachment dissolved, such as in a sale or refinance situation.

Section 123 of the statute requires that this type of bond be filed with the court clerk within 10 days after approval as well. While this is another rarely used procedure, it is worthwhile being aware of it in case you do run into it or you may need to use it for a particular client. For record title purposes, dissolution of an attachment by this method, also, would be established by recording a certified copy of the bond together with a Clerk's Certificate showing compliance with the statutory procedures.

c. Dissolution by Operation of Law

This is the one we see most often. The usual statutory bases for considering an attachment to be dissolved by operation of law and which could give rise to circumstances to which a Clerk could certify are under §§115 and 59 of G.L.c. 223 with §59 being read in conjunction with §4 of G.L.c. 236, which deals with the recording of a post-judgment execution.

Section 115 of the statute is straightforward, providing for dissolution of an attachment upon a final judgment (after any appeals) in favor of the defendant. A certified copy of the final judgment together with a Clerk's Certificate establishing its finality would be recorded for this one.

Section 59 provides that an attachment remains effective for 30 days[7] from the date that appears on the execution issued upon a judgment in the action, unless, of course, it was already dissolved by some other method. Contrast this with the provisions of §4 of G.L.c. 236. In an action in which there was a pre-judgment attachment, that section requires that an execution issued on the judgment in the action must be recorded within 40 days[8] after the date on the execution "and the attachment shall become void forty days after said date unless the copy is so deposited" [i.e., recorded].

Notice that, under both §59 and §4, the specified time period runs from the date of the execution issued in the case, not from the date of the judgment. Reconciling the two statues, it seems that the attachment continues for 30 days from the date of the execution, but if the execution is recorded within 40 days of the day it was issued, then the execution piggybacks on the lien priority of the attachment.

Essentially, while G.L.c. 223, §59 would seem to give an attachment a 30-day life, it's lien priority "spirit" lingers for another 10 days after death to attach to the body of the execution, thus continuing the lien priority of the attachment for the life of the execution.[9] But if the creditor fails to record the execution within the 40 days, the attachment becomes "void" and the execution, when it is finally recorded, will lose its piggyback status and establish its own lien priority as of the date and time of recording.

However, what if no execution is issued and, therefore, the 30-day limit on the life of the attachment based on the date of the execution doesn't kick in? That's where G.L. c. 223, § 114A and subparagraph 3 of Title Standard 49 come into play.

3. Expiration of Six Years. Subparagraph 3 of Title Standard 49 provides that an attachment is dissolved upon the expiration of six years from the date of recording in the Registry of Deeds (or filing with the land court Registry District if registered land) of the attachment or the most recent bringing forward of it.

The Comments point out that this portion of the Standard is derived from G.L.c. 223, §114A. The two points to be emphasized under both the Title Standard and the statute are: (1) the six years runs from date of recording, not date of issuance or approval of the attachment, and (2) watch out for attachments which have been brought forward for another six years.

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Bill would overhaul 'outdated' real estate mortgage discharge practice

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new subsections (a), (b) and (d) of section 55 of c. 183, also in Section 3 of the bill.

If the mortgagee fails to record the discharge, it shall return to the borrower, or credit the borrower's account, all fees charged or withheld for recording such discharge, and it shall be liable in damages to the borrower in an amount equal to the greater of: the amount of such fees that were not refunded or credited plus $2,500, or such borrower's actual damages, plus reasonable attorneys fees. See new subsections (c) and (e) of section 55 of c. 183, also in Section 3 of the bill.

4 In all other cases, the mortgagee shall within 45 days of receipt of a mortgage payoff provide to the closing attorney either (a) the duly executed and acknowledged discharge, together with necessary assignments and other authority supporting documents; or (b) a copy of the same together with the recording information. Merely providing a copy of the discharge or evidence that the discharge was sent to a registry of deeds for recording shall not be deemed to comply with this requirement, unless the recording information required herein is noted on the copy. Failure to comply will result in the same penalties as above. See new subsection (a) of section 55 of c. 183, in Section 3 of the bill.

5. If the holder of a mortgage and note is not the holder of record, the discharge shall also specify by what instrument(s) the holder became the holder of such mortgage and the note, with the recording information, or the holder himself shall record such documentation or provide it to the closing attorney. See new subsection (b) of section 55 of c. 183, in Section 3 of the bill.

A discharge that includes a recital of corporate succession from a holder of record may be relied upon without further evidence of corporate merger, consolidation, charter amendment or conversion of entity. See new subsection (i) of section 55 of c. 183, in Section 3 of the bill.

6. A new provision for one-to-four-family residential property allows for the discharge of a mortgage by recording an original note marked paid by the holder. If the note is not already in recordable form, it can be recorded as an exhibit to a G.L.c.183, § 5B affidavit. See new subsection (h) of § 55 of c. 183 in Section 3 of the bill.

7. In the case of discharge by a note holder who is not the holder of record of the mortgage, an original or photocopy of the note with the endorsements thereon evidencing the transfer of ownership of such note to said holder may be attached to or referenced in a discharge. A copy of the note may be attached to an affidavit by the note holder that it is a true copy, or an affidavit by an attorney that such attorney has seen the original note with the endorsements thereon and the copy being recorded is a true copy thereof. See revised § 54C, paragraph (B) of c. 183 in Section 2 of the bill.

8. The bill retains the opportunity for an attorney to record a discharge by affidavit if the mortgagee fails to either record or provide to the closing attorney a discharge of a mortgage within 45 days from receipt and acceptance of payment in accordance with a written payoff statement as evidenced by a cancelled check. See new subsection (g)(1) of § 55 of c. 183, in Section 3 of the bill. The bill also permits such an affidavit if there is a failure to record or provide the authority documentation for the entity executing the discharge. See also subsection (g)(1).

For wired funds, a written confirmation of payment that recites the payee information prescribed in the payoff statement, when issued by the bank transmitting payment, would be equivalent to a cancelled check, if attached to the affidavit. See new subsections (f) and (g)(1) of § 55 of c. 183, in Section 3 of the bill. The notice of intent to record such an affidavit may be sent by the closing attorney with the mortgage payoff, or, as under present law, it may be sent if the mortgagee fails to provide or record a discharge with respect to a mortgage that has already been paid off.

In either case, if the mortgagee sends a notice of inadequate payment or other objection, the affiant must not record the affidavit until the inadequacy or objection is satisfied and must add to the affidavit a copy of the notice of objection and either evidence or a statement that the inadequacy or objection has been satisfied. See subsection (g), paragraphs (1), (2), (3), (5) and (6), of § 55 of c. 183, in Section 3 of the bill.

9. The bill would reduce the current 50-year statute of limitations for enforcement of a mortgage to a period that, for a mortgage in which no term of the mortgage is stated, shall be 35 years from the recording of the mortgage and, for a mortgage in which the term or maturity date of the mortgage is stated, the limitations period shall be 5 years from the expiration of the term or from the maturity date, unless, in either case, an extension of the mortgage, or an acknowledgment or affidavit that the mortgage is not satisfied, is recorded prior to the expiration of such period. These provisions shall also apply to mortgages on registered land. See revised §§ 33 and 35 of G.L.c. 260, in Sections 5 and 6 of the bill.

10. The bill would amend the statute governing judicial discharges by adding a new first paragraph allowing a mortgagor (as well as his heirs, successors or assigns) who has some evidence of the payoff of a mortgage, but who is unable to obtain a discharge from the mortgagee and cannot fully meet the affidavit or document requirements of the statue for some reason, to file a petition in the Land Court or the Superior Court to have a mortgage discharged at any time without respect to any particular waiting periods or periods of uninterrupted possession. Alternatively, when there is no actual or direct evidence of payoff sufficient to proceed under the first paragraph, the second paragraph retains the procedure previously set forth in the statute for discharging old mortgages but allows for shorter possession periods than the previous statute. See revised § 15 of G.L.c. 240, in Section 4 of the bill.

In early 2003, at the height of the residential refinance boom, in response to increasing complaints from the home buying public and concerns from the lending community, the title insurance industry and REBA began work on a comprehensive overhaul of residential real estate mortgage satisfaction practice in Massachusetts.

A conversation with MMBA Chair Ruth Dillingham

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are long gone by the time the rule goes into effect. Many times we would be far better off to simply let capitalism do its thing.

The other major challenge will be the continuation of mergers and consolidation in the mortgage-lending field. This year, we will see a major regional player, BankNorth, enter the Cape Cod market, an area that has historically been localized, fragmented and even idiosyncratic. And we will see a major national player, Bank of America, enter the Massachusetts market.

Industry consolidation is a challenge for the MMBA because our membership is institutional, not individual. If there are fewer mortgage lenders in Massachusetts it may be that MMBA will have fewer members. We are exploring developing different classes of members and we are seeking ways to support and retain individuals who may be displaced by industry consolidation.

REBA News: Are there areas of shared or common interest between the Massachusetts Mortgage Bankers Association and the Real Estate Bar?

Ruth: Certainly in all areas involving the work and function of the registries of deeds. This is an area where we both share concerns and we must work together to assure that the registries receive the resources they need to preserve the integrity of the land records system.

Another area is technology. Mortgage lenders and lawyers must work more closely to make certain that both keep abreast of technology advances to exploit all potential technology-based cost-savings for the benefit of the consumers and homeowners that both groups serve.

New technology initiatives for REBA members

By Robert Thomas

This year the Real Estate Bar Association has launched a number of new technology initiatives while participating in the co-operative education program at Northeastern University's College of Computer Science.

Technology permits the Association to offer a menu of expanded services and benefits to a wider variety of members at a lower cost. REBA e-News, our e-newsletter to all members is, perhaps, the best known and most successful of our technology initiatives. While the REBA staff works closely with the Technology Committee, chaired by Mike Krone, to develop new services and benefits, we welcome comments and suggestions from any Association member.

Technology permits REBA to offer a menu of expanded services to more members at a lower cost.

Some of our upcoming plans include the following.

ListServe software. To more effectively serve the 15 committees that comprise the working elements of the Association reporting to the Board, we are introducing ListServe software that offers committee members 24/7 real time communication in a closed, secure environment. The ListServ software will require that REBA replace its existing web hosting company with one possessing greater capacity and flexibility. We are exploring some alternatives and hope to make ListServ available to our committees by early April.

Standards and Forms. In addition to hard copies mailed to every new member, the Association makes the Title Standards, Practice Standards, Ethical Standards and Forms available on the REBA web site, www.massrelaw.org. To reduce printing and postage costs REBA will soon begin to send a complete set of standards and forms to new members on a CD. We believe that we can save $18,000 a year in printing and postage alone with this change. Naturally, the CD will be available to existing members who would prefer to have the Standards and Forms available on their office computer.

Membership Software. We are currently working with a consultant testing various association membership software products all operating on a Microsoft Access platform. Membership software includes various modalities to permit broadcast fax, e-mail blasts, or postal service mailings to members. These programs also organize events and seminars, handle program registrations, publication of syllabi, payment processing and name badges. We expect to introduce this membership software in the summer of 2004 and have it running and de-bugged by September.

A native of Redmond, Wash., Robert Thomas is a "middler" in the College of Computer Science at Northeastern University. He is currently working as REBA's IT Intern for a six-month term as part of Northeastern's co-operative education program.

Deed excise taxes under G.L.c. 64D: A primer

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are not being properly taxed. The reaction to this was the adoption of a new section 6B of Chapter 64D. This provision provides:

"The register of deeds may refuse to record or register any deed, instrument or writing which does not have the stamps required by this chapter, *as determined by the register* (emphasis added) affixed thereto or to vellum, parchment or paper upon which it is written or printed."

This provision permits the register, in his or her discretion to refuse to accept a deed for recording. It does not provide for any appeal process, whether to the Department of Revenue or otherwise. It also does not provide any guidance as to how a person seeking to register a deed would satisfy the register that no excise stamps are actually required.

In practice, there have already been instances in which transactions where the registries have refused to accept deeds that the registry personnel have believed should have had excise stamps and none were purchased. A particular example is a transaction in which an individual owner of a commercial property transferred the property to a limited liability company for less than $100.00 and there followed immediately thereafter a mortgage to a conduit lender for several million dollars.

The registry personnel took the position that this was exactly the type of transaction that the statute was intended to capture and refused to record the deed. It required several hours to finally convince the registry personnel that there really was not any consideration requiring an excise stamp because the limited liability company was a single member LLC and that, according to the certificate from the Secretary of State's office that was to be recorded as part of the documents, the individual was the sole manager.

It would seem a likely target for suspicion is any deed that recites that it is for nominal consideration and where the grantee or the grantor is a corporation, limited liability company or other such entity. Practitioners should be aware of this as another potential problem in any transaction, as such a delay may result in not recording documents on the day that it is intended, leading to problems with wires and payoffs.

Other Potential Problems

There are several other areas that practitioners should be aware of involving Chapter 64D that may not necessarily occur frequently, but can be problematical.

The first area is the question of liability for payment for the excise stamp. Section 2 of Chapter 64D states, "The tax imposed by this chapter shall be paid by the person who makes or signs the deed, instrument or writing, or for whose benefit the same is made or signed."

If the excise is not paid, or less than the proper amount is paid, how long will the liability remain outstanding? The Department of Revenue has published DOR Directive 03-1– Limitation Period for Assessing the Deeds Excise – in which it takes the position that if the amount of excise stamps is less than the full amount required, the commissioner may make an assessment within three years from the date the deeds excise was paid.

If however, no excise stamps were purchased when they should have been, the Department asserts that there is no time limitation on the subsequent assessment. A full analysis of the Department's reasoning is beyond the scope of this article, however, your attention is directed to the Directive for the citations and reasoning set forth therein.

Another issue that arises is the transfer of beneficial interests in nominee trusts.

Some practitioners choose to effectuate a transfer by using a transfer off of-record interests in a nominee trust so as to avoid revealing that a transfer has occurred, the identity of the parties to a transaction, and the amount of the consideration. The reasons may range from concealing the identity of a high profile person to avoiding providing assessors with information that may work to the detriment of the owners.

There is nothing legally or ethically wrong with such a transaction, but it does not avoid liability for the proper amount of excise stamps for the amount of the true consideration. According to Massachusetts Department of Revenue Directive 95-5, "Sales and transfers of beneficial interests in nominee trusts for a consideration in excess of one hundred dollars are subject to the deeds excise. The excise stamps should be affixed to the assignments of beneficial interest, whether or not these documents are recorded."

Finally, the issue of excise stamps for deeds in which two parties swap property interests, whether through an IRC §1031 transfer or otherwise, is subject to the payment of excise stamps on each deed.

According to Massachusetts Department of Revenue 89-14: "When parties exchange real estate the conveyance of each parcel is subject to the deeds excise. If a parcel of real estate is conveyed in exchange for property other than real estate (i.e., personalty) only the conveyance of the real estate is subject to the excise. In like-kind exchanges, the consideration in each case is the value of the property received by the transferee."

This article is not intended to be an exhaustive study of the provisions of Chapter 64D and the regulations that have been promulgated, but is only intended to highlight a few of the issues that are of current concern. In addition to the materials on the Department of Revenue's website, your attention is also directed to the Real Estate Bar Association's website and the practice and ethical standards which can provide additional guidance.

ALTA adopts new form title insurance policy endorsements

By Lawrence F. Scofield

At the October 2003 American Land Title Association Annual Convention, 12 new, primarily commercial endorsements were promulgated by the Title Insurance Forms Committee and adopted by the ALTA Executive Committee. The Forms Committee had been debating and drafting these endorsements for the better part of the last three years.

The Committee first debated what commercial coverages were being requested on a regular basis in current commercial financing transactions. Once the number of endorsements was narrowed, it was time to formulate the wording for the coverages. The number of language variations for each type of coverage varied by carrier, by region, and by underwriters within the same company. Many of us on the Committee were quite surprised by the breadth of language variations relative to the same endorsement.

By standardizing the most common commercial endorsements the Committee intended for benefits to flow to insureds as well as insurers. Customers requesting these endorsement forms may rely on the coverage being consistent from company to company, state to state, and region to region.

By using common endorsement language, judicial decisions interpreting each endorsement will have greater precedent from state to state. Less time will be spent negotiating over exact language. Though in some circumstances it may be necessary to modify standard endorsement language to fit specific circumstances unique to a transaction or series of transactions, nevertheless, it is valuable to have well-considered coverage and language in standardized forms useful in the vast majority of circumstances.

Some of the following endorsements contain bracketed language that is optional language. It may or may not be used depending upon specific circumstances and individual company practice. In drafting these Forms, the Committee took great pains to use words and phrases consistent with those used in practice.

A long-time member of the Association, Larry Scofield is senior vice president and New England states manager for Old Republic National Title Insurance Corporation. He serves on ALTA's national Forms Committee and also on ALTA's Indian Land Claims Committee. He is a member of the American College of Real Estate Lawyers.

Endorsement Form 14

"(Future Advance-Priority) to a Loan Policy

1. The insurance for Advances added by Sections 2 and 3 of this endorsement is subject to: the exclusions in Section 4 of this endorsement and the Exclusions from Coverage in the Policy, except Exclusion 3(d); the provisions of the Conditions and Stipulations, except Section 9(b); and the Exceptions contained in Schedule B.

a. "Agreement," as used in this endorsement, shall mean the note or loan agreement secured by the insured mortgage or the insured mortgage.

b. "Advances," as used in this endorsement, shall mean only those advances of principal indebtedness made after the Date of Policy as provided in the Agreement, including expenses of foreclosure, amounts advanced pursuant to the insured mortgage to pay taxes and insurance, assure compliance with laws or to protect the lien of the insured mortgage before the time of acquisition of the estate or interest in the land and reasonable amounts expended to prevent deterioration of improvements, together with interest on those advances.

2. The Company insures against loss or damage to the insured as a result of:

a. The invalidity or unenforceability of the lien of the insured mortgage as security for each Advance.

b. The lack of priority of the lien of the insured mortgage as security for each Advance over any lien or encumbrance on the title.

c. The invalidity or unenforceability or loss of priority of the lien of the insured mortgage as security for the unpaid indebtedness and Advances resulting from: (i) re-Advances and repayments of indebtedness; (ii) lack of outstanding indebtedness before an Advance; or (iii) failure to comply with the requirements of state law to secure Advances.

3. The Company also insures against loss or damage to the insured as a result of:

a. The invalidity or unenforceability of the lien of the insured mortgage resulting from any provisions of the Agreement that provide for: (i) interest on interest; (ii) changes in the rate of interest; or (iii) the addition of unpaid interest to the principal indebtedness.

b. Loss of priority of the lien of the insured mortgage as security for the principal indebtedness, including any unpaid interest which was added to principal in accordance with any provisions of the Agreement, interest on interest, or interest as changed in accordance with the provisions of the insured mortgage, which loss of priority is caused by (i) changes in the rate of interest; (ii) interest on interest; or (iii) increases in the unpaid principal indebtedness resulting from the addition of unpaid interest.

"Changes in the rate of interest," as used in this endorsement, shall mean only those changes in the rate of interest calculated pursuant to a formula provided in the insured mortgage at Date of Policy.

4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) resulting from:

a. Advances made after a Petition for Relief under the Bankruptcy Code (11 U.S.C.) have been filed by or on behalf of the mortgagor.

b. The loss of priority of Advances to real estate taxes or assessments imposed on the land by governmental authority arising after the Date of Policy

c. The loss of priority to a federal tax lien of any Advance made more than forty-five days after a notice of federal tax lien has been filed in the public records.

d. The loss of priority of Advances to any federal or state environmental protection lien.

e. Usury, or any consumer credit protection or truth-in-lending law.

f. [The loss of priority of an Advance to a mechanic's or materialmen's lien.]

5. The Amount of Insurance defined in Section 2(c)(ii) of the Conditions and Stipulations shall include Advances.

6. Section 8(d) of the Conditions and Stipulations shall not apply to Advances."

This endorsement provides coverage to a lender for a revolving line of credit or credit line. It covers a loss the lender might suffer should a future advance not have the same priority as the original mortgage.

It also covers: a) the lender's loss if each advance does not create a valid and enforceable lien on the title; b) loss resulting from the invalidity or unenforceability of the insured mortgage due to re-advances and repayments of the mortgage; c) lack of an outstanding indebtedness before any advance; and d) failure of the lender to

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Technology and the conveyancing attorney in a 'bundled services era'

By Michael P. Krone

Although changes to RESPA seem, on one day imminent and on another far off, there is one truth that is becoming obvious. Lenders are starting to require settlement service providers, such as conveyancing attorneys, to offer them one fee pricing. They will then include this fee in their guaranteed price to consumers.

BN Amro, the fifth largest loan originator and seventh largest loan servicer in the United States is a bit of a pioneer in settlement services bundling. It has been offering its OneFee Mortgage Loan to its own customers for two years and recently began to roll it out in pilot programs to brokers across the nation.

What this means for conveyancing attorneys in Massachusetts, and for conveyancers throughout the country, is that fixed pricing for their services is now becoming a requirement rather than a suggestion. One need only look at the recent television ads for Ditech to see that one fee pricing is spreading throughout the mortgage lending industry.

The race to bundle is on and conveyancing attorneys appear to be the least adept at dealing with it. In order to gain the efficiencies they will need to compete for the business of these one-fee lenders they will need to transact business in the same fashion as do the lenders and practically all of the other service providers in the mortgage closing.

Technology is the link. No longer can conveyancers be without a high-speed Internet connection. The electronic delivery of documents for closing all but mandate that they obtain such service. Electronic ordering and Internet posting of status and placement of documents for lender and consumer viewing are now commonplace in this industry.

By developing an Internet presence, or adopting some of the web-based platforms and conveyancing software options, conveyancers can provide these Internet-based services that consumers, realtors and lenders want.

Some of this technology also allows conveyancers to transact business remotely with their client base and provides a connection to their title insurance underwriters for back policy review and electronic remittance of policies. The cost of such systems is minimal compared to their advantages Reductions in staff time devoted to data entry along with efficiencies gained through electronic delivery of documents can create real savings for conveyancers.

Several years ago there was doubt when one spoke about the promise of the Internet in conveyancing. The doubt has turned to confirmation.

Mike Krone serves on the Association's Board of Directors, chairing its Technology Committee. He is vice president and special counsel for First American Title Insurance Company and is a frequent lecturer non-real estate and legal technology issues.

Educating home buying public on role of the real estate attorney

By Sami S. Baghdady

With the spring home buying season upon us, the Real Estate Bar Association has resumed its statewide print advertising campaign.

Since the spring 2001, REBA has placed advertisements about the important role the real estate attorney plays in the home buying process in the Real Estate Section of the Boston Sunday Globe, the Boston Herald and various community newspapers throughout the state.

The objective of the ad campaign is to educate homebuyers on the advantages of having a real estate lawyer represent them when buying a home. Specifically, the target of the ads is the first-time homebuyer, because that individual is probably the least knowledgeable about why they need an attorney, while being the most vulnerable to the pressures of other parties representing the seller.

For example, homebuyers are often encouraged to hire an attorney just to review the purchase and sale agreement, or are misadvised that the lender's counsel also represents them. With a positive experience, the first-time homebuyer will likely retain a real estate lawyer again as a second-time homebuyer and as a seller of property.

The ads convey the message that buying a home is a serious matter, that real estate law is a specialty, and that the real estate lawyer will protect their interests. They promote the notion that retaining a real estate lawyer is an important first step to take in the home buying process. The ads are meant to be lightly humorous so as to avoid appearing too self-serving.

REBA is the first bar association in Massachusetts to implement a continuous print ad campaign to promote the public image of the real estate lawyer.

The ads were developed at little cost to REBA with the help of students of Boston University's School of Communications AdLab Program. REBA's Membership and Public Relations Committee has worked with BU's gifted AdLab students over the last several years to develop a series of cleaver advertisements.

Through its Co-Operative Advertising Program, REBA has adapted its ads for the use of its members to advertise within their local community. REBA does not charge its members for the use of the ads, and will even share in the cost of its members' advertising.

While the idea of advertising to counter the negative publicity that is often associated with the lawyer has been discussed by other bar associations, REBA is the first bar association in Massachusetts to implement a continuous print ad campaign to promote the public image of the real estate lawyer.

"REBA is firmly committed to helping the public realize the value its attorney members bring to the closing table," said President Christopher Kehoe. "All too often the role of the real estate lawyer is misunderstood and underestimated, until it's too late. It ends up costing the consumer a lot more money to correct a problem which could have been avoided if he or she were represented at the initial stages of the home-buying process."

REBA is grateful to First American Title Insurance Company, CATIC, Stewart Title Insurance Company, Commonwealth Title Insurance Company and Chicago Title Insurance Company for their support and generous donations to help fund the advertising campaign.

Sami Baghdady chairs the REBA Membership and Public Relations Committee. He practices with the Baghdady Law Offices in Arlington and Worcester.

2004 Spring Seminar

The Afternoon Sessions
Recent & Pending Legislation: Summary and Highlights
Recent Developments in Massachusetts Case Law

Continuing Education Committee Chair
Pamela B. O'Brien, Esquire

Sheraton Framingham Hotel
Monday, May 10, 2004
Framingham, Massachusetts
9:00 am - 3:30 pm

General Information

- Premium credit for professional liability insurance may be given for attending properly documented continuing legal education programs.
- Continuing Legal Education credit can be made available in other New England states. Contact REBA for specific details.
- Registration for REBA's 2004 Spring Seminar is open to REBA members/subscribers in good standing, their guests and non-members/subscribers (for an additional fee). Everyone attending the REBA 2004 Spring Seminar must register. The Registration Fee includes the cost of the morning and afternoon sessions, the seminar written materials and the luncheon. We are unable to offer discounts for persons not attending the luncheon portion of the program.
- Please submit only one registration form per person. Additional registration forms are available from the REBA office; registration forms may be photocopied.
- Confirmation of registration will be sent to all registrants. Name badges and a list of registrants will be distributed with program materials.
- Registrations with the appropriate fee should be sent by mail or fax to arrive prior to April 24, 2004 to guarantee a reservation at the Spring Seminar. Registrations received on/after April 24, 2004 are subject to an additional processing fee of $25. Registrations canceled in writing on/before April 24, 2004 are subject to a processing fee of $25. No other refunds will be permitted. Substitutions of registrants attending the program are welcome and may be made at any time. Written materials will automatically be mailed to "No Shows" after the program.
- Smoking is prohibited in this section of the hotel and the use of cell phones and pagers is strongly discouraged in the meeting rooms during the programs.

Driving Directions

From Boston:
Massachusetts Turnpike (I-90) West to Exit 12. Bear left after toll and proceed onto Route 9; the Sheraton Framingham Hotel is immediately on the right.

From Worcester:
Route 9 East. Pass hotel on left. At next set of lights, make a U-turn onto Route 9 West. The Sheraton Framingham Hotel is approximately one mile on the right.

From Points West via Massachusetts Turnpike:
Massachusetts Turnpike (I-90) East to Exit 12. Bear left after toll and proceed onto Route 9; the Sheraton Framingham Hotel is immediately on the right.

For additional information, telephone the hotel at (508) 897-7200.

Registration Form

Complete this form, include the appropriate fee and return to: REBA Educational Foundation, Attn: 2004 Spring Seminar, 50 Congress Street, Suite 600, Boston, MA 02109-4075. Tel: (617) 854-7555 and (800) 496-6799; Fax: (617) 854-7570.

_____ YES, please register me for REBA's 2004 Spring Seminar, May 10, 2004, Framingham, MA. I am a REBA member/subscriber in good standing and have paid my 2004 membership dues.

_____ NO, I am not a REBA member/subscriber but am registering for the 2004 Spring Seminar.

_____ YES, my firm/organization is interested in reserving table(s) at the 2004 Spring Seminar. Each reserved table hosts ten (10) registrants at a fee of $1250 per table.
Please reserve _____ table(s). Firm/Organization:_____
(Please attach completed registration forms for each of the ten people at this table.)

_____ I am unable to attend the 2004 Spring Seminar, but would like to purchase a copy of the seminar syllabus and an audiotape recording of the general sessions. (Orders must be placed no later than May 10, 2004. Please allow 6-8 weeks for delivery.)

Method Of Payment

(Please circle all that apply)	**Before Apr 24, 2004**	**On/After Apr 24, 2004**
Member/Subscriber Registration	$ 125	$ 150
Guest Registration	$ 165	$ 190
_____ Tables @ $1,250 each	$ _____	$ _____
Syllabus & Audiotape	$ 120	$ 120
TOTAL	$ _____	$ _____

_____ I have enclosed a check for the total amount listed above.
_____ Please charge my _____ MasterCard or _____VISA with the amount itemized above.
Card Number: ___ ___ ___ ___ - ___ ___ ___ ___ - ___ ___ ___ ___ - ___ ___ ___ ___
Expiration Date: _____________ Signature_____________________

(Please type or print clearly...Only one registrant per form, please.)

NAME: _____________________ Esq.(Y/N) _____
NICKNAME FOR BADGE: _____________________
FIRM/ORG: _____________________
ADDRESS: _____________________
CITY: _____________ STATE: _______ ZIP CODE: _______
DAYTIME TELEPHONE: _____________ FAX: _____________
E-MAIL: _____________________

REBA EDUCATIONAL FOUNDATION, INC. *presents the*

The Morning Sessions
Bankruptcy Sales "Free and Clear"
Bankruptcy Issues in Commercial Leasing
New Notary Public Regulations
Real Estate Holding Entities
Surveying for Attorneys
Federal Compliance Issues for Real Estate Attorneys

Keynote Speaker
Charles J. Kovaleski, Esquire
President
American Land Title Association

Schedule Of Events

9:00am - 12:00pm — **Registration Desk and Exhibits Open** — **Promenade**

9:15am - 12:00pm — **THE MORNING SESSIONS**
Most sessions are repeated. Check the times for each.

9:15am - 10:00am and 10:15am - 11:00am — **Bankruptcy Sales "Free and Clear"** — **Wayland**
Attorneys Melvin S. Hoffman, Robert J. Moriarty and Douglas B. Rosner will guide you through the intricacies of real estate sales in Chapter 7 and Chapter 11 bankruptcy cases. Panelists will describe the process of consummating bankruptcy sales and define what "free and clear" really means. You will learn about the ability of bankruptcy trustees or debtors to sell real estate free of municipal and other liens and interests and what strategies may be available to lienholders to protect themselves. The panel will also explore the title implications of free and clear sales transactions.

9:15am - 10:00am and 10:15am - 11:00am — **Bankruptcy Issues in Commercial Leasing** — **Middlesex North/South**
Should your landlord client take a letter of credit or cash as a security deposit? If your client's tenant files for bankruptcy, what are the landlord's rights under the lease while the case is pending? Can the tenant assign the lease in its bankruptcy over your client's objection? And, if your client is a tenant, what protections are available if the landlord seeks bankruptcy relief? Don't let the bankruptcy of your commercial landlord or commercial tenant take you by surprise. Attorneys Robert M. Carney and Michael J. Goldberg will discuss the "ins and outs" of drafting and negotiating commercial leases to protect your clients from the unexpected. They will also address various pre-bankruptcy enforcement strategies and their impact once a bankruptcy is filed and the basics of the bankruptcy process as it affects leases.

10:15am - 11:00am and 11:15am - 12:00pm — **New Notary Public Regulations** — **Middlesex North**
On December 19, 2003 Governor Romney issued Executive Order 455 establishing standards of conduct for notaries public. Deputy Legal Counsel Judith Goldberg and Attorneys Craig J. Martin and Virginia Stanton Smith will discuss the provisions and guidelines (including notary journals and client confidentiality) of this order which is based on the Model Notary Act published by the National Notary Association.

9:15am - 10:00am and 11:15am - 12:00pm — **Real Estate Holding Entities** — **Middlesex South**
With recent changes in laws and practices regarding corporations, limited liability companies, limited liability partnerships, joint ventures and trusts, real estate attorneys are rethinking title holding entities. Attorneys Howard L. Levin and William V. Hovey will review recent changes and how to go about selecting the most appropriate ownership vehicle given your client's intended ownership structure, business objectives and exit strategies. Considerations that will be included in this discussion will be holding of title, limited liability, tax treatment, ownership succession, creditors' rights, management and control.

10:15am - 11:00am and 11:15am - 12:00pm — **Surveying for Attorneys** — **Wayland/ Middlesex West**
This session will provide attorneys with valuable insight into reviewing and understanding surveys and will highlight some traps for the unwary attorney, including the implications of a plot plan vs. an instrument survey; recognizing true north vs. magnetic north; utilizing monuments; and reconciling original subdivision plans with overlays. The session will also include the surveyor's perspective. The panel includes Attorneys Ward Graham and Lawrence P. Heffernan and Land Surveyor A. Richard Vannozzi.

9:15am - 10:00am and 11:15am - 12:00pm — **Federal Compliance Issues for Real Estate Attorneys** — **Middlesex West**
Recent changes in regulations, January 1, 2004 implementation dates for new regulations and stepped up enforcement of existing regulations will all affect the conveyancing practices for all attorneys. Issues discussed include Executive Order 13224/Foreign Assets; USA Patriot Act; FTC Safeguards Rule; ECOA/Regulation B; HMDA/Regulation C; TIL/Regulation Z/Rescission; RESPA/Regulation X "Markups"; the *Echevarria* case and its "family." Practical guidance for compliance "at the closing table" will be given by Attorney Ruth A. Dillingham.

12:00pm - 2:00pm — **LUNCHEON** — **Grand Ballroom**

12:40pm - 1:00pm — **REBA President's Remarks** — **Grand Ballroom**
E. Christopher Kehoe, Esq., President

1:00pm - 1:20pm — **Keynote Address** — **Grand Ballroom**
Charles J. Kovaleski, Esq.
President, American Land Title Association

1:20pm - 1:45pm — **REBA Business Meeting** — **Grand Ballroom**
Clerk's Report
Treasurer's Report
Title Standards Committee Report, Amend Title Standard No. 16

1:45pm - 2:00pm — **Refreshment Break and Exhibits** — **Promenade**

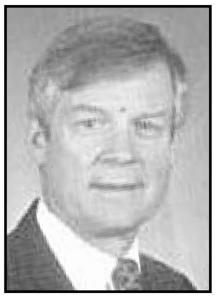
THE AFTERNOON SESSIONS

2:00pm - 2:30pm — **Recent and Pending Legislation** — **Grand Ballroom**
Summary and Highlights
Robert H. Kelley, Esq. and Edward J. Smith, Esq.

2:30pm - 3:30pm — **Recent Developments in Massachusetts Case Law** — **Grand Ballroom**
Philip S. Lapatin, Esq.

The evolving world of tenancy in common interests

By J. Patrick Dowdall



Anyone following trends in Section 1031 exchanges in the last few years will have observed the growing significance of tenancy in common interests ("TICs") as replacement property for such transactions.

This development reflects the confluence of several factors: the increasing use of Section 1031 exchanges by sellers, the desire of more exchangers to receive passive investment property as replacement property and the inability of many exchangers to acquire their own free standing investment property. Hence, sponsors have divided properties into fractional interests and sold such interests to investors.

J. Patrick Dowdall is managing director of Atlantic Exchange Company, a Boston-based company specializing in Section 1031 exchanges. He was previously a tax partner at one of the Boston law firms. He was also co-chair of the Task Force that drafted the Massachusetts limited liability statute enacted in 1995.

While to date the manifestations of these interests have not been as predominant in New England as other parts of the country, transactions during the past year have clearly indicated that those involved in real estate exchanges (as exchangers, real estate attorneys, tax advisors or qualified intermediaries) in this region definitely are going to be seeing more TICs. This will be occurring as properties in New England are packaged and sold as TIC interests and as more New England exchangers purchase TICs (regardless of where they are located) as replacement property.

For the attorney advising clients (either sponsors or purchasers), there are many aspects to consider in connection with TICs. This article will discuss three of them: tax, securities and financing.

Tax considerations: No partnership

The tax issues are paramount in dealing with a TIC arrangement. A partnership interest is not qualifying property for Section 1031 purposes, but a TIC interest does qualify. Accordingly, any TIC interest must be structured so that it is not classified as a partnership interest for tax purposes.

As the TIC industry began to develop a few years ago, there was a substantial degree of uncertainty as to what the IRS would view as a valid TIC interest because of the dearth of authority. In response to numerous requests, the IRS issued Rev. Proc. 2002-22, which set forth 15 guidelines that the IRS would require to issue a favorable ruling.

Some of the more significant are:

- Each co-owner must have a title interest;
- Each co-owner must share equally in all aspects of income, loss and outstanding indebtedness;
- All major decisions with respect to the property, including sale, financing and leasing, must require unanimous decisions;
- Any management and other agreements with the sponsor must be at arm's length and any management agreement must be renewed annually;
- If the sponsors retain interests beyond 6 months, their actions can be attributed to the owners, which could result in disqualification; and
- The co-owners must have the right to sell their interests individually although the other owners or the sponsor may have a right of first offer; the owners, however, cannot have a put right.

As the Rev. Proc. makes clear, these are ruling guidelines and do not purport to represent substantive law. Thus, advisors in evaluating TIC structures must determine which variances from the guidelines would have a negative substantive effect.

For example, many do not consider unanimity for leasing decisions or sponsors co-investing as relating to substantive law.

Are TICs securities or real estate?

One of the burning issues has been whether TIC interests should be treated as securities under state and federal

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Title Standard No. 49: Getting rid of real estate attachments

By Ward P. Graham

(Editor's Note: Title Standard Spotlight is a regular column in the REBA News, and is written by various members of the Title Standards Committee. REBA Title, Practice and Ethical Standards and Forms may be accessed on the association's website, www.massrelaw.org by clicking on "members" and then going to "The Fine Print.")

In this issue we will put the spotlight on a REBA Title Standard that comes into play with ever increasing frequency as a result of our society's growing penchant for debt, divorce and litigation over just about anything: Title Standard No. 49, Dissolution of Attachments.

Title Standard No. 49 and the statutes and rules referred to in the Comments and in this article should cover just about any situation you'll see involving attachments and their dissolution. Hopefully, this article will help provide some additional guidance in the event you run into any unusual situations that don't fit squarely within the Title Standard.

Overview Of Attachments

Attachments, of course, usually are obtained at the very beginning of litigation in which a money judgment is sought or anticipated, although it can be obtained at anytime prior to judgment.

The procedures and rules for obtaining a prejudgment attachment are governed by G.L. c. 223, §42 and Mass.R.Civ.P. Rule 4.1, together with its companion Domestic Relations Rule, Mass.R.Dom.Rel.P. Rule 4.1. The usual form of attachment is provided in Mass.R.Civ.P. Appendix Form 2 and Mass.R.Dom.Rel.P. Appendix Form CJ-D 410.

Certainly in many cases, attachments are legitimately sought because of a plaintiff's genuine concern about having security for any judgment ultimately obtained. Quite often, however, attachments, especially ex parte attachments, are sought as a vexatious means to tie up and encumber a defendant's property so as to force a defendant into settling a case rather than allowing the property to be tied up for the protracted period of time that even the simplest of cases can take.

Whatever the motives and legitimacy, however, when we as conveyancers encounter an outstanding attachment, we need to know whether to properly ignore it or how to get rid of it.

Attachments are usually general in form (i.e., against any real estate the defendant owns in the county), but they may be specific to a particular property. For attachments involving land to be effective against "subsequent attaching creditors or purchasers in good faith and for value," G.L. c. 223, §62 requires that the sheriff record "a certified copy of the writ of attachment and so much of his return thereon as relates to the attachment of the estate, in the registry of deeds for the county or district where the land lies."

It is the discovery of that recording that triggers our looking into whether or not, at the time of our transaction, the attachment is still effective or we need to do something to discharge or release it from the record title to the affected real estate. (For purposes of this article, assume there is not a question about whether the attachment affects the property you're going to be dealing with.)

Title Standard No. 49 provides an excellent source of methods for either establishing that the attachment is no longer effective or for getting it discharged or dissolved.

Title Standard No. 49 provides an excellent source of methods for either establishing that the attachment is no longer effective or for getting it discharged or dissolved.

Dissolution of Attachments

1. Release/Discharge by Plaintiff, Plaintiff's Attorney or Plaintiff's Administrator or Executor. Subparagraph (1) of Title Standard 49 provides for release of the attachment or part of the real estate attached by recording a release or discharge instrument signed and acknowledged by the plaintiff or the plaintiff's attorney of record at the time the instrument is executed.

This method of dissolving an attachment tracks the provisions of G.L. c. 223, §132 referred to in the Comments section of Title Standard 49.[1] However, while not mentioned in the Title Standard, that section of the statute also provides for an administrator or executor of a deceased plaintiff to also provide a discharge or release of the attachment.

Having such specific statutory authority for the administrator or executor to release avoids the necessity of having to determine whether the administrator has such authority inherently, under some other statute, under a will or under an order of court.

The Comments section of Title Standard 49 for this subparagraph supplements the statute by providing that a release signed by any attorney associated with a firm is acceptable if the appearance for the plaintiff is by the firm rather than an individual attorney.

The Comments also provide that a release signed by the attorney named in the writ of attachment is a representation of authority that the attorney is still the attorney of record. Be careful though. It is doubtful that you can rely on the signature by that attorney if it turns out the attorney has actually filed a notice or motion of withdrawal and, especially, if the withdrawal has been approved.

Thus, it is important to double check the docket and/or case file of the action before accepting and recording a release by the plaintiff's attorney unless there is a recitation in the release by the attorney that he or she is still the attorney of record or still represents the plaintiff in the matter.

2. Clerk's Certificate. Subparagraph (2) of Title Standard 49 provides for dissolution of an attachment by obtaining and recording "a certificate of an appropriate official [generally, the clerk] of the court setting forth sufficient facts to establish that the attachment has been dissolved by the court, by filing a bond or by operation of law." This one is a little more open-ended due to the phrase "setting forth sufficient facts to establish" the recited methods of dissolution of the attachment.

The Comments section of the Title Standard provides helpful references to relevant sections of G.L. c. 223: §§59, 115, 120 and 125. To that we can also add §§106, 108, 113A, 114 and 132 of G.L. c. 223, Mass.R.Civ.P. 4.1 (g) and §4 of G.L. c. 236.[2]

a. Methods of Court Ordered Dissolution of Attachments

The basic premise regarding dissolution by the court stems, of course, from the adage that "he that giveth may taketh away." As mentioned, the motion procedures for a pre-judgment attachment are governed by Mass.R.Civ.P. 4.1.

Subsection (f) of Rule 4.1 provides a procedure by which a plaintiff can file a motion for and obtain an ex parte attachment. That's the "giveth" part.

Subsection (g), on the other hand, is the "taketh away" part, which provides the defendant with an opportunity and procedure by which to challenge the ex parte attachment and get it dissolved or modified.[3] Unfortunately, defendants and their attorneys are not always good at recording the orders modifying or dissolving the attachment.

Thus, whenever you see an outstanding ex parte attachment on record, it may be worthwhile to check the case file to see if the defendant brought a motion to dissolve it and, if successful, simply neglected to record the court order or allowance of the motion at the Registry of Deeds along with a Clerk's Certificate, which would address any appeals, motions for reconsideration, etc.[4]

Statutorily, G.L. c. 223, §106, involving fraudulent attachments, provides a method for petitioning the court to dissolve an attachment on property of "any person, other than the parties, who claims a title or interest therein by a subsequent attachment, purchase, mortgage or other title" and who "disputes the validity and effect of such prior attachment on the ground that the amount demanded in the first action was not justly due or was not payable when it was commenced."

Frankly, I've never seen a petition filed under this section, but it's out there and available if you have circumstances that may allow for its use. From a conveyanc-

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Ward Graham is New England regional counsel for Stewart Title Guaranty Company. He serves on REBA's Title Standards Committee and Legislation Committee. He is the principal draftsman of REBA's recently filed mortgage discharge legislation. This article originally appeared in The Massachusetts Focus and is reprinted with permission.

The subrogation risk in commercial leases

John T. Ronayne

Landlords should, and almost certainly do, have casualty insurance covering their real estate. Tenants are usually required by their lease to have casualty insurance covering their equipment, fixtures and personal property.

But even if both landlord and tenant are each carrying insurance adequate to cover casualty loss to their own property, serious, perhaps catastrophic, complications can arise if a casualty occurs as the result of negligence or a failure to observe lease obligations by one of the parties to the lease. That is because, even though the injured party is compensated for its property losses by its own casualty insurance, under traditional negligence and contract law, the party causing such losses could still be liable to the injured party, and under traditional insurance law and many policy forms, the injured party's insurer will be subrogated to those claims if it pays the loss.

What can turn this situation from a complication to a catastrophe is the fact that most commercial liability policies exclude or cap coverage for damage to the property of others caused by the insured. The classic worst-case scenario is the 2,000 square foot tenant who starts a fire in the wastebasket and burns down the 200,000 square foot building.

The landlord's casualty insurer will (hopefully) reimburse the landlord for the loss, but may then seek to recover, through subrogation, against the tenant, and the tenant will almost certainly find that its own liability policy is not remotely adequate to cover that exposure.

On the other side is the increasingly more plausible scenario of the landlord whose wrongful act (e.g., a fire that starts in the common areas as a result the landlord's negligence, or a sprinkler system that goes off on its own as a result of the landlord's failure to maintain) results in the destruction of the tenant's extremely expensive computer equipment, leaving the landlord with the same kind of problem.

One response to this problem, of course, would be for each party to carry the additional liability coverage necessary to protect itself, but this "duplication" of coverages will probably cause the aggregate insurance bill of both parties to be a lot higher than it needs to be, and is frequently not economically feasible.

SJC rulings

Another response, which makes much more sense for both landlord and tenant, is a so-called "waiver of subrogation" provision in the lease, of which more will be said below. But first a quick excursion through recent efforts of the Supreme Judicial Court to confront this problem (at least as it effects tenants) on its own is required.

In two 1995 cases, the SJC began to reshape the law of landlord/tenant subrogation in Massachusetts. In *Lumber Mutual Insurance Company* v *Zoltek Corp.*, 419 Mass. 704 (1995), a pressurized tank belonging to tenant and located within the leased premises exploded, causing substantial damage to the building. The landlord recovered for this damage from its casualty insurer, which then sought to pursue a subrogation claim against the tenant (Zoltek).

The SJC saved Zoltek from this fate by finding that it was a "co-insured" under the landlord's casualty insurance and thus not susceptible to a subrogation claim (even though it was not named in the policy and the insurer was presumably unaware that it had assumed responsibility for another party).

The court reached this conclusion based on two factors: 1.) the tenant was required to pay, as additional rent, a portion of the landlord's operating expenses, which included the cost of casualty insurance, and 2.) the landlord had informed the tenant by letter that under the lease, it was not required to maintain property insurance on the building.

Additionally, the court found that the maintenance and the yield-up provisions of the lease both relieved the tenant of the responsibility to repair damage resulting from "fire and other casualty," and expressed the intention of the parties that the tenant was not responsible for casualty damage to the building, even if caused by tenant's negligence (expressed that intention so clearly, in fact, that it did not even present a triable issue of fact). That being the case, the landlord had no claim to which the insurance company could be subrogated.

In the second case, *The Lexington Insurance Company v All Regions Chemical Labs, Inc.*, 419 Mass. 712 (1995), the court reached the same conclusion, without reference to the first two factors and apparently based solely on the existence of a yield-up clause that exempted damage by fire and other casualty. Again, the court found that this result was so unambiguously expressed that it was appropriate for summary judgment.

From the point of view of rationally allocating the risk of loss, the writer feels that *Lumber Mutual* and *Lexington* probably came out in the right place. But under most circumstances (other than a ground lease or a lease covering an entire building, where the tenant may explicitly assume the obligation of carrying the casualty insurance and restoring after a casualty) only a weak or unsophisticated tenant would fail to get the "fire and other casualty" exception in its lease.

This being the case, *Lumber Mutual* and *Lexington* have the anomalous effect of imposing liability on the very tenants who are least likely to realize what they are getting into and least able to protect themselves against the potential consequences. Such a tenant would probably be shocked to learn that by failing to ask for the casualty exception, it had expressed an intention to be responsible to the landlord's insurance company if the entire building burned down.

Both the *Lumber Mutual* and the *Lexington* cases involved commercial tenants. The next step forward was in *Peterson v. Silva*, 428 Mass. 751 (1999), which involved a residential tenant.

An electrical fire started within the tenant's apartment and spread, causing significant damage to the building. The court referred to its decisions in *Lumber Mutual* and *Lexington*, but was unable to find in the lease in question any of the factors which helped it towards its conclusion in those cases (the lease apparently did not exempt fire and other casualty from the maintenance obligations of tenant and did not have any yield up provision at all, nor did it make any separate provision for operating expenses).

The court, therefore, moved to a much broader rationale to shield the tenant from the subrogation claim. First, it cited *New Hampshire Ins. Group v. Labombard*, 155 Mich. App. 369 (1986) for the proposition that the tenant is not liable for negligently caused fire damage un-

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A partner specializing in commercial leasing and real estate development in the Boston office of Robinson & Cole, LLP, John Ronayne is a member of REFA, the Real Estate Finance Association and the Boston and Massachusetts bar associations. He is a member of REBA's Commercial Leasing Committee.

Don't overlook real estate in retirement investment planning

By Michael P. Scott

Are your clients interested in purchasing real estate for investment purposes, but don't have enough cash on hand to do so? Maybe they do!

There is a longstanding Internal Revenue Code regulation (see IRS publication 590 for complete regulations) that allows all Americans to invest their IRA funds, or 401(k) funds rolled into an Self-Directed IRA, in a wide variety of non-traditional investment types. Under the umbrella of a Self-Directed IRA, retirement account funds can be invested in such non-traditional assets as private mortgages, raw land, commercial buildings, vacation rentals and multifamily homes, just to name a few.

Keep in mind that your clients do not have to "cash out" their IRA to do this type of investing. These investments are made *within* a Self-Directed IRA. Your client can simply transfer funds from existing IRAs or a 401(k) account that is from a previous employer, into a Self-Directed IRA to do this type of investing and it is penalty-free.

Additionally, the taxes due on the growth of the investments are deferred until distribution begins at retirement. If the Self-Directed IRA is in the form of a ROTH IRA, both the principal and earnings are *tax-free* when distributed at retirement.

Lucrative retirement strategy

Let's consider a real life example of how investing in real estate within a Self-Directed IRA can be a lucrative retirement strategy.

Steve is interested in purchasing an office building with his IRA funds. He has found a building in a growing executive park, which is 100 percent occupied. The asking price is $400,000 but he only has $200,000 in his IRA. The current owner of the office building is willing to do seller carry-back for the balance of the loan. Therefore, Steve's IRA has directly funded 50 percent of the purchase price and has financed the remaining 50 percent with the seller carry-back mortgage of $200,000.

Rental income from the office building now flows directly back to Steve's IRA as a return on investment. His IRA uses a portion of that income to pay off expenses related to the running and maintenance of the building, such as the monthly mortgage payment to the seller, insurance coverage, property taxes, snow plowing and so forth. At the end of the year, the building owned by Steve's IRA would have a net income of $20,000, after all expenses are paid.

However, since Steve's IRA used financing to make the purchase, the portion of the income that is attributable to the financing is subject to Unrelated Debt-Financed Income, or UDFI. In Steve's case, since his IRA financed 50 percent of the purchase price, then 50 percent of his net income, or $10,000, would be subject to UDFI tax.

Since UDFI is taxed at ordinary trust tax rates, often as high as 40 percent, he will end up paying approximately $4,000 in UDFI taxes. However, his IRA will still end up with a net gain of $16,000 for the year (ROI of 8 percent). Even though his total IRA income was impacted by the UDFI tax, his net gain is still much more than the IRS limitation of annual contribution of $3,000, or even the return on most publicly traded investments.

Twelve months after the debt is paid off, UDFI ceases to apply to the net income generated. Steve's IRA will then continue to earn rental income and years down the road, when he is ready to retire, his IRA can sell the office building realizing the appreciated profit and all capital gains from the sale flow back to his IRA as a return on investment. When he retires, his IRA distributions are taxed at his lower, retired tax bracket. If he makes this investment with a Self-Directed Roth IRA, all of the return on investment is tax free upon distribution.

You may be wondering, "What's the catch?"

While there is some paperwork involved, it is not much more than would be required if your customers were to purchase property without their IRA. There are also specific ways investments must be structured if your customers are using both their IRA and their own personal taxable funds to make a purchase.

And, of course, they will need a reputable qualified special asset custodian who is willing to hold alternative assets such as real estate within a Self-Directed IRA in order to make it all possible. It's always a good idea for your customers to contact their own financial or legal advisor to learn more about how they can take advantage of this little-known retirement strategy and start putting it to work today.

Investing in the potentially lucrative area of real estate with a Self-Directed IRA is a lot easier than your clients may think! It also can potentially be the catalysis in closing substantially more sales in 2004 for you.

Michael Scott is vice president of PENSCO Trust Company.

NELTA annual meeting scheduled for June

The New England Land Title Association will hold their 35th Annual Meeting and Convention June 24-27, 2004 at the historic Mount Washington Hotel & Resort, in Bretton Woods, N.H. Contact Cathy Jones at the NELTA office at 203-847-6885 or e-mail neltaoffice@aol.com, if you are interested in exhibiting or would like to receive registration materials. For additional information, check out the NELTA web site at www.nelta.org.

Also, NELTA is conducting a seminar – How to get and Keep Residential Closing Business – on May 5, 2004, from 9:30 a.m. to 12 noon at the Radisson Hotel, 15 Middlesex Canal Park Road in Woburn, Mass. This program will consist of a lively panel discussion by experienced lenders and realtors who will discuss what they look for when referring buyers and borrowers to closing attorneys. Space for this program is limited so register early to be guaranteed entry. Registration Forms are available on the NELTA website at www.nelta.org.

Deed excise taxes under G.L.c. 64D: A primer

By Robert J. Moriarty Jr.

Massachusetts imposes an excise upon the transfer of any deed, instrument or other writing whereby realty sold is conveyed to a purchaser pursuant to G.L. c. 64D, §1.

The excise is based upon the consideration given for the property and applies whenever the consideration, exclusive of any lien or encumbrance remaining on the property, is greater than $100. The tax is paid by the person making or signing the deed and is evidenced by an affixed stamp." (*See* Massachusetts Department Of Revenue Directive 89-14.)

The current rate is $2.28 for each $500, or fraction, of consideration except in Barnstable County where an additional county excise is added.

Issues with respect to the payment of excise stamps do not arise with great frequency, but when they do, they can be a source of discord in a transaction. An excellent place to begin any research on these issues is the Department of Revenue website, http://www.dor.state.ma.us/. The Department has posted all of its Revenue Rulings and Directives on the website with search capabilities.

Issues with respect to the payment of excise stamps do not arise with great frequency, but when they do, they can be a source of discord in a transaction.

This article is not intended to be an exhaustive study of the provisions of Chapter 64D and the regulations that have been promulgated, but is only intended to highlight a few of the issues that are of current concern. In addition to the materials on the Department of Revenue's website, your attention is also directed to the Real Estate Bar Association's website and the practice and ethical standards which can provide additional guidance.

Many will recall when the Boston Red Sox were recently sold to current ownership there was a controversy regarding the payment or non-payment of excise stamps to the Commonwealth in connection with the transaction. There have been several other transactions of late where the headlines trumpeted a large sale, but the papers that are actually recorded in the registry of deeds show significantly smaller numbers, or even nominal consideration, and little if anything in the way of excise stamps affixed to the documents.

New Legislation

Many legitimate transactions are structured in a way that it is more advantageous to the parties to sell interests in the title holding entity than to buy the real estate and many times there is an allocation between real and personal property that results in a smaller amount of the consideration allocated to the real estate.

In these days of revenue enhancement, the registers of deeds and the legislature have noticed this trend and have expressed concerns that some transactions

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Bob Moriarty is Treasurer of the Real Estate Bar Association. He is a founding partner of Marsh, Moriarty, Ontell & Golder, P.C.

REBA opposes DOR bill that could create title problems

By Robert H. Kelley

On March 3, the Joint Committee on Taxation held a public hearing on House Bill 4485, which is designed to close various tax loopholes and is supported by the Romney Administration. This article will focus on the sections of the bill that will affect titles to real property.

REBA opposes the passage of Sections 21 to 23, 25, 51, 66 and 67 of the bill as currently drafted.

Sections 21-23, 25, 51, 66 and 67 of the bill seek to increase the ability of the Massachusetts Department of Revenue ("DOR") to collect past-due child support and tax payments, which is a laudable purpose. However, the bill would cloud numerous land titles for an indefinite period of time.

The DOR is currently the collection agency for arrearages in child support payments owed pursuant to a court order or judgment and for unpaid state tax obligations. Liens to secure the payment of such obligations arise by operation of law. As a prerequisite to perfecting any such lien against the real property owed by a delinquent parent or taxpayer, DOR must file or record a notice of lien with a registry of deeds or registry district of the Land Court (collectively, the "Registry").

The notice of lien is entered into the grantee and grantor indexes maintained by the Registry, and all land owed by the delinquent person within the Registry district then becomes subject to the lien. The DOR may file or record a notice of lien with multiple Registries.

A lien to secure the repayment of child support automatically expires six years after the date it was perfected unless, during such six-year period, the DOR files or records another notice of lien. The second (or any subsequent) notice of lien also automatically expires six years after its perfection.

A lien to secure tax arrearages expires six years after the date the taxes were assessed. Prior to perfection, neither type of lien has priority over mortgagees, purchasers or judgment creditors who file or record with the proper Registry prior to the filing or recording of the notice of lien with the same Registry.

The bill would eliminate the six-year effective period of both types of liens. Instead, both types of liens would last indefinitely. No other type of lien that may be created in the Commonwealth has an infinitely long effective period.

The bill does not require the DOR to take any affirmative steps to clear a record title after all obligations secured by either type of lien have been satisfied. Given the confidential nature of many DOR activities, one wonders how responsive, if at all, the DOR will be to requests from potential mortgagees, purchasers or judgment creditors decades after a lien has been perfected under the bill.

If the circumstances are such that delinquents are avoiding payments of tax arrearages because the current six-year period is too short, a 10-year effective period as currently exists for federal tax arrearages (under Sections 6322 and 6502 of the Internal Revenue Code) could be implemented.

However, the elimination of the six-year period for child support liens makes no sense. One can only wonder why the six-year effective period for child support liens, which period can be extended by the mere filing or recording of another notice of lien, was changed to an infinitely long period.

The best solution would be to make the effective period six (or ten) years for both types of liens, and to allow both types of liens to be extended for one or more additional six- (or 10-) year periods. This solution would allow adequate time for collection of arrearages and provide statutory certainty as to the date on which any such lien expired or would expire.

The bill also would create a separate registry (the "DOR Lien Registry") of liens that secure the repayment of past-due child support and tax obligations. The DOR Lien Registry would be maintained at the DOR in lieu of current recording requirements at registries of deeds.

The bill would require DOR to provide access to the DOR Lien Registry from each registry of deeds, but the liens would no longer be entered into the grantee and grantor indexes maintained by each registry of deeds.

The bill also provides that the DOR Lien Registry shall not go into effect until and unless the DOR commissioner has issued a public notice stating that the DOR Lien Registry, and remote access thereto, is "functional and operational throughout the commonwealth."

However, that provision is ambiguous. "Functional and operational" should mean that there are sufficient access terminals at each Registry to allow for the filing and recording of documents without undue delays due to system downtime or waiting lines in front of the terminals. "Reliable operation of" and "reasonable access to" the DOR Lien Registry should be additional prerequisites to its implementation.

If access is not available from a particular registry of deeds or registry district, no prudent lawyer will allow any mortgage or deed to be recorded until access has been restored, because liens created under the bill would be perfected (i.e., have priority) "without respect to whether the lien or the deed or other instrument was recorded or registered first."

Bob Kelly is a member of the Real Estate Bar Association's Board of Directors and chairs the Legislation Committee. He frequently testifies at hearings on Beacon Hill on behalf of REBA. He also serves as co-chair of the Real Estate Section of the Boston Bar Association and is a member of the Abstract Club. He practices real estate and construction law with the Boston office of Piper Rudnick, LLP.

A conversation with MMBA Chair Ruth Dillingham

In January the Massachusetts Mortgage Bankers Association (MMBA) installed Ruth A. Dillingham as the 24th Chair of the Association.

Ms. Dillingham is a former president of the Real Estate Bar Association (REBA), then known as the Massachusetts Conveyancers Association (MCA) and vice president of First American Title Insurance Company serving in their Lenders Advantage Division. She is an expert in regulatory, legislative and practical consumer issues within the mortgage lending industry. She is a graduate of Mount Holyoke College and Boston University School of Law, and was admitted to the Massachusetts Bar in 1978.

REBA News caught up with Ruth recently at one of her regular lunchtime venues, a corner table at Top of the Hub, 52 floors above Boston's Back Bay.

* * *

REBA News: How did you first become involved with the MMBA?

Ruth: Back in the 1970s, I was a young real estate lawyer at Harrison & Maguire, a distinguished conveyancing firm that ultimately became the Boston office of Hartford-based Robinson & Cole. Bob Spiller who was chair and one of the original founders of MMBA headed the firm's principal client, the Boston Five Cent Savings Bank. He invited me to join because of my interest in regulatory and compliance matters. The federal Real Estate Settlement Procedures Act (RESPA), enacted in 1970, was the first national effort to bring uniformity and consistency to the hitherto chaotic residential real estate settlement process, which differed in every single state. It was an emerging area of law and it interested me, so it was easy to get involved.

REBA News: How did you become involved in the MMBA's leadership?

Ruth: As you know, I had been involved in the leadership of the MCA, now known as the Real Estate Bar Association or REBA in the early '90s. After my term ended with the MCA, I was invited to join the MMBA Board of Directors as one of the first lawyers to serve on the Board.

REBA News: And you're the first person ever to head both organizations. How does that make you feel?

Ruth: Honestly… I feel privileged and a little humbled.

REBA News: What are the challenges you and the MMBA will face this year?

Ruth: Well two major challenges come to mind. First, HUD's proposed RESPA rule changes in bundled services. As you know, the rules were first proposed in 2002 and at that time they received a great many comments, many of them adverse. There is a great deal of concern here in Massachusetts and in other states that the proposed rules will push many smaller providers out of business and accelerate consolidation and vertical integration in the mortgage lending industry. And HUD's recent decision to send the rules to OMB for final approval without any public disclosure may blindside many lenders and settlement services providers.

The problem here, as with so many federal regulatory initiatives, is that the rule-making process is so long and attenuated, the market conditions that provoked or created the rule in the first place

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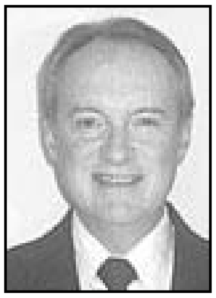
Massachusetts Mortgage Bankers Association Chair Ruth Dillingham (left) with REBA President E. Christopher Kehoe.

Bill would overhaul 'outdated' real estate mortgage discharge practice

By Edward J. Smith



By 2003, the mortgage discharge statutory scheme that performed adequately for earlier generations became so problematic and out-of-date as residential real estate lending evolved from a local to a regional and ultimately to a national marketplace.

The Massachusetts real estate mortgage discharge practice could not keep up with the increased volume of residential refinancing, bringing issues of hardship and inconvenience to consumers, and concerns of quality control and liability to lenders and their attorneys. Missing or unrecorded mortgage discharges had become a widespread and vexing problem.

In early 2003, at the height of the residential refinance boom, in response to increasing complaints from the home buying public and concerns from the lending community, the title insurance industry and REBA began work on a comprehensive overhaul of residential real estate mortgage satisfaction practice in Massachusetts. REBA launched this project at the invitation of members of the legislature's Joint Committee on the Judiciary.

Edward J. Smith is counsel to the REBA Legislation Committee. He practices in Boston.

Outline of REBA's legislative proposal

1. Require a bank or mortgage company that is receiving payments, upon request by the mortgagor or other authorized person, to provide a written payoff statement within 5 days. Similar proposal recommended by Committee on Banks & Banking, H.2731. See new section 54D of G.L.c.183, in Section 2 of the bill.

2. Effective with respect to mortgages recorded on and after July 1, 2004, a new provision would provide for a single recording fee at the time of recording a mortgage that would include the fee for recording the discharge, i.e., a pre-paid fee that would result in no fee when the discharge is recorded, thereby obviating the need for mortgagees or closing attorneys to withhold discharge recording fees. See amendments to sections 38 and 39 of G.L.c. 262, in Sections 7 and 8 of the bill.

3. A mortgagee that receives full payment of a mortgage on one-to-four family residential property that was recorded before July 1, 2004 (i.e., before elimination of the separate discharge recording fee), and either charges the borrower or withholds from borrower's funds the recording fee for recording a discharge, shall record within 45 days, rather than just provide a mortgage discharge together with necessary assignments and other authority-supporting documents.

A copy of the properly recorded discharge, together with the recording information, shall be provided to the closing attorney who transmitted the payoff. See

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ALTA president to speak at REBA spring seminar

Charles J. Kovaleski, president of the American Land Title Association (ALTA), will deliver the keynote luncheon address at the Real Estate Bar Association's Spring Seminar on Monday, May 10, 2004 at the Sheraton Hotel in Framingham.

Kovaleski has been very active on ALTA's Government Affairs Committee, participating in the dialogue on RESPA regulation reform. He has testified on behalf of ALTA before congressional committees on a number of occasions, most recently before the Senate Committee on Banking, Housing and Urban Affairs, chaired by Richard Shelby (R-AL).

Kovaleski is president of Attorneys' Title Insurance Fund, Inc. (the Fund), a bar-related title insurer headquartered in Orlando, Fla. The Fund is the largest bar-related title insurer in the U.S.

He has an extensive background in bar-related title insurance and is past president of the National Association of Bar-Related Title Insurers (NABRTI). Prior to his affiliation with the Fund in 1980, Kovaleski served in executive capacities with bar-related title insurance companies in Kansas and Illinois.

He is a graduate of the University of Illinois School of Law and is a member of the American Bar Association, The Florida Bar, Illinois State Bar Association and the Orange County Bar Association.

In addition to his work in the title insurance field, Kovaleski has been a Trustee and Vice Chair of Olivet College in Olivet, Mich. He was appointed by the governor of the State of Florida as a trustee of Seminole Community College in Sanford, Fla. From 1994 to 1997 Kovaleski was president of Planned Parenthood of Greater Orlando. He was also a director of the Greater Orlando Area Chamber of Commerce, an alumnus of Leadership Orlando (1986) and has served as a member of the Chamber's Education Task Force.

Charles J. Kovaleski, president of the American Land Title Association, will provide the keynote address at REBA's Spring Seminar on May 10. Kovaleski, active in legislative matters, including RESPA regulation reform, is president of Orlando, Fla.-based Attorneys' Title Insurance Fund Inc.

He served as chairman of Junior Achievement of Central Florida for the 1995-1996 term and was the 1994 recipient of the Henry Cragg Award for outstanding volunteer leadership.

In the 1992 election year he was the Democratic candidate for the U.S. House of Representatives in Florida's 8th Congressional District.

Executive Order on notaries faces likely changes

Continued from page 1

tificate to another person with the understanding that it will be completed or attached to a document outside of the notary public's presence by allowing, in connection with a commercial (non-consumer) transaction, a notary public to deliver a signed, sealed, or signed and sealed notarial certificate to an attorney with the understanding that: (i) the attorney will attach the certificate to a document outside of the notary's presence; (ii) the attorney will hold such notarial certificate in escrow; and (iii) the attorney informs the notary public that the attorney will obtain the approval of the principal, or principals, involved before attaching the certificate to the document;

- Clarification that a notary who is employed by a lender may notarize a document in conjunction with the closing of his or her employer's real estate loans;
- A statement that the failure of a document to contain the forms of acknowledgment, jurat, signature witnessing, or copy certification set forth in the Executive Order shall not have any effect on the validity of the underlying document, and that such failure should not be the basis of refusal to accept the document for filing, recordation, registration, or acceptance by a third party; and
- A declaration that the Executive Order shall not be construed in any way to impair or infringe in any way on the attorney-client privilege or the attorney work product doctrine.

You will find changes and updates on the Governor's Legal Counsel website, which is located at: www.mass.gov/legal/.

In addition, changes and updates may be posted on the Massachusetts and Boston Bar Association websites, the Real Estate Bar Association website,www.massrelaw.org, and in Massachusetts Lawyers Weekly.

BBO clarifies confidentiality under new Notary Journal requirements

(Editor's note: REBA recently requested Board of Bar Overseers Bar Counsel Daniel C. Crane to clarify the BBO's position on the impact of the new Notary Journal "public inspection" requirement on client confidentiality. He provided the following response.)

Question: Can I make my Notary Journal available for public inspection, as required by Executive Order No. 455, without violating my obligations of confidentiality under Mass. R. Prof. C. 1.6?

BBO Response: The limited inspection of the Notary Journal mandated by Executive Order 455 is not likely to breach a lawyer's obligation under Mass. R. Prof. C. 1.6 to maintain confidentiality for his or her clients. The Executive Order does not open the journal to general public inspection.

It requires only that a particular entry (or entries) specifically identified by the inquiring party be made available. The inquirer must specify the "month, year, type of document, and name of the person for the notarial act or acts sought." No inquirer may be shown any entry unless the inquirer has provided that identifying information.

The essential purpose of notarizing a signature on a document is to certify to the reader of that document that it is authentic. A client who asks a lawyer to notarize a deed, mortgage or similar document not only authorizes the lawyer to record the document in the normal course but also authorizes the lawyer to make the necessary certification upon request.

If a person makes the request, "Show me your record that you notarized this deed," the lawyer is normally authorized to do so. Certifying the authenticity of the document is both authorized to carry out the representation and required by law.

A lawyer must, however, be careful to avoid a "fishing expedition," particularly for documents that are not recorded, such as powers of attorney, prenuptial agreements, and wills.

A client may impliedly authorize the certification of such a document by delivering it to the recipient or otherwise putting it into effect, but does not normally authorize the disclosure prior to that event. Thus, an inquirer who has possession of a document notarized by a lawyer could reasonably expect the lawyer-notary to certify the authenticity of the document. But a person who knows nothing beyond the fact that a client consulted with the lawyer on a specific day would not be entitled to examine the lawyer's notary journal.

It is clear that there will be challenges to the Executive Order that will include whether a lawyer-notary's duty of confidentiality "trumps" the requirements of the Executive Order. Until these issues are resolved by court decision, it would be inappropriate to seek discipline of a lawyer-notary solely because she or he declines to make an entry in a journal available for inspection, provided that the refusal is made in good faith based upon either an exception in the Executive Order or a claim of client confidentiality.

HUD abandons new RESPA rule

By Joel A. Stein

On March 24, the acting secretary of HUD announced that the agency had abandoned the new RESPA rule, first proposed in 2003 and would be going back to the drawing board to begin again. Most participants in the RESPA rule process do not expect anything to be proposed until well after the 2004 elections.

Prior to HUD's rule abandonment, more than 200 members of the House of Representatives sent a letter to OMB urging it to reject the proposed RESPA Rule and return it to HUD for revisions. Among the signatories were Massachusetts Congressmen Barney Frank and Jim McGovern.

On the last day for OMB approval, March 15, and at the request of HUD, OMB announced that it would extend for an additional 30 days its review of the proposed RESPA Rule.

The statement from HUD noted that "the RESPA Rule currently under review is a complex document supported by an extensive and economic analysis. As a result, HUD and OMB require additional time to explore all the comments and questions raised by the review."

RESPA is a set of federal regulations that proscribe certain disclosures for home mortgages and prohibit certain kickbacks in real estate transactions, among other requirements.

The federal housing department, a $32 billion public agency with 9,300 employees submitted the finalized RESPA rule to OMB in mid-December 2003, just a week or so after then HUD Secretary Mel Martinez resigned from the cabinet-level post to run for a seat in the US Senate.

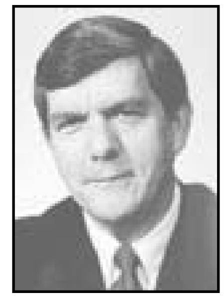
A former president of the Association, Joel Stein chairs the Title Insurance and National Affairs Committee of REBA. He practices with Friedman & Stein, P. C. in Braintree.

ABA and REBA co-sponsor national symposium on the unauthorized practice of law

By Craig J. Martin

The American Bar Association and The Real Estate Bar Association for Massachusetts will co-sponsor a National Symposium on the Unauthorized Practice of Law in Residential Real Estate Transactions in Boston on April 23 and April 24. A prior symposium was held in October 2003 in Alexandria, Va.

Keynote speakers at the symposium will include attorney Maureen Ohlhausen, deputy director of the Office of Policy Planning of the Federal Trade Commission, and Michael S. Greco, president-elect of the ABA.



Speakers at symposium will be Maureen Ohlhausen (left) and Michael S. Greco.

Ohlhausen has served as director of the FTC's Office of Policy Planning since September 2001. She is responsible for a variety of issues affecting competition and consumer protection, including the regulation of professions, restrictions on advertising, antitrust immunities, and e-commerce.

From 1998 to 2001, she served as an attorney advisor for Commissioner Orson Swindle, advising him on both competition and consumer protection matters.

Ohlhausen started at the FTC in 1997 in the General Counsel's Office. Before coming to the Commission, she worked at the U.S. Court of Appeals for the D.C. Circuit from 1992 to 1997. While there, she served as a law clerk for Judge David Sentelle.

She also clerked for Judge Robert Yock of the U.S. Court of Federal Claims from 1991 to 1992. She graduated with distinction from George Mason University School of Law in 1991 and is a 1984 honors graduate of the University of Virginia.

Greco, a partner in the Boston office of Kirkpatrick & Lockhart, LLP, is a trial lawyer with 30 years of litigation experience in business, employment and real estate law. He has served as a mediator and arbitrator in complex business and other disputes.

He joined Kirkpatrick & Lockhart in 2003 after 30 years as a partner with the firm of Hill & Barlow in Boston. He has served on the ABA House of Delegates since 1985 and represented the Commonwealth of Massachusetts at the ABA since 1993. Greco earned his J.D from Boston College Law School in 1972 and his B.A. from Princeton in 1965.

The ABA is the largest voluntary professional membership organization in the world, with over 400,000 members.

Craig Martin is a member of the Board of Directors of The Real Estate Bar Association and he is an active member of the Committee on the Practice of Law by Non-Lawyers. He practices in Taunton and Falmouth.

Casting light on the mysteries of Title 5

To the editor:

As an attorney specializing in environmental and land use law, I find the REBA News a good read.

Attorney Greg D. Peterson wrote an interesting opinion article on the topic of the housing production crisis in Massachusetts in the Winter 2004 issue ("A few modest proposals: suggestions for tackling the Massachusetts housing production crisis," page 16). He suggests a number of regulatory reforms, some of which are no doubt good and some of which (such as self-certification/PGPs) would in my opinion be dangerous to the environment and to abutters.

In particular, he inquires: Why doesn't Title 5 return to allowing the 15,000 gallons per-day septic system? As a member of the committee that rewrote Title 5 of the DEP Environmental Code over a period of three years, I believe I can answer that one, although not using the proper scientific language, no doubt.

Large septic systems all over the country have a very high failure rate. In fact, many members of the committee would have preferred to limit septic systems to 5,000 gpd. 10,000 gpd was a compromise. The reason for the failure, we were told, is that the water mounds up within the system. (This has nothing to do with "mounded" systems built on raised mounds of soil).

The liquid comes through too fast and too copiously to be able to spread out. Septic systems' effectiveness depends upon the treatment afforded to human wastes by passing them through dry soils. Systems in water fail. If the pathogens get into ground water, some of them travel thousands of feet. This is why systems are "mounded up" over areas with high groundwater levels in spring. So a very large system is perpetually within its own ground water, so to speak.

I hope this very amateurish explanation will cast some light on the mysteries of Title 5.

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Send a letter to the editor!

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